Dissertation for Ph. D. in Law

A Comparative Study on the Liability of the Carrier under the Contracts for the Carriage of Goods by Sea

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June 2011

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해상물건운송인의 책임에 관한 비교법적 연구

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해사법학과

지도교수: 정대

21 세기는 해양의 시대이다. 해양은 지구상의 최후의 미개척지이며, 인간의 삶과 국가의 전략은 해양과 관련되어 있다. 해양은 해상운송, 식량자원, 광물자원, 글로벌 환경 등의 의미에서 인류에게 의미가 있다. 경제의 국제화, 국제거래의 급속한 확대 및 과학과 기술의 발전에 따라서, 해상운송 및 기타 해양관련 활동들은 날마다 확대되고 있다. 예를 들면, 세계 무역의 90%이상이 해상을 통해 이루어지고 있다.

오늘날 운송 수단으로 선박을 이용하는 해상기업은 급속하게 발전하고 있고, 해상물건운송은 해상기업의 핵심적 위치를 차지하고 있다. 해상운송은 장거리 운송, 낮은 운임, 대량의 화물의 운송 등과 같은 많은 장점을 가지고 있다. 그래서 해상운송은 국제운송에서 매우 중요한 역할을 수행하고 있다.

그런데 해상운송의 발전과 함께 해상운송으로부터 기인하는 국가 간의 마찰과 다툼이 증가하고 있다. 이러한 분쟁 가운데 해상운송인의 책임은

매우 중요하고 복잡한 문제이며, 한 국가의 국내법만으로는 해결할 수가 없다. 현재 해상운송인의 책임과 관련하여 4 개의 국제협약이 있는데, 그것은 바로 헤이그규칙(Hague Rules), 헤이그-비스비규칙(Hague-Visby Rules), 함부르그규칙(Hamburg Rules) 및 로테르담규칙(Rotterdam Rules)이다. 해상운송인의 책임과 관련하여 이들 국제협약 간에는 명백한 차이점이 존재한다. 동시에 해상운송인의 책임과 관련된 규정들도 역시 각 국가의 법에 따라 차이가 있다.

중국의 해상법은 1993 년부터 시행되고 있는데, 중국해상법 제 4 장에 해상운송인의 책임에 관한 규정을 두고 있다. 최근 중국의 경제가 급속히 성장하면서 해상운송의 중요성도 점점 더 커지고 있다. 이와 함께, 해운업 분야에서도 중국은 매우 중요한 국가가 되었고, 중국의 수입품 및 수출품의 90%이상이 해상을 통해 운송되고 있다. 해운업을 발전시키고, 국제적 흐름에 발맞추어 나아가기 위해서 중국은 해상운송인의 책임의 영역에서 법규범을 단계적으로 완벽하게 정비할 필요가 있다.

그런데 중국의 해상법은 해상운송인의 책임법제와 관련하여 규범적 흠결이 있다. 예를 들면, 해상운송인의 책임의 원칙, 책임의 기간 및 책임의 주체로서의 운송인의 개념 등과 관련하여 법적 문제점이 발견되고 있다. 따라서 이러한 해상운송인의 책임법제를 개선하기 위해서는 해상운송인의 책임법제에 관한 깊이 있는 연구와 조사가 필요하고 또한

중요하다.

이와 관련하여 본 논문은 다음과 같이 구성되어 있다.

제 1 장에서는 해상운송인의 책임법제를 연구하기 위한 목적과 그 연구범위 및 방법에 대해서 서술하였다.

제 2 장에서는 해상운송인의 책임법제를 일반적으로 고찰하였다. 즉 해상운송인의 책임의 법적 기초로서 해상운송인의 개념, 해상운송인의 기본적 의무 및 해상운송인의 책임의 법적 성질에 대해 설명을 하였다. 그리고 4 개의 국제협약상의 해상운송인의 책임에 관한 내용과 중국을 포함한 미국, 영국, 일본, 한국법상의 해상운송인의 책임에 관한 기본원칙을 서술하였다.

제 3 장에서는 책임의 주체로서의 해상운송인의 개념을 비교법의 관점에서 검토하였다. 책임의 주체와 범위에 관해 설명을 하고, 해상운송인의 확정을 둘러싼 법적 문제들을 비교법적으로 검토하고 분석하였다.

제 4 장에서는 해상운송인의 책임의 원칙과 함께 책임의 기간에 관한 법적 쟁점들을 분석하고 설명하였다. 즉 해상운송인의 책임의 원칙, 책임의 기간, 해상운송인의 면책사유 및 입증책임의 분배와 관련하여 4 개의 국제협약과 중국 해상법을 포함한 각국 법제를 비교하고 분석하였다.

제 5 장에서는 해상운송인의 책임제한 법제를 비교법적 관점에서 분석하여 설명하였다. 즉 해상법상의 선박소유자의 책임제한과 포장당 책임제한 법제를 상세하게 비교하고 분석하였다.

제 6 장은 본 논문의 결론으로서 각 장의 내용을 요약하여 정리하였다. 결론적으로 해상운송인의 책임법제에 관한 비교법적 검토와 분석을 통해 향후 중국 해상법상의 해상운송인의 책임법제의 개선 방안을 제시하였다.

Chapter 1 Introduction

1.1 Purpose of the Study

1.1.1 The Necessity of Studying the Carrier's Liability

The 21st century is the century of ocean. Ocean is the last undeveloped area on the Earth and the human being's living and national strategy are all concerned with it. The ocean is meaningful to mankind in the sense of ocean transportation, food resources, mineral resources, global environment, national development, and so on.

With the economic internationalization and fast increasing international trade and rapidly developing science and technology, ocean transportation and other ocean-related activities are increasing day by day, for example, in the European Union 90 % of the international commerce is using carriage of goods by sea, while 30 % of the trade within the EU is shipped by this transport mode.[1] More than 90 percent of global trade is carried by sea.[2]

"*Shipping in the 21st century underpins international commerce and the world economy as the most efficient, safe and environmentally friendly method of transporting goods around the globe. We live in a global society which is supported by a global economy and that economy simply could not function if it were not for ships and the shipping industry*".[3]

As we know, the main principle of maritime activities is maritime enterprise.[4]

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[1] See Madeleine Jansson, The Consequences of a Deletion of the Nautical Fault, at http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf, p.8, taken on 04/08/2010.
[2] See International Maritime Organization, International Shipping, Carrier of World Trade, at http://www.diadomar.mdn.gov.pt/IntShippingFlyerfinal.pdf, p.2, taken on 03/05/2011.
[3] Ibid, p.1.
[4] See Cheong Yeong-seok, A Basic Course of Maritime Commercial Law, Busan: Hae-in Publishing House, 2003, pp. 3-6. Maritime enterprises are economic units that pursue profits using ships as tools and using ocean as stage.

Nowadays, maritime enterprises using ships as transport tools are developing rapidly, meanwhile carriage of goods by sea occupies the core position in maritime enterprises. Carriage by sea has many advantages, such as large quantities, long-distance, freedom, low freight, etc, so it plays a very important role in international carriage.[5]

With the development of carriage by sea, however, the friction and controversy arising from it among countries become more and more. Among these disputes, the liability of the carrier is a very important and also a very complicated issue. All these issues cannot be resolved only depending upon domestic laws of one state, which makes the unitive international convention be very necessary.

At present, there are four main international conventions in respect of liability of the carrier, i.e. the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. With regard to the carrier's liability, there are obvious differences in these conventions. At the same time, the provisions with respect to carrier's liability are also different among national laws. Therefore, in order to avoid frictions and controversies among countries, it is necessary for us to make a thorough comparative study in this field.

1.1.2 Existing Legal Problems in the CMC as to Carrier's Liability

The Maritime Code of the People's Republic of China (hereinafter referred to as "CMC") was adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on November 7, 1992, and entered into force in 1993. Section 2 chapter 4 of the CMC prescribes the liability of carrier.

In recent years, China is developing very rapidly. Besides, China is also an important ocean state. China-related international investment and trade are developing at an astonishing speed, and ocean transportation is becoming more and

[5] See Cheong Yeong-seok, Practice of Carriage by Sea, Busan: Hae-in Publishing House, 2004, pp.9-12.

more important in China. China maintains a large fleet of ships and is also a country with a large quantity of cargoes.[6] Over the past 30 years, China has rapidly become a heavy player in the shipping industry and over ninety percent of China's import and export goods were transported by sea.[7] China, however, is not a party to any of the international conventions yet.[8] In order to promote the shipping industry and keep pace with international trend, China is perfecting step by step her legal rules in the field of the carrier's liability.

Although the Chinese law and practice have developed a lot, this doesn't mean that there are no problems. On the contrary, in respect of the carrier's liability, many legal issues exist in the CMC. For example: (1) As to the principle of carrier's liability, the current CMC adopts the incomplete fault liability. Some scholars hold that this kind of principle of liability is outdated and has not accorded with the shipping practice of the today; (2) As to the period of responsibility, the CMC divides the goods carried into two types such as container goods and non-container goods, and the two kinds of goods respectively adopt different periods of carrier's responsibility which may easily result in the confusion of application of law; (3) As to the subject of carrier's liability, the relevant provisions are not perfect and the stipulation as for how to identify the carrier is not specific yet under the CMC, and so on.

In short, the knowledge and research on carrier's liability are quite deficient under the CMC at present, so the in-depth study relating to carrier's liability is very important and necessary.

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[6] See Li Hai, A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p.336.
[7] See Zhang Li-xing, Shipping Law and Practice in China, Tulane Maritime Law Journal, Vol.14, 1990, p. 209.
[8] See X. Chen, Chinese Law on Carriage of Goods by Sea under Bills of Lading, Currents International Trade Law Journal, Vol. 8, 1999, p.90; L. Li, The Maritime Code of the People's Republic of China, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ), 1993, pp.205-206, noting that China has never ratified the main shipping treaties, including the Hague Rules and Hague-Visby Rules.

1.1.3 The Reasons Choosing Different Conventions and Countries

In order to improve and amend the CMC, I need to compare the carrier's liability between the different conventions and national laws.

In relation to the international conventions, besides the Hague/Hague-Visby Rules and the Hamburg Rules, the focus is on the comparison between the CMC and the Rotterdam Rules. The full name of the Rotterdam Rules is "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea".[9] The Rotterdam Rules were adopted by the General Assembly on 11 December 2008 and opened for signature in Rotterdam, the Netherlands, on 23 September 2009. This Convention needs 20 ratifications to enter into force. The reason why I focus on the Rotterdam Rules is that provisions in the Rotterdam Rules reflect the new tendency of international shipping legislation. The Rules aim to establish a uniform and modern global legal regime governing the rights and obligations of parties in the maritime transport industry under a single contract for door-to-door carriage, namely, to create a modern and uniform law concerning the international carriage of goods which include an international sea leg, but which is not limited to port-to-port carriage of goods. They provide a modern alternative to earlier conventions relating to the international carriage of goods by sea, in particular, the Hague/Hague-Visby Rules and the Hamburg Rules.[10]

In relation to national laws, I have chosen the maritime laws of the United States, the United Kingdom, Korea and Japan to compare. The specific reasons are as follows: (1) All of the four countries are developed countries. They have advanced science and technology, and play very important roles in the world. (2) Nowadays, the four countries are important trade partners of China. They are

[9] See http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html, taken on 26/09/2010.
[10] Ibid.

crucial to the development of the Chinese international trade. (3) They all have perfect law systems especially the maritime law. America and England are the representatives of common law system. In particular, the English Maritime Law has a long history and many mature systems which are worthy of learning and research. (4) Korea and Japan are very close to China. The economic and trade exchanges between them are becoming more and more close. Moreover, Like China, the two countries belong to civil law system as well. Their many regimes with respect to carrier's liability in the maritime law are similar but not identical. Hence, it is necessary to compare and study.

In the view of above background, I think it is meaningful to compare and study the carrier's liability which is a worldwide and significant issue. As a law teacher,[11] I am very interested in this study and I get much courage from my supervisor Prof. Chung Dae. In this paper, I want to focus on the Chinese law and practice in respect of the carrier's liability, and through the comparison between the CMC and Rotterdam Rules and other international conventions &countries, try to conduct a thorough and deep comparative study on the carrier's liability and finally to propose some constructive suggestions for perfecting legislation of the CMC.

1.2 Scope of the Study

It is not possible, at least for the author, to deal with all aspects of the carrier's liability. In order to finish the above-mentioned purpose, after deeply thinking, I decide to include the following contents in this paper:

(1) Overview of Carrier's Liability

At first, the basis of carrier's liability is introduced including the definition and

[11] The author has been worked as an associate professor in law school of Qingdao University from 2005.

the legal nature of carrier's liability and the carrier's basic obligations. Then, the basic principle of carrier's liability under four international conventions is discussed, such as the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Thirdly, the basic principle of carrier's liability under different national laws is demonstrated, in particular, the United States, the United Kingdom, Korea and Japan. Finally, I introduce the basic principle of carrier's liability under the CMC.

(2) Definition of Carrier as the Subject of Liability

Firstly, I introduce the necessity of study on the subject of liability and the definition and scope of the subject of liability (i.e. Carrier). Secondly, I discuss the relevant provisions under the Korean Maritime Law and the Chinese Maritime Law. Then the general method of identifying the carrier has also been demonstrated in detail including the validity of the demise and identity of carrier clauses. At last, I analyze the new method under the Rotterdam Rules as to the identity of the carrier.

(3) The Principle of Liability of Carrier

In this part, I firstly demonstrate the overview of the principle of liability for the carrier including the definition and evolution of the principle of liability, discuss relevant provisions in the Rotterdam Rules and other international conventions & some countries and relevant provisions under the CMC, and make the comparison and analysis.

Secondly, I introduce the period of responsibility for the carrier. Concretely, I analyze the definition of the period of responsibility and the standard determining the period of responsibility, discuss respectively the different provisions under the relevant international conventions, under the relevant national laws and under the CMC, and make the comparative analysis between them.

Thirdly, I analyze the exception from liability. Specifically, the broad exceptions have been introduced including different provisions in international conventions and some countries, and then the two specific exceptions have been analyzed emphatically, which are the nautical fault exception and fire exception.

Finally, I analyze the allocation of burdens of proof by introducing the concept and effect of burdens of proof, discussing the position under the Hague Rules, Hague-Visby Rules and Hamburg Rules, summarizing the new structure of the allocation of burdens of proof under the Rotterdam Rules and making a comparison on the allocation of burden of proof between the CMC and the Rotterdam Rules.

(4) The Limitation of Carrier's Liability

Firstly, I make a generalization about limitation of liability in maritime law, including types of limitation and the relationship between the global limitation and the package limitation. Secondly, I analyze detailedly different stipulations in international conventions, e.g. the Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Thirdly, I compare in detail relevant provisions relating to the limitation of carrier's liability in different countries including the United States, the United Kingdom, Japan and Korea. Then, the provisions with respect to package limitation under the CMC have been discussed. Finally, I deal with the issue of the loss of benefit of limitation of liability.

(5) Conclusions and Suggestions

At the end of this paper, I summarize the contents having been discussed and analyzed, draw several conclusions, and give some suggestions for perfecting legislation and practice of the CMC.

1.3 Methods of the Study

In this dissertation, I plan to use effective methods to deal with the issues to be discussed and analyzed. According to the characteristics of the issues, I mainly take the following methods:

(1) Methods of Comparative Law

As mentioned above, the carrier's liability usually involves foreign elements. In this area there are many theories and practices, national laws and international conventions. They compete and influence each other, absorb the reasonable contents of one another, and in some degree they are the results of competition and reaction with one another. As far as the study is concerned, without the method of comparative law, the research can't go smoothly and can't be successful. Just as a famous maritime law expert William Tetley said, it is very important and even essential to use the method of comparison in the study of laws, as you can't truly know your laws unless you know the laws of other countries.[12] Thus, method of comparative law is the main method adopted in this research. The comparison is mainly made between the Chinese Law and the Rotterdam Rules and other international conventions, and other countries.

(2) Method of Connecting Legal Theory with Judicial Practice

Legislation is based on legal theory, and judicial practice is decided by legislation and directed by legal theory. In order to precisely explain the law and practice, the legal theory supporting the law and practice should not be ignored; in order to enrich and develop the legal theory and improve the law, the judicial practice should be studied. Unlike England and America, China is not a state of case law, but in China judicial rulings, particularly those made by the Supreme

[12] See William Tetley, Maritime Liens and Claims, 1st edition, London: Business Law Communications Ltd., 1985, preface, p.1.

Court of China, can exert great influence on the Chinese judicial practice.[13] Therefore, method of connecting legal theory with judicial practice is also one important method used in this study. The method of case analysis is given a special attention to in this study.

(3) Method of Historical Analysis

A famous former leader of China, Mao Ze-dong, once said:" if you want to know a thing from the head to the tail, you must study its history."[14] I believe that this is also true in respect of the research on the carrier's liability. For example, in the Hague Rules, each rule thereof has its own history of life, from its conception, its discussion, and its amendment to its enforcement in practice. Thus, method of historical analysis is also utilized in this study.

Besides these three main methods, there are other means as well. Here I don't enumerate them one by one. What I want to say is that the above methods are used jointly or individually with different degree in different chapters. More frequently, they are used jointly in the course of study.

[13] In Chinese current judicial practice, the Supreme Court of China often issues direction on the adjudication on special legal issues. In addition, the Supreme Court of China also directly deals with the most important and most influential cases. It is responsible for the explanation of law in the judicial practice. Its ruling on a case and direction on a legal issue are binding upon all the Chinese courts of all levels.

[14] See Mao Ze-dong, Against the Rigid Belief in Books, this Article was collected in the Selected Articles Written by Mao Ze-dong, Beijing: The People's Publishing House, 1965, p.20.

Chapter 2 Overview of Carrier's Liability

2.1 The Basis of Carrier's Liability

2.1.1 The Definition of Carrier's Liability

It is well accepted that the core of the convention on the carriage of goods by sea is usually the carrier's liability.[15] What is the carrier's liability? As we know, liability is one of the most significant words in the field of law. Simply speaking, carrier's liability means that where the carrier violates the obligations and causes damages to the shipper or other parties due to his acts or omissions, he shall assume corresponding responsibility and compensate for corresponding losses.

According to the general rules of law, one should endure his own loss. But, sometimes it is unfair. Especially, during carriage by sea, after the shipper has delivered the goods to the carrier, only the carrier can prevent loss of or damage to the goods while in his custody by taking all necessary measures. Therefore, it is fair to make him liable for loss or damage. Unlike common law, the main international conventions such as the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules in principle lay contractual liability on the carrier for breach of the contract of carriage agreed prior to loss. Indeed, Article 2 of the Hague/Hague-Visby Rules makes the carrier subject to the responsibilities and liabilities therein.[16] Generally, the carrier's liability regime includes many aspects, such as subject of liability, principle of liability, limitation of liability, and so on. These issues will be respectively discussed in the latter chapters of the dissertation.

[15] See Professor Jan Ramburg, UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea, at http://www.cmi2008athens.gr/sub3.3.pdf.

[16] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p82.

2.1.2 The Legal Nature of Carrier's Liability

(1) Liability with Fault for the Carrier's Own Act

Under Article 3(2) of the Hague Rules/Hague-Visby Rules, Article 5(1) of the Hamburg Rules and Article 17 of the Rotterdam Rules, the carrier shall be liable for his own fault. If the carrier has not taken all reasonable measures to avoid the occurrence or its consequences, he is at fault. Law cannot protect the carrier who did not exercise necessary steps to prevent loss or damage although he would be able to avoid it. Accordingly, the principle of liability adopted by the aforesaid four international conventions is the fault liability. In short, the fault criterion, which helps to prevent loss of or damage to cargo, is a reasonable ground for liability.

(2) Strict Liability for Others' Fault

Unlike his own acts, the carrier's contractual liability for his servants' or agents' acts is strict liability since the carrier is under an obligation to pay damages even though he is not at fault. The carrier's fault is not a liability condition. The causal relation between loss and his servants or agents' acts is enough for the existence of liability.

(3) Excepted Liability

Neither is the carrier made liable for all the fault of his servants or agents under the Hague/Hague-Visby Rules. The carrier shall not be liable for loss or damage arising from nautical fault and fire unless fault belongs to the carrier.[17] Of course, the Hamburg Rules and the Rotterdam Rules have deleted these exceptions and many maritime scholars have different opinions to this issue.

(4) Limited Liability

Under the conventions and national maritime laws, the carrier does not have to indemnify cargo interests for all loss arising from fault. Indeed, under Article 4(5)

[17] See Article 4 (2)(a) and (b) of the Hague/Hague-Visby Rules.

of the Hague/Hague-Visby Rules, Article 6 of the Hamburg Rules and Article 59 of the Rotterdam Rules, the carrier's liability is limited to particular amounts. Limitation of liability is one of the distinctive features of shipping law. It is needed in shipping in order to encourage investment and to serve the needs of commerce.

2.1.3 The Basic Obligations of the Carrier

Liabilities are always linked with obligations. In general, liabilities are resulting from the breach of the obligations. Therefore, in order to study the carrier's liability, first of all, we should be clear that how many obligations have been prescribed with regard to the carrier in different international conventions. Now, the basic carrier's obligations will be introduced.

(1) The Obligation to Exercise Due Diligence as to Seaworthiness

The carrier's obligation to provide a seaworthy vessel is one of the most fundamental obligations for the carrier. What is meant by the carrier's obligation to provide a seaworthy ship has been referred to in very many cases. Thus, in one of the leading cases it is said that a seaworthy vessel is one which is "fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage."[18]

Specifically, in accordance with Article 14 of the Rotterdam Rules, The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are

[18] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.296.

carried, fit and safe for their reception, carriage and preservation.

The above provision is similar to that in the Hague/Hague Rules, but the duration is different between them. Article 3 (1) of the Hague/Hague Rules only obliges the carrier to exercise due diligence to make the ship seaworthy before and at beginning of the voyage. Under the Rotterdam Rules, however, the duration extends to the whole voyage.

(2) The Obligation of Care in respect of Carried Goods

Article 13.1 of the Rotterdam Rules provides that: "The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods." And paragraph 2 of Article 3 of the Hague/Hague-Visby Rules also provides that: "Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." This is the obligation of care of cargo.

This provision of the Rules is of central importance. If there is no issue as to the unseaworthiness of the vessel, but the goods have arrived in a damaged condition or have been short delivered, it will form the central plank of the claimant's case. Indeed, in such an event, there will be a prima facie breach of the obligation of care of cargo and the carrier will be liable unless he can establish a defence under exception from liability clauses.

It will be noted that the carrier's obligation of care of cargo must be exercised "properly and carefully". Moreover, compared with the Hague/Hague-Visby Rules, the Rotterdam Rules add carrier's duties of receiving and delivering, which increases the obligations of the carrier.

(3) The Obligation of Issue of Bills of Lading

The bill of lading is a very important document in carriage of goods by sea. It is not only a formal receipt for the goods shipped and an evidence of the contract of carriage of goods by sea, but also a document of title. Accordingly, paragraph 3 of Article 3 of the Hague/Hague-Visby Rules provides as follow: "After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things....."

In addition, in light of Article 35 of the Rotterdam Rules, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option: (a) a non-negotiable transport document or a non-negotiable electronic transport record; or (b) an appropriate negotiable transport document or a negotiable electronic transport record.

It will be noted that the Hague/Hague-Visby Rules provides that the shipper can ask the carrier issue a bill of lading. That is to say, there is no obligation on the part of the carrier to issue such a bill of lading unless requested to do so by the shipper. This provision is different from that in the Rotterdam Rules under which once the goods were delivered to the carrier for shipment, the carrier shall issue the bill of lading to the shipper. The demand of the shipper is no longer a condition for the carrier to perform such obligation.

(4) The Obligation as to Unreasonable Deviation

According to paragraph 4 of Article 4 of the Hague/Hague-Visby Rules, any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or

damage resulting therefrom. Besides, Article 49 of the CMC also provides that the carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route.

These aforesaid provisions do not disturb the existing common law principles on deviation. Indeed, the provision recognizes the well-known liberty of "saving or attempting to save life". And extended protection is given to shipowners in the form of deviations to save property and reasonable deviations. These extensions are potentially of great significance.[19] However, it is very difficult to interpret the phrase "any reasonable deviation".

2.2 Introducing Carrier's Liability under International Conventions

2.2.1 Under the Hague Rules

2.2.1.1 The Legislative Background

In the late 17th century, English merchant fleet played an important role in international shipping industry, and goods were mostly carried in their vessels. Accordingly, common law became more important because disputes in respect of the contract of carriage were settled by common law courts. According to common law, common carriers were obliged to deliver goods in the same state as that in which they had received them, and imposed strict liability.

By the 18th century, freedom of contract became a basic principle of law of contract. Thus, the carrier tried to escape from severe liability by inserting exception clauses into bill of lading. By the middle of the 19th century, with the development in the shipping industry the carrier's position greatly improved. Then, he began to reduce the scope of his liability and the number of exception clauses

[19] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.343.

increased. Being aimed at the misuse of "freedom of contract", the Harter Act of the United States was passed in 1893. This Act provided that the carrier's liability was made mandatory, and any clause relieving the carrier of liability for loss or damage would be null. At the same time, some new exception clauses were added, such as nautical fault.[20] The Harter Act was the first national statute which established a compromise between carriers' and shippers' interests and directly gave rise to the Hague Rules in 1924 which was based on it.

Between May and June 1921, the Maritime Law Committee on Bills of Lading of International Law Association (ILA) prepared a draft. Shortly thereafter, the draft was accepted under the name of "the pre-Hague Rules 1921" at the ILA's Conference at the Hague on September 2, 1921. Under the Rules, the carrier would be liable for faults in the handling, loading, stowage, carriage, custody, care and unloading of cargo but not on the navigation or management of the ship.

In May 1922, a new draft was introduced in line with the pre-Hague Rules 1921 in a conference arranged by the British Board of Trade. Under the draft, the period for action was extended from one year to two years, and the burdens of proof for due diligence and lack of fault were shifted onto the carrier in favor of cargo interests.

In October 1922, the London Conference of the International Maritime Committee (IMC) prepared a London Draft. A few days later, the London Draft was discussed in the fifth session of the Diplomatic Conference on Maritime Law in Brussels. The sub-committee amended the Draft as follows: (1) a distinction was made between apparent and non-apparent loss of or damage to goods; (2) the period for action was reduced to one year as adopted in the pre-Hague Rules l921, and so on. In October 1923, the sub-committee clarified the French and English

[20] See Section 3 of the Harter Act.

versions of the final provisions. Moreover, the gold clause was added into the new draft. Meanwhile, the UK Carriage of Goods by Sea Act 1924 was passed in August 1924 before the international draft was voted on.

Finally, the rules were signed at Brussels as the "International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading" on August 25, 1924.[21] It was signed by 26 countries at that time.[22] The Convention, known as the Hague Rules, came into force on June 2, 1931.[23] At present, there are 73 countries or regions that have ratified the Hague Rules.[24]

2.2.1.2 The Main Contents

The Hague Rules have sixteen articles in all. Under the Hague Rules, shippers bear the cost of lost or damaged goods if they cannot prove that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo, i.e., carriers can avoid liability for risks resulting from human errors provided they exercise due diligence and their vessel is properly manned and seaworthy.[25] These provisions have frequently been the subject of discussion between shipowners and cargo interests on whether they provide an appropriate balance in liability. The carrier shall be entitled to the nautical fault exception and fire exception.[26] Any clause or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to goods arising from negligence, fault, or failure in the duties and obligations or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no

[21] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th edition, St.Paul: Thomson and West Publishing Co., 2004, p.563.
[22] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.21.
[23] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, pp.11-27.
[24] See http://en.wikipedia.org/wiki/Hague-Visby_Rules, taken on 08/06/2011.
[25] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, pp.26-27.
[26] See paragraph 2 of Article 4 of the Hague Rules.

effect.[27] Moreover, the carrier shall not be liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency.[28] After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading.[29] Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods.[30]

The Hague Rules represented the first attempt by the international community to find a workable and uniform means of dealing with the problem of shipowners excluding themselves from all liability for loss or damage of cargo. The objective of the Hague Rules was to establish a minimum mandatory liability of carriers. The Hague Rules formed the basis of national legislation in almost all of the world's major trading nations, and probably cover more than 90 percent of world trade.

2.2.2 Under the Hague-Visby Rules

2.2.2.1 The Legislative Background

In many years after the Hague Rules were signed, new steel ships were built in place of sailing and wooden ships, new packages such as containers were invented for the consolidation of goods, and new transport documents were introduced. During this period, it was widely recognized that the Hague Rules caused confusion and insoluble problems and could not keep up with developments in shipping and commerce.

Along with the growing number of complaints, the IMC appointed a sub-committee to investigate the flaws in the Hague Rules. In May 1959, the sub-committee prepared a report. In September 1959, the IMC drafted a new

[27] See paragraph 8 of Article 3 of the Hague Rules.
[28] See paragraph 5 of Article 4 of the Hague Rules.
[29] See paragraph 3 of Article 3 of the Hague Rules.
[30] See paragraph 4 of Article 3 of the Hague Rules.

Article 10. The sub-committee discussed a number of issues and presented a report to the IMC Conference in 1963. At this Conference, several problems were addressed, such as the figure of limitation, benefit of the carrier in tort, and extension of time limit, etc. In the IMC Draft Protocol, the provisions in respect of the carrier's liability under the Hague Rules were retained entirely. This Protocol was discussed in the 12th session of the Diplomatic Conference on Maritime Law at Brussels in May 1967.

In February 1968, the weight system was introduced to package and unit methods, and liability limits were clearly based on gold value. Besides, conditions under which a container would be deemed package or unit were addressed. Finally, the geographical scope of the Rules was changed so that the Rules would apply to outward shipment. The right was awarded to the Contracting States to apply the Rules to inward shipments.

On February 23, l968, these revisions were ratified at Brussels under the name of "the Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to bills of lading signed at Brussels on 25th August l924". The Hague Rules as revised by the Visby Protocol, known as the Hague-Visby Rules, came into force on June 23, 1977. In 1979, the Protocol, known as the SDR Protocol was agreed upon in Brussels on December 21, 1979 and came into force on February 14, 1984. Under the SDR Protocol, the SDR value was preferred to the gold value as a basis of limitation.[31] Up to now, there are 44 countries or regions that have ratified the Hague-Visby Rules.[32]

2.2.2.2 The Main Contents

The aim of the Hague-Visby Rules is to bring them into line with the needs of

[31] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, pp.27-32.
[32] See http://en.wikipedia.org/wiki/Hague-Visby_Rules, taken on 08/06/2011.

a modern shipping industry. The rules increase a carrier's liability limit and include containerized cargo under their provisions.[33] The main contents of this Convention are as follows:

(1) Geographical Scope of Application

In the Hague-Visby Rules it is required for their application that either the bill of lading or the port of loading be located in a contracting State, Therefore the Hague-Visby Rules do not apply to a contract from a port located in a non-contracting State to a port of discharge located in a contracting State. In addition, they apply when they or a national law giving effect to them are incorporated in the bill of lading.[34]

(2) Exclusions

The Hague-Visby Rules, pursuant to Article 1(b), apply only to contracts of carriage "covered" by a bill of lading or similar document of title and therefore they impliedly exclude charter parties. This provision gives rise to some uncertainty, for Article 3(3) provides that the carrier must issue a bill of lading on demand of the shipper and Article 6 grants the carrier freedom of contract when no bill of lading is issued. Therefore the Hague-Visby Rules apply also before a bill of lading is issued.

(3) Period of Application and Period of Responsibility of the Carrier

On the basis of the (indeed not very clear) definition of carriage of goods in Article 1(e) of the Hague-Visby Rules, it is now settled that the period of their application is, for dry cargo, from the beginning of loading of the goods on the ship to the completion of their discharge from the ship. Therefore, since very frequently – this is always the case in the liner trade – the carrier takes the goods in charge

[33] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.30.
[34] See Article 10 of the Hague-Visby Rules.

before their loading on board and delivers them to the consignee in a warehouse of the port of discharge, there are periods when the goods are in the custody of the carrier to which the Hague-Visby Rules do not apply. That creates uncertainty, because the rules applicable may vary from port to port.

(4) Obligations of the Carrier

Provisions are made in the Hague-Visby Rules regarding the obligations of the carrier to make the ship seaworthy and to care for the cargo, which is the same as the Hague Rules.[35]

(5) Exceptions from Liability

Under the Hague-Visby Rules, the carrier is excepted from liability a) in respect of loss of or damage to the goods arising or resulting from unseaworthiness unless caused by the breach by the carrier of his due diligence obligation and, b) as well as for loss of or damage to the goods arising from fault of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship and for loss of or damage to the goods due to fire caused by fault of the crew.[36]

(6) Liability of the Carrier for other Persons

Under the Hague-Visby Rules, except for the exonerations mentioned in article 4(1)(a) and (b), the carrier is liable for the faults of his servants or agents; a liability that results by implication from article 4(2)(q). The category of the agents appears to be rather limited, because article 4bis (2) provides that they do not include independent contractors and because the scope of application of the Hague-Visby Rules is limited to the period between commencement of loading on and completion of discharge from the ship; therefore, actions performed ashore in the ports of loading and discharge are not subject to the Hague-Visby Rules. But

[35] See Articles 2, 3 of the Hague-Visby Rules.
[36] See Article 4 of the Hague-Visby Rules.

agents probably include the master and crew of the ship if they are not under the employment of the carrier, as is the case where the carrier is the time charterer of the ship.

(7) Limitation of Liability

The carrier shall not in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. The unit of account mentioned in this article is the Special Drawing Right as defined by the International Monetary Fund.[37]

2.2.3 Under the Hamburg Rules

2.2.3.1 The Legislative Background

After the Second World War, many newly independent countries entered into international trade. In fact, these new countries became responsible for large amounts of shipments in maritime commerce. However, carriage was still in the hands of industrialised nations.

These developing countries complained about the language of the Hague Rules causing confusion, their insufficient systems imposing an unduly heavy burden of proof on the consignee, not including loss resulting from delay, not answering to the needs of modern sea carriage and international trade, and so on. During the 1970's, pressure mounted from developing countries and major shipper nations. Many, especially developing countries, took the view that the Hague Rules had been developed by "colonial maritime nations"[38] in 1924, largely for the benefit of their maritime interests, and that the imbalance between shipowners and

[37] See Article 4(5) of the Hague-Visby Rules.
[38] See http://www.law-essays-uk.com/resources/free-essays/hamburg-conventions.php, taken on 03/05/2011.

shipper interests needed to be redressed.

Working Groups were appointed by the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL) to investigate the flaws in the Hague/Hague-Visby Rules. In 1969, the Secretariat of UNCTAD prepared a comprehensive report to revise the Hague Rules. In 1971, the UNCITRAL Working Group met in Geneva and proposed that the Hague/Hague-Visby Rules should be examined and a new international convention might be prepared for adoption under the auspices of the United Nations.

After four years of discussions, the Working Draft was prepared in 1975. Finally, the Draft was accepted at a diplomatic conference held at Hamburg on 31 March, 1978, known as the Hamburg Rules. The full name of the Hamburg Rules is the "United Nations Convention on the Carriage of Goods by Sea, 1978".[39] The Convention became effective on 1 November, 1992. As of May 2011, 34 nations have ratified the Hamburg Rules.[40]

2.2.3.2 The Main Contents

Rather than just amending the Hague Rules, the Hamburg Rules adopted a new approach to cargo liability. Under the Hamburg Rules the carrier is responsible for the loss of or damage to goods while in his charge, unless he can prove that all reasonable measures to avoid damage or loss were taken. The main contents are as following.

