

## Chapter 7

### Remedies for the Carrier

#### When the Consignee Fails to Take Delivery

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From the above chapters, it can be concluded that delivering the goods properly, including delivering it at proper place, on proper time and to the proper person, is the essential obligation on the carrier under the contract of carriage of goods. In addition, as an implied rule, without otherwise stipulations or customs, the goods shall be delivered to the consignee or his agent personally.<sup>1</sup> In the early English case *Bourne v. Gatliff*,<sup>2</sup> the jury held that the discharging of goods at the wharf didn't constitute a proper delivery and the carrier, according to the contract, was supposed to deliver to the consignee until reasonable time elapsed. Even there is the agreement on the time and place of delivery, if not agreed otherwise, the goods shall generally be delivered to the consignee.

However, it is not uncommon that the goods are still kept by the carrier owing to some reasons or to the defaults on the part of the consignee in taking delivery. For example, the consignee may be improperly delayed, or the consignee rejects the goods, and even sometimes, there is no consignee showing up. A Chinese author calls these situations the "hindering of delivery."<sup>3</sup> These obstructions for delivery may result from various reasons, not least delay of the bill of lading and delay by the consignee. In addition, the consignee may refuse to accept the goods because of damages to the goods during transit, or disputes under the sale contract, or difficulties in the market or policy.

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<sup>1</sup> *Payne & Ivamy*, pp.152-153.

<sup>2</sup> *Ibid.*

<sup>3</sup> Li Wei-jun, "On Legal Issues on the Hindering of Delivery under Carriage of Goods by Sea" (hereafter as "*Li Wei-jun's Hindering of Delivery*"), in *Practice and Theory on Maritime Justice*, Tang Neng-zhong (chief editor), 1<sup>st</sup> ed., Law Press, 2002, PP.16-46.

In convention, the carrier may not be excused from the duty to deliver the goods to the consignee even when the latter fails to take them.<sup>4</sup> However, the urgency of the next voyage, extra charges for keeping the goods, additional risks to the safety of the goods and other reasons might put great pressure on the carrier. Does the carrier have to keep the goods until the consignee comes to take them over?

The UK is one of the earliest countries that gave carriers statutory remedies under such circumstance. Sections 493 to 496 of *Merchant Shipping Act 1984* provided that the carrier may place the goods in warehouse and dispose of them under certain conditions.

*China Maritime Code* provides similarly. When the goods are not taken over by the consignee, the carrier may store the goods.<sup>5</sup> However, due to lack of systematic supports by other provisions under CMC, the phraseology and the remedy itself under Art. 86 are rather simple and result in both legal and practical problems.

The questions of whether the carrier is entitled to certain remedies, what will be the effects of the remedies, and what kinds of remedies are reasonable and sufficient for the carrier are worth further research. Before answering these questions, it is necessary to discuss the legal nature of taking delivery.

## **1. Taking delivery: right or obligation**

Delivery is one of the essential obligations on the carrier under the contract of carriage, but on the other hand, receiving the goods by the consignee is usually the original objective for the conclusion of the contract. Therefore, delivery is an action completed by both sides--delivering and taking the delivery together accomplish the final stage of the contract. The obligation of delivering goods personally under common law also indicates that delivery includes the part of taking delivery by the merchant party. However, in maritime law, there is no consensus on the question of whether the consignee or the merchant party is obligated to take the delivery.

### **1.1 Both a right and an obligation**

Under civil law, taking delivery is receiving the performance by creditor. Is the receiving of the performance a right or an obligation of the creditor? It is still in controversy.

Some countries are inclined to regard receiving the performance as an obligation on the creditor, and some cases had held that the creditor should compensate for the

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<sup>4</sup> *Carver's Carriage by Sea*, para1562, p.1101.

<sup>5</sup> Art. 86 CMC.

damages resulted from improper refusal to the performance.<sup>6</sup> But in some other countries, receiving the performance is merely the right of the creditor and he is not forced to receive delivery.<sup>7</sup> For example, in China Taiwan, the prevailing opinion is the latter, and the creditor has freedom to exercise his right or not except under several specific contracts.<sup>8</sup>

Before the enforcement of CLC, there is no uniform opinion on the legal nature of receiving performance, nor does the CMC make it clear whether the carried goods must be received at the destination. In my opinion, the types of the contracts shall determine the legal nature of receiving the performance. As the contracts that concern with the transfer of the tangible objects are concerned, I prefer the viewpoint that receiving performance is both a right and an obligation of the creditor. If the creditor does not receive the concerned goods under the contract, the goods will be kept by the obligor and will put additional burden on him. So, for the reason of honesty and good faith, taking the transfer of goods is not only a right but also an obligation of the *obligee*. Similarly, taking the goods timely and properly is an obligation of the consignee or the party of the cargo interests.<sup>9</sup> Most Chinese scholars in maritime law also believe taking delivery is the opposite side of the delivery by the carrier, and delivery needs cooperation from both sides.<sup>10</sup> If the delivery is just one-side obligation on the carrier, it will be unfair for the carrier and will break the balance of the legitimate interests between the carrier and the shipper or consignee,<sup>11</sup> which will deviate from the practice of the transfer of the goods.

The Article 309 of CLC states, "...the consignee shall take the delivery promptly. Where the consignee claims the goods exceeding the time limited, it shall pay to the carrier for such expenses as storage of the goods, etc."<sup>12</sup> From this provision, it can be concluded that CLC puts the obligation of taking delivery on the consignee. However, CLC only emphasizes on the obligation to taking delivery on time, but it does not deal with the question of whether the consignee is entitled to reject the goods for various reasons.

Under common law regimes, taking delivery within the fixed period or

<sup>6</sup> See Wang Jia-fu, Liang Hui-xing (editors), *Science of Chinese Civil Law --Obligatory Rights* (hereafter as "*Wang Jia-fu's Obligatory Rights*"), 1<sup>st</sup> ed., Law press, 1997, pp.169-170.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> See also the author's article, *On Carrier's Remedies where the Consignee Fails to Take Delivery under Maritime Code of P. R. China* (hereafter as "*Zou's Carrier's Remedies*"), speech paper of the V International Conference of Maritime Law, October 2002, Shanghai.

Because it is not always the obligation on the consignee, so I prefer to use the more comprehensive, but a little vague, term "party of cargo interests" or "merchant party." For further discussions, please see Part 1.2 below.

<sup>10</sup> *Yin & Guo's Carriage Law*, p. 148.

<sup>11</sup> *Zou's Carrier's Remedies, ibid.*

<sup>12</sup> The omitted part of Art. 309 in CLC is: "After the carriage of goods is completed, if the carrier has the knowledge of the consignee, it shall notify the consignee promptly and..."

reasonable time is generally an obligation on the consignee.<sup>13</sup> Not only the UK but also the USA, Canada and other countries, provide carrier with remedies to land and warehouse the goods when the goods cannot be taken timely.<sup>14</sup> Meanwhile, many bills of lading indicate that the merchant party shall take delivery of the Goods within fixed time and provide carrier with remedies such as storage, unpacking or even applying for any procedures of sale.<sup>15</sup>

So, in my point of view, taking delivery is both a right and an obligation of the merchant party. The implications of the right to take the delivery have been discussed in the former chapters on the carrier's responsibilities on delivery. As to an obligation, the goods shall be taken not only promptly, but also properly. Whether the goods are taken promptly and properly shall also be determined by the criteria established in Chapter 3. Goods must be taken over in the manner and the time stipulated in the agreement or, if without such agreement, in a reasonable way in accordance with the customs, the practices or the special usages, and it shall not create unreasonable inconvenience to the carrier.