(1) Liability of the Actual Carrier

The Hamburg Rules provide a new concept "actual carrier". It means any person to whom the performance of the carriage of the goods, or of part of the

[39] See Fu Ting-zhong, Maritime Law, Beijing: Law Press, 2007, p.217.
[40] For detailed information, please see http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html, taken on 08/06/2011.

carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.[41] All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.[42] Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.[43]

(2) Period of Responsibility

The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.[44]

(3) Principle of Liability

The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[45] This is a fault liability. At the same time, the Hamburg Rules deleted the nautical fault exception and fire fault exception. This liability is a typical complete fault liability.

(4) Limitation of Liability

The liability of the carrier for loss resulting from loss of or damage to goods is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. Compared with the Hague-Visby Rules, the limits have been increased. Besides, the liability of the carrier for delay in

[41] See paragraph 2 of Article 1 of the Hamburg Rules.
[42] See paragraph 2 of Article 10 of the Hamburg Rules.
[43] See paragraph 4 of Article 1 of the Hamburg Rules.
[44] See Article 4 of the Hamburg Rules.
[45] See Article 5 of the Hamburg Rules.

delivery is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.[46]

(5) Notice of Loss, Damage or Delay

Where the loss or damage is not apparent, the time limit of notice in writing may be extended to 15 consecutive days after the day when the goods were handed over to the consignee. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.[47]

(6) Jurisdiction of Lawsuit and Arbitration

In judicial proceedings the plaintiff may institute an action in a court which is situated one of the following places: (a) the principal place of business; or (b) the place where the contract was made; or (c) the port of loading or the port of discharge; or (d) any additional place designated for that purpose in the contract of carriage by sea, and in the court of the port or place of the arrest.[48] The arbitration proceedings shall, at the option of the claimant, be instituted at a place in a State within whose territory is situated or any place designated for that purpose in the arbitration clause or agreement.[49]

(7) Extension of Prescription

Any action relating to carriage of goods is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.[50]

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[46] See Article 5(a)(b) of the Hamburg Rules.
[47] See paragraphs 2, 5 of Article 19 of the Hamburg Rules.
[48] See paragraphs 1, 2 of Article 21 of the Hamburg Rules.
[49] See paragraph 3 of Article 22 of the Hamburg Rules.
[50] See Article 20 of the Hamburg Rules.

In addition, there are many other contents in the Hamburg Rules, such as carriage of live animals (paragraph 5 of Article 1) and deck cargo (Article 9), multimodal transport (paragraph 6 of Article 1), issue of bill of lading (Article 14), and so on.

2.2.4 Under the Rotterdam Rules

2.2.4.1 The Legislative Background

In 1924, when the Hague Rules were adopted, virtually all ocean break-bulk cargo in the world's ocean trades moved as individual bags, cartons, crates, bales and barrels on sailing vessels, with bills of lading and the Hague Rules applying only for ocean transit. The use of pallets and containers, which became common in the 1960s, revolutionized cargo handling in terminals and aboard ship, with container terminals and container ships replacing traditional transit sheds on piers and break-bulk ships. Intermodal shipment of containers under ocean carriers' bills of lading from manufacturers to customers, door-to-door, became pervasive in the 1970s. The Hague Rules, with Hague-Visby Rules adopted by most maritime nations, did not provide for the containerization and intermodal transportation under through bills of lading that have dominated carriage of dry cargo for more than 50 years, and for electronic documentation.[51]

After several years of international negotiations and several drafts by the United Nations Commission for International Trade Law (UNCITRAL), the Rotterdam Rules adopted by the United Nations in 2009 are a long overdue necessary step to bring international shipping law into the modern era. From conceptualization to signing, the Rotterdam Rules took seven years to prepare (2002-2009). The preparation involved intergovernmental negotiations under the

[51] See Charles M. Davis, The Rotterdam Rules: Changes from COGSA, at: http://davismarine.com/articles/Rotterdam%20Rules%20-%20Changes%20from%20COGSA.pdf, taken on 07/06/2011.

auspices of the UNCITRAL and charged the Committee Maritime International (CMI) with the responsibility of preparing a draft of the convention. The preparation of the UNCITRAL draft convention on transport law worked upon at various meetings in Vienna, New York etc.[52] Finally, the Rotterdam Rules were adopted by the General Assembly on 11 December 2008 and opened for signature in Rotterdam, the Netherlands, on 23 September 2009. They provides for modern transportation of goods wholly or partially at sea, including the prevailing use of containers carried in multimodal transportation under through bills of lading ("transport documents") from "door-to-door", factory to distributer. The Rotterdam Rules change the existing law of ocean transportation both in terms of concepts and in substance.

2.2.4.2 The Main Contents

The Rotterdam Rules will apply to all international carriage of goods wholly or partly by sea. They provide for substantial changes in comparison with the existing liability regime in a number of respects. The main provisions in respect of carrier's liability are as follows.

(1) Obligation, Liability and Limitation of "Maritime Performing Parties"

The Rotterdam Rules provisions, including carriers' responsibilities and the limitations of liability and damages which apply to "carriers", are extended to any "maritime performing party" who physically performs any of the carrier's responsibility under a contract for the carriage, handling, custody or storage of the goods, at the carrier's request or under the carrier's supervision or control.[53]

(2) Period of Application

[52] See http://www.oetalaw.com/edodo/Publications/GenesisOfRotterdamRules.aspx, taken on 07/06/2011.
[53] See Article 19 of the Rotterdam Rules.

The Rotterdam Rules apply to the responsibilities of carriers and maritime performing parties at all times the goods are being carried or stored under a through contract of carriage. They apply to the period from the time when the carrier or a performing party has received the goods for carriage until the time the goods are delivered to the consignee at the time and location agreed in the contract of carriage, or, failing any specific provision relating to delivery, in accordance with the customs, practices, or usages in the trade.[54]

(3) Carrier's Obligations

The Rotterdam Rules require a carrier to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods and to exercise due diligence to make the ship seaworthy before, at the beginning of, and during the voyage by sea. Therefore, the Rotterdam Rules impose the carrier's obligation to make the ship and its holds and carrier-furnished containers seaworthy to the entire period the goods are in the control of the carrier.[55]

(4) Defenses to Liability

The carrier is not liable for cargo loss or damage if it meets its burden of proving that the loss was not the fault of the carrier or a performing party. A carrier is not liable for loss, damage or delay in delivery caused by deviation to save or attempt to save life or property at sea, or by other reasonable deviation. A carrier will be responsible for all or part of a loss, damage or delay if the claimant proves the loss, damage or delay was or was probably caused by or contributed to by the unseaworthiness of the ship, and the carrier cannot prove that it complied with its obligation to exercise due diligence. Importantly, the defense of error in navigation or management of the vessel has been omitted.[56]

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[54] See Article 12 of the Rotterdam Rules.
[55] See Articles 13, 14 of the Rotterdam Rules.
[56] See Article 17 of the Rotterdam Rules.

(5) Measure of Damages for Loss or Damage

Compensation for loss or damage is calculated by the value of the goods at the place of time of delivery, referring to a commodity exchange price, market price, or, if none, to the normal value of the goods of the same kind and quality at the place of delivery.[57]

(6) Damages due to Delay in Delivery

If the delay in delivery causes loss not resulting from destruction of or damage to the goods, damages are limited to a multiple of 2.5 times the freight payable on the goods delayed.[58] Notice of delay must be given within 21 days of the date the goods should have been delivered.[59]

(7) Limits of Liability

Article 59 of this Convention provides for a per package limitation of 875 SDRs and 3 SDRs per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract of carriage particulars. Packages or shipping units enumerated in the contract particulars as packed in or on a container are deemed packages or shipping units. If not so enumerated, the goods in or on a container are deemed one shipping unit.

(8) Time Bar

The Rotterdam Rules provide a time bar on any suit of two years, commencing on the day on which the carrier has completed delivery of the goods or, if there is no delivery, on the last day on which the goods should have been delivered.[60] An action for indemnity may be instituted after two years of the later

[57] See Article 22 of the Rotterdam Rules.
[58] See Article 60 of the Rotterdam Rules.
[59] See Article 23 of the Rotterdam Rules.
[60] See Article 62 of the Rotterdam Rules.

of the time allowed by the applicable law of the jurisdiction where proceedings are instituted, or 90 days of the date the person seeking indemnity has settled the claim has been served with process in the action against itself, or, if earlier, within the time.[61]

2.3 Introducing Carrier's Liability under National Laws

2.3.1 Under the US Carriage of Goods by Sea Act (US COGSA)

2.3.1.1 The Harter Act

In the late 19th century, due to the "free of contract", the carrier reduced the scope of his liability greatly depending on his bargaining power. As a result, several countries went to ahead and enacted domestic legislation, with the United States in the lead. In 1892, a congressman from Ohio, Michael Harter, introduced the Bill which later carried his name. After extensive amendment in the Senate Commerce Committee, the bill passed the Senate and the House of Representatives, without dissent, and was signed by the President on 13 February1893 and took effect on 1 July 1893.[62]

The Harter Act applies from or between ports of the United States of America, and foreign ports and places certain mandatory liabilities on carriers in order to afford shippers and consignees some protection. The Harter Act voids clauses in bills of lading which attempt to relieve the carrier of liability for loss or damage to cargo arising from negligence in loading, stowage, care and proper delivery or clauses that attempt to avoid or lessen the carrier's obligations to exercise due diligence to provide a seaworthy vessel and crew for the carriage and delivery of

[61] See Article 64 of the Rotterdam Rules.
[62] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.172.

cargo.[63] It also relieves the carrier of liability for errors in navigation or management of the vessel if the carrier exercises due diligence to make the vessel in all respects seaworthy.[64]

Currently, the Act is partially superseded by the US Carriage of Goods by Sea Act of 1936 (hereinafter referred to as "US COGSA36"). However, the Harter Act still applies to carriage of goods not subject to US COGSA36, including the period before loading and after discharge and carriage between U.S. ports unless the bill of lading expressly makes COGSA36 applicable to such shipments.

2.3.1.2 The US COGSA

In the United States today, the governing legal regime is the US COGSA36. In 1936, the United States enacted the US COGSA36 which incorporates the Hague Rules with some changes. On June 27, 1937 the United States formally ratified the Hague Rules, subject to an understanding that the US COGSA36 should prevail to the extent that its text differed from that of the Hague Rules. The US COGSA36 applies of its own force to both inbound and outbound shipments in foreign trade.

The main contents in respect of carrier's liability in the US COGSA36 are very similar to those in the Hague Rules, but not identical. Under Section 3 of the US COGSA36, the carrier has also the two basic obligations, namely the duty to exercise due diligence to make the ship seaworthy and the duty to care of the goods carried. The carrier shall be responsible for loss or damage arising from any cause arising with the actual fault and privity of the carrier, and shall be entitled to the benefit of nautical fault exception and fire fault exception.[65] The carrier may limit its liability for loss or damage to US $500 per package, or in case of goods not shipped in packages, per customary freight unit. The limitation does not apply

[63] See Section 2 of the Harter Act.
[64] See Section 3 of the Harter Act.
[65] See Section 4(2) of the US COGSA36.

where the freight charges are based upon a higher value declared by the shipper or where the carrier is found to have committed an unreasonable deviation.[66] With respect to the period of carrier's responsibility, the US COGSA36 applies from "rail to rail", which means from the time of vessel loading to the time of discharge.[67] However, this Act often applies to damage losses outside the "tackle to tackle" period and to some domestic shipments as well by the special agreement between the carrier and the shipper,[68] etc.

In 1999, draft "Carriage of Goods by Sea Act of 1999" (hereinafter "Senate COGSA99") was enacted. The main difference is to delete "error in navigation or management" as a defence. The complete fault liability has been established in this draft. At present, the Senate COGSA99 has not taken effect.

2.3.2 Under the UK Carriage of Goods by Sea Act (UK COGSA)

The United Kingdom adopted the Hague-Visby Rules by the Carriage of Goods by Sea Act 1971 (hereinafter referred to as "UK COGSA1971") which came into force on June 23, 1977[69] and at the same time repealed the Carriage of Goods by Sea Act 1924.[70] The Carriage of Goods by Sea Act 1992 was passed to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents.[71]

There is no national law for domestic carriage by sea. However, the UK COGSA1971 applies the Hague-Visby Rules, and gives them the force of law, in relation to and in connection with the carriage of goods by sea in ships when the

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[66] See Section 4(4), (5) of the US COGSA36.
[67] See Section 1(e) of the US COGSA36.
[68] See Section 7 of the US COGSA36.
[69] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.29.
[70] See William Tetley, Chapter1 Application of the Rules Generally, at http://www.eurotransport-solutions.com/documentos/Hague-Visby%20Comments.pdf, taken on 31/05/2011.
[71] See Cheong Yeong-seok, Principle of Bill of Lading, Revision, Seoul: Textbooks, 2007, p.50; See also Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.593.

port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states, and this applies the Rules to the coastal trade in situations where the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.[72] Where the goods are carried under a receipt which is a non-negotiable document, the Rules also have the force of law if the document expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.[73]

Because the Hague-Visby Rules were implemented by the UK COGSA1971, the main contents of the both are the same. In short, under the UK COGSA1971, the principle of liability is the incomplete fault liability; the nautical fault exception and fire exception were maintained; the kilo limitation is 2 SDR and the package limitation is 666.67 SDR; provisions are made regarding the obligations of the carrier to make the ship seaworthy and to care for the cargo, and so on.[74]

2.3.3 Under Japan International Carriage of Goods by Sea Act

The Japanese Commercial Code (hereinafter referred to as "JCC") was enacted in 1899, the maritime law chapter of which has remained basically unchanged since then. It regulates a carrier's liability for the national coasting trade, which was largely patterned after the German Commercial Code of 1861.[75] It is, of course, the principal source of maritime law in Japan. However, it is not the only source.

With the development of shipping industry, the original JCC has become outdated in some respects. Then it is necessary to enact an independent statute rather than modify the JCC greatly. On July 1, 1957, Japan ratified the Hague Rules

[72] See Section 1(3) and 1(4) of the UK COGSA1971
[73] See Section 1(6)(b) of the UK COGSA1971.
[74] For detailed information, please see the part of the Hague-Visby Rules.
[75] See William Tetley, Marine Cargo Claims, 4th Edition 2007, at http://www.mcgill.ca/files/maritimelaw/Japan.pdf, taken on 06/10/2010.

and enacted the International Carriage of Goods by Sea Act (Act No. 172 of June 13, 1957) (hereinafter referred to as "JICOGSA") to implement the Hague Rules. Subsequently Japan ratified the 1979 SDR Protocol on May 12, 1992, the ratification of which has the effect of ratifying the 1968 Protocol (Visby amendments) as well. The JICOGSA was amended accordingly on May 28, 1992 and came into force on June 1, 1993.[76]

Under JICOGSA, the carriers may claim the package limitation on the ground of the number of packages or quantity of the damaged cargo,[77] or may ask for error in navigation or fire exception.[78] The JICOGSA has the provision that the carrier shall be responsible for their negligence at the time of "receiving, loading, stowing, carrying, keeping, discharging and delivering" of the goods,[79] in addition, the carrier has the duties to exercise due diligence to make the ship seaworthy and to issue bill of lading.[80] The JICOGSA applies to a carrier's responsibility from the time of receipt of the cargo prior to loading to delivery of the cargo after discharge and not only from the time of loading to the time of discharge; in this respect the period of application is extended beyond that provided in the Hague-Visby Rules themselves. Special agreements including exemption clauses are permitted, however, provided that they relate only to the carrier's responsibility for the periods between receipt and loading of the cargo and between discharge and delivery of the cargo, and provided that such agreements are set out in the bill of lading.[81] The measure of damages is based upon the value of the goods at the place and time at which the goods are discharged from the ship or should have been discharged in

[76] Ibid.
[77] See Article 13 of the JICOGSA.
[78] See Article 3(2) of the JICOGSA.
[79] See Article 3(1) of the JICOGSA.
[80] See Articles 5, 6 of the JICOGSA.
[81] See Article 15 of the JICOGSA.

accordance with the contract,[82] and so on.

2.3.4 Under the Korea Commercial Code

The Korea Commercial Code (hereinafter referred to as "KCC") was enacted on January 20, 1962, and entered into force on January 1, 1963. This Act has arrived at its present form as the result of being amended many times, and the latest amendment was on August 3, 2007. The part 5 of KCC is Maritime Commerce. This part is divided into 4 chapters. The carrier's duty and liability have been provided in Section 1 of Chapter 2 of the KCC.[83]

Under the KCC, two basic duties are stipulated under the KCC, one is the duty to exercise due diligence as to seaworthiness, the other is the duty of care in respect of goods. If the carrier has fault, he shall be liable to compensate for loss resulting from loss of, damage to or delay in delivery of the goods.[84] The carrier shall not be responsible for loss arising from an act of the employees of the carrier in the navigation or the management of the ship, or a fire.[85] The carrier shall be relieved of the liability for compensation when the 11 exception clauses exist.[86] In addition, there are many other contents in respect of carrier's liability in the KCC, such as limitation of liability,[87] application to non-contractual claim,[88] provision for multimodal transport,[89] time bar,[90] electronic bills of lading[91] and seaway bills,[92] and so on.

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[82] See Article 12bis of the JICOGSA.
[83] See Chung Dae, The Movement of Legislation of Maritime Law, Evaluation and Movement of Legislation, Autumn, Seoul: Korea Legislation Research Institute, 2008, pp.48-49.
[84] See Articles 794 and 795 (1) of the KCC.
[85] See Article 795 (2) of the KCC.
[86] See Article 796 of the KCC.
[87] See Article 797 of the KCC.
[88] See Article 798 of the KCC.
[89] See Article 816 of the KCC.
[90] See Article 814, 840 of the KCC.
[91] See Article 862 of the KCC.
[92] See Articles 863, 864 of the KCC.

2.4 The Basic Principle under the Chinese Maritime Code

2.4.1 Introduction

China was one of the earliest countries to master navigation.[93] But by the middle of the twentieth century the Chinese flag had almost disappeared from the sea due to the "ban on sea trade" policy by the Ming Emperors dating from the 15th century. In the last two decades, however, China has emerged as one of the major maritime nations and has had to cope with increasing pressure from the trade. China has adopted more than 20 shipping related laws and regulations, especially the CMC. The CMC was adopted on November 7, 1992, and entered into force in 1993. It is a revolutionary document, not only because of what it contains but because of the way it came into being. It is the "first Chinese law to draw on the legal experience of other countries and from international agreements."[94] It largely incorporates many international conventions or foreign laws.[95]

2.4.2 The Main Contents

(1) The Subject of Liability, Period of Responsibility and Principle of Liability

As to the subject of liability, the CMC adopts the carrier and actual carrier, which is similar to the Hamburg Rules. "Carrier" means the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper. "Actual carrier" means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any

[93] For example, in Ming Dynasty, the navigator Zheng He ventured to Southeast Asia, India, Persian Gulf and Arabia with a huge fleet between 1405 and 1433, which is earlier than Christopher Columbus' sailing.
[94] See Fan Wei, The Measurement of Damages in Carriage of Goods by Sea, at https://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, taken on 6/4/2011.
[95] For example, Article 47 of the CMC is the same as Article 3(1) of the Hague-Visby Rules.

other person to whom such performance has been entrusted under a sub-contract.[96] Where both the carrier and the actual carrier are liable for compensation, they shall jointly be liable within the scope of such liability.

With regard to the goods carried in containers, the period of responsibility covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge. With respect to non-containerized goods, it covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom.[97]

The principle of liability under the CMC is the incomplete fault liability including the nautical fault exception and fire fault exception.[98]

(2) The Scope of Indemnity

Under the CMC, the scope of indemnity includes the loss of or damage to or delay in delivery of the carried goods. Delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon.[99] This stipulation is slightly different from that in the Hamburg Rules. According to Article 5 (2) of the Hamburg Rules, delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea 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. The carrier shall be liable for the loss of or damage to the goods caused by

[96] See Article 42 of the CMC.
[97] See Article 46 of the CMC.
[98] In respect of the subject of liability, the period of responsibility and the principle of liability, the detailed discussion will be made in this dissertation.
[99] See paragraph 1 of Article 50 of the CMC.

delay in delivery due to the fault of the carrier and be also 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. 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 in paragraph 1 of this Article.[100]

(3) The Amount of Indemnity

The amount of indemnity for the loss of the goods shall be calculated on the basis of the actual value of the goods lost. The amount of indemnity for the damage to the goods shall be calculated on the basis of the difference between the values of the goods before and after the damage, or on the basis of the expenses for the repair. The actual value shall be the value of the goods at the time of shipment plus insurance and freight.[101] As to the pure economic losses caused by delay in delivery of the goods, how to calculate the amount of indemnity has not been provided in the current CMC.

(4) The Limitation of Liability

The carrier's liability for the loss of or damage to the goods shall be limited to an amount equivalent to 666.67 Units of Account per package or other shipping unit, or 2 Units of Account per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading, or where a higher amount than the amount of limitation of liability set out in this Article had been agreed upon between the carrier and the shipper.[102] The liability of the carrier for the economic losses resulting from delay in delivery of the goods

[100] See paragraph 3 of Article 50 of the CMC.
[101] See Article 55 of the CMC.
[102] See paragraph 1 of Article 56 of the CMC.

shall be limited to an amount equivalent to the freight payable for the goods so delayed.[103] The carrier shall not be entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.[104]

(5) The Carriage of Live Animals and Goods on Deck

The carrier shall not be liable for the loss of or damage to the live animals arising or resulting from the special risks inherent in the carriage thereof. However, the carrier shall be bound to prove that he has fulfilled the special requirements of the shipper with regard to the carriage of the live animals and that under the circumstances of the sea carriage, the loss or damage has occurred due to the special risks inherent therein.[105]

In case the carrier intends to ship the goods on deck, he shall come into an agreement with the shipper or comply with the custom of the trade or the relevant laws or administrative rules and regulations. When the goods have been shipped on deck in accordance with the provisions of the preceding paragraph, the carrier shall not be liable for the loss of or damage to the goods caused by the special risks involved in such carriage. If the carrier, in breach of the provisions of the first paragraph of this Article, has shipped the goods on deck and the goods have consequently suffered loss or damage, the carrier shall be liable therefor.[106]

(6) The Limitation Period for Claims

[103] See Article 57 of the CMC.
[104] See paragraph 1 of Article 59 of the CMC.
[105] See Article 52 of the CMC.
[106] See Article 53 of the CMC.

The Limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or should have been delivered by the carrier. Within the limitation period or after the expiration thereof, if the person allegedly liable has brought up a claim of recourse against a third person, that claim is timebarred at the expiration of 90 days, counting from the day on which the person claiming for the recourse settled the claim, or was served with a copy of the process by the court handling the claim against him.[107]

Within the last six months of the limitation period if, on account of force majeure or other causes preventing the claims from being made, the limitation period shall be suspended. The counting of the limitation period shall be resumed when the cause of suspension no longer exists.[108] The limitation of time shall be discontinued as a result of bringing an action or submitting the case for arbitration by the claimant or the admission to fulfill obligations by the person against whom the claim was brought up. However, the limitation of time shall not be discontinued if the claimant withdraws his action or his submission for arbitration, or his action has been rejected by a decision of the court. The limitation period shall be counted anew from the time of discontinuance.[109]

[107] See Article 257 of the CMC.
[108] See Article 266 of the CMC.
[109] See Article 267 of the CMC.

Chapter 3 Definition of Carrier as the Subject of Liability

3.1 Introduction

In chapter 2, we have discussed the overview of carrier's liability. Subsequently, a question will appear in our mind, namely, if the loss of or damage to the goods occurred during transit, who shall be liable for the loss? In other words, who is the carrier?

It seems that the foregoing question is quite easy, but actually it is very difficult and complicated. Where the carrying ship is not under charter and the bill of lading is on the shipowner's form, it is clear that the carrier will almost certainly be the shipowner. However, where the carrying ship is under charter or the bill of lading is on someone else's form (or is signed by or on behalf of someone other than the owner), there will be an issue as to who is liable as the carrier. Either the shipowner or the charterer may be acting as the carrier. This issue arises because bills of lading do not identify the carrier (usually they merely say ABC Line and sometimes even this is lacking) and the Hague/Hague Visby Rules do not specifically define who the carrier is. Moreover, considering parties who are performing several of the essential functions in the carriage of the goods, the issue becomes more difficult.

"It would strike one unfamiliar with maritime law quite extraordinary that there should have grown up such an immense body of decided cases devoted to the issue whether owners or time charterers are parties to bills of lading contracts...".[110]

[110] See J. Colman, Homburg Houtimport B.V. v. Agrosin Private Ltd and Others, Lloyd's Report, Vol.1, 2000,

This comment illustrates that the proper identification of the carrier under bills of lading remains to be a problem, which is not resolved.

This problem, however, must be solved. When goods are lost or damaged during carriage, claimants must be very careful to sue the right party. It is obvious that suing the wrong party may incur unnecessary costs and the possible dismissal of the civil action. Furthermore, the claimant runs the risk of becoming time-barred.[111]

Given the foregoing, we clearly know the identity of carrier problem is a very important and difficult one. The basic aim of this chapter is to show who the carrier is and how to determine the identity of carrier under the contracts for the carriage of goods by sea.

3.2 Definition and Scope of the Carrier

3.2.1 The Definition of the Carrier

3.2.1.1 Under the Hague and Hague-Visby Rules

The Hague/Hague-Visby Rules provide that: "Carrier includes the owner or the charterer who enters into a contract of carriage with a shipper."[112]

Obviously, this is not a particularly clear or exhaustive definition,[113] which may give rise to a question as to whether only the owner or charterer is a carrier. The word "includes" seems to make it clear that other persons may be the carrier and does not indicate whether those persons must have entered directly into a

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p.89.

[111] See C. Pejovic, The Identity of Carrier Problem Under Time Charters, Journal of Maritime Law and Commerce, Vol. 31, 2000, p. 379; Also see C. Giaschi, Who is Carrier? Shipowner or Charterer, at http://www.admiraltylaw.com/papers/Carrier.htm, taken on 19/11/2010.

[112] See Article 1(a) of the Hague Rules.

[113] See Jens Weinmann, Identifying the Carrier, at http://lawspace2.lib.uct.ac.za/dspace/bitstream/2165/251/1/WeinmannJ_2005.pdf, p. 3, taken on 19/11/2010.

contract of carriage with the shipper.[114] This rather broad definition of the carrier which does not limit the application of the Hague/Hague-Visby Rules to shipowners or charterers is also called the "practical" [115] or "multicarrier" approach.[116]

3.2.1.2 Under the Hamburg Rules

In order to avoid possible conflicts, the Hamburg Rules similarly, but more clearly, provide that "carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.[117] From this definition, we can see clearly that the term carrier included not mere the shipowner or charterer.

In addition, the Hamburg Rules first provide the definition of "actual carrier".[118] In light of Article 1(2), the "actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted. This is a new development as to the concept of carrier. Correspondingly, we may call the former carrier the "contractual carrier".

Generally, the actual carrier is the shipowner and also the various charterers who share the duties of loading, handling, stowing, carrying, caring for and discharging the goods and of directing the course of the ship and making it seaworthy etc.[119] According to the Hamburg Rules, the carrier is responsible, in

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[114] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.23; See also William Tetley, Marine Cargo Claims, 3rd edition, Montreal: International Shipping Publications, 1988, p.233.

[115] COGSA carriers are accordingly delineated as entities being involved in transportation and engaged in actions that led to the loss (or damage) of cargo.

[116] See D. Charest, A Fresh Look at the Treatment of Vessel Managers under COGSA, Tulane Law Review, Vol.78, 2004, p. 895.

[117] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.164.

[118] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.36.

[119] See William Tetley, Marine Cargo Claims, 3rd edition, Montreal: International Shipping Publications, 1988,

relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.[120]

3.2.1.3 Under the Rotterdam Rules

The Rotterdam Rules stipulate that "Carrier" means a person that enters into a contract of carriage with a shipper.[121] Maybe, like in the Hamburg Rules, we can call it the "contractual carrier".

Moreover, the Rotterdam provide the other two new subjects of liability, one is "performing party". According to this convention, the performing party means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[122]

The other is "maritime performing party" which means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.[123]

These two concepts first appear in the Rotterdam Rules and play an important role. As we know, no provision exists in the Hague/Hague-Visby Rules in respect

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p.235.

[120] See Articles 10(1) and 10(4) of the Hamburg Rules.

[121] See Article 1.5 of the Rotterdam Rules.

[122] See Article 1.6(a) of the Rotterdam Rules.

[123] See Article 1.7 of the Rotterdam Rules.

to the consequences of the performance of the whole or a part of the carriage by a sub-carrier under a contract between the carrier and such sub-carrier, and therefore normally the claimant may sue the sub-carrier only in tort. The Rotterdam Rules have filled the gap completely. In fact, Article 4.1 of the Rotterdam Rules extends the scope of application of all its provisions to maritime performing parties, including those relating to the breach of obligations other than those in respect to loss, damage, or delay.[124]

As prescribed in Article 19.1 of this convention, a maritime performing party is subject to the obligations and liabilities imposed on the carrier under this convention and is entitled to corresponding defences and limits of liability. The establishment of maritime performing party concept, which makes it more convenient for the holder of the bill of lading to institute legal proceedings and lodge claims against the carrier and relevant responsible person when the goods are unavailable for the holder of the bill of lading at the port of destination, gives maximum protection to the right of the holder of the bill of lading, maintains the liquidity of the bill of lading as negotiable document as well as its function of title deed and is sure to have a positive impact on international trade and international shipping. This concept, as a breakthrough of traditional civil law, according to which the relationship of civil rights and obligations must be based on the contract, has improved the scope of the carrier as against the shipper, and is in accordance with the specialty of maritime law, corresponds to the requirement of the liquidity of the bill of lading, and fall in with the complexity in the conclusion and performance of the contract of carriage of goods by sea currently.

[124] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.14.

3.2.1.4 The Author's Opinion

On the basis of the foregoing analysis, the author holds that the carrier is a contract party under a contract of carriage of goods who promises to carry goods in his charge from one place to another. In other words, the carrier is the person who contracted with the shipper. Moreover, the contract should be concluded by the carrier himself or in his name by his representative with the shipper.

It is not important whether the carrier is a real person in performing his duty in the course of his business. He can be a shipowner or freight forwarder so long as he binds himself by the contract to carry cargo.[125] Maybe, it is more accurate that the carrier here is called contractual carrier.

3.2.2 The Scope of the Carrier

As mentioned previously, "Carrier includes the owner or the charterer who enters into a contract of carriage with a shipper."[126] Nonetheless, there are other parties who have been found to be the carrier in certain instances. Determining the identity of the carrier is "a question of fact that depends upon the documents and circumstances of each case."[127] Generally, the scope of the carrier is as follows.

(1) The Shipowner

The shipowner is one of the other main players in maritime commerce, besides the carrier. Where the ship is not under charter and the bill of lading is on the shipowner's form, the carrier will almost certainly be the shipowner. In this case, the bill of lading is usually signed by the master or on his behalf, and such a bill of lading normally binds the owner of the vessel for whom the master acts.[128]

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[125] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.164.
[126] See Article 1(a) of the Hague Rules.
[127] See C. Pejovic, The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law, Journal of Maritime Law and Commerce, Vol. 31, 2000, p. 386.
[128] See William Tetley, Marine Cargo Claims, 3rd edition, Montreal: International Shipping Publications, 1988, p.236.

Moreover, under some national laws, there is a presumption that the shipowner is a carrier in cases where the carrier is not clearly identified under the bill of lading issued by the master or any other representatives of the shipowner.[129]

Where the ship is under charter, the condition is very complex. Usually, when a time or voyage charterer signs the bill of lading as agent for the master, the shipowner is still bound by the bill of lading.

(2) The Charterer

Where a ship is under demise charter it is equally clear that the demise charterer is liable as carrier. A demise or bareboat charter party is a charter party under which the shipowner provides the charterer with an unmanned ship which the charterer shall possess, employ and operate within an agreed period and for which the charterer shall pay the shipowner the hire.[130] Given that the demise charterers control the master and crew, it has been noted that if a vessel is chartered by demise or bareboat, the charterer "generally replaces the shipowner."[131]

Where a ship is under a time or voyage charter, however, the situation is less clear. At times the shipowner has been held liable and at other times the charterer has been liable. The earlier case[132] seems to indicate that in the usual case under a time charter the shipowner will be the carrier. Although there is dicta in these cases that indicate the charterer might under some circumstances be liable as a carrier, the overall implication of the judgments is that this will rarely be the case where the bills of lading are signed by the Master.[133] The more recent case, however, indicates that the carrier will usually be the charterer if not both the

[129] See Article 644 of the German Commercial Code 1897.
[130] See Article 144 of the Chinese Maritime Code.
[131] See William Tetley, Chapter 10: Whom to Sue, Marine Cargo Claims, 4th ed., p.13. Available online at: http://tetley.law.mcgill.ca/maritime.
[132] See Patterson Steamships Limited v. Aluminum Co.of Canada, Supreme Court Reports of Canada, 1951, p.852.
[133] See C. Giaschi, Who is Carrier? Shipowner or Charterer, at http://www.admiraltylaw.com/papers/Carrier.htm, taken on 23/11/2010.

charterer and owner. Some of the important facts that led the court to this conclusion were: the booking note identified the charterer as carrier; freight was payable to the charterer; the charterer's name was prominently displayed on the bill of lading; the time charterer which was on the NYPE form assigned certain responsibilities to the charterer which are normally carried out by the carrier; and the bill of lading was signed for the Master and "for and on behalf of" the charterer.

In short, under certain circumstance, the voyage charterer and time charterer, as well as demise charterer, could act as the carrier.

(3) Freight Forwarder

A freight forwarder had been described as an entity who "acts as an intermediary between the shipper and the ocean carrier. The freight forwarder arranges for ocean transportation by locating available spaces, handles various ocean documentation for the shipper's goods, including preparation of bills of lading, and performs such other services as arranging for the transport of the goods to dockside…The freight forwarder receives compensation from both the shipper and from the carrier."[134] It is clear that, in fact, freight forwarder would act as agents for the owner by arranging contracts of carriage but without issuing own bills of lading.[135] Generally, while acting as agent the freight forwarder is not regarded as a carrier.

But this traditional role played by the freight forwarder has changed considerably over the last decades.[136] "…At times, the freight forwarder has acted

[134] See Black & Geddes, revised edition, American Maritime Cases, 1984, p.451.
[135] See Robertson Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, Tulane Maritime Law Journal, Vol.27, 2003, pp.521-522.
[136] See Clott Wilson, Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation,Transportation Law Journal, Vol. 26, 1999, p.210.

a principal contractor arranging the carriage in his own name."[137] And when acting as principal his liability is frequently that of a carrier.

"Freight forwarders may or may not be considered as carriers depending on whether their activities involve merely "arranging" or actually "effecting" the shipment."[138]

(4) Non-Vessel Operating Common Carrier (NVOCC)

With the development of container transportation, in shipping practice, the NVOCC (non-vessel operating common carrier) appears.

The NVOCC is in many respects similar to the freight forwarder, and is often considered under the heading of freight forwarder.[139] It is the concept of the United States, and is defined in the Shipping Act of 1984 as "non-vessel-operating common carrier means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."[140] It is concluded that the NVOCC thus performs a double role as a common carrier under COGSA in relation to the shipper and as agent of the shipper as against underlying ocean carriers.

According to the Chinese Law,[141] the non-vessel-operating service means that the non-vessel-operating common carrier accepts shipments from the shippers, issues its own bills of lading or other shipping documents, procures through the international shipping operator the carriage of goods by sea against payment of freight by the shippers, and undertakes the international shipping service under the

[137] See William Tetley, Chapter 33: Responsibility of Freight Forwarders, Marine Cargo Claims, 4th ed., Online at: http://tetley.law.mcgill.ca/maritime, p. 3.
[138] See J. Sweeney, The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV), Journal of Maritime Law and Commerce, Vol. 7, 1976, p. 630, footnote 193.
[139] See William Tetley, Chapter 33: Responsibility of Freight Forwarders, Marine Cargo Claims, 4th ed., who considers NVOCCs in this chapter; Also see Schoenbaum, T., Admiralty and Maritime Law, Practitioner's Ed.,West Publishing, Minn, 1987, pp. 281-282.
[140] See US Shipping Act of 1984, 46 United Stated Code, Appendix 1702(17) (B).
[141] See Article 7 of the Regulations of the People's Republic of China on International Maritime Transportation.

responsibility as the carrier.

Applicants for non-vessel-operating service shall register the bill of lading with the competent authorities in charge of transport and communications under the State Council and necessary deposit shall be made therewith. Carriers for non-vessel-operating service within the Chinese territory shall establish the enterprise corporation within the Chinese territory.

(5) Vessel Manager

Mostly as a result of the attempt to limit risks and exposure to liability, the ownership and management structure of fleets has changed considerably in recent decades.[142] "In many cases, the registered owner of a ship is a company with no assets other than the ship itself. The true owners take profit out of such one-ship companies through devices such as management fees paid by the shipowner shell to a ship management company."[143] Conversely, management companies have been simply described as providing services wherein "… the owner will thus entrust to another person (the manager) one or several of his functions. It may be that the manager will maintain, inspect, man and equip the vessel, keep books, attend to the claims, make calculations and otherwise attend to the commercial operation of the ship."[144]

Admittedly, the role of vessel managers have become increasingly important and prevalent,[145] but the exact role of the vessel manager is difficult to define now.

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[142] See D. Charest, A Fresh Look at Treatment of Vessel Managers Under COGSA, Tulane Law Review, Vol.78, 2004, pp.888–889, commenting on the modern tendency of individual ships in fleets to be owned by separate one-ship companies, with their beneficial owner being a parent or holding company, as a method of reducing risks with regard to the fleet.

[143] See M. Davies, In Defence of Unpopular Virtues: Personification and Ratification, Tulane Law Review, Vol.75, 2000, p.363.

[144] See L. Gorton, et al. Shipbrokering and Chartering Practice, 4th Ed., London: LLP, 1995, p.94.

[145] Ibid. Note that that the role of vessel managers have become increasingly important and prevalent for several reasons: "Because of the recent shipping depression some owners have gone bankrupt and the receiver normally has no knowledge of shipping, and then the commercial activity may be entrusted to a manager for a period of time. Similarly, several shipyards have become important shipowners, when the buyer under a shipbuilding contract has been unable to or has refused to take delivery of the vessel under construction. Furthermore,

There are several ways to deal with the question of vessel managers. In English law, it has been noted that the vessel manager is the agent of the shipowner, and therefore it is the shipowner who bears the legal and commercial risk.[146] Conversely, the Chinese courts have held the vessel manager, also described as a ship operator, to be a carrier.[147] In the United States, the handling of vessel managers is more varied.

3.3 Relevant Provisions as to Subject of Liability in the Korean Maritime Law

3.3.1 Introduction

As we know, the KCC, enacted in 1962, contained a section on Korean Maritime Law, which was recently revised and came into force on August 4, 2008.[148] With regard to the subject of liability for loss of or damage to the goods, there is no special provision under the KCC. Make a general observation of the KCC, there is also no specific and clear definitions of the carrier and actual carrier. Only in Article 798(4) of the KCC, the actual carrier is mentioned.[149] Notwithstanding, with the development of maritime transportation, a substantial revision and modernization of the maritime section of the Commercial Code have been undertaken to bring the Code into line with modern shipping practices.

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investors in some countries have bought second hand tonnage without sufficient knowledge of the shipping business and for a period they may entrust the ship to a manager waiting for second-hand prices to go up so that she may be sold at a profit…thus the shipowner's motives for management services may vary."

[146] Ibid.

[147] See for example People's Insurance Co. of China Property v. Shanghai Pujiang Transport (2003) Summarized in K. Li, Chinese Maritime Law 2003-2004, Lloyd's Maritime and Commercial Law Quarterly, 2005, p.390. In this instance the court held that all three defendants, the charterer who was characterized as the contractual carrier, the shipowner and ship operator who were characterized as actual carriers, to be jointly liable for damage to the cargo.

[148] See Article 1 of Supplementary Provisions of the KCC amended in 2007.

[149] Article 798(4) of the KCC provided: "The provisions of paragraphs (1) through (3) shall also apply in cases where the claim for indemnities in respect of the goods is made against the actual carrier, his employees or agents, other than the carrier."

3.3.2 As to Non-Contractual Claim

With regard to difficulties concerning the carrier, Korean law had in the past sanctioned tort actions against the carrier. "…the Supreme Court precedents seem to stand for the proposition that, unless a limitation clause appears in the bill of lading, liability may not be limited in a tort case."[150] The newest Commercial Code rectifies the situation by ensuring that limitations are applicable in tort-based actions, with Article 798(1) providing: "The provisions of this Section concerning the liability of the carrier shall also apply to the carrier's liability in tort". Article 769 of the KCC provides: "The shipowner may, regardless of the basis of the liability, limit his liability for the claims..."

3.3.3 As to Liability of Multimodal Transport Operators

Multimodal transport rapidly grows in recent years. Up to now, there are several international conventions regulating international multimodal transport, such as TCM Draft Convention of 1970, United Nations Convention on International Multimodal Transport of Goods of 1980, and UNCTAD/ICC Rules for Multimodal Transport Documents which is widely used in practice at present.[151] There was no systematic legislation governing multimodal transport before 2007.[152] The current KCC contains some of the stipulations in relation to liability of multimodal transport operators.

According to Article 816 (1) of the KCC, if the carriage of goods the carrier undertook includes a stage other than sea carriage, the multimodal transport operator shall assume liabilities in accordance with the law to be applied in the particular stage where the damage arose. Consequently, this provision reflects

[150] See R. Yu & J. Peck, The Revised Maritime Section of the Korea Commercial Code, Lloyd's Maritime and Commercial Law Quarterly, 1993, p.403.
[151] See Cheong Yeong-seok, Principle of Bill of Lading, 3rd ed., Seoul: Textbooks, 2008, p.101.
[152] See Chung Dae, A Study on Liability of Multimodal Transport Operators under the Commercial Code of Korea, Civil Law Theory and Practice, Vol.4, 2009, p.147.

liability of multimodal transport operators in case of known damage.[153]

Furthermore, according to Article 816 (2) of the KCC, if it is unclear in which stage of transport the damage occurred, or if the occurrence of the damage by nature cannot be confined to a certain stage, the multimodal transport operator shall assume liabilities in accordance with the law to be applied in the stage where the transportation is the longest: Provided, That in cases where the length of transportation is the same or it is not possible to determine the stage where the transportation is the longest, the carrier shall assume liability in accordance with the law of the stage for which the freight is the most expensive. Therefore, the second provision establishes a principle of liability of multimodal transport operators in case of concealed damage.[154]

However, only one article in the KCC does not effectively regulate complicated legal problems in relation to multimodal transport.[155] It is necessary to insert the stipulations into "Commercial Transactions" of Part 2 under the KCC in consideration of development and growth of carriage of goods by land or by air even though no stipulation for carriage of goods by air exists under the Commercial Code now.[156]

3.3.4 As to the Joint and Several Liability under the Charter Parties

There has been a long controversy among academics and practitioners on the coverage of the Article 806 of the 1991 revision of the KCC. Before the 1991 revision of the KCC, only the shipowner was liable for cargo damage when the carrier is a sub-charterer, which is called "shipowner core theory" as to the subject of liability.[157] When the KCC was revised in 1991, the shipowner became liable

[153] Ibid, p.152.
[154] Ibid, p.153.
[155] Such as the opinion of Prof. Chung Dae, the professor of Korea Maritime University.
[156] See Cheong Yeong-seok, Principle of Maritime Law, Seoul: Textbooks, 2009, p.286.
[157] See Cheong Jae-yeong, A study on Carrier's Liability under Maritime Law, 2006, p.102.

together with the carrier.

There are two viewpoints on this provision. One view is that the provision should be erased from the KCC because only the carrier should be liable for the cargo damage when the shipowner has let the vessel out on charter to the carrier.[158] It is held that if the carrier is the time charterer, the provision is not applicable because the contract between the time charterer and the shipper is not the sub-contract for the carriage.[159] The other view is that the provision is useful to protect the cargo interest.[160] According this view, the provision is applicable in a case in which the carrier is a voyage charterer and time charterer as well and thus the cargo interest can be protected widely. The most valuable benefit from this provision is that the cargo interest is entitled to make a prejudgment attachment on the vessel of the shipowner because the vessel is owned by the shipowner rather than the carrier.

After lengthy discussion, the KCC amended in 2007 solves this problem by inserting the wording of "time charterer and voyage charterer" in the provision.[161] As a result, even when the time charterer is the carrier the shipowner will be liable for the cargo damage under the KCC. However, Article 809 is located in the section on common carriage and thus it is applicable only when the contract between the carrier and the cargo interest is only that of common carriage, other than the voyage charter party. Taking into consideration that the need for protection of the cargo interest is higher in the voyage charter party situation rather than in the

[158] See Lim Dong-chul, Sub-contract for carriage and liability of the shipowner, Journal of Korea Maritime Law Association, 1993, p.30.

[159] The title of Article 806 says the sub-contract for carriage of goods. According to the former view, when the time charterer makes a contract for the carriage with the cargo interest, it is the first contract of carriage with the cargo interest because the contract between the shipowner and the time charterer is a kind of contract of demise(lease of the vessel) rather than a contract of carriage and thus the contract between the time charterer and the shipper is not the sub-contract for the carriage. It is only a contract for the carriage.

[160] See Lee Sik-chai, A study of the 2005 proposal for the Korean Maritime Law, Journal of Korean Maritime Law Association, Vol. 27, No. 2, 2005, p.457, note 4.

[161] See Article 809 of the Korea Commercial Code.

common carriage situation, the intention of the law makers is a matter of doubt.[162]

3.3.5 As to the Identity of the Carrier

In judicial practice, Korean courts always hold that a time charter is a type of a demise charter, so that the time charterer is regarded as the contractual carrier who is responsible for the third parties.

In the *Polsa Dos*[163] in 1990, the district court held that the bill of lading signed by the time charterer's agent for the master was the time charterer's bill. Even though the time charterer had not possession of the vessel, he had a right to order the master and crew. Also, he performed all cargo handling at his own expense under the supervision of the master. Thus, the time charterer was of the position equivalent to the shipowner against a third party holding the bill of lading. The high court admitted the district court's decision and further held that the identity of carrier clause on the reverse side of the bill of lading was null and void against the third party holder of the bill of lading.[164] Finally, the Supreme Court reconfirmed the lower court's decision and also ruled that the identity of carrier clause could be applied to an internal relationship between the shipowner and the time charterer and had no effect against the third party. As a result, in this situation, the time was regarded as the carrier.

However, in *Tokyo Senator*,[165] the viewpoint of the Korean court was greatly changed in respect of the identification of the carrier. In this case, the time charterer sub-chartered out part of the vessel's space to a slot charterer and the slot charterer issued the bill of lading. During the transmit, several containers damaged. The

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[162] See Korean Maritime Law Update: 2007- Focused on the Revised Maritime Law Section in the Korea Commercial Code, at http://findArticles.com/p/Articles/mi_qa5396/is_200807/ai_n30992869/pg_5/?tag=content;col1, taken on 12/12/2010.

[163] Oriental Fire &Marine Ins. Co. v. Dongnama Shipping Co., Ltd, the Supreme Court, 1992.2.25.

[164] The High Court, 1991.4.5.

[165] The Supreme Court 2001.

claimant brought an action against the time charterer, in the belief that the court would regard the time charterer as the carrier. But the result was that the Supreme Court considered the slot charterer as the carrier. This authority has added a new dimension to the enquiry as to whether the bill of lading is the time charterer's bill or the shipowner's bill.[166]

3.4 Relevant Provisions as to Subject of Liability in the Chinese Maritime Law

3.4.1 Introduction

According to the CMC, the carrier means the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.[167] In fact, China drew heavily from the Hamburg Rules when drafting the Articles concerning the parties involved in carriage. The definition of the carrier in Article 42(1) of the CMC is drawn verbatim from the Hamburg Rules.[168] Usually, the carrier is the shipowner,[169] but also probably the ship operator or ship charterer.[170] When the ship operator or ship charterer enters into a contract with a shipper, he is usually called "Disponent Owner".[171]

Article 42(2) of the CMC defines "actual carrier". It is almost identical to the Hamburg Rules in language, and specifies that "actual carrier" means the person to whom the performance of carriage of goods, or part thereof, has been entrusted by

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[166] See Lee Won-jeong, A Comparative Analysis on the Identification of the Bill of Lading Carrier, Journal of Korean Trade, Vol.10. No.2, 2006, p.153.
[167] See Article 42 of the CMC.
[168] There is a slight difference between the language of the Chinese provision and the Hamburg Rules provision in that in the Chinese Maritime Code stipulates “the person” where as the Rules provide “any person”. Arguably, the textual difference is inconsequential and would have no effect in practice.
[169] Shipowner means any person who uses his own vessel in order to make profit by maritime commerce for his own account. See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.172.
[170] See Si Yu-zhuo, Maritime Law, Beijing: Law Press, 2003, p.99.
[171] Disponent Owner means a person who operates vessels which do not belong to him with the aim of making profit for his own account. See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.172.

the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract. One may presume that the use of the word "includes" would mean that actual carrier includes those entrusted with the goods under a sub-contract or by assignment from the carrier, but it not limited to such a situation. The presumption however may be dangerous. The effect may possibly be therefore that where the time charter is found to be the carrier under the CMC, the shipowner would not be the actual carrier as the goods are not entrusted to him under a sub-contract, and thus we find ourselves again in the situation where the shipowner is exposed. Although there appears to be no commentary on this textual difference, in practice there does not appear to be a problem considering the shipowner to be an actual carrier. In a 2003 judgment, a Chinese court determined that the charterer of the vessel was the contractual carrier, while the ship owner and the ship operator were actual carriers.[172]

As in Article 10(1) of the Hamburg Rules, Article 60 of the CMC stipulates that the carrier shall be responsible for the entire carriage.[173] Similar to the Hamburg Rules as well, Article 73(2) of the CMC stipulates that the carrier must be identified in the contract of carriage, thus ensuring that the claimant has a concrete answer with regard to the enquiry as to who is the carrier.

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[172] People's Insurance Co. of China Property v. Shanghai Pujiang Transport (2003) Summarized in K. Li, Chinese Maritime Law 2003-2004, Lloyd's Maritime and Commercial Law Quarterly, 2005, p.390. In this instance the court held that all three defendants, the charterer, the shipowner, and ship operator were jointly liable for damage to the cargo.

[173] Although Article 60 of the CMC provides that where there is an express term in the contract of carriage, the carrier may be relieved of liability with respect to damage done by the actual carrier, if the said carrier was named in the contract. Article 60 of the CMC reads:

"Where the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Chapter. The carrier shall be responsible, in relation to the carriage performed by the actual carrier, for the act or omission of the actual carrier and of his servant or agent acting within the scope of his employment or agency.

Notwithstanding the provisions of the preceding paragraph, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier, the contract may nevertheless provide that the carrier shall not be liable for loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage."

3.4.2 With Regard to the Joint and Several Liability

With regard to the joint and several liabilities of the parties involved in carriage, Article 63 of the CMC provides: "Where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable within the scope of such liability."

It has been noted therefore the where a voyage or time charter is involved, "…generally speaking, both the shipowner and the charterer shall be liable under the bill of lading. In other words, the shipper may sue either the shipowner or charterer and both are liable jointly and severally."[174] This is exemplified by "A Holland Insurance v. An English Liner Co. & China Chartering Agency" where suit was taken against both the charterer and the vessel owner.[175]

Although the wording of Article 63, "where both the carrier and the actual carrier", implies two parties only, this provision has been given a much wider application in practice. In People's Insurance Co. v. Shanghai Pujiang Transport, the court found two actual carriers and one contractual carrier and then proceeded to hold all three defendants jointly liable for the damage to the cargo.[176]

3.4.3 With Regard to the Suit in Tort

Article 58 of the CMC addresses the problem of suit taken in tort, with a similar provision to Article 4 bis 1 of Hague-Visby, but with an important distinction: "The defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the

[174] See X. Chen, Chinese Law on Carriage of Goods by Sea under Bills of Lading,Currents International Trade Law Journal, Vol.8, 1999, p.94.
[175] Ibid.
[176] People's Insurance Co. of China Property v. Shanghai Pujiang Transport (2003) Summarized in K. Li, Chinese Maritime Law 2003-2004, Lloyd's Maritime and Commercial Law Quarterly, 2005, p.390.

action is founded in contract or tort."[177] Essentially, the CMC stipulates that the claimant need not be a party to the contract, thus avoiding the difficulties faced in English law. The fact, that Article 58 does not address whether the carrier must be a party to the contract or not, is not problematic given the existence in the CMC of the notion of an actual carrier who is not a party to the bill of lading contract. Article 61 specifically provides that "the provisions with respect to responsibility of the carrier contained in this Chapter shall be applicable to the actual carrier,"[178] which includes the benefit of the defences in the event of an action in tort. This is found to be the case in practice when Chinese courts apply the Maritime Code.[179]

3.5 Methods of Identifying the Carrier

3.5.1 General Methods

3.5.1.1 Introduction

The issue of the identity of the carrier is a question of fact. The question to ask in each case is who undertook or agreed to carry and deliver the goods. The answer to this question will largely depend on the facts.

In Chinese judicial practice, the identity of the carrier is subject to many factors, including the heading of the bill of lading, the issuer of the bill of lading, the manner of issuing, the status of the issuer, the parties of the transport contract and the leasehold status of the shipping, so on and so forth. When the heading of the bill of lading differs from the issuer of the B/L, the latter is identified as the

[177] Paragraph 2 of Article 58 stipulates "The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his act was within the scope of his employment or agency." Cargo claimants may therefore not circumvent the rules by action in tort against servants or agents of the carrier.

[178] Paragraph 2 of Article 61 of the CMC stipulates "Where an action is brought against the servant or agent of the actual carrier, the provisions contained in paragraph 2 of Article 58 and paragraph 2 of Article 59 of this Code shall apply."

[179] See People's Insurance Co. of China Property v. Shanghai Pujiang Transport (2003) Summarized in K. Li, Chinese Maritime Law 2003-2004, Lloyd's Maritime and Commercial Law Quarterly, 2005, p.390.

carrier in most circumstances first. The issuer of the bill of lading may rebut this identity by arguing that he acts as an agent for the carrier and the issuance of the bill of lading is an acting, but the onus of proof is upon him to show the carrier entrusting him as well as an explicit authorization. When the bill of lading which is seemed as an evidence of the contract of carriage of goods by sea is used in identity of the carrier, we should make a comprehensive judgment in combination of the conclusion progress of the contract of carriage of goods by sea.

3.5.1.2 Identifying the Carrier in Liner Shipping

In liner shipping, it is relatively easy to identify the carrier. Generally, the liner company supplys services for cargo interests using his own vessel and issues his own company's bill of lading, namely, the "Liner Bill of Lading".[180] On the top right-hand corner of the face of the "Liner Bill of Lading" is usually the name of liner shipping company. The bill of lading is always signed by the master, or the agents of the liner company on behalf of the carrier or the master.[181] In this case, the liner company is just the carrier. Once the loss of or damage to the goods occurred, doubtless, the liner company shall be liable for compensation as the carrier.

3.5.1.3 Identifying the Carrier in Charter Shipping

Where the carrying ship is under charter or the bill of lading is on someone else's form or is signed by or on behalf of someone other than the shipowner, there will be an complicated issue as to who is liable as the carrier.

When being faced with the necessity of identifying the carrier courts have "... traditionally looked to the bill of lading..."which often may be the only means of

[180] See He Hong-long, Zhang Peng-fei, Li Hai-chu, Identif ication of the carrier, World Shipping, Vol.29, No.5, Oct . 2006.
[181] See Si Yu-zhuo, Li Zhi-wen, Study on the Theories of Chinese Maritime Law, Beijing: Peking University Press, 2009, p.264.

identifying the carrier available to the shipper.[182] The question whether a bill of lading is an owner's or a charterer's bill has been found to be one of construction of the bill itself although other documents such as charterparties and other extraneous circumstances have partly influenced the decisions on this topic.[183] Where the bill of lading is subsequently endorsed to a party not originally party to the contract the bill of lading may often be the only document available in order to determine who the carrier is.

In practice, the contents in relation to the identity of the carrier on the bill of lading include the name on the heading of the bill of lading, the signature on the bill of lading and the clauses in the back of the bill.[184] Because the name of the heading of the bill of lading is always uncertain, generally, it cannot be the basis identifying the carrier. So, the most telling element tends to be the signature.[185]

(1) The Bill of Lading signed by the Master

There is a long line of established authority reaching back to the mid-nineteenth century that where the master has signed the bill of lading, despite the fact that the ship is chartered, the bill is an owner's bill and the shipowner is liable.[186] Under the English law, even where the bill of lading is signed "for the master" by an agent, the owners will also be held to be the contracting parties.[187]

According to Article 72 of the CMC, "The bill of lading may be signed by a person authorized by the carrier. A bill of lading signed by the Master of the ship carrying the goods is deemed to have been signed on behalf of the carrier." It is

[182] See Jens Weinmann, Identifying the Carrier, at http://lawspace2.lib.uct.ac.za/dspace/bitstream/2165/251/1/WeinmannJ_2005.pdf, p.7, taken on 25/11/2010.
[183] See G. Treitel & F. Reynolds, Carver on Bills of Lading, London: Sweet & Maxwell, 2001, p.127.
[184] See Zhang Ying-fen, An Analysis on the Identity of the Carrier, Gansu Agriculture, No.6, 2006, p.251.
[185] As to the clauses in the back of the bill, the latter of this section will be discussed in detail.
[186] See G. Treitel & F. Reynolds, Carver on Bills of Lading, London: Sweet & Maxwell, 2001, pp. 129-130
[187] See Vanessa Rochester, THE LONE "CARRIER": An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable, p.62, at http://lawspace2.lib.uct.ac.za/dspace/handle/2165/253, taken on 25/11/2010.

concluded that where the bill of lading is signed by the master, the issue that who shall be liable as the carrier, the shipowner or the charterer, is not certainly provided under the CMC. This clause is useless for the identity of the carrier.

(2) The Bill of Lading signed by the Charterer or His Agent

According to the opinion of Chinese scholars, this issue may be divided into several conditions:" .....; 3) when the bill of lading was signed by the charterer or his agent on behalf of the shipowner or the master: A) where it was provided in the charterparty, both the shipowner and the charterer are the carriers; B) where the charterparty provided that the bill of lading was signed by the charterer or his agent in his name: a) if the shipper did not know this provision, the shipowner and any other charterer are the carriers: b) if the shipper was aware of this clause, so the charterer is the carrier: 4) when the bill of lading was signed by the charterer or his agent in his name, the charterer is the carrier."[188]

The foregoing viewpoint is helpful to protect the benefits of the holder of the bill of lading, but it is difficult to explain two carriers exist simultaneously. In the author's opinion, if the bill of lading was signed by the charterer or his agent in the charterer's name and there is no other opposite provision, the charterer shall be regarded as the carrier.[189] And if the bill of lading was signed by the charterer or his agent on behalf of the shipowner or the master of the ship carrying the goods, the shipowner is the carrier.

In addition, in English law, the issue of who is the carrier will often depend on by whose authority the bill was signed.[190] "…a bill of lading signed for the master cannot be a charterer's bill unless the contract was made with the charterers alone,

[188] See Si Yu-zhuo, Questions and Answers on the Chinese Maritime Code, Beijing: China Communications Press, 1994, p.39.
[189] Despite the fact that there are the demise or identity of carrier clause in the back of the bill of lading.
[190] See R. Pritchett, Charterer's Authority to Sign Bills of Lading under Standard Time Charter Terms, Lloyd's Maritime and Commercial Law Quarterly, 1980, p.21.

and the person signing has authority to sign and does sign, on behalf of the charterers and not the owners."[191] The House of Lords decision has added a new dimension to the enquiry as to whether the bills are charterer's bill or owner's bills. Despite certain authorities, where the bill of lading is on the charterer's form and signed by the charterer as "the carrier" then the bill is a charterer's bill despite the demise clause and identity of carrier clause in the back of the bill.[192]

In the United States, there are guidelines for determining whether the shipowner or the charterer is the contractual carrier. In *Otto Wolf* the court outlined factors providing guidance in determining whether a vessel owner was the carrier:" ...5) whose name appears on the heading of the bill of lading? 6) On whose behalf was the bill of lading signed? …The two most important factors are the name on the heading of the bill of lading and the signature on the bill of lading."[193] The issue in the American courts tends to center around whether the charterer signed or issued the bill with or without authority from the owners. Notably, the signature "for the master" is not given as much weight in American law as it is in English law.

3.5.2 Demise and Identity of Carrier Clauses

3.5.2.1 Introduction

As mentioned above, some clauses in the back of the bill of lading are also important for the identity of the carrier. Now, we will discuss this issue in detail.

In normal circumstances the shipowner would be regarded as the carrier, notwithstanding the existence of any charterparty, he remains responsible for the

[191] See The Venezuela, Lloyd's Reports, Vol.1, 1980, p.396, "where an identity of carrier clause indicating the time charterer as the carrier was held to be sufficient to render the time charterer liable as 'the carrier' under the terms of the bill of lading despite the fact that the bill of lading had been signed under the words "on behalf of the master".

[192] See Vanessa Rochester, THE LONE "CARRIER": An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable, p.63, at http://lawspace2.lib.uct.ac.za/dspace/handle/2165/253, taken on 25/11/2010.

[193] See Otto Wolf Handelsgesellschaft v. Sheridan Transportation Co., 800 Federal Supplements, p.1362.

management of the ship and the master signs any bills as his agent.[194] But the charterer may transfer contractual liability to the shipowner by incorporating a demise or identity of carrier clause on the reverse side of the bill of lading in minuscule print, even in the situation where he is apparently a party to the bill of lading contract.

The demise clause and the identity of the carrier clause have in certain respects hindered uniformity in international and even national maritime law. The demise clause essentially stipulates that that the bill of lading contract will only take effect as a contract with the shipowner or the demise charterer. The identity of carrier clause is similar, declaring the shipowner to be the carrier and characterizing the time and voyage charterers as agents only.

This does not matter if the clauses merely confirm what is in the signature box or what is set out elsewhere on the front of the bill. But if the bill of lading refers to the charterer as the carrier on the front and has a demise or identity of carrier clause on the back, how do we identify the carrier? Such a conflict has arisen in several cases decided since the adoption in 1994 of the UCP 500.[195] This problem will be analyzed and solved in this section.

3.5.2.2 Typical Bill of Lading Terms Concerning Demise and Identity of Carrier

The demise clause states that the voyage or time charterer who issues the bill of lading is not a party to the contract of carriage and is thus not a carrier, of which the following is a typical example: "If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case

[194] See Huang Hai-bo, The Demise and Identity of Carrier Clause in Bills of Lading, at http://www.qingdaonews.com/content/2007-08/30/content_7858559.htm, taken on 26/11/2010.
[195] UCP 500 is the ICC Uniform Customs and Practice for Documentary Credits. Article 23(v) of UCP500 states that banks will not examine the contents of the terms and conditions of printed on the back of bills of lading.

notwithstanding anything which appears to the contrary) the bill of lading shall take effect as a contract with the owner or demise charterer, as the case may be, as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof."[196]

Such clause restricts the rights of suit of the shipper or consignee of lost or damaged cargo, merely permitting them to take an action in contract against the shipowner, even though it is the charterer who has concluded the contract of carriage, collected the freight, and performed most of the duties of a carrier.

A typical example of identity of carrier clause is the following: "The contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein and it is, therefore, agreed that the said shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage....."[197]

Such a clause has much the same effect as a demise clause, but is perhaps more acceptable to the shipper in that it avoids ambiguity by clearly designating the shipowner as the carrier.

It is apparent that although the aims of the demise and the identity clause are the same they differ in a few of points, for example, the identity of carrier clause does not list the shipowner and the demise charterer alternatively but only the shipowner as party to the contract. The bill of lading itself is not seen as being the contract of carriage but rather evidencing a contract of carriage.

3.5.2.3 The History of the Demise and Identity of Carrier Clauses

The demise clause has its origin in the U.S. law of carriage during World War

[196] The wording of the clause is common, see Roskill Lord, The Demise Clause, Law Quarterly Review, Vol.106, 1990, p. 403.
[197] See Vanessa Rochester, THE LONE "CARRIER": An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable, p.33, footnote 161, at http://lawspace2.lib.uct.ac.za/dspace/handle/2165/253, taken on 26/11/2010.

II. All merchant shipping was then controlled by the government who by requisition chartered the vessels. The limitation of liability to the shipper or aggrieved cargo owner for the loss of or damage to the goods during transit under the U.K. Merchant Shipping Act 1894, the U.S. Limitation of Shipowners' Liability Act 1851 and Convention of Limitation of Liability for Maritime Claims 1924 was, however, only available to the owner of a vessel or a demise charterer. Someone therefore advised that the solution was to make all bills of lading owner's bills. The way he did this was to draft words which declared that the contract was with the shipowners or demise charterers and that the charterer issuing the bill had no personal liability.

The demise clause continued to be used after the end of the World War II and after the enactment of the 1957[198] and 1976[199] Limitation Conventions, as well as after national legislation, such as the U.K. Merchant Shipping Act 1995 and the Canada Shipping Act 1985, which allow charterers to limit liability. Currently, most modern bills of lading in use by liner companies contain the demise and/or identity of carrier clauses.

3.5.2.4 Position under International Conventions and National Laws

Nowadays, the validity of the demise clause and the identity of the carrier clause is an area of great variability in the law. Not only does its validity vary on an international scale between conventions and nations, but in some instances it has varied within national jurisdictions as well. The main arguments brought forward against the validity of the clauses are that they are ineffective either under common law principles or under Article 3(8) of the Hague/Visby Rules, as they purports to

[198] Namely "International Convention Relating to the Limitation of the Liabilityof Owners of Sea-Going Ships 1957"
[199] Namely "Convention on Limitation of Liability for Maritime Claims, 1976"

lessen or probably avoid liability of the carrier.[200] Whereas the main argument for the validity of these clauses is that they only identify the carrier instead of purporting to lessen the carrier's liability.

Under the Hague/Hague-Visby Rules it has been argued that these clauses are unenforceable constituting non-responsibility clauses, which are outlawed by the Rules. Courts in a number of countries have taken this view but such clauses have sometimes been enforced by English courts. English common law may make both owner and charterer responsible in some circumstances and some authorities have argued that the Hague Rules system may recognize dual responsibility because the "ship" always has responsibility under the Rules but so does the "carrier". Under the Hamburg Rules, both the contracting carrier and actual carrier have responsibility under the Rules. Demise and identity of carrier clauses may therefore be expressly in derogation of the Hamburg system and unenforceable.[201]

In English Law, although there have been a few instances where the clause has not been given effect, the demise clause has a long and strong history of being upheld in English law. Nevertheless, due to a recent House of Lords decision,[202] this generally unshakable confidence in the enforcement of demise clauses appears to have been shaken. After this judgment, it has been suggested that precise drafting of terms on the face and on the reverse of the bill of lading will be a priority.[203]

In the United States, "The demise clause, denounced because of the possibility that the shipper would have no rights against the charterer who issued the bill of lading and no rights against the shipowner who was not formally the carrier, has not

[200] See F.M.B. Reynolds, The Demise Clause, Lloyd's Maritime and Commercial Law Quarterly, 1988, p.285.
[201] See http://www.fta.co.uk/policy_and_compliance/sea/long_guide/demise_identity.html, taken on 27/11/2010. See also See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.36.
[202] See Homburg Houtimport v. Agrosin Private Ltd, Lloyd's Reports (House of Lords), Vol.1, 2003, p.571.
[203] See S. Girvin, Contracting Carriers, Himalaya Clauses and Tort in the House of Lords, Lloyd's Maritime and Commercial Law Quarterly, 2004, p. 313.

caused major problems to cargo owners in the United States since the courts have refused to give it effect as against the H.R. III (8)."[204] Identity of carrier clause has also been invalidated as exculpatory provisions in contravention of 1303(8) of COGSA36.[205]

In Japan, there have been contradictory judgments concerning the validity of the demise clause. Prior to the introduction of the Hague Rules into Japanese law, the Supreme Court of Japan had held that there can only be one carrier under a time charter and in that instance it will be the time charterer.[206] The demise therefore was invalid. Nevertheless, in 1991, Japanese courts considered the matter and determined that the demise clause was valid, and holding the shipowner to be the carrier.[207]

3.5.2.5 The Position under the Chinese Maritime Code and Analysis

In China, with respect to the validity of the demise clause and the identity of the carrier clause, no explicit provisions exist in the CMC. In Chinese judicial practice, the cases as to this aspect are rare and the viewpoints of the Courts are very different. In the case of *Oriental Eagle*[208], the judge held that the demise clause as well as the identity of carrier clause were valid, the purpose of which is to expand shipping

[204] See J. Sweeney, The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV), Journal of Maritime Law and Commerce, Vol.7, 1976, p.630, footnote 193. Article 3(8) of the Hague-Visby Rules provides that:" Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

[205] 1303(8) of COGSA36 provides that:"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

[206] See R. Margolis, Validity of the Demise Clause Under Japanese Law and the Consequences for Enforcement Abroad of Claims Under Japanese Bills of Lading, Lloyd's Maritime and Commercial Law Quarterly, 1993, pp.164-166.

[207] See The Jasmine (24 February 1993) Tokyo Court of Appeal (Tokyo High Court). English Translation appears in: The Bulletin of the Japan Shipping Exchange Inc., December 1993. For mention and discussion of the judgment see R. Margolis, Validity of the Demise Clause Under Japanese Law and the Consequences for Enforcement Abroad of Claims Under Japanese Bills of Lading, Lloyd's Maritime and Commercial Law Quarterly, 1993, pp.167-169.