## 1.2 Rejection of goods

The rejection of goods by the consignee is also not rare in practice. Is he entitled to refuse to receive the goods? As a general rule and for the sake of fairness, the person claiming the goods may refuse improper delivery, i.e., he had no obligation to receive the goods in any unreasonable ways or in any form or manner other than what is contracted for.<sup>16</sup> For example, without legal excuse, the carrier shall not deliver the goods at the place other than the agreed destination, or, if taking delivery is dangerous for consignee (not because of the latent characteristic of the goods), he can also refuse to receive it. Nevertheless, the person claiming the goods always had the obligation to mitigate the damage.

In addition, a consignee may probably abandon the damaged goods and opt for claiming for the compensation against the carrier. In general, "consignee must accept the delivery of damaged goods, must mitigate the damages, and only then

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<sup>13</sup> *Tetley's Cargo Claims*, p.311, fn.60.

<sup>14</sup> *Ibid.*

<sup>15</sup> E. g. paragraph (2) clause 20 on reverse of the P&O Nedlloyd Bill of Lading: "The merchant shall take delivery of the Goods within the time provided in the Carrier's applicable Tariff. If the carrier fails to do so the Carrier shall be entitled, without notice, to unpack the Goods if packed in Containers and/or to store the Goods ashore, afloat, in the open or under cover, at the sole risk of the Merchant..." Paragraph (3): "If the Merchant fails to take delivery of the Goods within thirty days of delivery becoming due under Clause 20 (2), or if in the opinion of the Carrier they are likely to deteriorate ... the Carrier may ... sell, destroy or dispose of the Goods and apply any proceeds of sale in reduction of the sums due to the Carrier from the Merchant."

<sup>16</sup> *Tetley's Cargo Claims*, p.312.

may he claim against the carrier.”<sup>17</sup>

However, if the goods have been badly damaged and lost most of their value, or even become worthless or acquire negative value, is the consignee or other party still obligated to receive them? CMC does not deal with this issue. Generally speaking, if taking delivery has become impossible (for example, the cement transported is concreted by water, the liquid cargo has become solid and is beyond reconditioning at the destination), the consignee is permitted to refuse them.<sup>18</sup> It is worth attention that determining whether taking delivery is impossible shall be a matter of fact and there seems no standard criterion. In addition, whether a serious damage of goods is included in the condition “impossible to take delivery” is not clear.

Furthermore, the consignee, as a buyer of the goods may be entitled to reject the goods under the sale contract if the goods have not meet the specifications set forth in the sale contract. So, the buyer might refuse to receive the goods from the ship at the destination even he has received the document of the goods, e.g. bill of lading.<sup>19</sup> In these cases, the goods might be kept on board or in container yards or other places. From the point of the carrier, he shall not bear the risks arising from the sale contract. But from the perspective of the buyer, he comes to know the defects of the goods only after he has inspected them at the destination, so it is very difficult for him not to affect the carrier when he is exercising the right of rejection.

Most Acts of sale of goods and carriage laws have not dealt with this difficulty very well. In my opinion, those rights under sales contract are different from the consignee’s rights and obligations under contract of carriage. The goods shall not be kept in the hands of the carrier simply because of the disputes under the sales contract; otherwise, the carrier may be in an uncertain position of his risks and bear extra burden arising from the sales contract.<sup>20</sup> This confusion will bring chaos to the relationship between the carriage contract and the sale contract, and may also destroy the normal operations of the contract system.

According to some scholars, “the consignee must take delivery of the damaged goods and rely on his right of rejection under the contract of sale.”<sup>21</sup> The CISG provides a solution for this issue. If the goods dispatched to the buyer have been placed at his disposal at the destination and the buyer exercises the right of rejection, “he must take possession of them on behalf of the seller,” provided that

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<sup>17</sup> *Ibid*, p.313.

<sup>18</sup> *Ibid*.

<sup>19</sup> According to Charles Debattista, rejection to accept document and rejection to receive the goods are regarded as separate and independent rights of the buyer, and he is entitled to exercise either of them even the buyer has received the other or lost the opportunity to reject the other, i.e. even the buyer has accepted the document he is still entitled to reject the goods, vice versa. *Debatista*, 9-26, pp.203-206.

<sup>20</sup> *Zou's Carrier's Remedies*, p.4.

<sup>21</sup> *Tetley's Cargo Claims*, p.313.

this can be done without payment of the price and without unreasonable inconvenience or expense, and, this taking possession of goods shall have no prejudice to the rights and obligations of the buyer under the sales contract.<sup>22</sup> But the buyer does not have to do so, if “the seller or a person authorized to take charge of the goods on his behalf is presented at the destination.”<sup>23</sup> So, according to this article, even the buyer under the sales contract has successfully rejected the goods, they shall not be kept in the hands of the carrier, and the buyer or the seller<sup>24</sup> is obligated to receive them from the carrier.

The greatest difficulty is under an anti-dated or an advanced bill of lading.<sup>25</sup> In the case of these bills, the carrier may usually take part in this defect of the document, and in China, this inaccuracy is generally regarded as a result of an action concurrent of the carrier’s breach of contract and tort. In such case, is the buyer still entitled to reject the goods against the carrier at the destination even after he has accepted the document? There is no clear answer to this question. In my opinion, the aforesaid Art.86 of CISG can provide reference to this situation. The carrier might be liable for this “fraud”, but the goods should be received first by the buyer or the seller.

Moreover, under the CMC, if the goods have been delayed by un-exonerated fault of the carrier, whether the consignee is still obligated to take the delivery needs further examination. The CMC’s provisions mainly deal with the liability for compensation on the carrier when a delay in delivery occurs, but do not give other remedies for the consignee in the abovementioned case. In my opinion, if the delay is not very serious, mitigation of the damages shall be borne by the person claiming the damages and the goods should still be received. In the contract law theory of China, when the performance by the *obligor* is delayed, and the delay makes the performance be of no interest for the *creditor* any longer, the *creditor* is entitled to refuse the late performance and claim for the compensation.<sup>26</sup>

CLC provides a relatively wider right of rescission for the creditor. In Article 94, when “one party to the contract delays in performing the principal debt obligations and fails, after being urged, to perform them within a reasonable period,”<sup>27</sup> or when the party “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,”<sup>28</sup> the other party is entitled to rescind the contract. However, we must be very prudent in applying the former two rules to the shipping field. First of all, the

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<sup>22</sup> Art.86 (2) CISG.

<sup>23</sup> Art. 86 (2) CISG.