[208] See Cases of People's Court, Beijing: People's Court Press, 1994(2), p.144.

business, disperse risk and avoid unlimited liability. As long as these clauses do not lessen the carrier's liability, they should be considered to be valid.[209]

In author's opinion, the validity of these clauses should be held to be invalid. The reasons are as follows:

Firstly, seen from the angle of protecting the interests of cargo owner, the existence of these clauses is meaningless. Because, like the Hamburg Rules, the CMC solves the problem of the identity of the carrier by defining carrier and actual carrier,[210] which alleviates the difficulty of identifying the carrier under the charterparty. Consequently, the cargo claimant may sue both the carrier (charterer) and the actual carrier (shipowner), and the shipowner and the charterer are jointly and severally responsible.

Secondly, for the charterer, the purpose of evading the legal liability won't come true easily. Under the Chinese law, Chapter 4 of the CMC provides the minimum duties to the carrier[211] such as duty as to seaworthiness, duty of care of goods, and so on. Meanwhile, these duties are mandatory and don't be allowed to change by contractual clauses. If the parties are permitted to appoint the definition of the carrier depending on the contract, the statutory obligation is quite possibly going to be evaded. The provisions in Articles 44 and 72 of the CMC also deny the validity of the demise and identity of carrier clauses to some extent.[212]

Finally, from relevant legislations and cases of the above-mentioned nations, it is easily concluded that denying the validity of the demise clause or identity of

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[209] See Liu Jun, Lv Jin-liang, The Effect of Demise Clause and Identity of Carrier Clause, Annual of China Maritime Law, Vol. 17, Jan. 2007, p.126.

[210] See paragraphs (1) and (2) of Article 42 of the Chinese Maritime Code.

[211] See Articles 47-50 of the Chinese Maritime Code.

[212] Article 44 of the CMC provides that:"Any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this Chapter shall be null and void."

Article 72 of the CMC provides that:"…The bill of lading may be signed by a person authorized by the carrier. A bill of lading signed by the Master of the ship carrying the goods is deemed to have been signed on behalf of the carrier."

carrier clause has become a general trend, which just reflects the tendency of the international community for enhancing the carrier's liability.

3.6 The New Method under the Rotterdam Rules as to the Identity of the Carrier

3.6.1 Introduction

As mentioned previously, while identifying the carrier, the cargo claimant will encounter many problems especially that the bill of lading is sometimes issued without clearly indicating who the carrier is. Although this problem is well recognized in many jurisdictions, solutions to the issue of "identity of the carrier" vary considerably among them. Fortunately, the Rotterdam Rules adopted in 2008 by the U.N. General Assembly provide a new method to solve this problem. I will discuss the method in detail in this section.

3.6.2 Where the Carrier Is Identified by Name in the Contract Particulars

Article 37 (1) of the Rotterdam Rules provides the situation when the carrier is identified by name in the contract particulars. Under such circumstances, "any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification." That is to say, other clauses in the transport document or electronic transport record which assert that the named party is not the carrier are invalid, such as the "demise clause" or the "identity of the carrier clause".

The Italian government and the Dutch government had put forward a more detailed suggestion for the purpose of solving the conflict between the frontal clause and the back clause in the transport document. The suggestion was: "If a carrier is identified by the frontal clause in the transport document or electronic

transport record relating to the identity of the carrier, any other information in the back of the transport document or electronic transport record shall have no effect to the extent that it is inconsistent with that identification." But this detailed suggestion was not adopted by the Working Group.[213]

It seems that this rule is quite fair and not controversial, but where there is no name of the carrier in the transport document or it is simply signed "for the master", how can we identify the carrier? This is the issue which will be dealt with in paragraph 2 of this Article.

3.6.3 Where No Person Is Identified in the Contract Particulars

3.6.3.1 Registered Owner or Bareboat Charterer Presumed to be Carrier

By virtue of Article 37(2) of the Rotterdam Rules, if no person is identified in the contract particulars, there is a presumption that the registered owner of the ship whose name is indicated in the contract particulars is the carrier. Then, the registered owner may rebut the presumption (i) by proving that the ship is under a bareboat charter at the time of the carriage and identifying this bareboat charterer and indicating its address. In this case, the bareboat charterer is presumed to be the carrier; or (ii) by identifying the carrier and indicating its address. When the bareboat charterer is presumed to be the carrier, like the said (ii), it can rebut the presumption by proving the identity of the carrier with an indication of its address.

This was one of the most controversial provisions under the deliberations in the UNCITRAL[214] Working Group. Some delegations suggested deleting this Article.[215] The main argument was that the presumption was unfair because the registered owner sometimes had no connection with the contract of carriage and

[213] See Liu Yi, A Study on the Identity of Carrier, Entrepreneur World, November 2008, p.216.
[214] Namely United Nations Commission on International Trade Law.
[215] See Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April, 2007), UN Doc. A/CN.9/621, paragraphs 281-282.

might not have information about the carrier. However, it was also argued that the Convention should stipulate a solution to the long-standing issue. After lengthy debates, the Working Group III decided to keep the presumption.

It is worth noting that both the registered owner and the bareboat charterer presumed to be the carrier can't rebut this presumption simply by proving that it did not enter into the contract of carriage with the shipper. It must identify the carrier with its address. Actually, Article 37(2) of the Rotterdam Rules is best regarded as a method for the cargo claimant to obtain information from the registered owner or the bareboat charterer in respect of the identity of the carrier under the contract of carriage rather than to make them ultimately responsible.[216] Nevertheless, the registered owner should be careful of being kept informed of how and by whom its ship is operated. Otherwise, it will be difficult to defeat the presumption by proving the identity of the carrier with its address.

Although Article 37(2) is simple, convenient, practical and creative in dealing with the identity of the carrier, I don't think it is adaptable to all types of contracts of carriage of goods by sea, especially the container liner transport. There are at least two reasons: Firstly, the separation of proprietary rights from management rights is very common in container transport. For example, the vessel may be leased out under bareboat charters or time charters, or the vessel has an independent manager. Thus in the light of this provision, it is highly possible that the carrier and its address be identified for several times and the litigation period be extended accordingly, which is not only a waste of judicial resources but also not fair for the registered shipowner. Secondly, there is a large quantity of NVOCC bill of lading in container transport, so considering the imperfect management system

[216] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.173.

of the NVOCC, it is unreasonable for the shipper holding the NVOCC bill of lading to sue the registered shipowner stated in such bills of lading. In fact, to the registered shipowner or the real carrier, usually the shipper is the NVOCC, so the registered shipowner or the real carrier has no responsibility for the shipper stated in the NVOCC bills of lading.

3.6.3.2 Persons Other Than the Registered owner or the Bareboat Charterer

Article 37(3) of the Rotterdam Rules provides that: "Nothing in this Article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this Article is the carrier." This means that the claimant as a plaintiff is always free to choose other persons as defendants by proving they are the party with whom it entered into the contract.

Generally speaking, if the plaintiff wants to hold the defendant liable as a carrier, he should prove that he entered into a contract of carriage with the defendant. The provision under Article 37(2) of this Convention alleviates the plaintiff from this ordinary burden of proof when he chooses the registered owner of the ship or the bareboat charterer as a defendant by virtue of the presumption. At the same, Article 37(3) preserves claimant's rights to prove that another person other than the person identified in the contract particular is the carrier. In short, Article 37 does not exonerate any person who is really the carrier.

In short, Article 37 of the Rotterdam Rules is more adaptable to the identity of the carrier under the bareboat charter party, time charter party and voyage charter party. By providing clear rules for identification of the potential defendant carrier it appears to address the call to give extensive protection to shippers so that the more influential carrier, with a better negotiating power does not unduly avoid liability for damage or loss to the goods which it may conveniently do under the Hague or

Hague-Visby Rules.[217] Nevertheless, it should be noted that although the Rotterdam Rules provide an additional solution to the issue of the identity of the carrier, it does not deny any remedy for the cargo owner existing under applicable national law. For instance, when there is no name in the transport document, if a certain jurisdiction regards the heading of the bill of lading as the decisive factor, the plaintiff may depend on such a theory, rather than Article 37(2) of the Rotterdam Rules. Besides, while it comes to the registered shipowner in container transport which involves several thousands of containers and bills of lading, this method of identity is neither suitable nor convenient.

[217] See http://www.ecomaritimebenin.net/index.php?option=com_docman&task=doc_download&gid=23, p.27, taken on 01/12/2010.

Chapter 4 The Principle of Liability of Carrier

4.1 The Principle of Liability

4.1.1 Overview of the Principle of Liability

4.1.1.1 Definition of the Principle of Liability

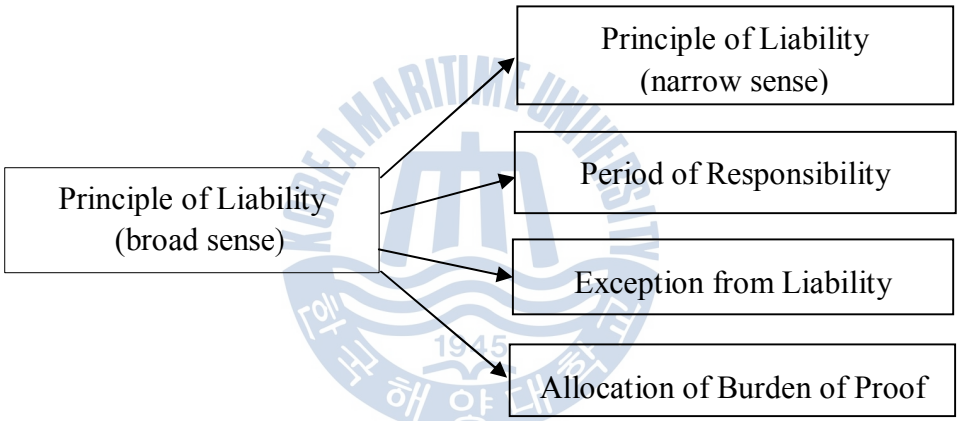
As for the definition of the principle of liability, this is a seemingly easy but actually difficult question, as up to today there is no worldwide-accepted uniform definition. Generally speaking, the principle of liability is a foundation or a criterion according to which the carrier shall be liable for loss resulting from loss of, damage to or delay in delivery of the goods under international conventions on the carriage of goods by sea or related national laws.[218]

The principle of liability always occupy the central position in any international convention or related national law, which decide the basic character and value orientation of the transportation law. After studying the evolution of international conventions on the carriage of goods by sea, it is not difficult to see that the change of the principle of liability is the symbol of evolution of international conventions on the carriage of goods by sea. With the developments in international trade and international shipping, once the strength between shipowners and cargo interests changes, a new convention will appear which shall further promote the growth of international shipping.[219]

The principle of liability has the branch of narrow sense and broad sense. In a narrow sense, the principle of liability is similar to the "imputation principle" under

[218] See Si Yu-zhuo, Li Zhiwen, Study on the Theories of Chinese Maritime Law, Beijing: Peking University Press, 2009, p.304.
[219] Ibid.

the civil law system.[220] In a broad sense, the principle of liability is equivalent to the "basis of liability" provided in the Rotterdam Rules.[221] In accordance with Article 17 of the Rotterdam Rules, the basis of liability includes three fundamental elements that must be analyzed and be paid special attention to, namely the principle of liability[222], the exception from liability, and the allocation of burden of proof. But in the author's opinion, the period of responsibility is also an important factor of the principle of liability. In the latter part of this chapter, I will respectively discuss these four elements in detail. The relationship of the four factors is shown in the following graph.



4.1.1.2 The Evolution of the Principle of Liability

It is well known that the present rules relating to the carrier's liability do not appear suddenly. They have a history. Similarly, the principle of liability has its developing process. In order to understand why it was necessary and precisely what needs it satisfied, it should be historically analyzed.[223] For this purpose, this part

[220] See Si Yu-zhuo, The Great Innovation of the Basis of Liability of B/L, published on China International Law Yearbook, Beijing: China Translation & Publishing Corporation Press, 1984, p.146.
[221] See Article 17 of the Rotterdam Rules. Article 17 of the Rotterdam Rules is entitled “Basis of Liability” which is under Chapter 5 dealing with the liability of the carrier for loss, damage, or delay.
[222] The principle of liability here is a narrow sense, namely the "imputation principle".
[223] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.7.

attempts to explain the historical development of the principle of liability from past to present. The study starts with common law.

Some scholars hold that the principle of liability may be sub-divided into three different criteria, such as liability without fault, which is also called strict liability,[224] liability with fault and presumption liability with fault.[225] But in the author's opinion, the presumption liability with fault is only one type of the liability with fault. The detailed introductions are as follows.

(1) The Strict Liability

In the late 17th century, English merchant fleet played a very important role in the stage of international shipping industry, and goods were mostly carried in their vessels. Accordingly, common law became more important because disputes in respect of the contract of carriage were settled by common law courts, whose jurisdictions had extended to cover maritime litigation.[226]

According to common law, common carriers were obliged by the courts to deliver goods in the same state as that in which they had received them, and imposed strict liability on all of them.[227] That is to say, except acts of God, the king's enemies, inherent vice, the negligence of the cargo interest, and general average sacrifice, the carrier shall be liable for loss arising from loss of or damage to the goods regardless of whether the carrier himself, the master, seaman or other

[224] In this book, the word "strict liability" is used to mean "liability without fault" rather than "liability without any exception".

[225] According to theory of civil law, liabilities without fault mean that in certain circumstances the law provides for "strict" liability or "liability without fault," irrespective of individual fault; liabilities with fault mean that as a general principle, a person will incur liability where he infringes upon another person's civil rights and interests and is at fault; presumption liabilities with fault mean that in some circumstances, the law makes a presumption of liability, and the person concerned must produce evidence rebutting that presumption. For detailed information, please see http://www.faegre.com/showArticle.aspx?Show=10911, taken on 28/10/2010.

[226] See L.Gorton, The Concept of the Common Carrier in Anglo-American Law, Gothenburg, 1971, p. 94.

[227] In the author's opinion, in maritime law there is no good reason for distinguishing between a common carrier and a private carrier, because both of them are carriers undertaking to transport cargo by sea.

employees or agents have faults or not.[228] The legal nature of liability was strict, i.e., liability without fault.[229] This kind of strict liability was also adopted by US and other Anglo-American courts.[230]

(2) The Incomplete Fault Liability

By the 18th century, a new circumstance occurred. At that time, freedom of contract became a basic principle of law of contract. In the first half of the 18th century, the carrier tried to escape from severe liability at common and civil law by inserting exception clauses into bill of lading. By the middle of the 19th century, with the development in the shipping industry owing to improved navigation instruments, more efficient steam power and steel, the carrier's position greatly improved. Then, he began to reduce the scope of his liability further depending on his bargaining power over them. In the course of time, the number of exception clauses increased so much that he had almost no duty other than the collection of freight.[231]

Being aimed at the misuse of "freedom of contract", the Harter Act of the United States was passed in 1893 by the US Congress. This Act provided that the carrier's liability was made mandatory, and any clause relieving the carrier of liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to his charge would be null, void, and of no effect.[232] At the same time, some new exception clauses were added, such as

[228] See Si Yu-zhuo, Maritime Law, Beijing: Law Press, 2003, p.149.
[229] See G. Gilmore, C. Black, The law of Admiralty, 2nd ed., New York, 1975, p.5
[230] See L.Gorton, The Concept of the Common Carrier in Anglo-American Law, Gothenburg, 1971, p. 20.
[231] The carrier excluded 55 incidents thanks to these clauses. For the list of exceptions, see M.B. Crutcher, The Ocean Bills of Lading, Tulane Law Review, Vol. 45, 1971, p.720.
[232] See Section 1 of the US Harter Act. The full name of Harter Act is "an Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property".

nautical fault.[233] The Harter Act was the first national statute which established a compromise between carriers' and shippers' interests by mitigating the carrier's strict liability and nullifying unreasonable clauses in the list. This kind of liability was the incomplete fault liability.[234]

The Harter Act had great influences on other national legislation, such as Australia, New Zealand, Canada, and directly gave rise to the Hague Rules in 1924 which was based on it. The Hague Rules established a minimum mandatory liability of carriers. According to the Hague Rules, the carrier shall be liable for loss of or damage to the goods arising from the fault of the carrier, his employees or agents. Obviously, this is the fault liability. But, owing to the provisions of the nautical fault exception and fire exception, this kind of liability became incomplete.[235]

In 1968, the Hague Rules were revised and amended in order to bring them into line with the needs of a modern shipping industry. The amended Rules are known as the Hague-Visby Rules. These rules increase a surface transport carrier's liability limit and include containerized cargo under their provisions. But with respect to the principle of liability, it is the same as the Hague Rules, namely, the incomplete fault liability.

(3) The Complete Fault Liability

After the Second World War, economic and political conditions in the world changed greatly. Many newly independent countries entered into international trade. Usually, developing countries represented cargo interests. However, at that time carriage by sea was still in the hands of developed nations. Hence, developing and

[233] See Section 3 of the Harter Act.
[234] See B.F. Williams, Carriage Damage at sea: The Ship's Liability, Texas Law Review, Vol. 27, 1949, p. 526.
[235] See Article 4 of the Hague Rules.

other cargo owner countries became to complain that the Hague/Hague-Visby Rules protected carriers unjustifiably, did not include loss resulting from delay, and so on.

Accordingly, in 1978 a new convention was adopted named the Hamburg Rules. The main feature of this convention was to be born of political agreement rather than commercial compromise.[236] Comparing to the Hague-Visby Rules, the Hamburg Rules made a radical reform in respect of the principle of liability, which was thought a victory of establishing a new international economic order in the field of shipping for developing countries.[237] They did not deal with the carrier's exceptions, instead, introduced a new liability rule based on the principle of fault and abolished the long list of exceptions including the nautical fault exception. This kind of liability was the complete fault liability. It seems clear that the Hamburger Rules tends to the developing countries representing cargo interests, so only 34 nations have approved Hamburg Rules until now most of them are developing countries.

Similarly, the Rotterdam Rules adopted in 2008 by the General Assembly provides the same principle of liability as that in the Hamburg Rules, i.e., the complete fault liability. In light of Article 17 of the Rotterdam Rules, except the listed excepted perils, if the carrier fails to prove that the cause or one of the causes of the loss, damage, or delay was not attributable to his fault or the fault of any person for whom he was responsible, he shall be liable for the loss.

[236] See G.F. Chandler Ⅲ, After Reaching a Century of the Harter Act: Where Should We Go from Here?, Journal of Maritime Law and Commerce, Vol.24, 1993, pp.43 -51.
[237] See Wu Huan-ning, Maritime Law, 2nd ed., Beijing: Law Press, 1996, p.120.

4.1.2 Relevant Provisions as to Principle of Liability in International Conventions

4.1.2.1 Under the Hague/Hague-Visby Rules

The Hague Rules provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from "any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."[238] From this stipulation, we can easily conclude that the carrier shall be liable for loss of or damage to the goods arising from the fault of the carrier, his employees or agents. Evidently, this is the fault liability.

Nevertheless, this Article also provides the nautical fault exception and fire exception.[239] Thus, this kind of fault liability became incomplete. As previously mentioned, we call it the incomplete fault liability.

The Hague-Visby Rules were different from the Hague Rules in many aspects, such as the limitation of carrier's liability, container cargoes, and so on. But with respect to the principle of liability, they were the same, i.e., the incomplete fault liability.

4.1.2.2 Under the Hamburg Rules

Paragraph 1 of Article 5 of the Hamburg Rules sets out the statement of basic liability of the carrier: "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which

[238] See (q) of paragraph 2 of Article 4 of the Hague Rules.
[239] See (a) and (b) of paragraph 2 of Article 4 of the Hague Rules.

caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

Thus, it is not difficult to see that principle of liability is based on fault. Meanwhile, the list of exceptions like the Hague Rules is omitted including nautical fault and fire exception. So different from the Hague/Hague-Visby Rules, it is called the complete fault liability. It should be pointed out that the abolition of nautical fault exception is basic to the Hamburg Rules, which comports with the view of cargo interests as well as impartial observers that it is unjust to exonerate the carrier from such liability since the carrier is, after all, in complete control of vessels and cargo.[240]

4.1.2.3 Under the Rotterdam Rules

According to the Rotterdam Rules, if the carrier fails to prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article 18, he is liable for loss of or damage to the goods, as well as for delay in delivery during the period of the carrier's responsibility as defined in chapter 4.[241]

Thus, we can see that the principle of liability under the Rotterdam Rules is a complete fault liability. It is the same as that under the Hamburg Rules.

4.1.3 Relevant Provisions as to the Principle of Liability in Some Countries

4.1.3.1 Under the US Carriage of Goods by Sea Act (COGSA)

In the United Stated, the Hague Rules were incorporated into domestic law

[240] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th ed., St.Paul: Thomson and West Publishing Co. 2004, p. 571.
[241] For detailed information, please see Article 17 of the Rotterdam Rules.

with the enactment of the US COGSA36.[242] Accordingly, the principle of liability under US COGSA36 was the incomplete fault liability.

Through comparing to the Hague Rules, we surprisingly find that the provision of Section 4(2) (q) of US COGSA36[243] was completely same as that of (q) of paragraph 2 of Article 4 of the Hague Rules. In other words, either the carrier or the ship shall be responsible for loss or damage arising from any cause arising with the actual fault and privity of the carrier or with the fault or neglect of the agents or servants of the carrier except for the excepted perils. This is a typical fault liability. Nevertheless, in the light of Section 4(2) (a) of US COGSA36, it is easily concluded that this kind of liability is incomplete.

In 1999, the Senate COGSA99 was enacted by the Senate staff, which reflects most of the corrections and amendments suggested by the U.S. Maritime Law Association (MLA)'s Steering Committee.[244] The main difference comparing to US COGSA 36 is that it abolishes "error in navigation or management" as a defence, as in the Hamburg Rules. It seems that in this draft, the complete fault liability has been established. But up to now, Senate COGSA 99 has not entered into force yet.

4.1.3.2 Under the UK Carriage of Goods by Sea Act (COGSA)

Because the UK COGSA1971 adopts the Hague-Visby Rules, the principle of carrier's liability is identical under them. Concretely, although the UK COGSA1971 does not directly deal with the principle of liability, according to

[242] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th ed., St.Paul: Thomson and West Publishing Co. 2004, p. 576.

[243] Section 4 (2) of US COGSA 36 provides that "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from — …(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

[244] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.350. See also http://www.mcgill.ca/maritimelaw/maritime-admiralty/tetley-cogsa/, taken on 05/10/2010.

Article 4(2)(q) of the Hague-Visby Rules, "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier". Moreover, by virtue of (a) and (b) of paragraph 2 of Article 4 of the Hague-Visby Rules, the nautical and fire fault exceptions have still retained. Therefore, like in America, the principle of liability is an incomplete fault liability as well in England.

4.1.3.3 Under the Korea Commercial Code

As a whole, two basic duties are stipulated under the KCC, one is the duty to exercise due diligence as to seaworthiness, the other is the duty of care in respect of goods. If the carrier fails to prove that he or the crew or other employees of the ship exercised due diligence as to seaworthiness or his duty of care in respect of receiving, loading, stowage, carriage, keeping, discharging and delivering of the goods, which assumes that he or the crew or other employees of the ship has fault. Then the carrier shall be liable to compensate for loss resulting from loss of, damage to or delay in delivery of the goods.[245] Obviously, this is a kind of fault liability.

Meanwhile, paragraph 2 of Article 795 of the KCC stipulates: "The carrier shall not be responsible for loss in respect of the goods arising or resulting from an act of the master, seaman, pilot, or other employees of the carrier in the navigation or the management of the ship, or a fire. The above shall not apply where the fire was caused by the intentional act or negligence of the carrier." Hence, there exist the nautical exception and fire exception. So, we can draw a conclusion that the principle of liability under the KCC is an incomplete fault liability too.

[245] See Articles 794 and 795 (1) of the Korea Commercial Code.

4.1.3.4 Under the Japan International Carriage of Goods by Sea Act

Under the JCC, the carrier will not be able to escape liability for compensatory damages for loss, damage or delay of the transported goods, unless it can prove that it, the forwarding agent, their employees or other parties employed for the transport did not fail to give due care in the receipt, delivery, storage, and transport of the transported goods.[246] In addition, under the JICOGSA, the carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading, stowage, carriage, custody, discharge and delivery of such goods.[247] Notwithstanding the wordings of these provisions are somewhat different, substantially they are identical. Accordingly, the principle of liability provided in the JCC and the JICOGSA, in respect of carrier's liability for the loss, damage or delayed arrival of the goods, is obvious fault liability.[248] At the same time, in accordance with paragraph 2 of Article 3 of the JICOGSA, the carrier shall not be liable for damage arising or resulting from an act of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship, or arising from fire on board. So, like the Hague Rules and the Korean Maritime Law, the Japanese Maritime Law also established the incomplete fault liability.

4.1.4 Relevant Provisions as to the Principle of Liability under the CMC

Chapter 4 of the CMC deals with the contract of carriage of goods by sea. In fact, many of the provisions or principles contained therein are incorporated from the Hague-Visby Rules or the Hamburg Rules.

Section 2 of Chapter 4 of the CMC is entitled carrier’s responsibility, under

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[246] See Article 577 of the Japanese Commercial Code.
[247] See paragraph 1 of Article 3 of the Japan International Carriage of Goods by Sea Act.
[248] See Yamano Youshiro, Yamada Yasuniko, 30 Lectures on Modern Insurance and Maritime Law, 6th edition, Tokyo: Central Economy Press, 2004, p. 236.

which Article 46 provides that: "… During the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this Section". Moreover, taking into account the provision of subparagraph 12 of paragraph 1 of Article 51 of the CMC, namely, "Any other causes arising without the fault of the carrier or his servant or agent", it might be safe to say that the principle of liability under the CMC, like in the other international rules, is also fault. However, due to nautical fault exception and fire exception by virtue of subparagraphs 1 and 2 of paragraph 1 of Article 51 of the CMC, the fault principle becomes incomplete, which is consistent with the Hague/Hague-Visby Rules.[249]

4.1.5 Comprehensive Analysis on Principle of Liability

4.1.5.1 Three Different Opinions

As previously noted, we have clearly known that the principle of liability has experienced a process of development, from strict liability at common law to incomplete fault liability such as in the Hague Rules, and finally to complete fault liability in the Hamburg Rules and Rotterdam Rules.

In China, like in US or Korea, the incomplete fault liability has been adopted in respect of carrier's liability in the CMC now. But, the incomplete fault liability is regarded as an unfair and unreasonable system by many maritime scholars and cargo interests, so the voice of being taken place of by the complete fault liability is very high.[250] Furthermore, some scholars even suggest that a strict liability should be carried out. What kind of legislation attitude should we take when we revise the CMC in China? Generally speaking, in the amendment of the CMC, there are three opinions as to principle of liability for the carrier by sea as follows:

[249] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol.20, No.3, Sep. 2009, p. 7.
[250] See Xing Hai-bao, Law of Maritime B/L, Beijing: Law Press, 1995, p.5.

(1) The first viewpoint is that we should adopt the strict liability, like at common law. The main reason is that the strict liability has been stipulated as the fundamental principle of liability in the Chinese Contract Law (hereinafter referred to as the "CCL"). According to the CCL, the carrier is liable for damages in case of damage to or loss of the cargoes in the course of carriage, provided that it is not liable for damages if it proves that such damage to or loss of the cargoes is caused by force majeure, the intrinsic characteristics of the cargoes, reasonable depletion, or the fault of the consignor or consignee.[251] It is now clear that the carrier shall bear the strict liability under the CCL. Regardless of whether the carrier has faults or not, he shall be liable for loss of or damage to the goods, unless existence of the three statutory causes.[252]

(2) The second viewpoint is that we should adopt the complete fault liability as to carrier's liability, i.e., the nautical fault and fire exceptions should be deleted in the course of amendment of the CMC like the Rotterdam Rules. One of the reasons is that in an early stage of development of shipping industry, owing to backward nautical technology, the carrier always confronted huge risks in sailing and sea travel could indeed be considered as an "adventure".[253] For the purpose of allocation of risks at sea, the nautical fault exception was established. Since then there has been an incredible development in technology as well as progress in insurance industry. Many of the risks a ship must face can be predicted and avoided with radars, satellites and warning systems in the machinery and modern means of communication allow the carrier to remain in constant contact with his ship.

[251] See Article 311 of the Chinese Contract Law.
[252] See Gao Hua, Thinking on the Determinative Principle to Carrier's Liability in Carriage of Goods by Sea，Journal of Huazhong University of Science and Technology(Social Science Edition), No.3, 2007, p. 30
[253] For example, those were the days when seafarers relied more on sextants and stars and when computers and satellites were not even contemplated. At that time the shipping was carried out in old steel ships or even wooden ships with large crew handling complicated machinery and vulnerable sails.

Accordingly, the basis of existence of nautical fault exception has already disappeared.

(3) The third viewpoint is that the incomplete fault liability should be retained, that is to say, the nautical fault and fire exception clauses should not be abolished. The main reason is that although modern nautical technology has greatly improved, sea accidents sometimes occur such as collision, stranding, sinking, etc, in this case the lost the shipowner suffered is often much higher compared to the cargo owner's loss of his cargo. Moreover, large container ships, chemicals ships and tankers widely used now are huge risks themselves.[254] So risks the carrier must face in the navigation and management of the vessel are still tremendous. In order to reduce the carrier's risks and further prompt the development of shipping industry, the nautical fault and fire exceptions should be valid.

4.1.5.2 Analysis

As to the first opinion as mentioned above, in the author's opinion, it is improper. Firstly, Article 123 of the CCL provides that "Where other laws provide otherwise in respect of a contract, such provisions shall prevail". According to this clause, it is obvious that the relationship between the CCL and the CMC is that of the general law and the special law. That is to say, in respect of the contract of carriage of goods by sea, the CMC should prevail. In a case where there are no relating provisions in the CMC, the CCL may apply. Secondly, most importantly, the CCL adopts the strict liability only in order to comply with the trend of civil liability. However, scholars holding this viewpoint ignore the special risks of carriage of goods by sea and enormous pressure taken on by the carrier. So, at present, not many scholars insist on this opinion.

[254] See Huang Ya-ping, A Study on the Existence and Abolition of Nautical Fault exception, World Shipping, 2005(2), p. 32.

As to the second and third opinions, there are great disputes. Some people insist that we must be consistent with the Hague/Hague-Visby Rules, namely, still carry out the incomplete fault liability,[255] whereas others hold that the Rotterdam Rules represents the trend of shipping industry and current liability system of the carrier in the CMC should be changed into the complete fault liability.[256] In fact, the core issue of these two viewpoints is whether or not the nautical fault exception should be deleted. Essentially, they are consistent and what they insist is fault liability in respect of the principle of carrier's liability.

In my opinion, in the future amendment of the CMC, we should cancel the nautical fault and fire fault exceptions, namely, insist on the complete fault liability. The main reasons are as follows:

Firstly, from the perspective of jurisprudence, the complete fault liability is in conformity with the principle of fairness. In accordance with the basic legal principle, all rights carry with them corresponding obligations. The carrier shall bear corresponding duties after he received the freight, that is to say, he should exercise due diligence to make the ship seaworthiness, and exercise his duty of care in respect of receiving, loading, stowage, carriage, keeping, discharging and delivering of the goods. If he has faults, he shall be liable to compensate for loss resulting from loss of, damage to or delay in delivery of the goods. One should be liable for his acts, which is fair and reasonable. If the carrier is exempted from liability for certain wrongful acts including errors of navigation and negligence of management of the vessel, which make the cargo interests unable to claim, obviously, it is unfair. Accordingly, from this angle, the complete fault liability

[255] Such as the opinion of Gao Hua, associate professor of Law School of Huazhong University of Science and Technology.
[256] Such as Si Yu-zhuo, professor of Dalian Maritime University; Zhu Zuo-xian, associate professor of Dalian Maritime University, and so on.

should be advocated.

Secondly, as previously stated, all cargo liability regimes are based on compromises between carrier and cargo interests. The incomplete fault liability was originated from the US Harter Act some 100 years ago, and was later incorporated into the Hague/Hague-Visby Rules.[257] It was built on the basis of backward nautical technology and it is fair to say that it has played an important role for the historical development of the international shipping industry in past. But with the development in technology as well as progress in insurance industry, the basis of existence of nautical fault exception has already disappeared. Today, the incomplete fault liability does not reflect the realities of modern shipping and does not appropriately apportion the risk of loss between carrier and shipper. Why should the risk of negligent navigation and negligent ship management be on the shipper?[258]

Thirdly, China is a big trading country. According to data from Chinese National Bureau of Statistics, total volume of import and export in 2008 reached 2561.6 billion US dollars, which accounts for above 8% of global volume of import and export.[259] At present, prompting the development of international trade is still our urgent task. In this case, continuing to retain nautical fault exception is unhelpful for cargo interests. So maintaining the incomplete fault liability has not conformed to the actual situation of China yet. That is to say, the nautical fault exception and fire fault exception should be abolished and the complete fault liability should be established entirely.

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[257] See Si Yu-zhuo, Henry Hai Li, The New Structure of the Basis of Liability for the Carrier, at http://www.rotterdamrules2009.com/cms/uploads/Final%20Paper%20of%20Prof%20Si%20and%20Li%20for%20the%20Rotterdam%20Rules%202009%20Colloquium.pdf, p.7, taken on 13/10/2010.

[258] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th ed., St.Paul: Thomson and West Publishing Co. 2004, p. 568.

[259] See http://www.drcnet.com.cn/DRCNet.Common.Web/DocViewSummary.aspx?docId=2039916&leafId=5, taken on 15/10/2010

Finally, Senate COGSA99 has cancelled the nautical fault exception, and in order to recover the shipper and consignee has the burden of proving negligence.[260] This reflects the certain attitude towards abolishing the incomplete fault liability. Although it is only a draft now, it has influences on other national and international law, such as the Rotterdam Rules. The Rotterdam Rules, like Senate COGSA99, also cancelled the nautical fault exception. As shown in the UNCITRAL reports, during the discussion by the Working Group of the Rotterdam Rules, "the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. Such a step might be essential in the context of establishing international rules for door-to-door transport."[261]

In a word, it should be recognized that the removal of the fault exception and the adoption of a complete fault liability regime for the carrier's liability would reflect the development of the international shipping legislation and, would in addition keep the legislations up to date with the characteristics and the demands of the times.

4.2 The Period of Responsibility

4.2.1 Introduction

(1) Definition of the Period of Responsibility

The period of responsibility of the carrier is a basic concept in the law of international carriage of goods by sea. It was first referred to in the Hague Rules and first explicitly proposed in the Hamburg Rules. In the CMC, it is also

[260] See Section 9(d) (2) of US Senate COGSA99: "NEGLIGENCE IN NAVIGATION OR MANAGEMENT.--In an action for loss or damage in which a party alleges that the master, mariner, pilot, or servants of an ocean carrier were negligent in the navigation or management of a ship, the burden of proof is on that party to prove negligence in the navigation or management of the ship".
[261] See A/CN.9/525, paragraph 35.

provided.[262]

What is the period of responsibility? In China, as to the meaning of the period of carrier's responsibility, there are different opinions. Some scholars hold that it is a time limit during which the carrier shall be liable for the loss of or damage to the goods.[263] Other scholars consider that the period of responsibility is a period during which the carrier shall be responsible for the violation of obligation and for the loss of or damage to the goods arising from it.[264] Speaking simply, in the author's opinion, it means the period while the carrier shall be liable for cargoes.[265] During the period the carrier is in charge of the goods, the carrier shall, except as otherwise provided for, be liable for the loss of or damage to the goods.

Obviously, this period is essential, because the carrier is liable or until he, at the least, engages its liability during this period. The carrier is liable for damage sustained in the event of loss or damage to cargo only if the event that caused the damage took place during the period.[266]

(2) The Standard Determining the Period of Responsibility

As mentioned above, we have already understood the definition of the period of responsibility, but how do we determine this period? What is the standard determining the period of responsibility? This is a very important issue which shall be discussed in detail.

Generally speaking, the period of responsibility of the carrier for the goods begins when the carrier receives the goods and ends when the goods are delivered.

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[262] See Tong Li-ming, Wang Hai-jiao, Comparative Study on the Period of Liability of Carrier, Harbor & Shipping Forum, No.1, 2007, p. 8.
[263] See Fu Ting-zhong, The Period of Carrier's Responsibility in Carriage of Goods By sea, World Shipping, No.1, 1995, p.43.
[264] See Shan Hong-jun, Zhao Yang, Ge Yan-min, Brief Analysis on Period of Liability of Carrier, Annual of China Maritime Law, Vo l. 13, 2002, p. 53.
[265] Si Yu-zhuo, Maritime Law, Beijing: Law Press, 2003, p. 110.
[266] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.80.

That is, the carrier's liability should be limited to the period while he is in charge of goods, as provided under Article 4.1 of the Hamburg Rules. Obviously, it is unreasonable to make the carrier liable since cargo is not within the carrier's control before being received and after being delivered. So in order to determine the period of responsibility of the carrier, the moments when goods are taken and handed over by the carrier ought to be ascertained.[267]

① Receipt of Goods

Receipt of goods means to obtain direct or indirect possession of goods through a mutual legal transaction made between the carrier and the shipper. Goods can be given directly to the carrier or indirectly left for him in such a manner, as he is able to control.[268]

Goods may be received onboard the ship or on shore. For the determination of the moment when they have been taken over by the carrier, the person who is obliged to load and stow them must be identified. If the obligation is on the carrier, they are received on shore before or at the beginning of loading. In liner carriage they are normally taken over by a warehouseman nominated by the carrier. Receipt of cargo from the shipper's agent by the carrier's agent ought to be considered the moment of taking over by the carrier himself. This is apparent under Article 4(3) of the Hamburg Rules.[269]

Pursuant to law or regulations applicable at the port of loading, receipt of goods by a port authority or any other third party to whom goods must be handed over for shipment, cannot be regarded as receipt by the carrier. The carrier is in

[267] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.225.
[268] Ibid, p.226.
[269] Article 4(3) of the Hamburg Rules provide that:" In paragraphs 1 and 2 of this Article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee."

charge of goods from the time he has taken them over from an authority or any other third party. This is clearly indicated under Article 4(2) of the Hamburg Rules.[270] Similarly, goods might be received by the carrier on shore and might then have to be delivered to a port authority for shipment according to law or regulations at the port of loading. In that case, the carrier cannot be placed in charge of goods and cannot be held liable for loss or damage arising from an act of the port authority unless the carrier has delayed receipt of cargo from the port authority without any justification.

If the obligation to load is on the actual shipper, goods are received onboard the vessel after loading.[271] However, immediately cargo has passed over the ship's rail, it partly enters the carrier's custody because the vessel is under his control. Likewise, in the carriage of live animals, the carrier is liable for the supervision of these animals after crossing the ship's rail although they are not in the carrier's charge where the cargo interest has employed an attendant to take full care of them onboard the ship.

When shipment is performed by use of barges or lighters, the same principles are also applicable. If there is no FIO (free in/free out)[272] or similar clause in the contract of carriage, the moment of receipt of cargo is determined in relation to barges or lighters rather than the mother ship. In that case, each lighter and barge is a vessel. By contrast, where the actual shipper performs the loading, cargo is not regarded as received by the carrier until connected to the ship's apparatus.

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[270] Article 4(2)(a) of the Hamburg Rules provide that:"For the purpose of paragraph 1 of this Article, the carrier is deemed to be in charge of the goods
(a) from the time he has taken over the goods from:
(i) the shipper, or a person acting on his behalf; or
(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;"

[271] See Federal Insurance v. Sabine Towage 1986, American Maritime Cases 1860, 1864 (2 Circuit of the Court of Appeal 1986)

[272] The carrier and shipper sometimes agree that the shipper will load and unload the goods onto or from the vessel. Such an arrangement is called "free in/free out" (FIO).

In container carriage, there is receipt of container goods, that is, receipt of containers by the carrier. A carrier is not therefore liable for improper stowage of goods in a container by the actual shipper. In the carriage of bulk liquid or grain cargo, the liquid or grain must be in the carrier's control, in other words, must be pumped or sucked into the ship's pipes to constitute receipt. On this account, the carrier is liable for any leakage or escape from the ship's pipes.

In multimodal transport, when goods are received by the (contracting) carrier on the first vehicle, his liability begins. However, before the carrier loads them under the Hague/Hague-Visby Rules or receives them at the port of loading under the Hamburg Rules, his liability is not subject to these convention based liability regimes.[273]

② Delivery of Goods

Delivery means transfer of direct or indirect possession of goods to the consignee by a mutual legal transaction made between the carrier and the consignee.[274] In order to end his liability, the carrier should deliver goods to the consignee. Goods can either be handed over to the consignee or be left to his authority. Delivery is completed at the time goods enters into the consignee's possession with both parties' consents.

To inform the consignee of the readiness to receive does not amount to their delivery because they are still in the carrier's hands. However, in some cases the carrier's liability may end although goods have not actually been put in the consignee's possession. Indeed, the carrier may be entitled to place them at the consignee's disposal in accordance with the contract or with law or usage of a particular trade, applicable at the port of discharge, where the consignee does not

[273] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, pp.225-228.
[274] See W. Poor, American Law of Charter Parties and Ocean Bills of Lading, 5th ed., New York, 1968, p. 141.

receive goods within a reasonable period. The consignee is bound to take over goods presented pursuant to contractual conditions. Otherwise, the carrier may land and warehouse them at the consignee's risk and expense. To place goods at the consignee's disposal cannot constitute their delivery to the consignee because the person who has taken delivery is not acting on behalf of the consignee. He is in fact the carrier's servant or agent rather than the consignee's. Nevertheless, since the consignee has not done what is necessary for the acceptance of goods, he is in default. Accordingly, his liability is only for fault in the choice of the warehouseman.

Goods can be delivered onboard the ship or on shore. For the determination of when they are handed over to the consignee, the one who is under an obligation to discharge them should be ascertained. If the carrier discharges them, they may either be delivered on quay, or may be handed over in a warehouse depending on the contract. Delivery of goods to the consignee's servants or agents or any person acting on his behalf should be treated as the handing over to the consignee himself. This is in line with Article 4(3) of the Hamburg Rules.

If the carrier can negotiate with a port authority or a terminal operator, delivery of goods to them cannot be regarded as a handing over to the consignee because they act as though they were the carrier's servants. If such delivery is made pursuant to law or regulations applicable at the port of discharge, they should be considered to have been delivered to the consignee so long as all necessary documents are surrendered to him because the carrier loses control over goods by handing them over to the third party pursuant to law or regulation. Once the carrier duly delivers goods to such a third party, he must be presumed to have fulfilled his obligation to carry them in his charge. This view is clearly approved by Article 4(2)

(b) (iii) of the Hamburg Rules.[275]

If the obligation to discharge goods is shifted to the consignee, their delivery is performed onboard the ship. However, until they have passed the ship's rail, the carrier's limited custody thereon continues because control over the vessel is still with the carrier.

If the carrier unloads goods by means of lighters or barges, the moment of their delivery is fixed in relation to the barges or lighters rather than the mother ship. In that case, each lighter or barge is a vessel. By contrast, where discharge is performed by the consignee, cargo is still in the carrier's possession until disconnected from the ship's apparatus.

In container carriage, the moment of delivery of goods is determined in relation to the container itself. However, where they are taken out of the container by the carrier, the subjects of delivery are the goods, not the containers. In the carriage of bulk liquid or grain cargo, delivery is performed at the moment they are pumped or sucked out of the ship's pipes. The leakage from pipes is, therefore, at the carriage expense.

In multimodal transport, once goods are finally delivered to the consignee, the carrier's liability ends. However, after goods are unloaded under the Hague/Hague-Visby Rules and delivered at the port of discharge under the Hamburg Rules, liability is no longer governed by these convention based liability regimes.[276]

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[275] Article 4(2)(b)(iii) of the Hamburg Rules provide that:"For the purpose of paragraph 1 of this Article, the carrier is deemed to be in charge of the goods

.....

(b) until the time he has delivered the goods:

.....

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over."

[276] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, pp.228-231.

(3) The Difference between the Two Concepts

It is worth noting that the period of responsibility of carrier and the period of application of the international rules do not pose the same legal issues. They are the different concepts. As stated previously, the period of responsibility is limited to the period while he is in charge of goods, from receipt to delivery. In many cases, it may not coincide with the period of application of the rules.

For example, under the Hague/Hague-Visby Rules, the period of responsibility usually differs from the period of application. Generally, the contract of carriage can be subdivided in three periods, the period prior to loading, the transport itself and the period subsequent to the unloading. The second period, namely the transport itself, is the only one to which the Hague/Hague-Visby rules apply. In other words, these Rules apply only between loading and discharging, that is to say, from "tackle to tackle".[277] However, the period of responsibility of the carrier might begin before the loading operation and extend after the unloading.[278]

As to the Hamburg Rules, they apply to the period during which the goods are under the carrier's custody, throughout the voyage, and at the ports of loading and discharge. That is, the period of the application is from "port to port". Obviously, in container carriage, this period is different from the period of responsibility.

The Rotterdam Rules extend the period of application of the Rules, which will govern from reception to delivery of the goods in a "door to door" solution. Under the Rotterdam Rules, the period of application of the rules coincides with the period of liability of the carrier. More precisely, the period of responsibility of the carrier begins when the carrier or a performing party receives goods for carriage and ends

[277] See Article 1(e) of the Hague Rules. Before the advent of mechanical cranes, heavy cargo was loaded on board vessels using ship's "tackle". "Tackle to tackle" referred to a period commencing when the tackle was hooked on to cargo for loading until the time the tackle was unhooked at discharge.
[278] See Article 7 of the Hague Rules.

when goods are delivered including reception and delivery from or to an authority or other third party.[279]

4.2.2 The Provisions under Relevant International Conventions

4.2.2.1 Under the Hague and Hague-Visby Rules

Article 1(e) of the Hague Rules provides that "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship. It is decided that the liability of the carrier would begin with loading of the ship, and end with discharge from the ship. After discharge, the local law at that place would govern liability. So some scholars hold that the period of responsibility of the carrier is from loading on to discharging the goods from the ship.[280] This period is commonly referred to as "tackle to tackle" or "rail to rail", which Professor Tetley explains as follows:

"Tackle to tackle has traditionally meant from the moment when the ship's tackle is hooked on at the loading port until the moment when the ship's tackle is unhooked at discharge. If shore tackle is being used, that moment has traditionally been when the goods cross the ship's rail."[281]

In addition, Article 2 of the Rules renders them applicable only to "the loading, handling, stowage, carriage, custody, care, and discharge of such goods".[282] It follows that any right or liability arising before loading or after discharge prima facie falls outside the scope of their application.[283]

In fact, neither the Hague Rules nor the Hague-Visby Rules directly deal with

[279] See Article 12 of the Rotterdam Rules. See also Diego Esteban Chami, The Obligations of the Carrier, at http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Diego%20Chami%20-%20Obligations%20of%20the%20Carrier.pdf, taken on 15/2/2011.

[280] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, p.25.

[281] See William Tetley, Marine Cargo Claims, 3th Ed, 1988, p.14.

[282] See Article 3(2) of the Hague Rules. In particular, it is the carrier's duty at common law and under the Rules to discharge the goods.

[283] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.18.

the period of responsibility of the carrier. Nevertheless, Article 7 of the Rules provides that: "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exception as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea." In short, the parties concerned are liberty to make any agreement over their respective rights and liabilities as to their responsibilities prior to the loading on and subsequent to the discharge from the ship, that is, complete freedom of contract is maintained for the regulation of liability before loading and after discharge. This complete freedom of contract is logical as the risks at sea are far greater than on land and it is this aspect of carriage that the rules are attempting to regulate. Also, the rules and procedures for loading and discharging are different in different countries for various reasons and it would be unwise to ignore these. Also, it can be argued that the carrier has very little control over the goods while they are not aboard his ship and therefore it is fairer to allow the parties to provide for this themselves.[284] Theoretically speaking, such special agreement may impose a less exacting or a stricter liability upon the carrier, or simply extends the liability regime of the Rules to those periods.[285] Nonetheless, it remains a point that whether or not this agreement should be regulated by the Rules and, furthermore, enforceable the local law if the latter would otherwise impose, for instance, a different or heavier liability upon the carrier. Indeed, there are decisions in both

[284] See http://www.law-essays-uk.com/resources/free-essays/hamburg-conventions.php, taken on 19/2/2011.
[285] See a "warehouse to warehouse" bill of lading. Clearly, only some of the Rules may rationally be applied in such circumstances, such as the limits of liability and time-bar but probably not all the carrier's obligations and exceptions in Article 4 of the Rules. See also Article 3(8) concerning the nullification of any agreement reducing the carrier's liability and Article 6 relating to the carrier's surrender of rights and immunities or increase of responsibilities and liabilities.

England and Australia to the effect that certain provisions of the Rules could apply to matters following discharge.[286]

How to determine the exact time of loading on and discharging from the ship in practice? It would seem that the following points satisfy the requirements in the various usual situations:

When cargo is hoisted by ship's gear and tackle, the loading on occurs when the ship's tackle is hooked onto the cargo. When cargo is hoisted by a shore crane, or a floating derrick not controlled by the ship, the loading on occurs when the cargo is first laid down at a point within the boundaries of the hull of the ship. When the cargo is rolled from the shore or lighter into the ship by a gangway, the loading on occurs when the cargo passes over the ship's rail or through the ship's side door. When the cargo flows through a chute or a pipe, the loading occurs at the ship's end of the chute or pipe; in handling liquids, this would be at the flange where the ships piping or hose is connected to the shore or lighter pipe or hose.

As to the moment of "discharging from" the ship, there would seem to be various possibilities, depending on the method of discharge. If the ship's gear and tackle are used, the moment of discharge from the ship seems to be generally accepted as the moment when the cargo is laid down on a lighter or pier, and the hook of the tackle released. If shore cranes or floating derricks are used, the moment would seem to be when such apparatus lifts the cargo from the ship's hold or deck. If a mechanical conveyor is used and is not furnished by the ship, the discharge would seem to occur when the item of cargo is picked up by the conveyor. And if the cargo flows through a pipe, it is delivered at the last flange supplied by the ship.[287]

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[286] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.19.
[287] See A. Knaiti-H, Ocean Bills of Lading, 4th Ed. 1953, pp.145-146.

In fact, this point was criticized by Devlin J. He said: "But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth century significance....."[288] To make sense, the term "loading" covers the whole operation and not just that stage of loading occurring after the goods had crossed the ship's rail. Although it is composed of a number of stages, it is a single process.[289] It follows that the loading process may nonetheless begin before the goods pass the ship's rail whereas the discharging process is not deemed complete until all the cargo has been discharged into the lighter.

Whereby a barge is used as part of the loading or discharging process, lighterage is always covered, although a barge is not the same as a "ship". Indeed, wherever a carrier undertakes to load or discharge the consignment, his liability is arguably extended and regulated by the Rules. For one thing, this international convention prohibits the reduction as opposed to the increase of the carrier's mandatory liability.[290]

4.2.2.2 Under the Hamburg Rules

The Hamburg Rules abandon the "tackle to tackle" rule in the Hague/Hague-Visby Rules.

In terms of Article 4 of the Hamburg Rules, the carrier's responsibility covers the period during which he is in charge of the goods at the port of loading, during the carriage and at the port of discharge,[291] which is usually called "port to port".

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[288] See Pyrene Co. Ltd v. Scindia Navigation Co. Ltd, Queen's Bench, Vol.2, 1954, p.419. In this case, the cargo dropped and was damaged on being lifted onto the vessel by the ship's tackle but before crossing the rail. The "tackle-tackle" interpretation may not be appropriate where the cargo is loaded or discharged by hose.

[289] Ibid, pp.416-417.

[290] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, pp.20-21.

[291] Article 4(1) of the Hamburg Rules provides that:"The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."

The carrier is deemed to be in charge of them from the time of taking over the goods in the loading port.[292] This provision differs from its counterpart in the Hague/Hague-Visby Rules since the carrier's responsibility is no longer determined on the basis of loading and discharge. Instead, the carrier is answerable from the moment of taking over to delivery. It is clear from this Article that the carrier's liability has been extended to all time under which he has taken over the goods from the sender until such times as they are regarded by the destination port as out of port and in storage, warehouse or onward transit etc. Furthermore, in view of the specific definition of "delivery" in the provision, any "deemed" delivery clause against the cargo interest will probably be read down under Article 23 of this Convention.[293]

Where the shipper loads the cargo on his own premises to which an empty container is delivered by the carrier as in the case of a full container load, it is suggested that the carrier takes over the cargo when collecting the container at the inland point and the Hamburg Rules accordingly apply before the goods arrive at the port for loading. In general, it seems quite possible that the goods are taken charge of before a bill of lading is issued, notwithstanding the provision in Article 14(1) of the Rules for the issue of a bill of lading on the shipper's demand when the carrier or the actual carrier takes the goods in his charge.

However, it is not clear whether the port of loading or discharge referred to in Article 4 of this Convention includes the carrier's own container terminal which may be located outside of the port of loading or discharge. There exist different opinions on the issue. Some scholars hold that such a terminal falls within the

[292] The carrier may take charge from the port authority, see Article 4(2) (a) (ii) of the Hamburg Rules. The act of a servant, an agent or another person according to the instructions of the carrier is deemed to be an act of the latter, see Article 4(3) of the Hamburg Rules.

[293] See McGovern, The Practical and Economic Effects of the Hamburg Rules from the Point of View of a Shipowner, CMI Colloquium on the Hamburg Rules (Vienna 1979), p.6.

meaning of the port of loading or discharge.[294] The others consider that this Convention does not apply when the terminals of the carrier are outside the port area, because the rules applicable would be different, nor are there provisions on the allocation of the burden of proof as to the conditions of the goods in the Hamburg Rules when they arrive to the port of loading and when they leave the port of discharge.

In any case, it is suggested that the carrier should not be assumed to have taken over the goods until he has checked them because such receipt as absence of any knowledge of their nature and quality should not be forced upon the carrier. The effect of this viewpoint depends on whether Articles 14, 15 and 16 virtually impose upon the carrier a positive duty to check the goods.[295] Moreover, there may be practical difficulties in carrying out the examination at the port of loading.

It is known that the carrier's responsibility ends when the goods are handed over to the consignee or a warehouse according to the custom or the regulations of the port. According to the contract of carriage as well as the law and custom at the port of discharge, the carrier may be held responsible for certain operations on land, such as stevedoring and storage. In practice, the national law always grants monopolies to state-owned or private docks or warehouses for the handling and storage of goods before loading or upon discharge. In terms of Article 4(2) (b) (iii) of the Hamburg Rules, the carrier is not responsible for any loss or damage during such period because he has no control over the process.[296]

Likewise, the goods should not be considered to have been handed over to the

[294] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.22. Generally, the port and the port authority's power and jurisdiction are defined by local law.
[295] These provisions should be viewed together with the shipper's guarantees in Article 17 of the Hamburg Rules.
[296] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, pp.22-23.

consignee until the consignee has checked the goods at the port of discharge. This means that the carrier has a duty to inform the consignee in advance of discharge and delivery, although this is not clearly mentioned in the Hamburg Rules.

If the consignee fails to take delivery, according to the provision of Article 4(2)(b)(ii) of the Hamburg Rules, the carrier can be relieved from further liability. This is the same as the provision in the common law. "The master has power to land goods, of which the owner has not taken delivery... But the master's power at common law only arises after a reasonable time, that is to say, a reasonable time under the circumstances which exist at the time of unloading in each case has been allowed to the owner to take delivery himself at the ship's side."[297]

In sum, in the author's opinion, the Hamburg Rules do not essentially change the carrier's responsibility in the Hague/Hague-Visby Rules since the party is deemed in charge of the cargo practically from the loading to the discharge.

4.2.2.3 Under the Rotterdam Rules

(1) Introduction

One of the most significant changes made by the Rotterdam Rules to existing law is the expansion of its scope of application to include door-to-door transport.[298]

In fact, the Rotterdam Rules do not establish a full multimodal system. There must be an international sea leg, as well as an overall international carriage, in order for the Convention to apply, thus establishing what has been described as a "maritime plus" approach rather than a multimodal convention.[299] Further, the new Convention recognizes that in taking a "maritime plus" approach, the possibility of conflict with the existing inland conventions could be raised. In order to avoid that

[297] Ibid, p.24.
[298] See Article 5 of the Rotterdam Rules.
[299] See Kate Lannan, Launch of the Rotterdam Rules, Annual of China Maritime Law, Vol.20, No. 4, Dec. 2009, p.5.

possibility, the Rotterdam Rules adopt the same practice as the contractual approach, i.e. a "limited network principle". Thus where the damage to or delay of the goods can be localized as having occurred during an inland leg of the transport, the Rotterdam Rules provisions that govern the carrier's liability, limitation of liability and time for suit will give way to those provisions of an international convention that would have applied if a separate contract of carriage had been concluded for that leg of the transport.[300]

In order to ensure clarity in respect of the interaction between the Rotterdam Rules and inland conventions, the Convention also includes a provision that prevents it from affecting the application of inland conventions in respect of the carriage of goods by air, road, rail, or inland waterway that regulate the liability of the carrier for loss of or damage to the goods, and that could apply to a contract of carriage subject to the Rotterdam Rules.[301]

(2) As to Article 12(1) of the Rotterdam Rules

As mentioned previously, with regard to the carrier's period of responsibility, the Hague Rules follow the limited "tackle-to-tackle" approach. With respect to the periods before loading or after discharge, the parties are free to agree on other rules, subject to any mandatory national law that might otherwise apply. The Hague-Visby Rules do not change the "tackle-to-tackle" approach.[302] The Hamburg Rules have expanded their scope a little, but they still restrict coverage from "one port to another port".

Nevertheless, modern container transport typically requires the use of door-to-door contracts of carriage, and it is logical that the underlying legal infrastructure should allow for the same scope of application. Taken a step further,

[300] See Article 26 of the Rotterdam Rules.
[301] See Article 82 of the Rotterdam Rules.
[302] See Article 1(e), 7 of the Hague-Visby Rules.

with the development of containerized transportation, a single coherent liability regime that covers the whole period of transit was highly desired.

So the period of responsibility in the Rotterdam Rules, which is one of the most significant innovations, differs from those of the Hague-Visby Rules and Hamburg Rules. Article 12 (1) of Rotterdam Rules provides that "the period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered". Therefore, the period of responsibility could begin and end outside of the port area. It is also called a "door to door" principle.

It is clear that under the Rotterdam Rules, the carrier is responsible for the entire contractual period of carriage,[303] which in a multimodal shipment will often be from the carrier's receipt of the goods at an inland location in the country of origin to the carrier's delivery of the goods at an inland location in the country of destination. This fundamental change in the law was initially controversial, but it is the only way to accomplish the most basic goal of a uniform international legal regime in this field. In order to achieve certainty, predictability and uniformity, it was logical to ensure that a single legal regime should cover the entire performance of the contract of carriage, rather than the current system in which each segment of the transport could be subject to a different contract of carriage and a different legal regime governing that particular mode of transport, whether it be by road, rail or other inland transport.[304] In practice, the parties often agree in their contract to extend the maritime regime inland, but such a contractual extension takes effect

[303] See Tomotaka Fujita, The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications, pp.352–353 (explaining that the "door to door" approach adopted by the Convention means that the "carrier's period of responsibility extends from the place of receipt to the place of delivery of the goods for carriage," subject to the terms of the carrier's contract).

[304] See Kate Lannan, The Launch of The Rotterdam Rules, at http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/20.doc, taken on 05/03/2011.

only with the force of a contract. The Rotterdam Rules will apply a uniform legal regime with the force of law.[305]

(3) As to Article 12(3) of the Rotterdam Rules

It should be pointed out that the Rotterdam Rules do not prohibit the parties from entering into a traditional tackle-to-tackle or port-to-port contract of carriage, but this is a decision that will be made by the contracting parties according to their commercial needs. Article 12(3) provides that the parties are to agree on the time and location of the receipt and delivery of the goods. At the same time, Article 12(3) prohibits the parties from making the carrier's period of responsibility shorter than "tackle to tackle". It allows some flexibility in the provision, but prevents abuse of it. In other words, on the one hand, the parties can define by themselves the bounds of period of responsibility, on the other hand, the text limits this freedom - receipt cannot take place after the loading, and delivery cannot take place before the unloading.

Article 12(3) also states that the time of receipt of the goods cannot be defined to be less than their initial loading under the contract of carriage. However, it is not clear whether this expression means "tackle to tackle", as in the Hague-Visby Rules. The question must be posed because Article 12(3) uses the term "initial loading" and not "initial receipt". In fact, initial loading means loading on the first means of transport, which may be a ship or a truck, a train or a boat. If it is a ship, initial loading means the commencement of loading on the ship, exactly as under Hague-Visby Rules.

[305] The Convention's limited-network approach does make the regime somewhat less uniform in this context. The network system divides the carriage into different modes of transport and imposes liability on the carrier based on the liability regime which would be mandatory applicable if the parties entered into a separate contract of carriage corresponding to each transport mode. But this Convention will still be more uniform than any available alternative. At http://www.tilj.org/journal/44/sturley/Sturley%2044%20Tex%20Intl%20LJ%20427.pdf, p.434, taken on 05/03/2011.

Another question is, does Article 12(3) mean that a provision would be valid for an exception of the carrier from liability for loss or damage that occurred before loading of the goods or following their having been unloaded, despite the fact that at such time the carrier or its servants had custody of the goods? Actually, Article 12(3) does not modify Article 12(1), but aims only to prevent the carrier from limiting its period of responsibility to exclude the time after initial loading of the goods or before final unloading of the goods.[306]

(4) As to the FIO Clause

In practice, the carrier and shipper sometimes agree that the shipper will load and unload the goods onto or from the vessel. Such an arrangement is called "free in/free out" (FIO).

The validity of a FIO clause has been discussed under both the Hague Rules and the Hague-Visby Rules. In some jurisdictions, such as the U.K., the courts understand a FIO clause as determining the scope of the contract of carriage and that the mandatory regulation to the carriage of goods by sea does not apply to activities under FIO clauses because they are outside the scope of the contract of carriage. Under the Rotterdam Rules however, this justification is no longer valid. Under Article 12(3), the clause is void to the extent that it provides that receipt is subsequent to the beginning of the initial loading or delivery is prior to the final unloading. This is why Article 13(2) of this Convention specifically provides that the carrier and the shipper may agree that the loading, handling, stowing, or unloading of the goods may be performed by the shipper, the documentary shipper, or the consignee. From this angle, the FIO clauses have been incorporated into the Rotterdam Rules. Article 13(2) explicitly authorizes the validity of FIO clauses and

[306] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.81.

Article 17 provides an explicit exoneration for the carrier from liability as a result of such activities.[307]

4.2.3 The Provisions under Relevant National Laws

4.2.3.1 Under the Harter and US COGSA

In the United States, the Hague Rules were incorporated into domestic law with the enactment of the US COGSA36. This Act is applicable to every bill of lading for the carriage of goods by sea, to or from ports of the United States in foreign trade. Accordingly, with respect to the period of carrier's responsibility, the US COGSA36 applies from "rail to rail", which means from the time of vessel loading to the time of discharge.[308] As to the carrier's responsibility before loading and after discharge, US COGSA36 does not apply to losses that occur prior to loading or after discharge from the vessel. However, this Act does permit the shipper and carrier to extend the application beyond the "tackle to tackle" period by including a provision to that effect in the bill of lading.[309] Thus, US COGSA36 often applies to damage losses outside the "tackle to tackle" period and to some domestic shipments as well.

It is worth noting that the Harter Act applies to all domestic shipping, even though shipping is carried on wholly within one state, so long as it takes place upon the navigable waters of the United States, Congress has jurisdiction to regulate it and the Harter Act will apply.[310] So the Harter Act governs the period after the

[307] See Tomotaka Fujita, The Coverage of the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/the%20coverage%20of%20rotterdam%20rules%20(BA2010)%20-%20T.Fujita.pdf, pp.3-4, taken on 05/03/2011.

[308] See http://themooneylawfirm.wordpress.com/2010/03/03/goodbye-cogsa-hello-rotterdam-rules/, taken on 07/03/2011.

[309] Section 7 of the US COGSA36 provides that "nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exception as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea".

[310] Barge operating on Erie Canal, which is wholly within New York State, held subject to federal regulations and steamer engaged solely in intrastate commerce on Grand River in Michigan held subject to congressional

goods are delivered to the foreign carrier but before they are "loaded on" the ship, and the period after the goods are "discharged" from the ship but before they are delivered to the consignee.[311] Accordingly, if any agreement conflicts with the provision in the Harter Act, it is obviously void. Those clauses, which can relieve the carrier of the responsibility for compensation before loading and after unloading, are also invalid under the Harter Act.

4.2.3.2 Under the UK COGSA

The United Kingdom adopted the Hague-Visby Rules by the COGSA1971 which came into force on June 23, 1977. The Hague-Visby Rules do not directly deal with the period of responsibility of the carrier. According to Article 1(e) of the Hague-Visby Rules, carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship. Accordingly, it can be concluded that, under UK COGSA1971, the period of responsibility of the carrier is from loading on to discharging the goods from the ship, i.e. the principle of "tackle to tackle" which is the same as that in the Hague Rules.

Besides, by virtue of Article 7 of the Hague-Visby Rules, the carrier may enter into any agreement or exception with the shipper as to the responsibility and liability of the carrier for the loss of or damage to the goods before loading and after discharging. That is to say, in UK, complete freedom of contract is maintained for the regulation of liability before loading and after discharge. Many scholars hold that it is fairer to allow the parties to provide for this themselves. Hence, if there is no "Before and After Clause" in the bill of lading, the period of carrier's responsibility is from loading to discharge; if there is this kind of agreement between the carrier and the shipper in the bill of lading, the period of carrier's

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control.

[311] See Yung F. Chiang, The Applicability of COGSA and the Harter Act to Water Bills of Landing, Boston College Law Review, Vol. 14, Issue 2, No. 2, 1972, p.269.

responsibility may extend in light of the content of the agreement.

4.2.3.3 Under the Japan International Carriage of Goods by Sea Act

Under the JICOGSA, the carrier shall be liable for loss of or damage to the goods during the period from the loading to discharge. Further, according to Article 3 of the JICOGSA, this Act applies to a carrier's responsibility from the time of receipt of the cargo prior to loading to delivery of the cargo after discharge and not only from the time of loading to the time of discharge.[312] In this respect, the period of responsibility is extended beyond that provided in the Hague/Hague-Visby Rules themselves. Moreover, it is also different from the relevant provision in the Hamburg Rules, that is, unlike the geographic limitation of "port to port" in the Hamburg Rules, there is no any geographic limitation in the JICOGSA.

Meanwhile, in light of opinions of Japanese scholars, the JICOGSA should also apply to the whole period from the time of receipt of the cargo to delivery of the cargo. They hold that the duration from receiving the goods to delivering them is successive, which is in accordance with the natural quality as well. It is suitable when the legal issue occurred during this period is dealt with according to a single law.[313]

It should be noted that special agreements including exception clauses are permitted,[314] however, provided that they relate only to the carrier's responsibility for the periods between receipt and loading and between discharge and delivery, and provided that such agreements are set out in the bill of lading.[315] This

[312] See William Tetley, Marine Cargo Claims, 4th Edition 2007, at http://www.mcgill.ca/files/maritimelaw/Japan.pdf, taken on 10/03/2011.
[313] See Tanaka Seniji, Yosnida Akira, A Study on International Carriage of Goods by Sea Act, Tokyo: Keisou Syobou, 1984, pp.48-49; see also Komachiya Souzou, On the Unification of Law Relating to Bills of lading, Tokyo: Keisou Syobou, 1958, p.46.
[314] See paragraph 3 of Article 15 of the JICOGSA.
[315] See William Tetley, Marine Cargo Claims, 4th Edition 2007, at http://www.mcgill.ca/files/maritimelaw/Japan.pdf, taken on 10/03/2011.

provision is consistent with the main purpose of the Hague Rules.[316] At the same time, in order to invoke the exception clause, the carrier shall prove that the fact which resulted the loss has arisen before loading or after discharge. However, if the special agreement between the parties provides that the consignee or the holder of the bill of lading should bear the burden of proof with respect to the damage arisen from loading to discharge, this agreement shall be null due to the virtual infraction of the paragraph 1 of Article 4 of the JICOGSA.[317]

4.2.3.4 Under the Korean Commercial Code

In respect of the period of the carrier's responsibility, no special provision exists in the Korean Maritime Law. Nevertheless, according to paragraph 1 of Article 795 of the KCC, if the carrier fails to prove that he or the crew or other employees of the ship exercised his duty of care in respect of receiving, loading, stowage, carriage, keeping, discharging and delivering of the goods, he shall be liable to compensate for loss resulting from loss of, damage to or delay in delivery of the goods. Accordingly, it is concluded that the period of the carrier's responsibility covers the time from receiving the goods to delivering them.

However, unlike the provision in the JICOGSA, under the KCC, the clause of prohibition of reduction of carrier's liability is also applicable during the periods before loading and after discharging of the goods.[318] Consequently, any special agreement between the parties that reduces or exempts any obligation or liability of the carrier before loading or after unloading, shall be null and void. Apparently, in

[316] See Ishii Terunisa, Liability of the Carrier, The Journal of Maritime Law Association, Resume Publication, No.5, 1957, p.15.
[317] See Toda Shuzou, Nakamura Masumi, International Carriage of Goods by Sea Act, Tokyo: Seirin Syoin, 1997, p.334.
[318] See Article 799 of the KCC. It provides that :"(1) No special agreement between the parties that reduces or exempts any obligation or liability of the carrier in breach of the provisions of Articles 794 through 798, shall be valid. This provision shall also apply to a stipulation transferring insurance benefits in respect of the goods to the carrier, or to any similar stipulations. (2) Paragraph (1) shall not be applicable to carriage of live animals and carriage of the goods which are stated in the bill of lading or other documents evidencing the contract of carriage as being carried on deck and is so carried."

comparison with the Hague Rules and the JICOGSA, this provision is going against the carrier by sea.

4.2.4 The Provisions under the Chinese Maritime Law

4.2.4.1 The Specific Provision under the Chinese Maritime Code

The general maritime regime of the CMC is also on a port-to-port basis, although provision is also made for multimodal contracts of carriage. Under the CMC, the goods for carriage are divided into two types, one is the goods carried in containers, and the other is the non-containerized goods. The periods of responsibility in respect of different types are also different.