<sup>24</sup> Professor Tetley puts the obligation on “consignee”, see Tetley’s Cargo Claims, p.313.

<sup>25</sup> See *Zou’s Carrier’s Remedies*, p.4.

<sup>26</sup> *Wang Jia-fu’s Obligatory Rights*, pp.163-164.

<sup>27</sup> Art.94 (3) CLC.

<sup>28</sup> Art.94 (4) CLC.

length of “reasonable period” will be uncertain, and it will be determined by respective carriage. In addition, the condition that “the purpose of the contract cannot be realized” needs further examination. From the general implication of contract of carriage, though the delivery is delayed, one of the two contractual purposes<sup>29</sup> that the goods are to be carried from one place to another has been realized, and the goods are deliverable. So it is difficult to say that the purpose of the contract of carriage has been defeated. So there is no sufficient reason for the refusal of goods when they are delayed.

If the delay is very serious, it is then unfair to force the merchant party to receive the goods. But it also is very difficult to tell whether a delay is serious enough or not.

Paragraph 4 of Article 50 of the CMC provides, “the person entitled to make a claim for the loss of goods may treat the goods as lost when the carrier has not delivered the goods within 60 days from the expiry of the time for delivery specified” by express agreement. From this Article, it can be understood that that the person who is entitled to claim for the goods is not obligated to receive them when they arrive after 60 days of the agreed time, if he has claimed for the compensation of total loss before their arrival. However, a question arises. When the goods arrive after the mentioned 60 days and the person entitled to the goods has not claimed for total loss before the arrival of them, is he still entitled to refuse to receive them but to treat the goods as lost and to claim for the compensation? Is “sixty days” the explanatory phase of the “reasonable period” that enables the consignee to refuse the goods and the practical standard for determining the condition that “the purpose of the contract is not able to be realized” as aforesaid in the shipping contract? In *Zhejiang Ji'engshi Garment Group Corp. v. Fancheng International Freight Forwarder*, which had been introduced in part 6.1 Chapter 5<sup>30</sup>, the judges thought “the sixty days” in Article 50 of CMC would apply to the holder's claims although there is no specific date for delivery in this case. Since sixty days had elapsed from the date of the arrival of goods at the destination, the plaintiff was entitled to refuse the goods but for the compensation only.

Regulations in CMR is offering food for thought. Deviating from the view of the refusal of goods, CMR stipulates that the consignee is still entitled to receive the goods even he has gotten the compensation for deeming the goods totally lost, if he has given carrier a written notice of his willing for the goods promptly.<sup>31</sup>

Anyhow, the conditions for rescission of the contract of carriage and the refusal of goods by the merchant party when the goods are delayed needs elaboration and

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<sup>29</sup> The two contractual purposes are: transporting the goods from one place to the destination, delivering the goods to right person.

<sup>30</sup> See fn. 217 in Chapter 5.

<sup>31</sup> See art. 20 of CMR.

clarity.

### 1.3 Obligor of taking delivery

When taking delivery is regarded as an obligation, this duty is borne by the consignee under many regimes.<sup>32</sup>

Before the goods are taken over, the “consignee” just refers to the person who is entitled to receive the goods, and the actual acceptance of the goods is not necessary. A consignee can be the legal holder of original bill of lading, or the named consignee in a sea waybill or a straight bill of lading. As it has been discussed above, the reasons for the failure of taking delivery may include the consignee’s rejection, delay of the consignee, or, not unusually, the case there is no consignee showing up. Therefore, in the latter two situations, no one will appear to claim for rights concerning with the goods at the destination.

In theory of contract, the right and the obligation of receiving the performance are vested in the same person, i.e. the creditor.<sup>33</sup> However, as I have discussed in the former chapters, when the shipper and the consignee are different persons, the contract of carriage is a contract for benefits of the third party, and the consignee is the beneficiary third party, or the creditor beneficiary.<sup>34</sup> Though I agree with the view that “the third party may have to bear certain related obligations in order to obtain the benefit according to the principle of the third party’s benefit contract,”<sup>35</sup> the obligations related to the benefit, in my opinion, will effect only when the third party tries to obtain his benefit or exercise any of his rights under the contract. According to the general theory of the third party’s benefit, the named third party is not compelled to accept his right and he may abandon his right.<sup>36</sup> Moreover, before the third party exercising or expressing the acceptance of his right under the contract, the *promisee* under the contract is entitled to change or rescind the contract.<sup>37</sup> Therefore, under the contract of carriage, when the named consignee or

<sup>32</sup> See for example, *Tetley’s Cargo Claims*, pp.311-313, *Yin & Guo’s Carriage Law*, p. 148, *Li Wei-jun’s Hindering of Delivery*, p.25-16 at PP.16-46. Scandinavian Maritime Code also imposes the obligation on the consignee: “At the place of destination the consignee shall receive the goods at the place and within the time indicated by the carrier.…” Section 18 of “The carrier’s delivery of the goods” in *Finish Maritime Code*.

<sup>33</sup> *Wang Jia-fu’s Obligatory Rights*, pp.163.

<sup>34</sup> According to Corbin, the third party is divided into the donee beneficiary and the creditor beneficiary. The former means that the benefit is the donation by the offeree, but the latter means that the third party gets the right because the offeree owes him certain obligation. *Corbin On Contract*, p.181

<sup>35</sup> *Li Wei-jun’s Hindering of Delivery*, p. 22 at pp.6-46.

<sup>36</sup> Shi Shang-kuang, *General on Obligatory Law*, Taiwan Rongtai Publishing Ltd. Co., 1978, p.595, quoted in *Zhao’s Maritime Law*, p.287; see also *Corbin on Contracts*, pp.236-237.

<sup>37</sup> See Sakae Wagatuma, *On General Rules of Obligatory Relationship of China Civil Law*, translated by Hong Xi-heng, 1<sup>st</sup> ed., Publishing House of China University of Politics and Law, 2003, pp.203-204. But there also exists the minority view that the contract will effect on the third party when it is concluded regardless the third party express his acceptance or not, see *ibid*.



the holder of bill of lading<sup>38</sup> does not show up to exercise his right under the contract, he is not obligated to receive the goods.<sup>39</sup>

However, some Chinese scholars and judges think differently: “even if the consignee never claims his right, the carrier shall be allowed to claim for the compensation against the consignee for the damages caused by his failure of taking delivery.”<sup>40</sup> The UNCITRAL Draft Instrument of Transport Law also reflects this divergence of opinion.<sup>41</sup> There are variants, one being “the consignee shall accept delivery of goods” at the time and location as is mentioned above, the other being “the consignee *that exercises any of its right under the contract of carriage* shall accept the delivery of goods (emphasis added).”<sup>42</sup> Indeed, putting the obligation on the consignee helps to avoid the carrier’s additional responsibility to the goods, but, seen from the above analysis, the second approach in the draft instrument adapts to the theory and practice better.

If the consignee never shows up, it means he chooses to waive his right under the contract, and he is not borne by any obligation under the contract. But, when the consignee exercises any right under the contract, such as making inspection of the sample of the goods, or giving directions about the goods, his action indicates that he has deemed himself the creditor of the carrier though he may later refuse the goods. And he shall be bound by the contract of carriage or the transport document, and is obligated to accept the goods unless legal exemptions arise.

If the consignee delays improperly but later claims or receives the goods even after they have been warehoused, the consignee shall still bear the liabilities to the carrier, such as paying for the freight and charges of storage, and compensating the carrier for the damages caused by this delay.

In summary, when the consignee does not show up to exercise any of his right under the contract, he is not obligated to receive the goods. However, as it has been discussed clearly, the goods shall not be kept in the hands of the carrier, otherwise it will bring additional responsibilities to him. And taking delivery is an obligation. In my view, it is generally the shipper’s obligation to make the goods deliverable. First of all, it is the shipper who concludes the contract with the carrier, and who instructs the goods to be delivered to the third party. So, the shipper shall be responsible for making the goods deliverable under the contract. In addition, according to the theory of third party’s benefit contract, when the named third party refuses to obtain the right under the contract, the shipper is still the contractual party who is entitled to the rights and is bound to the obligations under the contract.

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<sup>38</sup> According to the theory of the instrument of value, the holder of the instrument is either not obliged to receive the performance under it before he exercises the rights under the instrument.

<sup>39</sup> See also *Zhao's Maritime Law*, p.287.

<sup>40</sup> *Li Wei-jun's Hidering of Delivery*, p.28 at pp.16-46.

<sup>41</sup> See Sect.10.1 in WP.21, Art.46 in WP.32.

<sup>42</sup> *Ibid.*

Moreover, when no negotiable bill of lading is issued or transferred, the shipper is the controlling party who is entitled to redirect the consignee before the goods is delivered.<sup>43</sup> Therefore, when the named consignee does not accept the right to the goods, the shipper shall make the goods deliverable -- he may instruct a new consignee, or make the goods surrendered to an appropriate place, otherwise, he is obligated to receive them. When no other person takes over the goods, the shipper shall be liable for the damages suffered by the carrier for this delay or failure of taking delivery.

Nevertheless, the right of controlling might be vested in or transferred to another party by express agreement in the contract, or by statutory conditions, or by the transfer of bill of lading and others. In this case, the shipper might have no interest of the goods and is not entitled to make instruction on the goods. So, the controlling party shall give instructions on the delivery when the consignee fails to take delivery. When the controlling party is the consignee or the legal holder of bill of lading, he may be unwilling to exercise his right under the contract of carriage, or he maybe not identified; in this case, it becomes difficult to find them out or to compel them to make instructions on delivery. Therefore, when the carrier fails to get instructions from the controlling party, he may turn back to the shipper again.

The *German TRAT* provides that when the delivery of goods encounters obstacles, “the carrier shall ask for the instructions from the person who has the right of disposal in relation to the goods.”<sup>44</sup> So, giving instruction in such a case is both the right and the duty of the controlling party. According to this act, first is the sender (shipper) to be the controlling party and then is the consignee on the arrival of the goods at the destination.<sup>45</sup> But this act does not obligate the consignee to give instructions. “If that is the consignee (has the right of disposal) and if he cannot be located, or if he refuses to accept the goods, the sender shall have the right of disposal,” and the carrier may assert claims against him for the outlays by carrying out the instructions.<sup>46</sup>

The UNCITRAL Draft Instrument establishes the similar mechanism. In Part 5.2.4 of Chapter 5 of this thesis, I have introduced the innovation by this draft instrument. The innovation is not only made for the situation when bill of lading is not surrendered for delivery, but also for the case that the carrier fails to deliver the goods. Facing the obstacle of delivery, the carrier shall try to obtain instructions from the controlling party or, the shipper if the controlling party cannot be identified or be found after reasonable effort. When the carrier fails to find either of the two, the person indicated as the “shipper” indicated in the document shall be

<sup>43</sup> For discussions on controlling party see *supra* Chapter 4 and 5.

<sup>44</sup> Section 419 (1) TRAT.

<sup>45</sup> Section 418 TRAT.

<sup>46</sup> Section 419(1), Section 418(1) TRAT.

treated as the shipper.<sup>47</sup> Meanwhile, the instrument stipulates expressly that the controlling party or shipper is obligated to give the carrier instructions in respect of the delivery of the goods.<sup>48</sup> When the carrier delivers the goods in accordance with the instruction of the former party, he is discharged from his obligation to deliver the goods under the contract of carriage. So seeking for the instruction from the controlling party or the shipper is the preliminary remedies for the carrier in addition to other remedies set forth in this draft.<sup>49</sup> Some Chinese scholars put forward that when the consignee is unable to be identified, the shipper might also be liable for the damages suffered by the carrier if the shipper fails to confirm the consignee in reasonable time after the carrier has sent him the notice.<sup>50</sup> According to this assumption, the liability of the shipper shall be limited to the scope of “the uncompensated part remained by the carrier when he has dealt with the carried goods,” and to the condition that the carrier has performed the obligation of notice of arrival.<sup>51</sup> These views indicated that the shipper might be difficult to escape from the liabilities of failure to take delivery.

Because most laws, including China Law, do not put the obligation on the shipper or the controlling party to make the goods deliverable, so when the goods are hindered at the hands of the carrier, few carriers will fall back on the shipper for instruction. In addition, the provisions under CMC do not provide sufficient remedies for the carrier. Failure to take delivery is regarded as one of the biggest difficulties for a number of shipping companies, especially container liner companies, and has brought great pressure on them.

In short, accepting the delivery is both the right and the obligation of the merchant party. As a breach of this obligation, failure to take delivery shall at least bring the following consequences:<sup>52</sup> 1) Changing or even precluding the carrier from the obligation of performance; 2) conferring remedies for the carrier, such as depositing of goods and other remedies; 3) reducing the carrier's responsibility on the care of the goods. According to traditional theory of contract law in China, after the delay of receiving performance, the obligor of delivery shall just be liable for the damages caused by intentional action or gross negligence, and will not be liable for damages caused by *culpa levis*. 4) *Obligor* is entitled to claim for the necessary charges of maintaining the object and for the compensation of the damages caused by the delay of receiving delivery.

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<sup>47</sup> Sect. 10.3.2 (b) in WP.21, Art. 49 (b) in WP.32.

<sup>48</sup> *Ibid.*

<sup>49</sup> Sect. 10.3. in WP.21, Art. 51 in WP.32.

<sup>50</sup> *Li Wei-jun's Hinderling of Delivery*, p.29 at pp. 6-46.

<sup>51</sup> *Ibid.*

<sup>52</sup> See also *Wang Jia-fu's Obligatory Rights*, pp.174-175.

## 2. Notice of arrival of goods

Notice of arrival of goods is a problem related closely with the carrier's relief from the usual obligation on delivery when the consignee fails to take delivery. Whether the carrier must give the notice of arrival or not has been an issue of disputes for years.