(1) With Regard to the Goods Carried in Containers

Chinese container transportation began in September, 1973, at that time a Japanese vessel with 34 containers reached the Shanghai port.[319] According to Article 46 of the CMC, the responsibilities of the carrier covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge.

In fact, this provision is based on that in the Hamburg Rules. Under these circumstances, receiving and delivering of the goods often involve three basic concepts, such as door, container yard (CY) and container freight station (CFS). Door means the factory or warehouse of the consignor or consignee; CY means a place where the full container is taken over or delivered to the consignee; CFS means a place where less than container load (LCL) is dealt with. Hence, nine types of receipt and delivery of the goods may exist, namely door to door, door to CY, door to CFS, CY to door, CY to CY, CY to CFS, CFS to door, CFS to CY and CFS

[319] See Wang Yi-yuan, Zeng Kai, Ocean Transportation Service, Beijing: China Communications Press, 2005, p.158.

to CFS.[320] The parties may by contract determine the types of receipt and delivery of the goods. Whatever types adopted, as long as the place of receipt or delivery of the goods is located within the ports of loading and discharging, the carrier shall be liable for damage to the goods only if he is in charge of the goods.

(2) With regard to non-containerized goods

The responsibility of the carrier with respect to non-containerized goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom. In short, the period of carrier's responsibility is from loading to unloading. Obviously, this provision originates in the Hague Rules. That is to say, the "tackle to tackle" or "rail to rail" principle shall apply to non-containerized goods under the CMC.

In order to further clarify the liabilities before loading and after discharge of the goods, paragraph 2 of Article 46 of the CMC provides that: "The provisions of the preceding paragraph shall not prevent the carrier from entering into any agreement concerning carrier's responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship." At present, shipping market is extremely competitive. The carrier, for the purpose of getting more goods for carriage, may take the approach of extending the period of responsibility. This kind of agreement between the carrier and the shipper is valid and effective. The provision of paragraph 2 of this Article shall apply to liner shipping, voyage charter and multimodal transport.[321]

(3) Special Clause about the Multimodal Transport Contract

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[320] See Cheong Yeong-Seok, Practice of Carriage by Sea, Busan: Hae-in Publishing House, 2004, p.215.
[321] See Wang Mu-xin, Zhong Lei, The Practice and Cases of China Maritime Law, Beijing: Law Press, 2008, p.79. For detailed information, see Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, pp.382-384.

The CMC does take into account multimodal contracts of carriage, using a type of "maritime plus" approach. As stated above, a multimodal transport contract means a contract under which the multimodal transport operator undertakes to transport the goods, against the payment of freight for the entire transport, from the place where the goods were received in his charge to the destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage.[322] That is to say, the multimodal provisions of the CMC apply when two or more legs of transport are used in a single contract, one of which involves maritime carriage.

According to Article 103 of the CMC, the responsibility of the multimodal transport operator with respect to the goods under multimodal transport contract covers the period from the time he takes the goods in his charge to the time of their delivery. In other words, the multimodal transport operator shall be responsible for the performance of the multimodal transport contract or the procurement of the performance therefore, and shall be responsible for the entire transport. The multimodal transport operator may enter into separate contracts with the carriers of the different modes defining their responsibilities with regard to the different sections of the transport under the multimodal transport contracts. However, such separate contracts shall not affect the responsibility of the multimodal transport operator with respect to the entire transport.[323]

Moreover, it is also provided that if loss of or damage to the goods has occurred in a certain section of the transport, the provisions of the relevant laws and regulations governing that specific section of the multimodal transport shall be applicable to matters concerning the liability of the multimodal transport operator

[322] See Article 102 of the CMC.
[323] See Article 104 of the Chinese Maritime Code.

and the limitation thereof.[324] In other words, where damage is localized to a particular leg of the transport, the law or regulation that applies to that mode of transport will be applicable in respect of the liability, and limitation on the liability, of the multimodal transport operator. The CMC approach in respect of localized damage is similar to that of the Rotterdam Rules.[325]

If the section of transport in which the loss of or damage to the goods occurred could not be ascertained, the multimodal transport operator shall be liable for compensation in accordance with the stipulations regarding the carrier's liability and the limitation thereof as set out in this Chapter.[326] Thus it can be seen that the approach of the CMC that non-localized damage will be subject to the general "maritime plus" regime is the same approach to that taken in the Rotterdam Rules as well.

(4) Period of Responsibility of the Actual Carrier

In practice, the carrier often entrusts the performance of the carriage or part of the carriage. In this case, the carrier the carrier shall nevertheless remain responsible for the entire carriage. That is to say, the period of responsibility is the same as that in Article 46 of the CMC. In relation to the carriage performed by the actual carrier, the carrier shall be responsible for the act or omission of the actual carrier and of his servant or agent acting within the scope of his employment or agency.

It is worth noting that where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier, the contract may provide that the

[324] See Article 105 of the Chinese Maritime Code.
[325] See Kate Lannan, Launch of the Rotterdam Rules, Annual of China Maritime Law, Vol.20, No. 4, Dec. 2009, p.6.
[326] See Article 106 of the Chinese Maritime Code.

carrier shall not be liable for the loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage.[327]

4.2.4.2 Existing Problems about the Period of Responsibility in the CMC

On the whole, the provisions in respect of the period of responsibility in the CMC are reasonable and perfect in the particular circumstances of those days. But with the development of international shipping, more and more problems have arisen. One of the most important issues is relevant to the responsibility of the carrier with respect to non-containerized goods. As discussed above, the period of responsibility as to non-containerized goods is from load to discharge of the goods, namely "tackle to tackle" under the CMC. In the author's opinion, this provision is not perfect. Detailed reasons are as follows.

(1) The Article 41 of the CMC has the similar provisions with the Hamburg Rules on the definition of "the contract of carriage of goods by sea",[328] therefore, the transportation period of the contract of carriage of goods by sea should be "port to port" according to the CMC. However, the period of responsibility with respect to non-containerized goods is relatively short, namely from "loading to unloading", which means that it is inconsistent between the period of transportation and the period of duty of care in respect of goods.[329] In my opinion, this is contradictory not only in theory, but also in logic.

(2) Outwardly, this provision is accordance with that of Article 48 of the CMC.[330] However, if the fact which has resulted in damage to the goods arose

[327] See Article 60 of the CMC.
[328] Article 41 of the CMC provides that:"A contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another."
[329] See Shan Hong-jun, Zhao Yang, Ge Yan-min, Brief Analysis on Period of Liability of Carrier, Annual of China Maritime Law, Vo l. 13, 2002, p. 59.
[330] Article 48 of the CMC provides that: "The carrier shall properly and carefully load, handle, stow, carry,

before loading of the goods or after discharge of the goods and there is no any special agreement between the parties in respect of the liability during this period, who will bear the liability for loss or damage and how to bear it? For example, the vessel has reached the port of discharge on schedule and has unloaded the goods from the ship. Because of the omission of the agent of the carrier, the goods have not been delivered within the time expressly agreed upon. Delay in delivery caused the rot of the goods.[331] Apparently, the loss of or damage to the goods did not occur during the period of the carrier's responsibility under the CMC, in this case how can we determine the liability for compensation without Before and After Clause in the bill of lading? Regarding this point, the provision in the CMC is not explicit.

(3)From the legislative intent of Chapter 4 of the CMC, the provisions of this chapter should be to adjust the entire contract of carriage of goods by sea obviously including the periods of before loading and after discharging. The stipulations regarding the carrier's liability, the limitation thereof and the amount of indemnity for the loss of the goods as set out in this Chapter shall apply to the two periods. However, Article 51 of the CMC provides that the carrier's exception from liability is merely applicable during the period of responsibility, which excludes the periods of before loading and after unloading. Therefore, when the parties do not enter into any agreement concerning carrier's responsibilities prior to loading onto and after discharging from the ship, if the loss of or damage to the goods occurs in any of these two periods, the carrier cannot invoke this provision for exception from

keep, care for and discharge the goods carried."

[331] See Tong Li-ming, Wang Hai-jiao, Comparative Study on the Period of Liability of Carrier, Harbor & Shipping Forum, No.1, 2007, p. 9.

liability, even worse, the carrier would burden heavier responsibility than it should take during the period of responsibility.[332]

4.2.5 The Comparative Analysis

4.2.5.1 The Comparative Analysis between Conventions and National Laws

As stated previously, in respect of the period of responsibility, the provision in the Hague Rules is the same as that in the Hague-Visby Rules, which is beginning with loading and ending with discharging the goods. But some problems exist in this provision: (1) It is ambiguous about the definitions of loading and discharging; (2) According to this provision, the period before loading and the period after discharging of the goods should be adjusted by other international conventions or domestic laws, which complicates the legal relationship if it needs more than one code to be applied into one process of transportation; (3) According to Article 7 of the Hague and Hague-Visby Rules, a carrier or a shipper may enter into any agreement or exception as to the liability of the carrier for the loss or damage to the goods prior to the loading on, and subsequent to, the discharge from the ship. It is negative to the owner of goods.

In Japan, the JICOGSA provides that the period of responsibility is from receiving the goods until delivering the goods. The provision is applicable to the entire process of transit, which avoids the defect of applying diverse laws to the same legal relationship, but the problems of above (1) and (3) also exist in the Japanese Maritime Law. In Korea, the Korea Maritime Law also provides the same period of responsibility as the Japanese Maritime Law, but meanwhile, it provides that any agreement which reduces or exempts the carrier's responsibility before loading or after discharging the goods is null and void. Hence, the provision in

[332] Ibid.

Korean law does not include the problems of above (2) and (3), but it is very detrimental to the carrier.

There are two limitations on the period of responsibility in the Hamburg Rules, one is from the port of loading to the port of discharging, and another is from receiving goods to delivering the goods. But the Hamburg Rules does not give the exact definition of port, which leads to ambiguity in practice. Meanwhile, it still does not give the perfect definitions of receiving and delivering the goods, although it provides them somehow.

Under the Rotterdam Rules, the period of responsibility coincides with the period during which the carrier is in charge of the goods. However, when the carrier receives the goods before their arrival at the port of loading and delivers them inland, beyond the port of discharge, due to the fact that the Rotterdam Rules form a maritime plus regime this principle will apply already.[333] Both limits of period of responsibility are well identified, but the question remains as how these limits are understood--within a material approach or within a contractual approach. This issue, put forward by delegates has not been deeply discussed. Besides, although some delegates made proposals to define the delivery, the Working Group preferred to remain vague on this point.[334] In addition, the Rotterdam Rules provision takes into account only mandatory international instruments that would have applied to that leg of the carriage, and not mandatory national law.[335] As a result, although the approaches in the CMC and the Rotterdam Rules are similar,

[333] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.79.
[334] Ibid, p.80.
[335] Article 26 of the Rotterdam Rules included both mandatory national law and mandatory international instruments until late in the negotiation process. As part of a more general compromise, the UNCITRAL Working Group agreed that reference to "national law" should be deleted, as it would open the door to too many broadly differing regimes, thus negatively affecting overall uniformity of the Convention. See A/CN.9/621, at paragraphs 187-192 and A/CN.9/642, at paragraphs 163 and 166.

the result will not be the same.

4.2.5.2 The Comparative Analysis between the CMC and Other Provisions

The provisions with regard to the period of responsibility provided in the Hague/Hague-Visby Rules are quite similar to those in respect of non-containerized cargoes in the CMC. In addition, the relevant laws have already enacted about the two periods of before loading on and after the discharge of the goods in British, American, French and other countries' maritime laws. But in China, when the carrier do not enter into any agreement with the shipper concerning carrier's responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship, no explicit provisions exist for this circumstances which can easily cause confusion in judicial practice.

Besides, comparing the provisions of period of responsibility in the CMC with those in the Hamburg Rules as to the goods carried in containers, there are the following differences:

(1) Under the Hamburg Rules, the responsibility of the carrier for the goods covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.[336] And the duration of in charge of the goods by the carrier is from receiving the goods until delivering the goods. The Hamburg Rules shall be applicable to these two durations. Therefore, it can be concluded that, as to the overlap of these two durations, the Hamburg Rules are applicable as well. Unlike Hamburg Rules, under the CMC, the responsibilities of the carrier with regard to the goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered

[336] See Article 4.1 of the Hamburg Rules.

at the port of discharge.[337] Under this provision, there is no problem for the carrier to receive and deliver the goods in the port areas, but if the carrier receives or delivers the goods outside of the port, the period of carrier's responsibility is not clear.

(2) In respect of cargo types, the Hamburg Rules apply to all types of cargoes. The provision as to the period of "port to port" in the CMC is only applicable to container goods. At the same time, the Hamburg Rules clarify the definitions of taking over and delivery of the goods, but the CMC does not.

(3) Under the Hamburg Rules, the carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge.[338] However, according to the CMC, during the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods.[339] It's different between the two rules. For example, when the reason causing the loss in respect of the goods occurred during the period of carrier's responsibility, but the damage result occurred after delivery of the goods to the consignee, the carrier shall be liable for the loss according to the Hamburg Rules, however, in light of the CMC, the carrier does not assume the liability under this circumstance.

In a nutshell, through the comparison and analysis above, it is can be seen that some lacks on the period of carrier's responsibility still exist in the CMC. Firstly, the provision applicable to the carrier's responsibility is not clear during the time which is prior to loading and after the discharge of the goods. Secondly, under the circumstance of multimodal transportation, the rules with respect to the period of

[337] See Article 46 of the CMC.
[338] See Article 5 of the Hamburg Rules.
[339] See Article 46 of the CMC.

carrier's responsibility are relatively vague. Thirdly, in case it is inconsistent between the time when the reason resulting in the loss of goods took place and the time when the damage to the goods occurred, it is inappropriate to determine the carrier's responsibility in accordance with the latter.

4.2.5.3 Problems and Countermeasures in the CMC as to Period of Responsibility

In short, it is not difficult to see that there are still lots of problems with regard to the period of responsibility in the CMC. The following aspects need to be modified and improved.

(1) The Application of the Law before Loading and after Discharging

A transportation contract of goods is a contract whereby the carrier carries cargoes from the starting place of carriage to the agreed destination, and the consignor or consignee pays for the freight.[340] Accordingly, the transportation process from receiving the goods to the end of their delivery is a whole, and it is logical that the legal relationship occurred during this process shall apply the same law. So the CMC should not divide the cargoes into container cargoes and non-container cargoes and should provide the uniform period of carrier's responsibility. Of course, in the case of multimodal transportation, the application of the law will become more complicated.

(2) Determining the Carrier's Liability for the Loss

Under the current CMC, during the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this Section.[341] However, it is worth noting that although the loss of or damage to the goods occurred during the period of carrier's

[340] See Article 288 of the Chinese Contract Law.
[341] See paragraph 1 of Article 46 of the CMC.

responsibility, in light of paragraph 12 of Article 51 of the CMC, the carrier shall not be liable for compensation resulting from any other causes arising without the fault of the carrier or his servant or agent. In addition, when the fact causing the loss in respect of the goods occurred during the period of carrier's responsibility, but the damage result occurred after the end of the period, according to relevant provision in the CMC,[342] the carrier shall be relieve of the liability. As a result, the carrier shall only be responsible for the loss of or damage to the goods when such loss or damage took place during the period of responsibility, which is unfavorable to the owners of the goods. Moreover, although the CMC explicitly provides the delay in delivery,[343] the provision of period of responsibility does not mention any delay in delivery, which could be the shortcoming of legislation of the CMC. Therefore, seen in this way, it is appropriate for the CMC to be modified and perfected according to the Hamburg Rules, namely, "the carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge."[344]

(3) The Validity of Agreement in Respect of the Period of Responsibility

It is noteworthy that the duration during which the carrier is actually in charge of the goods could be determined by the time of receiving and delivering the goods. Like the Rotterdam Rules, for the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods. But the legislation should stipulate it clearly that any provision in a contract of carriage is void to the extent that it shortens the period of

[342] Ibid.
[343] See Article 50 of the CMC.
[344] See Article 5 of the Hamburg Rules.

responsibility.[345]

4.3 Exception from Liability

4.3.1 Introduction

Actually, exception from liability originated from compromises between carriers and cargo interests. At common law the common carrier was completely responsible for the risk of loss or damage except for "acts of God, and of the enemies of the king".[346] However, the carrier used the doctrine of contractual freedom which the courts fashioned in the 19th century to reduce or exclude their liability by catalogs of immunities and exceptions. The first compromise between carriers and cargo interests over these practices was contained in the Harter Act.[347] The Harter Act established a compromise by mitigating the carrier's strict liability, limiting the long list of exception clauses, and nullifying unreasonable clauses in the list. At last, this compromise was extended and was carried over into the Hague Rules.

4.3.2 The Broad Exceptions

4.3.2.1 Under Effective International Conventions

Under the Hague/Hague-Visby Rules, the carrier had a duty to exercise due diligence at the beginning of voyage to make his ship seaworthy and must also properly and carefully load, carry, and discharge the goods carried. But in return he is entitled to seventeen specific defenses which exonerate him from liability from loss or damage to goods.[348] When these exception clauses are analyzed, it appears

[345] See paragraph 3 of Article 12 of the Rotterdam Rules.
[346] The common law eventually recognized four causes of exoneration (so-called excepted perils) from strict liability: act of God; act of the King's (or Queen's) enemies; inherent vice of the thug carried; and the consignor's own fault.
[347] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th ed., St.Paul: Thomson and West Publishing Co. 2004, p. 566.
[348] See Articles 3 and 4 of the Hague Rules.

that Article 4 (2) (q) of the Hague and Hague-Visby Rules is designed as an all-embracing exception rule generally releasing the carrier from paying damages for loss or damage resulting from any other cause arising without the actual fault or privity of the carrier, and without the fault or neglect of his agents or servants. Since the general rule (q) is made subject to so many exceptions on Articles 4(2) (a)-(p), there are very few "other causes" left.[349] Among the remaining 16 exception clauses, in fact, only nautical fault and fire fault clauses really belong to exception from liability, the rest should be called excepted perils, i.e., special perils at sea.[350]

Unlike the Hague/Hague-Visby Rules, the Hamburg Rules do not include any list of exceptions. According to Article 5(1) of this convention, for the purpose of bringing transport conventions close to each other and facilitating the making of multimodal carriage contracts, the Article 4(2) (q) of the Hague and Hague-Visby

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The excepted perils are listed in Article 4(2). They cannot be added to, but, if the carrier agrees, they can be reduced. They are:

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(d) Act of God.

(e) Act of war.

(f) Act of public enemies.

(g) Arrest or restraint or princes, rulers or people, or seizure under legal process.

(h) Quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.

(k) Riots and civil commotions.

(l) Saving or attempting to save life or property at sea.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks.

(p) Latent defects not discoverable by due diligence.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

[349] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p. 273-274.

[350] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol.20, No. 3, Sep. 2009, p. 5.

Rules is converted into one which makes the carrier liable for loss or damage to the goods unless he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[351] In fact, since the majority of the exceptions to liability in the Hague-Visby Rules do not involve fault on the part of the carrier, the effect of their abolition on carrier liability should not be drastic, except in one important matter, the abolition of the nautical fault exception.[352] It seems fair to delete this exception, after all, the carrier is in actual control of ship and cargo.

4.3.2.2 Under the Rotterdam Rules

Under the Rotterdam Rules, the carrier is liable for loss or damage if the claimant proves the event or circumstances took place during the carrier's period of responsibility. He is able to be relieved of liability if he proves one or more of 15 specific exceptions set out in Article 17(3).[353] These specific exceptions are similar

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[351] Ibid.

[352] See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4th ed., St.Paul: Thomson and West Publishing Co. 2004, p. 571.

[353] Article 17(3) of the Rotterdam rules are:

"The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this Article if, alternatively to proving the absence of fault as pro- vided in paragraph 2 of this Article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d)Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in Article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the control- ling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to Article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with Article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

to those in the Hague/Hague-Visby Rules, e.g. Act of God, latent defect etc. However it should be particularly pointed out that these exceptions do not apply and the carrier is liable for all or part of the loss, damage or delay if the claimant proves the fault of the carrier or person in Article 18 (i.e. carrier, master, performing party, maritime performing party) caused or contributed to the event or circumstances on which the carrier relies.[354]

From the list of exceptions, we can see two really important changes in comparison with the Hague/Hague-Visby Rules. One is the deletion of the famous nautical fault defense, which means that an error in navigation or negligence in the management of the vessel no longer affords the carrier a defence, but establishes liability. That is to say, the carrier will no longer be able to rely on the fault of his own servants to exclude his own liability.[355] This is the most significant change. The other change is that the Rotterdam Rules make no specific restriction with respect to the fire exception, as all listed exceptions can be overridden by the claimant as long as he proves that the fault of the carrier or of one of its servants or agents caused or contributed to the event or circumstance on which the carrier relies.[356]

On the other hand, the Rotterdam Rules also brings some further modifications. Thus, "an act of war" now specifically includes "hostilities" and "armed conflicts", while "an act of public enemies" is defined to include "piracy, terrorism, riots, and

(m) Reasonable measures to save or attempt to save property at sea;
(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
(o) Acts of the carrier in pursuance of the powers conferred by Articles 15 and 16".

[354] See http://www.thomasmarinelaw.com/Articles/002.html, taken on 19/10/2010.

[355] See Silviu Bursanescu, Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL's Draft Convention on the carriage of goods [wholly or partly] [by sea], doctoral thesis, p.57, at http://www.mcgill.ca/files/maritimelaw/Silviu_Bursanescu-MastersResearchProject.pdf, taken on 04/05/2011.

[356] See paragraph 4 of Article 17 of the Rotterdam Rules.

civil commotions".[357] Quarantine restrictions, as well as detention, arrest or seizure by public authorities, and strikes, lockouts, stoppages or restraints in labour have also been maintained, subject to the general exclusion when caused by fault or privity of the carrier.[358] Latent defects are specified as having to specifically relate to the ship.[359] Moreover, the carrier will also be able to invoke any act or omission of the shipper, consignor, consignee or controlling party, or any activity carried on by such person pursuant to a FIO or FIOS clause, in order to exclude his own responsibility.[360] Finally, two specific exceptions have been provided for reasonable measures to save or attempt to save property at sea and reasonable measures to avoid or attempt to avoid damage to the environment.[361]

4.3.2.3 Under the US COGSA and UK COGSA

As discussed previously, the Hague Rules were incorporated into domestic law with the enactment of the US COGSA36 in America. So the above two laws have the same provisions in respect of exception from carrier's liability. Similarly, the Hague-Visby Rules were adopted by the UK COGSA1971, so the same stipulations can be found with regard to exception from liability in this Act and the Rules. Moreover, based on the above introduction and analysis, we have already learned that the Hague Rules are identical to the Hague-Visby Rules in respect of exoneration from the carrier's liability. Accordingly, it can be concluded that the provisions as to exception from liability in the American law are the same as those in the English law.

Therefore both in US and in UK, neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) act, neglect, or default

[357] See (c) of paragraph 3 of Article 17 of the Rotterdam Rules.
[358] See (d), (e) of paragraph 3 of Article 17 of the Rotterdam Rules.
[359] See (g) of paragraph 3 of Article 17 of the Rotterdam Rules.
[360] See (h), (i) of paragraph 3 of Article 17 of the Rotterdam Rules.
[361] See (m), (n) of paragraph 3 of Article 17 of the Rotterdam Rules.

of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; (b) fire, unless caused by the actual fault or privity of the carrier; (c) perils, dangers and accidents of the sea or other navigable waters; (d) act of God; (e) act of war; (f) act of public enemies; (g) arrest or restraint of princes, rulers or people, or seizure under legal process; (h) quarantine restrictions; (i) act or omission of the shipper or owner of the goods, his agent or representative; (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; (k) riots and civil commotions; (l) saving or attempting to save life or property at sea; (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) insufficiency of packing; (o) insufficiency or inadequacy of marks; (p) latent defects not discoverable by due diligence; (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.[362] It should be pointed out that the two countries both maintain the nautical fault exception and fire fault exception.

4.3.2.4 Under the KCC and JICOGSA

Korea and Japan are very close together. They both belong to civil law system nations. As to the maritime law, they are great similarities. By comparison between the KCC and the JICOGSA, we can easily conclude that they all remain the nautical fault exception and fire fault exception,[363] as well as a list of exception clauses.

According to Article 796 of the KCC, the carrier shall be relieved of the liability for compensation if he has proved that any facts referred to in the following subparagraphs existed:

[362] See Article 4(2) of the Hague/Hague-Visby Rules.
[363] See Article 795(2) of the Korea Commercial Code and Article 3(2) of the Japan International Carriage of Goods by Sea Act.

"(1) Perils or accidents of the sea and other navigable waters;

(2) Act of God;

(3) War, riots, or civil commotions;

(4) Piracy and other similar acts;

(5) Judicial seizure, quarantine restrictions and other restraint by public authorities;

(6) Act of the shipper or the owner of the goods or his employees;

(7) Strikes, restraint of labor or lockouts;

(8) Saving life or property at sea or any deviation in saving life or property at sea or any reasonable deviation;

(9) Insufficiency in packing the goods, or inadequacy of marks;

(10) Particular nature or latent defects of the goods; and

(11) Latent defects of the ship."

It is obvious that these 11 exception clauses are very similar to Article 4(2) (c)-(p) of the Hague/Hague-Visby Rules. In the JICOGSA, there are also 11 exception clauses, which are almost the same as those in the KCC.[364]

4.3.2.5 Under the Chinese Maritime Code

With respect to the exception from liability, the CMC followed the Hague/Hague-Visby Rules and maintained the nautical error exoneration. Article

[364] According to the Article 4(2) of the Japan International Carriage of Goods by Sea Act, these 11 exception clauses are:
1) Perils of the sea or other navigable waters;
2) Act of God;
3) Act of war, riots and civil commotions;
4) Act of public enemies;
5) Seizure under legal process, quarantine restrictions or other disposal by governmental authority;
6) Act of the shipper or the owner of the goods or their servants;
7) Strikes, sabotage, lockouts or other industrial disputes;
8) Saving life or property at sea, or any deviation for such purpose, or any other reasonable deviation;
9) Quality or inherent defect of the goods;
10) Insufficiency or inadequacy of packing or marks;
11) Latent defects of cranes or other similar facilities.

51 of the CMC reads as follows:

"Article 51 The carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier's responsibility arising or resulting from any of the following causes:

(1) Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship;

(2) Fire, unless caused by the actual fault of the carrier;

(3) Force majeure and perils, dangers and accidents of the sea or other navigable waters;

(4) War or armed conflict;

(5) Act of the government or competent authorities, quarantine restrictions or seizure under legal process;

(6) Strikes, stoppages or restraint of labour;

(7) Saving or attempting to save life or property at sea;

(8) Act of the shipper, owner of the goods or their agents;

(9) Nature or inherent vice of the goods;

(10) Inadequacy of packing or insufficiency or illegibility of marks;

(11) Latent defect of the ship not discoverable by due diligence;

(12) Any other cause arising without the fault of the carrier or his servant or agent.

The carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in sub-paragraph (2), bear the burden of proof."

In comparison with Article 4.3 of the Hague/Hague Visby Rules, the provisions of Article 51 of the CMC are basically the same. The only difference is

to change 17 exception clauses into 12 items.[365] Compared with the contents of Article 17.3 of the Rotterdam Rules, it seems that except for the nautical error exoneration, the provisions of Article 51 of the CMC are quite similar to the said Article 17.3. Further, it is also worth mentioning that according to Article 51 of the CMC, in particular item (12), the carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier's responsibility, if the carrier may prove that the same occurred without the fault of the carrier or his servant or agent, therefore, it appears that the effect of this provision is to some extent the same as that of Article 17.2 of the Rotterdam Rules.[366]

It should be particularly pointed out once again that the present CMC maintains the nautical fault exception, whereas the Rotterdam Rules abolish it. This is the most significant difference between the CMC and the Rotterdam Rules in respect of exception clauses. However, in author's opinion, taking account the beneficial changes that the Rotterdam Rules are going to bring on to the international shipping industry, the deletion of the nautical fault exception by the Rotterdam Rules should not constitute a real obstacle for China to accept the Rotterdam Rules.

4.3.3 The Two Specific Exceptions

4.3.3.1 Analysis of the Nautical Fault Exception

With regard to the nautical fault exception, we have already talked a lot. The nautical fault exception from liability is completely unique to shipping business. Not air, nor railway, nor road transport has any corresponding rule of this kind. Moreover, it is not only an important exception, but also a symbol of principle of liability.

[365] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol. 20, No. 3, Sep. 2009, p. 7.

[366] Article 17.2 of the Rotterdam Rules provides that: "the carrier is relieved from of all or part of its liability pursuant to paragraph 1 of this Article if it proves that the cause or one of the causes of loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article 18."

Because of its importance, it is necessary for us to systematically analyze it.

(1) Background

The basic concept in Roman law was to hold the carrier liable for loss or damage to the goods unless caused by force majeure. The system of liability is therefore only an innovation, historically young. At the end of the nineteenth century, error in navigation and management of the ship was simply a contractual exception used in bills of lading.[367] The nautical fault exception first appeared in the Harter Act and was a compromise between carrier and cargo interests. Then, the Hague/Hague-Visby Rules provided this exception under Article 4(2) (a).[368] At present, many countries, such as US, Korea, Japan and China, maintain the nautical fault exception, whereas in the Hamburg Rules and Rotterdam Rules, this exception has been cancelled.

The fault of a carrier's mariners and servants can be divided into nautical and commercial fault.[369] Under the Hague/Hague-Visby Rules, the carrier shall be liable for so-called commercial fault of his servants on the one hand and discharge him from so-called nautical fault on the other hand.[370] When applying the nautical fault exception the court must first separate nautical fault from commercial fault. However, it is not always easy to distinguish an operation done for the purpose of the ship from one done for the purpose of the cargo, or "management of the ship" from "management of the business of the ship".[371]

It should be noted that the error has to be on the part of the master, any member

[367] William Tetley, Error in Navigation or Management, p.2, at http://www.mcgill.ca/files/maritimelaw/ch16.pdf, taken on 03/05/2010.
[368] See Cheong Yeong-seok, Principle of Bill of Lading, Busan: Hae-in Publishing House, 2003, p.77.
[369] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.288.
[370] See Madeleine Jansson, The Consequences of a Deletion of the Nautical Fault, at http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf, p.13, taken on 21/10/2010.
[371] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.93.

of the crew, pilot or other person performing work in the ship's service. This means that the neglect of a servant is considered the fault of the carrier. The developments in maritime commerce have evolved to include loading, handling, stowage, carriage, custody and discharge by experts. Nowadays almost all segments of carriage are carried out by third parties rather than by the contracting carrier.[372]

(2) Types of the Nautical Fault

According to Article 51(1) of the CMC, there are only two types of nautical fault: in the navigation and in the management of the ship.

① Fault in the Navigation of the Ship

No maritime Act attempts defining the meaning of the words "navigation or management".[373] Generally speaking, fault in the navigation of the ship means fault in measures which should have been exercised during the navigation of the ship for her safe arrival to the place of discharge.[374] It covers for example the work of steering and manoeuvring the ship, use of navigational equipment, lanterns, signals (giving signals as well as responding to others), determination of her location and route, berthing, anchorage, the evaluation of meteorological news, adjustment of speed, abandonment, taking refuge in a port, obeying navigational rules, forcing the ship through a storm and ascertaining what time to proceed.[375] As a result of navigational error we normally see a ship stranding, grounding, taking a list, colliding with another ship, or striking a quay, and goods get wet by sea water

[372] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.85.
[373] See T. E. Scrutton, Charterparties and Bills of Lading, Sweet and Maxwell, twentieth edition by Stewart Boyd, Andrew Burrows, David Foxton, 1996, p. 239.
[374] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.291.
[375] See Madeleine Jansson, The Consequences of a Deletion of the Nautical Fault, at http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf, p.14, taken on 23/10/2010.

penetrating the cargo holds.[376]

In the case where grounding causes the damage to the cargo there is often no third party involved. Hence the cargo interest may present a claim directly against the carrier who can defense himself using the exception of the navigational fault. In the case of collision, it is usual that the colliding ships are all in fault in the navigation of the ship. The cargo interest cannot claim damages from the contracted carrier whose servants negligently contributed to the collision because of nautical fault. Nevertheless the other carrier may be held tortiously liable to damages.[377] According to the CMC, since in a collision where both ships are to blame each ship is only liable for damages in proportion to its own degree of fault, the claim through tort cannot exceed the ship's proportional degree of fault.[378]

② Fault in the management of the ship

According to Article 51(1) of the CMC, another type of nautical fault is fault in the management of the ship. Any time after the ship has commenced her voyage until goods are discharged this fault may occur. Examples of fault in management of the ship (as long as they influence the safety of the vessel more than that of cargo) are: fault in providing and maintaining seaworthiness (after the commencement of the voyage) of the ship in regard of the hull, valves, (bilge) pipes, pumps, ballast tanks, machines by checking and clearing them; manning equipping, supplying and stabilizing the ship by ballasting, closing port holes,[379] and so on.

Actually, it is pointless to describe the difference between navigation and management of the ship since the outcome remains the same. As discussed above, it

[376] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.292. See cases in footnotes 941, 942, 943.
[377] Ibid.
[378] See paragraph 1 of Article 169 of the Chinese Maritime Code
[379] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.294.

is very important to find whether the management concerns handling of the ship or handling of the cargo, i.e. to distinguish between nautical fault and commercial fault. It can often be difficult to distinguish them, and there is no key for this provided under the Hague Rules and Rotterdam Rules. For example, an omission to close the hatches of the vessel was deemed to fall outside the exception in view of the ensuing rain damage to cargo as opposed to ship. But could the closing of hatches also be regarded as part of the management of the vessel inasmuch as decks are swept by seas?[380]

A simple rule is to consider whether the fault was an act taken for the safety of the vessel or for that of the cargo,[381] which is called the "criterion of benefit". Generally, the distinction between nautical fault and commercial fault depends on the actual purpose of the measures which have been failed and is drawn from facts of each case. "The following conclusions can be drawn: If the benefits of steps which should have been taken for the goods were more than those for the ship, the carrier would be liable for commercial fault. Failure to: ventilate cargo, stow and keep goods in a cargoworthy ship… secure cargo on a barge so that it won't slide, and minimize the subsequent loss or damage arising from one of the excepted causes, affects the benefit of cargo more than the ship."[382]

4.3.3.2 Analysis of Fire Exception

With respect to fire exception, the provision in the CMC is same as that in the Hague/Hague-Visby Rules. Under Article 51(2) of the CMC and Article 4(2) (b) of the Hague/Hague-Visby Rules, the carrier is exempted from liability for the loss of

[380] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.93.
[381] See Madeleine Jansson, The Consequences of a Deletion of the Nautical Fault, at http://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf, p.15, taken on 5/11/2010.
[382] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.290.

or damage to the goods arising or resulting from fire unless the fire is caused by the actual fault or privity of the carrier.[383] It seems that it would be both fair and reasonable to exempt the carrier from liability where the casualty falls outside his expectation and control.

Similarly, we can find the same provisions in the KCC and the JCC. Under Article 795 (2) of the KCC, "The carrier shall not be responsible for loss in respect of the goods arising or resulting from an act …, or a fire. The above shall not apply where the fire was caused by the intentional act or negligence of the carrier." According to Article 3 (2) of the JICOGSA, "The preceding paragraph shall not apply to damage arising or resulting from an act …, or arising from fire on board (unless the fire is caused with the privity or actual fault of the carrier)."