In most bills of lading, there is a box of "notify party." But meanwhile, almost all of these bills indicate, "it is agreed that no responsibility shall attach the Carrier or his Agents for failure to notify," or "any mention herein of parties to be notified of the arrival of the Goods is solely for information of the carrier," or "failure to give such notification (of arrival) shall not involve the Carrier in any liability nor relieve the Merchant of any obligation hereunder."<sup>53</sup> In common law, in the absence of special contract or custom, the shipowner is not bound to give notice for his readiness to unload no matter under the charter party or bill of lading,<sup>54</sup> consequently, extending to the arrival of the goods, it is not the obligation on the carrier to give notification of arrival.

However, in other systems, notice of arrival is an obligation on the carrier. The CLC puts forward this rule that the carrier shall give the notice promptly upon the completion of the carriage if he has the knowledge of the consignee.<sup>55</sup> It is so supported by scholars that notice of delivery is the necessary condition for the remedies for the carrier, and if the notice of arrival has not been surrendered, the consignee shall not be responsible for the damages resulted from the delay of taking delivery.<sup>56</sup>

Without the stipulation otherwise in the CMC, the CLC will apply to the carriage of goods by sea, and the notice of arrival is required when the consignee is identified.

At present, national laws will determine whether the notice of arrival or delivery is necessary. In theory, when the obligation of taking delivery is established, the notice of arrival or delivery is required. However, in my opinion, such kind of notice is more a matter of practice than a matter of law. In practice, for the purpose of the commercial motivations and to reduce the delays in the collection of goods, most carriers are giving such notices to urge the consignee to take the delivery even when notification is not a statutory obligation. However, if the consignees, as is discussed before, "hide" themselves or is unwilling to exercise their rights, it is not so feasible for the carrier to notify them personally. And, when no consignee shows

<sup>53</sup> E.g., P&O NedLloyd bill of lading, box of "Notify Party" and Clause 20 on reverse.

<sup>54</sup> *Scrutton*, Art.150, p.290. See also *Gaskell*, 14.1, p.412.

<sup>55</sup> Article 309 CLC.

<sup>56</sup> *Li Wei-jun's Hindering of Delivery*, pp.22-23 at pp.4-46.

up, if the law puts the responsibility on the shipper or the controlling party to give instruction of delivery, the carrier will contact with them and the notice of arrival might be incorporated together with his seeking of instruction from them. On the other hand, if the consignee is keen on the goods, he will be alert for the schedule of the carriage. Therefore, the notice of arrival may be given to the consignee, or the shipper or the controlling party appropriately, but the manners of the notice may vary as the case may be. When the consignee, the shipper or the controlling party is available or their agents or bodies are available, a clear notice shall be surrendered to them. When the consignee is unidentified, the carrier shall publish the schedule of arrival and immediately satisfy any query with the information available, or meet with any other demands as individual cases may require.

### **3. Traditional remedy for the carrier: warehousing the goods**

Remedies for the carrier refers to means for the protection of the carrier and to discharge him from the agreed or reasonable obligations on the delivery (including the implied obligation of personal delivery) when the consignee fails to take over the goods actually. Warehousing the goods is a traditional remedy.

Article 86 of the CMC provides, "If the goods were not taken delivery at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the master may discharge the goods into warehouse or other appropriate places, and any expenses or risks arising there from shall be borne by the consignee."

#### **3.1 Effects of warehousing**

##### **3.1.1 Constructive delivery under contract of carriage**

If the responsibility of the carrier to the goods is extended when the goods cannot be taken over by the merchant party, it will be unfair for the carrier. Though the term in Article 86 of the CMC is not so clear, from the words that the risks and expenses to the goods "shall be borne by the consignee" after the discharging and warehousing of them. It can be concluded that the warehousing of the goods by the master shall constitute a constructive delivery<sup>57</sup> and the carrier is then discharged from the traditional obligation of delivery to the consignee personally. Meanwhile, the contract of carriage is terminated upon this warehousing. In addition, when a bill of lading has been issued, the presentation rule will not bind the carrier in such

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<sup>57</sup> See *Li Wei-jun's Hindering of Delivery*, p. 25, see also *Zou's Carrier's Remedies*, p.5.

case. However, the simple phraseology of the Article 86 of CMC does not match the shipping carriage very well. From the words of the provision, it is easily perceived that the risk and expenses will be transferred to the consignee as soon as the goods have been discharged into a warehouse or other appropriate place. But in the modern practice, except under charterparties, almost no goods are taken over alongside the ship. Therefore, after the arrival at the destination, the goods will generally be discharged into the container yard, CFS or warehouses. And, under the tariff of the carrier and the rules of the container yards or CFS, there is usually a specified free period for the keeping of the goods during which the consignee does not have to pay the storage charges. In Chinese ports, the free period is usually 3 to 5 days after the arrival or after the notice of the arrival. Considerable bills of lading provide that the consignee shall take the delivery during the specified period under the tariff, which generally lasts as long as the free period of storage. In addition, with the development of the agreement on delivery, certain contracts will provide the time for delivery. So, the stated specified period of time for delivery is both the duty and the right for the consignee. After the expiration of the period, failure to take the delivery may be deemed delay, but before the lapse of it, the consignee or other persons are not forced to receive the goods.

According to the contract theory, if there is no such agreement on the period, a reasonable time is required, and the carrier or vessel “cannot discharge his liability by landing them immediately on the ship’s arrival.”<sup>58</sup> In my view, the abovementioned 3 to 5 days of free period in practice may be of reference to the reasonable period.

So, before the agreed or reasonable period for delivery has lapsed, the obligation to receive the goods is not due, the carrier is still under the responsibility to the delivery, and risks to the goods are borne by the carrier at the meantime. Under the CMC, at least the risks to the containerized goods are still borne by the carrier before the aforesaid period is due. Whilst, as the bulk and general cargos are concerned, the risks to the goods will transfer to the consignee once the goods are discharged from the vessels,<sup>59</sup> but the cease of risk on the carrier results from the stipulation of responsibility period not from the remedy for the carrier.

Therefore, before the lapse of the agreed or reasonable period, the carrier is not entitled to the remedy under the Article 86 of CMC. In addition, since the remedy can be available only after the discharge and certain period, consequently, it will not be the master to carry out the remedy of warehousing or storage. So it is more reasonable to put the “carrier” instead of the “master” in Article 86.

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<sup>58</sup> *Scrutton*, art.151, p.291.

<sup>59</sup> Art. 46 of the CMC, under the containerized carriage, the responsibility period of the carrier will continue until the delivery of the goods, while under the non-containerized one, the responsibility of carrier will cease by discharging the goods from the vessel; for details see *supra* Chapter 2.

### **3.1.2 Duty to the safety of the goods**

Though this “constructive delivery” is an alternative of the actual delivery, the carrier is still under the responsibility not to infringe any property right or title to the goods of others. The latter is an absolute obligation not only under a contract. However, as is pointed out in Part 1.3, by the breach of the obligation to receive the delivery, the duty of the care of the goods on the carrier will be reduced. Briefly, the carrier shall exercise the remedy properly.

First of all, “properly” means that the carrier shall do due diligence to store the goods. He shall find a warehouse or other place suitable for receiving and storing the goods. The place for storage shall be appropriate to the characteristics of the goods, for instance, the temperature and ventilation shall be fine for certain goods. Moreover, it shall be safe under the applicable law and policy, such as the customs regulations of the port. In addition, when choosing the storage place, the carrier shall take a reasonable consideration for the convenience of the consignee, and, without legal authorization, the carrier shall not store the goods in places other than the agreed range.

If the place chosen by the carrier is not appropriate, the carrier shall, if possible, re-store the goods in an appropriate place and may recover the additional costs occurred to the person who takes the goods owing to inconvenience or unsuitability of the warehouse or place.

When the carrier has done “due diligence,” he shall not be liable for the damages caused from such unsuitability of the warehouses or other storage places, and, if the storage place became inappropriate simply after the goods have been moved into, the carrier shall no longer be liable for the damages to the goods arising therefrom. The “duty of taking care of them devolves upon warehouseman,”<sup>60</sup> and the “risks and expenses shall be borne by the consignee.”<sup>61</sup>

The carrier shall be liable for the damages only if the damages have resulted from his intentional act or gross negligence.

### **3.1.3 Concluding storage and related contracts**

Article 86 of CMC just provides that the expenses and risks arising after the warehousing shall be borne by the consignee, but it does not make clear who shall be the party in the storage contract with the port or the warehouseman (sometimes including the handling, transiting or other contract with stevedores). Should the

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<sup>60</sup> *Carver's Carriage by Sea*, para. 1575.

<sup>61</sup> Article 86 of CMC.

party be the carrier, or the person who will take over the goods? There are two voices on this issue in China.

One of the popular views in practice of China is in favor that the contract shall be concluded between the warehouseman and the consignee or other person who will take over the goods. The payment for storage and other charges or expenses to the goods during storage shall be paid directly by person who takes over the goods. In the absence of such consignee, the warehouseman or others might be reimbursed through selling or disposing of the goods. And, the carrier is regarded as the agent of the receiver to warehouse the goods. The main reason for this view is that Article 86 has put the expenses on the consignee directly, and the agent status may alleviate the burden on the carrier and protect him well. The other opinion supports that the carrier is the contractual party in the warehousing and other handling contract, and he shall pay the warehousing charges and other expenses.<sup>62</sup>

I prefer the latter view. **Firstly**, the person who will take the delivery does not appoint the carrier to make the contract of warehousing on his behalf, and, even often, there will be no consignee showing up. So, it is difficult to say the carrier is the agent of the person who will receive the goods. Even under common law, the warehousing of the goods by the carrier in such cases is difficult to constitute “agent of necessity.”<sup>63</sup> **Secondly**, though the future actual handing over of the goods will be carried out by the warehouse or the container yard, the carrier in practice is bound to give instruction on the person to whom shall the goods be delivered by the warehouseman. This instruction complies with the feature of the storage contract. **Thirdly**, it is also common for the carrier to retain the goods for lien after warehousing and to apply for selling or disposing them in his own name. **Fourthly**, as mentioned above, the goods are usually discharged into the storage place where they wait for the consignee to take over. Within the free period or reasonable time for taking delivery, the carrier is the contractual party with the storage party, and if the goods continue to be kept in such places, usually the former contract continues. **Finally**, if the carrier is just the agent of the consignee and shall not be liable under the storage or related contract, it will be unfair for the storage parties, and the latter’s interests might not be well protected especially when no consignee eventually shows up.

Therefore, the carrier is the direct contractual party under such storage contracts. In my opinion, this kind of contract is also the contract for the third party’s benefits. Under such contract, it may be agreed that the third party is obligated to pay the

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<sup>62</sup> Li Wei-jun’s *Hindering of Delivery*, p.26.

<sup>63</sup> “Agent of necessity” means authority on some person to act as the agent of principal for preservation and improvement purpose even without the entrustment by the principal in emergent situation, e.g. the master may be the agent of necessity of the owner of goods to conclude the contract of salvage during the navigation. For details see *Yang’s Bill of Lading*, pp.373-375.



charges and expenses to the goods when he claims for the delivery of the goods from the warehouse. However, if there is no person claiming for the goods, or the third party fails to pay these charges, the carrier is still liable for the payment.

Therefore, after the storage of the goods to appropriate places, the carrier is not relieved from all the responsibilities to the goods for the benefit of the consignee or other person who is entitled to the goods. This relationship is closer to the *negotiorum gestio* between the carrier and the merchant party.

### **3.1.4 Reimbursement for the carrier**

The carrier is entitled to the reimbursement for any necessary and reasonable costs and damages such as the storage fares, the charges of the extra usage of the containers and even sometimes the costs for handling the goods, caused by the failure of the merchant party to take the delivery. The person who takes over the goods is liable for such charges, and when there is no one taking over the goods, the controlling party, or the shipper shall be liable for it.

### **3.2 Insufficient protection by warehousing**

Though the storage of the goods may discharge the carrier from the heavy burden of taking care of the goods and entitle him to the reimbursement of damages, a single remedy is not enough to protect the carrier in all events in light of the practice and related legal systems. There exist many problems: for example, the expenses of warehousing is still borne by the carrier when no consignee shows up to receive the goods or the consignee delays too long; the carrier will suffer from the reduction of containers in circulation and even pay for the rents of the containers if they are hired; the carrier may lose freight; it is difficult for the carrier to find an appropriate place to store the goods. Just because of the insufficiency of the remedy under existing statute, most container shipping companies deem the consignee's failure to take delivery their biggest headache. Therefore, it is necessary to establish a comprehensive system of remedies for the carrier.

## **4. Supplements of remedies**

The *German TRAT*,<sup>64</sup> *Scandinavian Maritime Code*<sup>65</sup> and the UNCITRAL Draft Instrument<sup>66</sup> all provide categories of the remedies for the carrier when he

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<sup>64</sup> Section 419 TRAT.

<sup>65</sup> E. g Section 21,22 of the *Finnish Maritime Code*.

<sup>66</sup> See Sect. 10.3.2 (b) and 10.4.1 in WP.21, Art. 49(b), 50 in WP.32.

encounters the obstacles of delivery. Making reference to these legislations and considering China's present legal and practical systems, the following measures are suggested to be the supplementary remedies in addition to the remedy of storage.

#### **4.1 Acquiring instructions**

As is discussed in Part 1.2, giving instructions on delivery when the consignee fails to take the goods promptly is both the right and obligation of the controlling party or the shipper. Meanwhile, carrier's obligation of giving the notice of arrival to the counterpart also makes this duty of instruction reasonable. The carrier shall follow the reasonable instructions made by the controlling party or the shipper.

This remedy may discharge the carrier from consequent troubles arising from warehousing, such as the burden of looking for appropriate storage places, the costs of storage fares and so on. So, asking for the instructions from the shipper or the controlling party will be a relatively sufficient remedy for the carrier and is, in most cases, geared to the interests of the cargo during the transit of them. Therefore, seeking for the instruction for delivery shall be the primary remedy for the carrier. However, when the shipper or the controlling party delays to give instructions or their instruction is impossible to be carried out or will bring great inconvenience to the carrier, the carrier may avoid the instruction and recourse for the other remedies.