Coming to the Hamburg Rules, the carrier shall be liable for loss of or damage to the goods or delay in delivery if the fire is caused by his (or his servant's or agent's) fault or neglect, or if he (or his servant or agent) has failed to take all measures reasonably required to put out the fire and avoid or mitigate its consequences.[384] Obviously, the Hamburg Rules deleted the fire fault exception, which is different from the Hague/Hague-Visby Rules. In fact, this provision does not change so much the pre-existing law.[385] Because the claimant must prove that the fire arose from fault or neglect on the part of the carrier, his servants or agents and, as we know, this is very difficult. Consequently, someone believes that the Hamburg Rules essentially retain the fire exception.[386]

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[383] Section 186 of the UK Merchant Shipping Act 1995 also granted the carrier such exception.
[384] See Article 5(4) (a) of the Hamburg Rules.
[385] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.89.
[386] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol. 20, No. 3, Sep. 2009, p. 6.

Like the Hamburg Rules, the Rotterdam Rules also cancelled the fire exception. Under this convention, the carrier shall be relieved of all or part of its liability if it proves that fire on the ship caused or contributed to the loss, damage, or delay unless the claimant proves that the fault of the carrier or of a person referred to in Article 18 of this convention caused or contributed to the fire on which the carrier relies.[387]

In the author's opinion, deleting the fire exception has been a trend. Firstly, as previously mentioned, the fire exception, like the nautical fault exception, is also a product of special times. An important reason providing the fire exception in the Hague Rules is that it is very difficult, even impossible, to distinguish whether the fire was caused by the fault of the carrier or his agents. But now, in many fire cases, verifying the cause or distinguishing the liability is not difficult thing. Furthermore, nowadays, insurance system has become perfect, which makes the carrier greatly enhance the ability in resisting risks at sea. Lastly, China's major trade partners, such as US, Japan and Korea, all hold that the fire exception should be cancelled. In order to benefit China's international trade, we must follow this tendency.[388]

4.4 Allocation of Burden of Proof

4.4.1 The Concept and Effect of Burden of Proof

4.4.1.1 The Concept of Burden of Proof

The burden of proof is the risk of being exposed to an unfavorable court decision because of inability to prove whether or not an occurrence has taken place,[389] and it is also a duty placed upon a party to prove or disprove a disputed

[387] See Article 17.3(f) and 17.4(a) of the Rotterdam Rules.
[388] See Jiang Yue-chuan, Zhu Zuo-xian, Legislative Features and Analysis of Several Issues Concerning Vital Interests of the Rotterdam Rules, Annual of China Maritime Law, Vol. 21, No. 1, Mar. 2010, p.29.
[389] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague,

fact, or it can define which party bears this burden. In civil cases, the plaintiff is normally charged with the burden of proof, but the defendant can be required to establish certain defenses.[390]

The common law concept of the burden of proof includes the "burden of production" and the "burden of persuasion". The burden of production creates an obligation for the party to produce evidence to prove the existence or non-existence of a fact. The burden of persuasion refers to the necessity or obligation to prove that the existence of a fact is more probable than its non-existence. Generally, the standard of proof in civil litigation is the preponderance of evidence. The party has met his burden of production if he has given sufficient evidence to send that issue to the jury. And he has met his burden of persuasion if he has produced enough evidence to lead the jury to believe that the existence of a fact is more probable than its non-existence.[391]

China is a civil law country. However, a careful review of the Civil Procedure Law of China will find that China shares the similar concept of burden of proof. Under this code, "a party shall have the responsibility to provide evidence in support of its own propositions".[392]

4.4.1.2 The Effect of Burden of Proof

In fact, the burden of proof is a technical legal concept. In brief, it serves to determine the answer to an important practical question, namely: if two parties argue, who needs to prove what?[393]

With respect to any legal dispute, the burden of proof is a matter of great

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Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.120.

[390] See http://legal-dictionary.thefreedictionary.com/burden+of+proof, taken on 11/11/2010.

[391] See http://www.uilawfirm.com/zyen/kanwu/Article_view.asp?id=70, taken on 11/11/2010.

[392] See paragraph 1 of Article 64 of the Civil Procedure Law of China.

[393] See the UNCTAD secretariat, Carrier Liability and Freedom of Contract under the UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea], 24/11/2004, p.10.

significance, which may affect the outcome of the dispute. This is especially so in cases where evidence is difficult to obtain. The party bearing the burden of proof in respect of a particular issue or argument needs to provide relevant evidence. If it cannot do so, it will lose the argument and will have to accept defeat on the issue in question. Thus, whoever bears the burden of proof bears the risk associated with a lack of evidence.[394]

In respect of loss resulting from the international carriage of goods by sea, evidence about the causes of a loss will often be difficult to obtain, particularly for the consignee or shipper of cargo, who may not have access to any of the relevant facts. Moreover, loss, damage or delay of cargo during transit are often due to a combination of factors and, in these cases, evidence about the extent to which different identified causes have contributed to a loss may be even more difficult to find. Against this background, it is clear that rules on the allocation of the burden of proof as between carriers and cargo interests are crucial to the overall allocation of risk as between the two parties.[395]

4.4.2 The Position under the Hague/Hague-Visby Rules and Hamburg Rules

Generally, the claimant is made obliged to establish the occurrence on which he has based his legal claim.[396] It should be noted that the allocation of the burden of proof is closely related to the order of proof. These two concepts are the same.

In fact, the order of proof is not set out in the Hague/Hague-Visby Rules. Certain hints are to be found in particular articles where the burden of proof is alluded to.[397] Under Articles 3-4 of the Hague/Hague-Visby Rules, we can

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[394] Ibid.
[395] Ibid, p.11.
[396] See Article 8 of the Swiss Civil Code 1911; Article 2697 of the Italian Civil Code 1942; Article 64 of the Civil Procedure Law of China.
[397] See William Tetley, Marine Cargo Claims, 3rd edition, Montreal: International Shipping Publications, 1988, p.133

conclude the traditional allocation or order of proof:

(a) The claimant must first prove contract of carriage, goods shipped in apparent good order & condition and goods missing or delivered damaged on arrival. This is the prima facie case of carrier's breach of Article 3(2) of the Hague/Hague-Visby Rules.

(b) Then burden of proof shifts to the carrier to rebut claimant's prima facie case by establishing that loss was caused by exceptions provided in Article 4 (2) of this convention.

(c) If an exception was established, burden of proof shifts to the claimant who may displace carrier's defense by: (i) Proving carrier failed to satisfy requirements of Article 3 (2) of the Hague/Hague-Visby Rules; or (ii) Proving ship was unseaworthy at start of voyage, and that caused the loss under Articles 3(1) & 4(1) of the Hague and Hague-Visby Rules.

Notwithstanding, the allocation under the Hague and Hague-Visby Rules seems misleading, and there is a need for careful interpretation because, as we know, under Article 4 the carrier's liability in Article 3 is subject to numerous exceptions and special provisions whose scopes are unclear. That has caused friction and consequently delays in litigation and arbitration, increase in amount of cases and litigation costs.[398]

The allocation of burden of proof under the Hamburg Rules is relatively clear because, under Article 5 and Annex 2 of the Hamburg Rules, the due diligence provision, the care of cargo provision and the exculpatory exceptions are all found in Article 5(1) of the Hamburg Rules, and "it is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed

[398] See Hakan Karan, The Carrier's Liability under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.122.

fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule."[399]

Essentially, despite significant differences in the text, under the Hague/Hague-Visby Rules, as well as under the Hamburg Rules, once a cargo claimant has established a loss, the burden of proof in relation to the causes of the loss is on the carrier.[400] In the absence of sufficient evidence about the cause of a loss, the carrier will be responsible for the loss. The carrier is therefore generally liable in cases of unexplained losses.[401]

4.4.3 The New Structure of Allocation of Burden of Proof under Rotterdam Rules

The Rotterdam Rules, adopted by the UN General Assembly on 11 December 2008, have constructed a new structure of the allocation of burden of proof, which is not only different from the allocation under the Hague/Hague-Visby Rules, but also different from the allocation under the Hamburg Rules. It seems that the Rotterdam Rules combine the reasonable elements and get rid of the shortcomings of the relevant provisions contained in the previous conventions.

By analyzing the provisions of Article 17 of the Rotterdam Rules, it seems obvious that the allocation of the burden of proof is made up of three presumptions of carrier's fault.

4.4.3.1 The First Presumption

The first presumption is the presumption at fault in respect of carrier's duty of care of goods.

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[399] See Annex 2 of the Hamburg Rules.
[400] See the last sentences of Article 4(1) and (2) (q) of the Hague/Hague-Visby Rules and Annex 2 of the Hamburg Rules.
[401] See the UNCTAD secretariat, Carrier Liability and Freedom of Contract under the UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea], 24/11/2004, p.11.

In light of Article 17.1, the initial burden of proof rests upon the claimant, who is obliged to provide proof that the loss, damage, or delay, or the event or circumstance that caused or contributed to the same took place during the period of carrier's responsibility as provided for in Article 12 of Chapter 4 of the Rotterdam Rules. Once the above initial burden of proof is discharged by the claimant, the burden of proof should shift from the claimant to the carrier. In other words, the carrier is presumed at fault. This is the first presumption.

Certainly, the carrier has an opportunity to put forward his counter-proof to rebut the presumption. According to 17.2 of the Rotterdam Rules, for the purpose of relieving of all or part of its liability for the loss, damage, or delay, the carrier would need to prove that the cause or one of the causes of the loss, damage, or delay was not attributable to its fault or the fault of any person for whom he was liable. If the carrier is not able to prove it, the aforesaid presumption at fault will be sustained and the carrier's liability will be established.

The aforesaid presumption at fault is similar to that provided in Article 5 of the Hamburg Rules, but there are two small differences between them. The first one is that the degree of proof is different. Article 5 of the Hamburg Rules require that if the carrier want to be relieved of its liability, he must prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[402] It seems to be a more stringent standard than that in the Rotterdam Rules. The second is that the scope of presumption at fault is

[402] Article 5(1) of the Hamburg Rules provides that:" The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

different. The scope of presumption at fault in the Hamburg Rules is wider than that in the Rotterdam Rules.[403]

4.4.3.2 The Second Presumption

The second presumption is the presumption of carrier's no-fault within the listed excepted perils.

In light of Article 17.3, if the carrier proves that one or more of the events or circumstances listed in Article 17.3 (hereinafter referred to as the "listed excepted perils") caused or contributed to the loss, damage, or delay, consequently he is presumed of no fault, and shall be exempted from all or part of his liability. This is the second presumption in the Rotterdam Rules.

In light of Article 17.4, if the claimant is able to rebut the presumption in Article 17.3, namely, the claimant proves that the fault of the carrier or of a person referred to in Article 18 caused or contributed to the event or circumstance on which the carrier relies, the abovementioned presumption of carrier's no-fault will not be sustained and the carrier shall still be liable for the loss, damage, or delay. However, actually, it is very difficult for the claimant to prove that the fault of the carrier or of any person for whom he was responsible caused or contributed to excepted perils on which he relies, such as fire on the ship. As a result, in comparison with the Hamburg Rules, this presumption aggravates the claimant's burden of proof.[404]

4.4.3.3 The Third Presumption

The third presumption is the presumption of carrier's fault as to seaworthiness obligation.

In light of Article 17.5(a) of the Rotterdam Rules, for the purpose of

[403] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol. 20, No. 3, Sep. 2009, p. 2.
[404] Ibid, p.3.

maintaining the carrier's liability for loss, damage, or delay, the claimant may prove that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship, (ii) improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of this ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods . If the claimant proved the same successfully, according to Article 17.5(b) the fault of the carrier would be presumed. This is the third presumption provided for in Article 17 of the Rotterdam Rules.

Like the first presumption, the carrier also has a further opportunity to put forward his counter-proof evidencing that none of the events or circumstances referred to in 17.5(a) of the Rotterdam Rules caused the loss, damage, or delay or that he had complied with its obligation to exercise due diligence pursuant to Article 14 of the same convention. If unfortunately the carrier was not able to discharge this burden of proof, it would mean that the presumption of carrier's fault in this regard would not be able to be rebutted, as a result, the carrier's liability due to this presumed fault would be sustained and the carrier would be maintained liable for the loss, damage, or delay for this circumstance.[405]

As to this presumption, it is reasonable that the carrier takes on more burdens of proof, because it is the carrier who clearly knows the seaworthiness of the ship.

4.4.4 Comparison on Burden of Proof between the CMC and the Rotterdam Rules

As discussed previously, the principle of carrier's liability under the CMC, like in the Rotterdam Rules, is also fault liability. Although, in light of the CMC, the

[405] See Si Yu-zhuo, Li Hai, The New Structure of the Basis of Liability for the Carrier, at http://www.rotterdamrules2009.com/cms/uploads/Final%20Paper%20of%20Prof%20Si%20and%20Li%20for%20the%20Rotterdam%20Rules%202009%20Colloquium.pdf, pp.5-6, taken on 16/11/2010.

allocation of burden of proof is not very clear, we can draw several conclusions by analysis of some clauses in the CMC. The detailed discussion is as follows.

4.4.4.1 As to Carrier's Duty of Care of Goods

Article 46 of the CMC provides that: "… During the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this Section." In view of this clause, it might be safe to say that there exists a presumed fault. In other words, the initial burden of proof shall rest upon the claimant, once the claimant proves that the loss of or damage to the goods occurred during the period of the carrier's responsibility, the carrier is presumed at fault and the burden of proof shifts from the claimant to the carrier. If the carrier is unable to rebut this presumption, he shall be liable for the loss. One can easily find that the above mentioned presumption is quite similar to the first presumption as provided for in Article 17 of the Rotterdam Rules.

4.4.4.2 As to Excepted Perils

Paragraph 2 of Article 51 of the CMC provided that: "The carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in sub-paragraph (2),[406] bear the burden of proof."

It seems that, within excepted perils, (a) if the loss of or damage to the goods occurred during the period of carrier's responsibility arose or resulted from the fire, the carrier is presumed of no fault and the claimant shall bear the burden of proof. If the claimant cannot prove that the fire was caused by the actual fault of the carrier, the no-fault presumption will be sustained and the carrier is entitled to exception from the liability. The aforesaid presumption is equivalent to the second presumption in the Rotterdam Rules; (b) if the loss of or damage to the goods

[406] For detailed information, see Article 51 of the Chinese Maritime Code.

occurred during the period of carrier's responsibility arose or resulted from the remaining 11 items provided for in Article 51 of the CMC, unlike the provision in the Rotterdam Rules, the carrier shall bear the burden of proof. That is say, the carrier is presumed at fault. Only the carrier proves that aforesaid causes occurred without the fault of the carrier or his servant or agent, can he not be liable for the loss. Actually, it is also worth mentioning that this provision is to some extent the same as the first presumption in the Rotterdam Rules.

4.4.4.3 As to Seaworthiness Obligation

It should be noted that the provision of the burden of proof in respect of seaworthiness obligation is not clear under the CMC. By virtue of the provision in Article 51 of the CMC and the above analysis of burden of proof, it is not difficult to find that the carrier shall take on the burden of proof with respect to seaworthiness obligation. If the carrier is unable to prove, he will bear the legal effect of unseaworthiness. In essence, this is equivalent to the third presumption in Article 17 of the Rotterdam Rules.[407]

In a word, it is obvious that although the CMC followed the Hague/Hague-Visby Rules, the provisions in relation to the allocation of burden of proof under the CMC are very close to those in the Rotterdam Rules. Notwithstanding, it is also noting that the provisions under the CMC have not been perfect and many aspects in respect of the burden of proof are very obscure. The Rotterdam Rules provide for the allocation of burden of proof respectively to the cargo claimant and the carrier in details, which is worth using for reference when we amend the CMC in the future.

[407] See Si Yu-zhuo, The New Structure of the Basis of Liability for the Carrier, Annual of China Maritime Law, Vol. 20, No. 3, Sep. 2009, p. 7.

Chapter 5 The Limitation of Carrier's Liability

5.1 Limitation of Liability in Maritime Law

5.1.1 Introduction

One of the distinctive features of shipping law is that shipowners may limit their liability. Limitation of liability is considered a traditional rule and a principle of the maritime law. It was generally acknowledged the limitation of liability is needed in shipping in order to encourage investment and to serve the needs of commerce. It is also said that it protects the carrier from risks associated with cargoes of high undisclosed value and encourages the shipowner to offer uniform and cheaper freight rates.

Some scholars have traced the idea of limitation to its development in Italy and in Spain sometime in the middle ages.[408] In France, Book II, Title VII, Article II of the Ordinance de la Marine of 1681, established the limitation of liability of the shipowners.[409] This provision has been followed by the French Commercial Code, the codes of Spain, Greece, Portugal and Italy, among others, and by several Latin American codes such as those of Argentina, Brazil, Mexico, Peru and Uruguay.[410] One scholar explains that in the United Kingdom, shipowner's limitation of liability has been introduced in 1733 by the Responsibility of Shipowners Act, pursuant to which shipowners were allowed to limit their liability for cases of theft by the master or crew. In 1786 the limitation was extended to include any act of the master or crew occurred without shipowners' privity or

[408] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.383.
[409] See Alberto C. Cappagli, Limitation of Liability in the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf, taken on 27/03/2011.
[410] Ibid.

knowledge.[411]

At present, the limits of liability and the terms on which limitation is offered are prescribed by several international conventions, including the Hague, Hague-Visby, Hamburg and Rotterdam Rules. Additionally, limitation is available under maritime oil pollution convention[412], and two general limitation conventions, the 1957 Limitation Convention[413], and the 1976 Convention[414].

5.1.2 Types of Limitation

Nowadays, there are two different limitations of liability in maritime law. One is the carrier's limitation; the other is the general limitation.

The carrier's limitation, which caps the compensation for each unit damaged during carriage regardless of its value, arises under the carriage of goods conventions, such as the Hague Rules, Hague-Visby Rules, Hamburg Rules, and Rotterdam Rules. It is also known as package or unit limitation which is restricted to individual and separate claims made under a contract of carriage. This type of limitation of liability is the emphasis discussed in this chapter.

The general limitation which sets a ceiling on the amount of damages in respect of all claims against the shipowner arising out of one incident, also called the global limitation, is given to the shipowner under the general maritime conventions. This limitation is calculated by reference to the tonnage[415] and applies to all claims arising out of the same occurrence by all claimants.[416] In other

[411] See Griggs Patrick, Williams Richard and Farr Jeremy, Limitation of Liability for Maritime Claims, fourth edition, LLP, London, Singapore, 2005, p.5.
[412] Such as the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC1969) and 1992(CLC1992).
[413] Namely, the Brussels International Convention Relating to the Limitation of the Liability of Sea-going Ships 1957.
[414] i.e. the 1976 London Convention on the Limitation of Liability for Marine Claims.
[415] According to the International Convention on Tonnage Measurement of Ships 1969.
[416] In fact, Regarding global limitation, there are basically three systems: (a) the limitation based on the value of the ship at the end of her voyage, (b) the limitation based on the tonnage of the ship, and (c) a mix of both these systems.

words, it is applicable to claims not only in connection with the carriage of goods but also the other forms of claim which may arise, for example hull and property damage and personal injury arising out of a collision between ships.

5.1.3 The Relationship between the Global Limitation and the Package Limitation

5.1.3.1 The Connections between the Two Limitations

Although the global limitation and package limitation belong to different systems, they have similarities in protecting the benefits of the carriers or the ship operators.

(1) The Function of Protecting the Person Liable

Either the global limitation or the package limitation is a kind of right of the person liable. It could protect the benefit of the person liable effectively, limit his responsibility in a certain extent, and thus bear limited liability.

(2) The Function of Cooperation in Limiting Liability

The package liability undertook by the carrier is the product of the unit liability standard and the amount of the damaged cargo or the number of people, which is the first limitation of liability the carrier enjoys. If the carrier could satisfy the rules of the global limitation, belonging to the scope of subjects of limitation of liability for maritime claims, then he may enjoy the second limitation of liability. It means that the carrier could refuse to compensate for the part which exceeds the amount of limitation of liability for maritime claims.[417]

5.1.3.2 The Differences between the Two Limitations

As mentioned above, there are obvious differences between the global limitation and the package limitation in the following aspects. Specific differences

[417] See Wang Peng, Hu Mei-yu, The Comparison Between the Global Limitation and the Package Limitation, New Western Part, No.4,2007, p.72.

are as follows.

(1) The Scope of Application

The global limitation is based on the occurrence of marine accident and limits the liability in tort whereas the package limitation is based on the breach of contract. The package limitation applies to the carrier's liability arising from the performance of the contract of carriage of goods by sea, but the applicable scope of global limitation is much broader. According to Article 207 of the CMC, the person liable may limit his liability with respect to the following claims: (a) Claims in respect of loss of life or personal injury or loss of or damage to property, as well as consequential damages resulting therefrom; (b) Claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage; (c) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations; (d) Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability and further loss caused by such measures. It is thus clear that the two scopes are different and the scope of the global limitation actually includes that of the package limitation in most cases.

(2) Legal Nature

Essentially, the global limitation is a legal right. Both domestic legislations and international conventions explicitly provide restrictive debts and nonrestrictive debts. The person liable shall limit his liability for compensation in light of legal provisions. The package limitation is a kind of contractual right and may be changed by the agreement between the parties. Of course, this agreement shall not violate the mandatory provisions.

(3) Legal Provisions

The international conventions, which stipulate the global limitation, mainly include "International Convention Relating to the Limitation of the Liability of Sea-going Ships 1957(the 1957 Convention)", "Convention on the Limitation of Liability for Marine Claims 1976(LLMC 1976)", "International Convention on Civil Liability for Oil Pollution Damage 1969(CLC 1969)", and so on. Unlike the global limitation, the international conventions which apply to the package limitation usually consist of the Hague, Hague-Visby, Hamburg and Rotterdam Rules.

(4) The Subject of Limitation of Liability

The 1957 Convention provides that the subjects who are entitled to limit their liability are the shipowner, charterer, manager and operator of the ship, the master, members of the crew etc.[418] On the basis of the 1957 Convention, LLMC 1976 adds the salvor and his servant or agent, and the insurer of liability.[419] With respect to the package limitation of liability, the Hague Rules provide that the subject of package limitation of liability is the shipowner or charterer. The Hague-Visby and Hamburg Rules provide that the subjects include the shipowner, charterer and their servant or agent.[420] It is apparent that the range of the former is wider.

(5) The Aggregate Amounts of Liability

With regard to the aggregate amounts of global limitation, the 1957 Convention provides that the amounts to which the owner of a ship may limit his liability shall be an aggregate amount of 1,000 francs for each ton of the ship's tonnage.[421] LLMC 1976 provides that, in respect of any other claims other than

[418] See Article 6 of the 1957 Convention.
[419] See Article 1 of the LLMC 1976.
[420] See He Li-xin, Xie Mei-shan, Limitation of Liability for Maritime Claims, Xiamen: Xiamen University Press, 2008, p.62.
[421] See Article 3 of the 1957 Convention.

loss of life or personal injury, the limits of liability for claims shall be calculated as follows: (i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons, (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i): for each ton from 501 to 30,000 tons, 167 Units of Account; for each ton from 30,001 to 70,000 tons, 125 Units of Account; and for each ton in excess of 70,000 tons, 83 Units of Account.[422] As we know, the global limitation is a legal right and the parties cannot agree on the aggregate amounts of limitation at random.

As to the package limitation of liability, the Hague Rules stipulate that the carrier shall not in any event be liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit or the equivalent of that sum in other currency.[423] The Hague-Visby Rules provide that the carrier shall not in any event be liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.[424] The package limitation is a contractual right and a higher amount than the amount of limitation of liability set out in relevant conventions may be agreed upon between the carrier and the shipper. This agreement is valid and shall be protected by law.

(6) The Conditions of Loss of Limitation of Liability

With respect to both the global limitation and the package limitation, the person liable could lose the benefit of the limitation of liability because of some subjective factors. The conditions of loss of limitation of liability, however, are different.

[422] See Article 6.1 of the LLMC 1976.
[423] See paragraph 5 of Article 4 of the Hague Rules.
[424] See paragraph 5 of Article 4 of the Hague-Visby Rules.

As for the global limitation, the 1957 Convention provides that the owner of a sea-going ship may not limit his liability in respect of claims if the occurrence giving rise to the claim resulted from the actual fault or privity of the owner.[425] The LLMC 1976 provides that a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.[426]

As for the package limitation, in respect of the condition of loss of limitation of liability, no explicit provisions exist in the Hague Rules. The Hague-Visby Rules provide that a servant or agent of the carrier shall not be entitled to the benefit of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier, or his servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.[427] The similar provisions could be found in the Hamburg and Rotterdam Rules.[428]

Based on the above analysis, it is concluded that the provision in respect of loss of limitation of liability in the LLMC 1976 is the same as that in the Hague-Visby Rules. That is to say, only without the intention or gross negligence can the person liable be entitled to the benefit of both the package and the global limitation, otherwise the two limitations of liability will be forfeited. Nevertheless, in case the shipowner loses the global limitation due to the intention or gross negligence according to the LLMC 1976, he shall still be entitled to the benefit of package limitation in light of the provision in the Hague Rules. Moreover, due to the general negligence, the shipowner loses the global limitation in accordance with

[425] See Article 1 of the 1957 Convention.
[426] See Article 4 of the LLMC 1976.
[427] See Article 4 bis (4) of the Hague-Visby Rules. In China, the sentence "recklessly and with knowledge that damage would probably result" is also explained as "gross negligence".
[428] For detailed information, see Article 8 of the Hamburg Rules and Article 61 of the Rotterdam Rules.

the 1957 Convention whereas he shall be entitled to the benefit of package limitation according to the Hague-Visby or Hamburg Rules.

(7) The Procedure of Limitation of Liability

The global limitation is a kind of counterplead right and its exercise is based on the application. Specifically, the person liable first applied to the court, and after approved by the court he shall constitute, then he may be entitled to the right of limitation. The package limitation is a kind of compensation based on the material law. It needs neither the basis of application nor a limitation fund in comparison with the global limitation.

In short, the two kinds of limitations of liability differ greatly in many respects. They belong to different maritime limitation regimes. Now, after the brief introduction I will now focus my Article on the carriers' limitation of liability, i.e. the package limitation of liability.

5.2 Provisions as to Package Limitation in International Conventions

5.2.1 Background

Except for the exception clauses foreseen in the conventions, the carrier is liable for the damage to the goods and will, in case of loss or damage to the goods, be obliged to fully compensate the receiver of the goods. Since most of the time huge amounts of money are involved, the carrier has always tried to limit his liability as much as possible,[429] namely the package limitation.

Generally, the package limitation serves two important functions. First, it protects the carrier from the risks associated with cargoes of high undisclosed

[429] See http://www.maritimeknowhow.com/English/Know-How/Bill_of_Lading/limitation_of_liability.htm, taken on 29/3/2011.

value.[430] Secondly, by providing a standard level of liability, it enables the carrier to calculate his risks in advance so that he can offer uniform and cheaper freight rates, which in turn is of benefit to most shippers. The carrier can charge more for high value cargoes than for others. This is in accordance with the efficiency theory.

In fact, till the beginning of the last century, bills of lading included clauses of limitation of liability which were admitted by the courts of a number of countries. Before the Hague Rules entered into force, the bills of lading contained provisions limiting the carriers' liability to very low amounts. As a reaction against such clauses, however, some States enacted legislation restricting carriers' right to limit their liability.

The first legislation was the Harter Act of the United States (1899), which inspired similar legislation in Australia (1904), Canada (1910) and New Zealand (1908), and the Hague Rules of 1921 adopted by the International Law Association (ILA). The ILA rules are the immediate precedent of the Hague Rules.[431]

5.2.2 Under the Hague Rules

5.2.2.1 Introduction

As we have seen previously, the Hague Rules regulate the rights, duties, and immunities of the carrier under a contract of carriage of goods by sea covered by a bill of lading. The carrier's right under the Rules to limit his liability is contained in Article 4(5) of the Rules. This right, as much as any of the other provisions, underlines the desire of those involved in drafting the Rules of ameliorating the

[430] In a Chinese case Switzerland Bern Insurance Co v Senator Lines GMBH and Tianjin Container Pier Co Ltd, Tianjin Maritime Court, 25th June 2002 (settlement mediated by the court), the cargo owner's banknote and securities printer worth of 17,190,000 RMB (about £1,227,857) was totally damaged. A carrier might know he was carrying a precision machine, but its particularly high value was apparently unknown to him. Without package limitation, the carrier would have incurred an unconscionable loss compared to his profit. In practice, this "large undisclosed liability" rationale reflects very common commercial practice.

[431] See Alberto C. Cappagli, Limitation of Liability in the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf, taken on 27/03/2011.

commercial unfairness of many existing contracts of carriage.[432] The provision in the Hague Rules is quite different in several respects to what now appears in the Hague-Visby Rules; nevertheless, there are still a number of points of similarity.

5.2.2.2 The Specific Provisions

Hereunder, according to the Hague Rules we give the limitation of liability as follows which contains four paragraphs setting out the essential terms on limitation:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."[433]

In addition, Article 9 of the Hague Rules provides that the monetary units mentioned in this Convention are to be taken to be gold value.

[432] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.385.
[433] See paragraph 5 of Article 4 of the Hague Rules. See also Cheong Yeong-seok, Principle of Bill of Lading, 3rd ed., Seoul: Textbooks, 2008, p.82.

5.2.2.3 Analysis

As stated above, the amount of £100 represents 100 pound sterling. Every country that ratified the convention converted this amount into its own currency in its own legislation. In fact, the limitation sum of £100 was arrived at after considerable discussion in the deliberations leading to the Hague Rules.[434] At that time this represented a fair figure for the average value of a package shipped.[435]

For the calculation of the maximum amount of liability, a package represents each part of the cargo which is packed separately, or which at least is bound together for the carriage. However, the concept of package is not defined in the Rules. A dictionary definition sometimes resorted to by the courts is that a package is "a bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up."[436] In practice, the shape, weight, size and nature of the wrapper or goods shipped therein are not important factors determining the package.[437]

A unit is what is described as a "unit" in the bill of lading. It can thus be a unit of volume or a unit of weight as used for the calculation of the freight. There is, however, a considerable lack of clarity as to the meaning of this term and it has been the subject of much debate. As to the meaning of unit, two possibilities have been presented. The first is that the reference to unit is a reference to "freight unit", being the unit of measurement applied to calculate the freight. However, this

[434] It has not been adopted in the United States Carriage of Goods by Sea Act 1936, which provides for a limit of' $500 per package lawful money of the United States.

[435] Lord Diplock has explained that "the economic purpose of the Hague Rules limitation was to enable the shipowner, on the basis of knowing that his liability was limited to that figure, to offer standard freight rates for all ordinary cargo without the delay and cost to himself and to the cargo-owner which would be incurred by inquiring into the value of the particular consignment and by adjusting the freight rate accordingly". See Lord Diplock, Conventions and Morals — Limitation Clauses in International Maritime Conventions, (1969-1970) 1Journal of Maritime Law and Commerce, p.529.

[436] See Oxford English Dictionary.

[437] See Hakan Karan, The Carrier's Liability Under International Maritime Conventions-The Hague, Hague-Visby, and Hamburg Rules, New York: The Edwin Mellen Press, 2004, p.343.

approach has been generally rejected. The second possibility is a reference to the "shipping unit", being the physical unit which the shipper hands over to the carrier. There has been support for this in a number of cases. Thus, it would seem that a motor vehicle shipped without any form of packaging is a unit, as is an unpacked tractor, a log of wood or a bar of metal, but not bulk cargoes, such as grain or liquids in bulk.[438]

A smaller amount than 100 pound sterling may not be agreed as a limitation of liability. By mutual agreement a higher amount than 100 pound sterling may however be fixed. If the nature and value of the goods have been inserted in the bill of lading as declared by the shipper before shipment, only this value counts as limitation of responsibility and it does not the amount of 100 pound sterling. In case of a deliberate misstatement, the shipper would lose his rights.

5.2.2.4 Existing Problems in the Hague Rules

Through the study of Articles 4.5 and 9 of the Hague Rules, it is concluded that some general problems regarding basic criteria still exist. For example, (1) Is a container a package? Is a huge and unpackaged machine a unit? Which is the unit in case of bulk cargoes? (2) What packages or units should be considered in order to establish the limit? The packages or units mentioned in the bill of lading or the packages or units lost or damaged? (3) Can the carrier lose the right of limitation? (4) Are damages for delay subject to limitation? (5) What is the gold value to be considered in order to convert the 100 pounds sterling into currency?[439]

All problems above have not been considered in the Hague Rules but have been solved by further Protocols, Rules or Conventions.

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[438] See Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007, p.392.

[439] See Alberto C. Cappagli, Limitation of Liability in the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf, p.3, taken on 27/03/2011.

5.2.3 Under the Hague-Visby Rules

5.2.3.1 Basic Provisions

Unlike those in the Hague Rules, according to Article 4(5) of the Hague-Visby Rules, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher. This Article also provided that a franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'.

As for package or unit, the Visby Rules gave a new wording to Article 4.5 of the Hague Rules. Pursuant to the new wording "where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."[440] Although China is not a party to the Visby Rules, some of their provisions have inspired the CMC.

As for unpackaged goods, if unpacked goods were not considered a package or unit, carriers would not be entitled to limitation of liability in their respect under the Hague Rules. Especially to bulk cargo, it is unpackaged cargo and the concept of unit seems clearly inapplicable. It may therefore be the case that there is no limitation of liability in respect of bulk cargo under the Hague Rules. In the US COGSA36, the problem of bulk cargo has been addressed by Section 4(5) providing that, in case of goods not shipped in packages the carrier can limit its liability to US$500 "per customary freight unit". Nevertheless, the wording of the US

[440] See Cheong Yeong-seok, Principle of Bill of Lading, 3rd ed., Seoul: Textbooks, 2008, p.86.

COGSA36 differs from the wording of the Hague Rules, so in other countries the conclusion was that when the Hague Rules apply, bulk cargo does not allow the carrier to limit its liability.

The Hague-Visby Rules solved this problem and provide for an alternative weight limitation intended to provide for the case of bulk cargoes which could not be accurately described as a package or a unit. Under the new wording of Article 4(5)(a) of the Hague-Visby Rules, not only the number of packages or units is to be considered but also the gross weight of the goods lost or damaged when the limit that results from it is higher than the limit that results from the number of packages or units.

5.2.3.2 The Protocol of 1979

The Protocol of 1979 amended the Hague-Visby Rules by introducing a different unit of account: the Special Drawing Right (SDR), as defined by the International Monetary Fund (IMF), instead of the Franc.

Specifically, the main adaptations are:

(1) The limit of liability now amounts to 666.67 units of account per package or unit or 2 units of account per kilo; it's always the highest limitation that counts. The unit of account is the SDR as defined by the IMF.[441]

(2) The conversion into the national currency (i.e. the local currency) is on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case. Usually this will be on the date that the goods were delivered or had to be delivered.

(3) Parties which are not a member of the International Monetary Fund, apply the Visby Amendment 1968, i.e. the Poincaré franc of 65.5 milligrams of gold of

[441] Ibid, p.87.

millesimal fineness 900'. [442]

Although China is not a party to the 1979 Protocol of the Hague-Visby Rules, the provisions in respect of the limit amount of liability under the Chinese Maritime Code are the same as those in this Protocol.