#### **4.2 Retaining the goods as a lien**

Put a lien on the goods for the due freight or other charges to the goods is the carrier's right generally recognized by shipping legislations. Article 87 of the CMC provides that if the freight, contribution in general average, demurrage and other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier "may have a lien, to a reasonable extent, on the goods."

When the consignee claims for collecting the goods even after delay, or the shipper gives the instruction for delivery, the carrier is still entitled to exercise the right of lien on the goods and may refuse to release them. In addition, when the carrier has exercised the remedy under Article 86 of CMC, the carrier is still entitled to the lien of goods. Though the warehousing of the cargo under Article 86 is regarded as a constructive delivery, it just discharges the carrier from the obligation of actual delivery and transfers the risks to the person who takes over the goods, and it will not prejudice the rights for the carrier under the contract of carriage. Thus, the carrier may give notice to any wharf, warehouseman or

container yard with the goods in whose custody, that the goods are to remain subject to a lien for freight or other charges. The “other charges” under Article 87 of CMC, in my opinion, will include the storage charges and any other necessary outlays to the goods caused by the delay of taking delivery. Moreover, the carrier is entitled to the consequent rights of disposal of goods provided by law when exercising the statutory lien.

### **4.3 Selling the goods by auction**

Certain legislations give the carrier right for selling the goods under the statutory conditions, for instance, if the goods are perishable, or their conditions make the storage impossible, or if the costs which would otherwise be incurred are out of the proportion to the value of the goods.<sup>67</sup> According to Article 88 of CMC, if the goods under the lien have not been taken delivery within 60 days from the next day of the ship's arrival, or within less than 60 days in some special circumstance such as the goods are perishable or not suitable for storage, the carrier may apply to the court for an order of selling the goods by auction to satisfy his claims for the charges and expenses. But this provision does not generally apply to the storage of goods when they are not taken over.

When the consignee rejects the goods, or there is no consignee claiming for delivery, usually, there is no application for the customs clearance of these goods. In this situation, the court in China is not authorized to decide whether an application for auction should be approved or not. It is the Customs that takes charge of this application.

Article 30 of *The Customs Law of PRC* provides, “ If the consignee of the imported cargo has not filed to the customs within 3 months from the day when the carrying instrument applies for entry in China, the cargo shall be taken over by the customs and be sold or disposed of in accordance with laws and regulations. With deduction of the charges to the carriage, stevedores and storage etc., the payment of the cargo got by selling shall be returned to the consignee upon his same application, which is made within one year from the day when the cargo was sold legally ...”

On 20 December 2001, the General Customs Bureau of PRC issued the document of *Measures in Relation with the Imported Cargo without being Applied in the Required Period, the Entering Cargos because of Mis-discharging or Over-discharging and the Abandoned Imported Cargoes* to help the implementation of Article 30 under *The Customs Law*.

However, these regulations do not establish clear systems of procedures for

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<sup>67</sup> For example, Section 419, paragraph (3) of German TRAT

handling the related goods by the Customs, which makes it difficult for the carrier to apply for the selling of the goods. In addition, more importantly, the Customs are not very enthusiastic to dispose the goods in accordance with the *Customs Law*. Especially when the goods are of low or even negative values, few of the Customs will take measures to handle them, just leaving them stored at the warehouses or container yards. Moreover, even the involved goods have been sold by the Customs, provisions under the *Customs Law* and the aforesaid *Measures Regulations* may conflict with the civil law and rights on the goods. According to the former two regulations, only the Chinese Consignee is entitled to the balance of the payment by the selling. But in the case that the consignee in China fails to receive them or he rejects them, the bill of lading might flow back to the shipper who is out of China. In such case, the final legal holder of the bill of lading who is entitled to the goods under civil law is not allowed to get the money of the disposal of the goods under these administration laws. Therefore, the harmonization of the shipping law and the *Customs Law* or other administration law is very necessary.

Suggestions for improving the *Customs Law* are put forward.<sup>68</sup> But, with the coordination of the Maritime Code, the Maritime Procedure Law and the Customs Regulations, I think that authorizing the court the power to deal with the disputes and the application for the order to sell the goods by auction will be a more sufficient and effective approach when the carrier encounters the obstacles of delivery. More importantly, resolving these applications under the civil procedure may help to make clear the relationship among the carrier, the warehouse and the consignee or the shipper and others, and may resolve the disputes more fairly. As the time for applying the order of selling is concerned, it will be reasonable to be in line with the *Customs Law* to set 3 months from the arrival of the vessel or from the application of the vessel for entry in China.

In order to avoid possible abuse of the remedy and infringement of the title to the goods by the third party, the selling, in my point of view, must be taken under judicial procedure, and private sale shall be forbidden.<sup>69</sup>

#### 4.4 Applying for an injunction

The remedies for the storage or lien or selling of goods may not always be appropriate for the carrier. For examples, at a very busy port, because of the congestion of the container yards, the goods may not be stored for a long period, or if the containers are provided by the carrier and he is in urgent need for the usage

<sup>68</sup> See Li Wei-jun's *Hindering of Delivery*, pp.42-43.

<sup>69</sup> See also Zou's *Carrier's Remedies*, p.6.

of them, he is also not patient to wait for 60 days as is stipulated in Article 88 of CMC or 3 months in the *Customs Law* to unpack the goods and sell them. Or, sometimes, even the value of the goods cannot cover the due freight and other charges borne by the merchant party. In all these circumstances, carriers all like some measures to push the consignee to take over the goods as soon as possible and to relieve the carrier from the risks of the freight and others.

With the coming into force of the *Maritime Procedure Law of PRC* (hereafter referred to as "MPL"), another remedy may be invoked by the carrier. He may apply for an injunction by the maritime court to compel the consignee or other person who is obligated to take the delivery to collect the goods and to pay the freight and other charges due.

A maritime injunction is the innovation by the MPL in China; it means "the compulsory measures taken by a maritime court on the application of a maritime claimant to compel the person against whom a claim is made to act or refrain from action to prevent the legitimate rights and interests of the claimant from being infringed."<sup>70</sup> From the effectiveness of the MPL on 1 July, 2000, more and more parties have resorted to this remedy to protect their rights and reduce further disputes in future. Some carriers have therefore been able to make the goods taken over promptly and get the freight and other charged to the goods.

However, applying for an injunction to compel the consignee or other party to take over the goods and to pay the charges shall meet the following conditions: 1) a breach of the legal provisions or contractual provisions by the person against whom a claim and an injunction is made needs to be redressed, and 2) as a matter of urgency, loss will occur or be increased if an injunction is not granted forthwith.<sup>71</sup> Therefore, whether an injunction is approved or not shall be determined on the facts of the matter.

In addition, an injunction shall be made against the right person. In practice, generally, the counterpart under the injunction is the consignee. However, as I have analyzed in Part 1. 2, if the consignee has exercised any right to the goods under the contract, the injunction may be issued against him, but when there is no consignee showing up, the shipper or the controlling party who is found shall be the obligor.

However, there are limits to this remedy. When the shipper or the controlling party locates out of China, even if an injunction has been issued against them, it is difficult to effect actually. If the person against whom a claim is made refuses to comply with the injunction, the maritime court may impose fine or order a detention according to the seriousness of the case.<sup>72</sup> Some of the carriers apply for

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<sup>70</sup> Art. 51 MPL.

<sup>71</sup> Art. 56 of MPL, there are two other conditions in addition.

<sup>72</sup> Art. 59 MPL.

both the compelling to take over the goods and, if the counterpart fails to carry it out, the selling of goods by auction. Nevertheless, the court is not allowed to issue the order of sale of goods by auction if the goods have not been applied to the customs as discussed above. So, this will be another limit to the injunction.

#### 4.5 Opening or unpacking the goods

Under existing law, the biggest pressure on considerable carriers is that the containers are occupied for a very long period when the goods are stored. This will bring the shortage of containers to the carrier, and if the carrier hires the containers, they will have to pay high rents and even the demurrage when they delay to return them to the owner. Under these circumstances, it is urgently desired to vest in the carrier with the rights to open or unpack the goods packed in containers or other similar instrument, or to act appropriately in respect of the goods in consideration with the condition of the goods.

The UNCITRAL Draft Instrument provides such remedy.<sup>73</sup> After the opening or unpacking of the goods, the carrier may continue to store the goods into appropriate place.

#### 4.6 Depositing of Goods

Depositing means the system that the *obligor* surrenders the object to the agency of depositing when he fails to deliver it for the reason of the *obligee*, and the obligation shall be terminated thereby.<sup>74</sup> The CLC provides this system to the *obligor* when the *obligee's* whereabouts is unknown or when the *obligee* refuses to take the delivery of the object illegally and so on.<sup>75</sup> Furthermore, the Article 316 of the CLC in the chapter of the contract of carriage specifies that where the consignee is unidentified or the consignee refuses to take the delivery of the goods without justifiable reasons, the carrier may deposit the goods. Thus, the CLC provides an additional remedy for the carrier to deposit the goods.

Depositing goods is similar, but not identical, to the storage of goods. The main differences between them lie in: depositing the goods to certain place is deemed the thorough fulfillment of the delivery, and the carrier shall be relieved from all the risks and expenses to the goods thereafter. In addition, the goods may be delivered by the depository agency and the carrier is not bound to give the instruction of the delivery. Whilst, under the storage remedy under the CMC, the carrier is still responsible to the warehouseman or others under the storage contract, and there is

<sup>73</sup> See 10.4.1.b (ii) in WP.21, Art. 50 (2) (b) in WP.32.

<sup>74</sup> Wang Jia-fu's *Obligatory Law*, p. 207.

<sup>75</sup> Art. 101 CLC.

the relationship of *negotiorum gestio* between the carrier and the receiver after the storage.

Therefore, on this basis, depositing the goods is the most sufficient remedy for the carrier. However, there are other sides to this remedy. First of all, after the depositing, generally, the carrier shall not put a lien on the goods any more, nor is he entitled to withdraw the goods. So, when the freight or other charges have not been fully paid, the carrier would not like to use this measure.

In addition, CLC just provides the principles of this system but not the detailed implementation stipulations.<sup>76</sup> With this absence, the procedure and the conditions for the depositing are not clear. Moreover there is no special agency to deal with the application and approval of the depositing, meanwhile, there is no statutorily designated place for the depositing in China's port. And it is difficult to find such appropriate places to store the goods. Therefore, due to the insufficiency of completion system of depositing, it is still impractical in China for the time being.

Someone suggests that the maritime courts will be the most suitable body to act as the agency of depositing for the reasons that they have authority and special professional experience in resolving the disputes related to the carriage, in addition, the maritime courts may coordinate with other bodies, such as the Customs, more easily, compared with other bureaus.<sup>77</sup> I agree with the opinion that the court will be a more appropriate institution to deal with the procedure of depositing.

As far as the procedure is concerned, the *Notary Rules of Depositing* is of great reference: firstly, the application by the carrier; secondly, the approval by the court of such application for depositing; thirdly, the court designates the place of storage and the carrier surrenders the goods; fourthly, the goods are inspected when they are received by the depositing body, the record of conditions of them is issued, and the date of depositing is decided by the court or other body authorized by the court; fifthly, the carrier notifies the consignee or the shipper or other related party about the depositing of the goods; finally, if necessary, the depositing body or court may sell the goods through the court by auction.<sup>78</sup>

## **5. Conclusions**

To take delivery as agreed or without agreement on delivery, taking delivery promptly and properly is both the right and the obligation on the merchant party

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<sup>76</sup> *Notary Rules of Depositing* issued by the Ministry of Justice of PRC authorizes certain notary office as the agency to deal with the application and the depositing of the object. But the rules do not apply to the practice of the carried goods very well.

<sup>77</sup> See *Li Wei-jun's Hindering of Delivery*, pp.41-42.

<sup>78</sup> *Ibid.*

under the contract of carriage. In certain regimes, this obligation is borne by the consignee. In my opinion, on the basis of the contract of third party's benefit, and the theory of instrument of value if a bill of lading has been issued, the consignee is obligated to receive the goods only when he has exercised any right under the contract of carriage or transport document. When there is no consignee showing up in time, the controlling party is responsible to make the goods deliverable, when the controlling party is unidentified or fails to take this responsibility, the shipper will be the final obligator.

National laws and contract theories provide the carrier with remedies when the goods are not taken over. These remedies shall discharge the carrier from the obligation of the actual delivering of the goods or from the manner as agreed. Meanwhile, with the remedies, the responsibilities of the carrier to the safety of the goods shall be reduced and the carrier shall only be acting due diligence to dispose of the goods under the statutory authority. After exercising the remedy, for instance, warehousing the goods, the risks and expenses shall be transferred to the party who will take the goods or who will be responsible for taking the goods. In addition, the carrier is entitled to the reimbursement caused by such delay or failure of taking delivery.

However, the carrier shall enjoy the remedies and the protections by the law only when his case meets with these conditions: 1) an appropriate notice of arrival or delivery has been issued; 2) the agreed or reasonable period for taking delivery has been lapsed; 3) the goods are ready for delivery, which means the manner of delivery is proper and taking delivery is possible. Otherwise, the consignee or the shipper is not obligated to receive them, and the carrier may not enjoy the remedies.

Warehousing the goods is a traditional remedy for the carrier, but it has some insufficiencies during tin practice. With the improvement of the existing legal system, a relatively comprehensive remedy system is recommended. The carrier shall be entitled to exercise one or some of the remedies as follows at the risks and expenses of the consignee or the person entitled to the goods if the situation requires: 1) acquiring the instruction on delivery or disposal of goods from the controlling party or the shipper; if fails to do so, 2) storage of the goods at appropriate place; 3) putting a lien on the goods; 4) applying for injunction compelling the taking delivery of the goods; 5) selling goods by auction under the court; 6) opening and unpacking the goods or any reasonable acts in respect of the goods; 7) depositing goods to appropriate places.