5.2.4 Under the Hamburg Rules

The Hamburg Rules follows the criteria of Article 4(5) of the Hague-Visby Rules with higher limits. Article 6(1)(a) provides that the liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of Article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. Therefore, the limits are established by reference to the number of packages or units lost or damaged, or by reference to their weight.

The Hamburg Rules retain the provision where a container, pallet or similar article of transport is used to consolidate goods, and further provide that in cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.[443]

Under the Hamburg Rules carriers are entitled to limit their liability in cases of delay to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.[444] In no case, however, shall the aggregate liability of the carrier for loss or damage, and for delay, exceed the limit applicable to a total loss of

[442] For detailed information, please see Article 4(5) of the Hague-Visby Rules 1979.
[443] See Article 6.2 of the Hamburg Rules.
[444] See Article 6.1(b) of the Hamburg Rules.

the cargo.[445] Notwithstanding the provision for delay in delivery, however, the carrier's liability has not increased comparing with both the Hague and Hague-Visby Rules. For one thing, the Courts have also awarded damages for delay under these conventions, despite the absence of any express provision to this effect, given the carrier's overriding obligation to carry the cargo in a timely manner.[446] For another, the maximum amount of damages recoverable under the Hamburg Rules (as limited to just 2.5 times of the freight payable for the cargo in question) may turn out to be far below the general limit set by the Hague-Visby Rules.[447]

Article 26 of the Hamburg Rules refers to the unit of account applicable under the Rules as the Special Drawing Right as defined by the International Monetary Fund and converted into the national currency at the date of judgment or the date agreed upon by the parties. However, this new convention has abandoned the exception of "declaration of value", although, as in both the Hague/Hague-Visby Rules, the carrier and the shipper are at liberty to agree to limits of liability higher than the maximum prescribed.[448]

5.2.5 Under the Rotterdam Rules

5.2.5.1 Introduction

Articles 59, 60 and 61 of the Rotterdam Rules provide the carrier's limitation of liability. The rules of the limitation follow the general trend in previous international conventions. The main provisions are as follows.

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[445] See Article 6.1(c) of the Hamburg Rules.

[446] Economic loss caused by delay should be covered insofar as the provision which expressly applies "in any event" is meant to compensate the injured cargo-owner whilst limiting the carrier's liability It would appear irrational to construe such a provision as to either allow one party to get everything or preclude another from receiving anything for the consequences caused by the delay. Given that loss of profit is included in the assessment of damages under the Hague Rules, it is difficult to see why economic losses are excluded from the provision, particularly as it also applies to cases where the cargo is a total loss.

[447] See Sze Ping-fat, Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules, The Hague: Kluwer Law International, 2002, p.136.

[448] See Article 6(4) of the Hamburg Rules; Article 4(5) of the Hague Rules; Article 4(5)(g) of the Hague-Visby Rules. The exact relationship between this agreement and the shipper's declaration of value is unclear.

Pursuant to Article 59.1 of this Convention, carriers are entitled to limit their liability in any event of breach of their obligations. This Convention adopts a dual standard in order to fix the amount of the limits: the traditional per package limitation and the per kilogram limitation, whichever is higher. This solution solves the problem of unpackaged cargo of significant volume and weight. The packages or units to be considered for the purpose of establishing the amount of the limit are the packages or units subject to the claim or dispute, not the total of the cargo covered by the bill of lading.

Pursuant to Article 59.2 of this Convention, when goods are carried in or on a container, pallet or similar article used to consolidate goods, or in a vehicle, the packages or shipping units enumerated in the bill of lading as packed in or on the article of transport or vehicle are deemed packages or shipping units. If the goods in or on the article of transport or vehicle are not enumerated, each article or vehicle are deemed a shipping unit.

Pursuant to Article 59.3 of this Convention, the unit of account is Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). The amounts are to be converted into the national currency of a State according to the value of such currency at the date of judgment or award or the date agreed upon by the parties. If a Contracting State of this Convention is a member of the IMF, the value of a national currency, in terms of the SDR, shall be calculated in accordance with the method of valuation applied by the IMF in effect at the date in question for its operation and transactions. If not, the value of a national currency, in terms of SDR, shall be calculated in a manner to be determined by that State.

Article 60 regulates the limitation of liability for loss caused by delay.[449] If

[449] According to Article 22 of this new Convention, "delay in delivery only occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed." This provision is different from the one in the Hamburg Rules.

the loss of or damage to the goods is caused by delay in delivery, compensation shall be calculated in accordance with Article 23 of this Convention, and the limits for loss of or damage thereto shall be calculated by Article 59. However, if only economic loss occurred as a result of delay in delivery, the limitation of liability of carrier is limited to an amount equivalent to 2.5 times the freight payable on the goods delayed. In addition it is regulated that provided the loss of or damage to the goods arising from delay and the economic loss occurred together, the limitation of liability of carrier shall not exceed the amount established in accordance with Article 59.[450]

According to Article 61 of the Rotterdam Rules, the right of limitation of the carrier's liability for loss of or damage to the goods as well as delay in delivery may be lost. The issue will be addressed in detail in the Section 5 of this Chapter.

At the same time, application of the Convention does not affect the application of international conventions or national laws regulating the global limitation of liability of vessel owners.[451] Of course, in the author's opinion, the words "vessel owners" include other beneficiaries of the global limitation systems.

5.2.5.2 Different Provisions from Those in Other Conventions

The Rotterdam Rules follow the Hamburg Rules with certain differences. For instance, they equate the term "vehicle" with "container, pallet or similar article of transport used to consolidate goods".[452]

Another significant different provision is that in the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, the limitation may be invoked in case of "goods lost and damaged". Under the Rotterdam Rules the carrier may invoke

[450] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.261.
[451] See Article 83 of the Rotterdam Rules.
[452] See Article 59.2 of the Rotterdam Rules.

the limit in any event of "breaches of its obligations under this Convention".[453] The following obligations have been mentioned by scholars among those that may be breached by the carrier without losing the benefit of limitation of liability: the obligation of Article 35 to issue a transport document with the particulars of Article 36; the obligation of Article 40 to qualify the information related to goods if the carrier has actual knowledge or has reasonable grounds to believe that any material statement in the transport document is false or misleading; the obligation of Articles 45 to 47 related to the delivery of the goods; and the obligation to execute the instructions of the controlling party which results from Article 52.[454]

In addition, the Rotterdam Rules increase the limitation level, compared to the level provided for under the Hague, Hague-Visby and the Hamburg Rules. The figures are raised to 875 SDR per package or 3 SDR per gross kilogramme in this new Convention. This means that the package limitation and the weight limitation in the Convention have been raised by 31% and 50% compared with those in the Hague-Visby Rules and by 5% and 20%, respectively, compared to the Hamburg Rules.[455]

Moreover, Article 60 of the Rotterdam Rules first adopts the phrase "economic loss", which is sometimes referred to as "consequential loss". The Hague Rules and Hague-Visby Rules are silent on this issue. The Hamburg Rules does not provide clearly the name of loss caused by delay beyond the physical loss of or damage to the goods caused by delay, it is generally considered as economic loss. The phrase

[453] See Article 59.1 of the Rotterdam Rules.

[454] See Alberto C. Cappagli, Limitation of Liability in the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf, taken on 27/03/2011; See also Mbiah Kofi, The Convention on Contracts for the International Carriage of Goods wholly or partially by Sea: The liability and the limitation of liability regime, CMI Yearbook 2007-2008, Athens I, Documents for the Conference, p.297.

[455] Several countries, such as China, Japan, Korea, Denmark, Italy, Greece, etc., clearly objected this higher amount. See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.249, footnote 18.

obviously meant pure economic loss, and the decreased market value of goods was considered a type of loss covered by Article 22 of the Rotterdam Rules.

5.2.5.3 Two Arguments

Actually, in respect of the limitation of carrier's liability under the Rotterdam Rules, many arguments exist among maritime scholars. Here, only two arguments will be introduced.

One is the limitation level of the carrier's right to limit its liability. Some scholars hold that because the period of liability of carrier under the Rotterdam Rules was extended to cover door-to-door transports, that is, stages before and after the carriage of goods by sea, the limitation level should be raised considerably compared to the maritime limits established in the Hague Rules and Hague-Visby Rules. Moreover, nearly 30 years after their adoption, the limitation level in the Hamburg Rules no longer reflected the realities of commerce and international transport, so this Convention should envisage a substantial increase over and above the amounts set out in the Hamburg Rules. On the contrary, other scholars oppose this opinion and hold that this Convention should aim at setting the limits for the carrier's liability in the vicinity of the limits set forth in the Hague-Visby Rules, possibly with a moderate increase. Although, the Rotterdam Rules finally adopt the level of limitation up to 875 SDR per package or other shipping unit or 3 SDR per kilogramme of the gross weight of the goods, whichever is higher, some scholars still expressed concern whether the figures would be acceptable widely in future adoption.[456]

The other is the limitation of liability of shipper. On October 22, 2010, a group of distinguished maritime lawyers recommended governments and parliaments not to adopt the Rotterdam Rules. One of the main concerns is the fact that the benefit of

[456] Ibid., pp.249-254.

limitation is only available to carriers and not to the shippers.[457] It is noted that pursuant to the Hague-Visby Rules[458] and Hamburg Rules,[459] the shipper may be liable for damage caused by delay or for loss as a result of providing inaccurate information[460] or from failure to mark, label, or inform regarding dangerous goods.[461] It was further noted that the liability of the shipper under these provisions was unlimited. So some scholars propose that the shipper shall be entitled to the benefit of limitation as well. However, the proposal on a limitation of the shipper's liability did not gain sufficient support, with some countries objecting strongly. Many scholars worried about the uncertainty and extra expense that might occur. In the end, this proposal was not accepted in the Rotterdam Rules.

5.3 Provisions With Respect to Package Limitation in Other Countries

5.3.1 Under the US COGSA

5.3.1.1 Introduction

In 1936 the United States Congress passed the US COGSA36. The purpose of US COGSA36 was to establish a standardized set of definitions and rules to govern the terms and conditions used in ocean bills of lading.[462] The United States Congress, concerned that the Hague Rules did not offer shippers enough protection against damage to cargo by shipowners, amended the Hague Rules in a number of minor but important ways.

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[457] See Alberto C. Cappagli, Limitation of Liability in the Rotterdam Rules, at http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf, taken on 27/03/2011

[458] See Article 4(3) of the Hague-Visby Rules.

[459] See Article 12 of Hamburg Rules.

[460] See Article 3(5) of Hague-Visby Rules and Article 17(1) of the Hamburg Rules.

[461] See Article 13(2)(a) of the Hamburg Rules.

[462] COGSA, modeled after the Hague Rules, attempted to standardize bill of lading terms and the limitation of liability a carrier could assert for negligent damage to cargo. See D.C. Toedt III, Comment, Defining "Package" in the Carriage of Goods by Sea Act, Texas Law Review, Vol. 60, 1982, p. 964.

Specifically, pursuant to Section 4 (5) of the US COGSA36, "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier." This limit shall apply "in any event", however the majority jurisprudence has held that it can be set aside based on the unreasonable deviation doctrine.

It is obvious that US COGSA36 increased the amount that shipowners would have to pay cargo owners for damage in transit from £100 per package to US$500 per package or, for goods not shipped in packages, per customary freight unit. This "package limitation" has become one of the most contentious and litigious areas in the field of cargo damage, particularly as it relates to the transportation of goods by ocean shipping containers.[463]

The US COGSA36 was enacted to give primacy in domestic law to the United States' adherence to the Hague Rules.[464] It would appear that sponsors of the US COGSA36 were again trying to affect some kind of compromise between the interests of the carrier and shipper. This is evidenced by the setting of the $500 package limitation. As a minimum liability which cannot be contracted away, it ensures that shippers will be at least partially compensated for the loss of their cargo. The same $500 amount also acts as a ceiling which limits the carrier's potential

[463] See http://en.wikipedia.org/wiki/Carriage_of_Goods_by_Sea_Act, taken on 01/04/2011.
[464] Understanding to the ratification of the Hague Rules provides that where COGSA and the Hague Rules conflict, COGSA will prevail.

liability.[465]

As mentioned previously, the US COGSA36 governs the export and import of goods in foreign trade, and the Harter Act remains in effect with respect to domestic shipping. The most important difference between the two is the absence of a provision in the Harter Act regarding a package limitation on liability. In addition, the US COGSA36 allows for greater freedom of contract to the extent that carrier liability may be increased, but not decreased, by agreement of the parties.[466]

5.3.1.2 What a COGSA "Package" Is

The definition of a package is a key element in limiting liability. Under the US COGSA36, the carrier's liability is limited to $500 per package or per customary freight unit, however, no definition of the term "package" was provided in the Act. Accordingly, shippers and carriers heavily litigated the issue of what a COGSA package is for purposes of limiting a carrier's liability. This debate reached a new intensity with the advent of containerization in the 1960's.[467] With carriers providing large reusable containers which the shippers could load themselves at inland points, the courts had to determine whether the container or some unit within the container as loaded was the "package" for determining liability.

After much litigation, the courts constructed a complex set of rules that help shippers and carriers to determine what a COGSA package for purposes of limiting liability is. For example, when machinery or equipment is shipped in a container: (a) If there is no indication on the bill of lading whether the machinery or equipment

[465] See Lisa Filloramo, Admiralty–The Package Doctrine of COGSA art.4(5)–Second Circuit Abandons the "Functional Economics" Test, Fordham International Law Journal, Volume 4, Issue 2, 1980, p.413.
[466] Ibid.
[467] Containerization became popular in the 1960's as an economic means of shipping cargo. It allows shippers to load their goods directly at their plants into reusable metal containers. The most common size of these containers is 40 feet by 8 feet by 8 feet. The goods are then transported in the container to the ship, where they can be stowed more efficiently for passage. See G. Gilmore & C. Black, The Law of Admiralty, 2nd ed., 1975, p.14.

inside is packaged, the number of pieces stated as the contents on the bill of lading will determine the carrier's liability; (b) If the bill of lading lists the container but does not identify the contents, the container will be deemed the package; and, (c) If the cargo in the container is indicated to be goods not shipped in packages, the customary freight unit will be applied to limit the carrier's liability.[468]

In short, in deciding a COGSA package case, the factor most relied upon by the courts is the intent of the parties as exhibited by the ocean bill of lading. The description of the cargo plays a significant role in determining intent.[469] In describing the goods, a key element is how the goods are physically packaged. To determine intent, the courts have also examined the construction of the freight rate and any clauses that appeared in the bill of lading.

It has been more than seventies years since US COGSA36 was passed, and the conflict over what is a COGSA package may not be ended. Although the present environment is relatively static, there is no telling what the future holds.

5.3.1.3 Proposed Modifications to US COGSA36

The Senate COGSA99 adopts the Hague-Visby limits of liability based on the number of packages and weight, namely the higher of 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged.[470] It also incorporates another much needed provision from the Visby Rules, namely the rule for consolidated goods, which states that if a container, pallet, or similar article of transport is used to consolidate goods, the number of packages enumerated in the contract of carriage shall be deemed to be the number of packages for the purpose of

[468] See Nancy A. Sharp, What Is a COGSA "Package"? Pace International Law Review, Vol.5, Issue1, 1/1/1993, p.132.
[469] See Norwich Union Fire Ins. Soc., Ltd. v. Lykes Bros. S.S. Co., Inc., 741 Federal Supplement 1051 (the container is the package where the contents were not listed on the bill of lading); see also Insurance Co. of North America v. M/V Frio Brazil, 729 Federal Supplement 826 (where description is ambiguous, the court will resolve the issue in favor of the shipper).
[470] See Section 9(h)(1) of US COGSA 99.

calculating the limit of liability, except as provided in the preceding sentence, such an article of transport shall be considered to be the package for such purposes.[471] This rule was introduced by the Visby amendments as an answer to the containerized transport revolution, and ensures that the individual packages in the container are used to calculate the limit of liability, rather than the container as a whole.

5.3.2 Under the UK COGSA

5.3.2.1 Introduction

According to Section 1(1) and (2) of the UK COGSA1971, the Hague-Visby Rules and the Protocol of 1979 have the force of law in England.[472] Accordingly, in respect of the package limitation, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.[473]

5.3.2.2 Unit of Account

The 1979 Protocol adopts the Special Drawing Rights (SDR) as defined by the International Monetary Fund (IMF). This Protocol was duly ratified the United Kingdom and implemented by legislation in 1981[474] and the amended Article 4(5)(d) now provides that: "The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary

[471] See Section 9(h)(2) of US COGSA 99.
[472] Section 1 of the UK Carriage of Goods by Sea Act 1971 provide that: (1) In this Act, "the Rules" means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924, as amended by the Protocol signed at Brussels on 23rd February 1968, and by the Protocol signed at Brusels on 21st December 1979. (2)The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.
[473] See Article 4(5)(a) of the Hague-Visby Rules as amended by the 1979 Protocol.
[474] By the Merchant Shipping Act 1981, Section 2(4) (itself since repealed).

Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case."[475]

The value of SDR fluctuates, as with any other currency, on a daily basis. It is to be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the court in which the case is being heard. As far as the UK is concerned, UK COGSA1971 empowers the Secretary of State periodically to specify the conversion amount in sterling by statutory instrument. There is a clear practice in the UK that ensures that the conversion is done at the date of judgment. It can be converted according to the conversion rate on that date.[476]

5.3.2.3 The Limitation Amount

As mentioned previously, in English law, the relevant package limitation is 667.67 SDR per package or unit and 2 SDR per kilogramme of gross weight, whichever is higher. The shipper can make other maximum amounts higher than the above by making an agreement with the carrier, master or agent of the carrier.[477] If the shipper wants to obtain full cover for a particular cargo, he must declare the nature and value of such goods to the carrier before shipment and have this amount embodied on the bill of lading.[478] Any contract clause that is intended to replace the package limitation with a less figure will be rendered null and void in England.[479] In China, the similar rules can be found in the CMC.

[475] For the UK provisions as to conversion, see Section 1A of the Carriage of Goods by Sea Act 1971 (as added by the Merchant Shipping Act 1995, Section 314 and Sch 13, paragraph 45).
[476] See Fan Wei, The Measurement of Damages in Carriage of Goods by Sea, at https://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, taken on 6/4/2011.
[477] See Article 4(5)(g) of the Hague-Visby Rules.
[478] See Article 4(5)(a) of the Hague-Visby Rules.
[479] See Article 3(8) of the Hague-Visby Rules.

Unlike the CMC, in relation to the sanction for knowingly misstating the "nature and value" of the cargo, under English law, the misstating shipper ships the goods entirely at his own risk: the carrier will be free of any liability for loss or damage whatsoever.[480] In the author's opinion, the punishment to the shipper is disproportionate to his wrong and thus is a serious penalty indeed. The breach of contractual obligation and the misrepresentation of the shipper are different matters. Although the shipper has fault in providing the misstated information, the shipowner should not be exempted from responsibilities under the contract of carriage. In contrast, the CMC simply states that the shipper shall compensate the carrier against any loss resulting from inaccuracies in the information.[481] The shipowner still shall indemnify the shipper if the misstated cargo is damaged because of his negligence.

5.3.3 Under the Japan International Carriage of Goods by Sea Act

Actually, the package or weight limitation in Japanese Maritime Law is identical to what is provided for in Article 4(5) (a) of the Hague-Visby Rules as amended by the 1979 Protocol. Specifically, pursuant to Article 13(1) of the JICOGSA, the carrier's liability for a package or unit of the goods shall be the higher of the following: 1) An amount equivalent to 666.67 units of account; 2) An amount equivalent to 2 units of account per kilo of gross weight of the goods lost, damaged or delayed. In this connection, a commentator has pointed out that there is a discrepancy between Article 13 (1) 1) and Article 4 (5)(a) of the Hague-Visby Rules since Article 13 (1) 1) lacked the phrase of "per package or unit" at its end. In spite of the above drafting error the prevailing opinion of commentators is that this

[480] Article 4 (5) (h) of the Hague Rules provides that "Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading."
[481] See Article 66 of the CMC.

Article 13(1) should be understood to have the same meaning as Article 4 (5)(a) of the Hague-Visby Rules.[482]

This article also provides that the unit of account used in each item of the preceding paragraph shall be the final publicized one at the date on which the carrier pays damages in respect of the goods.[483] This provision corresponds to Article 4 (5)(d) of the Hague-Visby Rules. In spite of this provision it is still not clear at what time the carrier's liability expressed in SDRs is to be converted into Japanese yen.

Where a container, pallet or similar Article of transport (which are referred to as "containers and etc." in this paragraph) is used for the transportation of the goods, the number of containers and etc. or units shall be deemed to be the number of the packages or units of the goods for the purpose of the preceding paragraph unless the goods' number or volume or weight is enumerated in the bill of lading.[484] Although there is some difference of wording, it is the prevailing opinion of commentators that this provision corresponds to Article 4 (5)(c) of the Hague-Visby Rules.

In addition, the provisions of each of the preceding paragraphs shall not be applied where the kind and value of the goods has been declared by the shipper at the consignment of the goods for transport and inserted into the bill of lading if it is issued.[485] Nevertheless, if the shipper knowingly has declared a value which is remarkably higher than the actual price, the carrier shall not be responsible for the damage in connection with the goods;[486] If the shipper knowingly has declared a

[482] See Kazuo Iwasaki, Revision of Japanese COGSA, at http://www.jseinc.org/en/bulletin/issues/Vol.25.pdf, p.8, taken on 02/04/2011.
[483] See Article 13(2) of the Japan International Carriage of Goods by Sea Act.
[484] Ibid, Article 13(3).
[485] Ibid, Article 13(5).
[486] Ibid, Article 13(6).

value which is remarkably lower than the actual price, the declared price shall be deemed to be the value of the goods for the purpose of assessing damages in connection with the goods.[487]

5.3.4 Under the Korea Commercial Code

5.3.4.1 Subject of Package Limitation of Liability

Generally, the subject who is entitled to package limitation of liability is the carrier. Therefore, in principle, the shipowner who is not the carrier shall not be entitled to the benefit of limitation.[488]

Pursuant to paragraph 4 of Article 798 of the KCC, in cases where the contractual carrier and actual carrier exist, the actual carrier may be entitled to invoke this limitation. Although, the master or pilot shall be entitled to avail himself of the limits of liability which the carrier is entitled to invoke if the action in respect of loss or damage of the goods is made against him and if such loss or damage occurred during performance of his duties,[489] it is still a dispute for the stevedores whether he can invoke this benefit because he, as a independent contractor, is different from the employee or agent of the carrier.

5.3.4.2 Amounts of Limitation

Under the former KCC 2001, the carrier is allowed to limit its liability to 500 SDR per package or shipping unit of the cargo. There is no kilogram limitation in the KCC, which has been heavily criticized by cargo interests because the limitation figure is lower than that of the Hague-Visby Rules.

In accordance with Article 797(1) of the current KCC, the carrier may limit his liability for compensation under Articles 794 through 796 to the monetary equivalent of 666 and 67/100 (666.67) Units of Account per package or shipping

[487] Ibid, Article 13(7).
[488] See Kim In-hyeon, Maritime Law, Seoul: Bobmun sa, 2007, p.170.
[489] See paragraph 2 of Article 798 of the KCC.

unit or 2 Units of Account per kilogram, whichever is higher: Provided, that the carrier shall not limit his liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that damage would probably result.[490]

It can be seen that the current Code adopts the limitation figures in the Hague-Visby Rules and thus the carrier's limitation amount increases to the higher one between 666.67 SDR per package or shipping unit and the 2SDR per kilogram. However, it deserves to be specially noted that the implementation of the kg limitation scheme was postponed for two years and thus it was effective on August 4, 2010.[491]

This increase may play a role in rectifying the Korean court's tendency to deliver protective judgments for the benefit of cargo interest in the cases involving the carrier's limitation of the liability. For example, in Korean Supreme Court case 2004.722. Docket No. 2002da44267, the Court decided that the higher figure should be selected for limitation calculations in an attempt to give the cargo interests higher figures in so far as possible. There was discrepancy between figures in the Number of Package field and Kind of Package field in the bill of the lading in question. The Court did not select the quantity in the Number of Package field because it was a smaller number than in the Kind of Package field, saying that the party's intention was to use the higher number as the calculation base regardless where the number is written down in the bill of lading.[492] Furthermore, in the Korean Supreme Court case 2006.10.26. Docket No. 2004da27082, the Court did

[490] See Chung Dae, The Movement of Legislation of Maritime Law, Evaluation and Movement of Legislation, Autumn, Seoul: Korea Legislation Research Institute, 2008, p.52.
[491] See Korean Maritime Law Update: 2007-Focused on the Revised Maritime Law Section in the Korea Commercial Code, at http://findArticles.com/p/Articles/mi_qa5396/is_200807/ai_n30992869/?tag=content;col1, taken on 04/04/2011.
[492] Please refer for details to Maritime Law Update 2004/2005, Journal of Maritime Law and Commerce, Vol. 36, 2005, p.365.

not allow the carrier to limit its liability in an on deck carriage case, saying that there was a reckless mind of the carrier personally when the lower level managerial staff decided to load the cargo on deck without agreement with the consignor.[493] Following this Supreme Court's judgment, a lower court (Seoul Western District Court 2007.12.21.Docket No. 2006gahap8979) also did not allow the carrier to limit its liability in an on-deck carriage case.[494]

5.3.4.3 How to Determine the Package or Shipping Unit

Determining the package or shipping unit is a core issue in respect of the package limitation of liability, meanwhile it is a difficult problem. With regard to the number of packages, the carrier hopes that it is as fewer as possible, however, the desire of the shipper is directly opposed to that of the carrier, namely the more the better.

According to Article 797(2) of the KCC, (a) Where a container or similar article of transport is used to consolidate the goods, if the number of packages or shipping units of the goods in such article of transport is enumerated in the bill of lading or other documents evidencing the contract of carriage, each package or unit shall count as a package or a shipping unit. Except as aforesaid, each article of transport that contains the goods shall count as a package or a shipping unit; and (b) Where the article of transport itself supplied by a person other than the carrier has been lost or damaged, such article of transport shall be deemed a separate package or shipping unit.

[493] Please refer for details to Maritime Law Update 2006, Journal of Maritime Law and Commerce, Vol.38, 2007, p.404.
[494] See http://findArticles.com/p/Articles/mi_qa5396/is_200807/ai_n30992869/?tag=content;col1, endnote 15, taken on 04/04/2011.

5.4 Provisions as to Package Limitation under the Chinese Maritime Code

5.4.1 Introduction

Like Korea, China has not ratified any of the conventions yet. This is because as far as Chinese scholars are concerned, the Hague-Visby Rules are regarded as being outdated, and the Rotterdam Rules are too advanced in turn. So they would like to absorb the best from each convention.

Chinese law treats coastal carriage and international carriage separately. For coastal carriage i.e. from one Chinese port to another,[495] the Regulations on Carriage of Goods by Water apply and carriers do not have the benefit of any package limitation. In respect of international carriage, carriers are entitled to this benefit pursuant to the CMC, which is based on a combination of the Hague-Visby Rules and the Hamburg Rules and thus is a hybrid regime.

In Chinese judicial practice, package limitation is always a important issue. On 5 March 2009, the Supreme People's Court of PRC provided an judicial interpretation, which involved the package limitation. The interpretation confirms that the carrier who misdelivered cargo could not limit his liability under the package limitation provisions in the CMC,[496] on the following ground: Firstly, the intention of package limitation is to share the risk at the sea leg between the carrier and the merchants. The Hague/Hague-Visby Rules only apply to contracts of carriage by sea "from the time when the goods are loaded on, to the time they are discharged from the ship". The misdelivery takes place after discharge and at the land leg, during which there is no sea peril. Secondly, the carrier who delivers without production of bill of lading does so at his own risk and peril. Liabilities

[495] However it should be pointed out that the carriage between mainland and Hong Kong, Macao, Taiwan is treated as international carriage.
[496] See Article 4 of Supreme People's Court of PRC Announces Interpretation on Several Issues of Delivery Without Production of Original Bill of Lading.

arising therefrom are not as of right covered under the rules of P&I clubs.[497]

5.4.2 Basic Provisions

5.4.2.1 Limitation for the Loss of or Damage to the Goods

Pursuant to Article 56 of the CMC, the carrier's liability for the loss of or damage to the goods shall be limited to an amount equivalent to 666.67 Units of Account per package or other shipping unit, or 2 Units of Account per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading, or where a higher amount than the amount of limitation of liability set out in this Article had been agreed upon between the carrier and the shipper.

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed to be the number of packages or shipping units. If not so enumerated, the goods in such article of transport shall be deemed to be one package or one shipping unit.

Where the article of transport is not owned or furnished by the carrier, such article of transport shall be deemed to be one package or one shipping unit.[498]

5.4.2.2 Limitation for the Economic Losses Resulting from Delay in Delivery

According to Article 57 of the CMC, the liability of the carrier for the economic losses resulting from delay in delivery of the goods shall be limited to an amount equivalent to the freight payable for the goods so delayed.

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[497] See http://www.dopstar.com/post/03-11/234/Supreme-People-s-Court-of-PRC-Announces-Interpretation-on-Several-Issues-of-Delivery-Without-Production-of-Original-Bill-of-Lading.html, taken on 05/04/2011.

[498] See Cheong Yeong-seok, The Law of International Carriage of Goods by Sea, Seoul: Pan Korea Book Corporation, 2004, pp.388-389.

Where the loss of or damage to the goods has occurred concurrently with the delay in delivery thereof, the limitation of liability of the carrier shall be that as provided for in paragraph 1 of Article 56 of this Code.

5.4.3 Analysis

5.4.3.1 Meaning of Package or Unit

As discussed previously, the terms "package" and "unit" are not explicitly defined under the Hague Rules and US COGSA. Various forms of packing could be potentially regarded as a unit, e.g., crate, box, wrapper etc., or the shipping unit, or the freight unit, i.e., the unit of measurement used to calculate the freight. However, this problem was effectively solved by the CMC, which provide an appropriate container test. That is, if the number of goods packed within the container is given, each is a package: if not, the container itself is a package.[499]

Of course, certain ambiguities remain. For example, in case the cargo is stowed in wheeled trailers in a roll on vessel, should the trailer counted as one pack as "similar article of transport…used to consolidate goods" when calculating package limitation? Chinese law fails to give a specific answer. In the author's opinion, trailers have the same function as containers, so in the absence of separate enumeration of their contents they should count as one package.

With regard to the treatment of the article of transport itself, although the Hague-Visby Rules do not provide any guide, the CMC provides that if the container provided by the cargo owner is damaged or lost in a marine accident, it shall be deemed to be one unit of cargo and therefore subject to the same calculation as cargo. This clause is the same as that in the Hamburg Rules.[500]

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[499] See Article 56 of the CMC.
[500] See Article 6(2)(b) of the Hamburg Rules.

5.4.3.2 Unit of Account

According to Article 277 of the CMC, the unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). Although SDR has no inherent ability to maintain real value and has been criticized as a unit of account,[501] it is by far the most sensitive to the trends of inflation and it ensures that limits of liability will be identical in terms of value at any one point in time regardless of the currency of payment on time of conversion.[502] Therefore it is accepted by China.[503]

It is also provided under this article that the amount of the Chinese currency (RMB) in terms of the SDR shall be computed on the basis of the method of conversion established by the authorities in charge of foreign exchange control of this country on the date of the judgment by the court or the date of the award by the arbitration organization or the date mutually agreed upon by the parties. In fact, there is a significant gap between legislation and practice. The CMC only introduces the method to convert SDR to RMB, failing to mention other currency, e.g. US Dollars, which is a common currency for maritime decisions. Besides, the Article is not in line with the practice of the State Bureau of Foreign Exchange Administration (SBFEA), which never publishes conversion rate of the SDR to RMB directly, but only SDR to other foreign currencies. In practice, if a decision is in US Dollars, a Chinese court will convert SDR to US Dollars at the rate published by IMF on the date of judgment.[504] If the judgment is in RMB, they will

[501] See A. Tobolewski, The Special Drawing Right in Liability Conventions: An Acceptable Solution?, Lloyd's Maritime and Commercial Law Quarterly, Vol.2, 1979, p.169.
[502] See Fan Wei, The Measurement of Damages in Carriage of Goods by Sea, at https://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, taken on 6/4/2011.
[503] SDR is accepted in China according to Article 56 and Article 277 of the CMC.
[504] See Fujian Tingyi Food Co Ltd v. COSCO Container Lines Co Ltd, Guangzhou Maritime Court,

follow the above first and then convert from US Dollars to RMB on the rate published by the SBFEA on the date of decision.[505] Therefore, Article 277 of the CMC should be amended.

5.4.3.3 The Issue of Stevedore

Could stevedores be entitled to the benefit of package limitation of liability? This issue is very complicated. Stevedores are different from servants, and generally they are independent contractors. Chinese law only extends limitation to the carrier's servants but not stevedores.[506] However, many disputes still exist in China and there is a significant lacuna in the legislative framework on this point.

In Chinese judicial practice, in respect of the package limitation of stevedores, Chinese Maritime Courts have given two contradictory decisions. The Dalian Maritime Court and Guangzhou Maritime Court treat stevedores as servants of the carrier and grant them rights of package limitation.[507] In *Shenyang Mining Machinery (Group) Co. Ltd v Hyundai Merchant Marine Co. Ltd and Wantong Logistics Ltd*,[508] stevedores caused a container to collide with the bridge of the vessel. The case was remanded twice by appeal court and retried twice by the Dalian Maritime Court. At last the court held that the stevedores were the "servants" of the carrier and accordingly entitled to limit the liability. Conversely, in *Bank of China Insurance Co. Ltd v Shanghai JY Container Development Co. Ltd*,[509] the stevedores' lorry collided with and damaged the container during

18/06/2003; Jinxi Machinery Industries Group v Rickmers Linie, Tianjin Maritime Court, 20/05/2002; China Silk Materials and Fabrics Imp & Exp Corp v. Ensign Freight (China) Ltd and Pacific International Lines (Pte) Ltd, Shanghai Maritime Court, 24/07/2002.

[505] See Shenyang Mining Machinery (Group) Co. Ltd v. Hyundai Merchant Marine Co Ltd and Wantong Logistics Ltd, Dalian Maritime Court, 01/02/2002.

[506] See Article 58 of the CMC.

[507] See Si Yu-zhuo, Legal Status of Terminal Operators, Xiamen University Seminar, 27/10/2005.

[508] See Case of Dalian Maritime Court, 1st Feb 2002.

[509] See Case of Shanghai Maritime Court, 20th April 2003.

discharging. After the plaintiff received compensation from the shipowner based on package limitation, he succeeded in claiming for the rest against the stevedores. It is uncommon that the Shanghai Maritime Court did not give any explanations for its reasoning at all. The only certainty is that the court did not see stevedores as servants of the carrier; otherwise the decision would surely be the opposite.

The two cases demonstrate that the uncertainty of law only invites disputes and increases the transaction costs as all these litigations are highly costly and time-consuming. Vague or conflicting provisions in Chinese law have led to arbitrary application of these rules in particular cases. In the author's opinion, although stevedores are independent contractors, more precisely, subcontractors of the carrier, their benefits of limiting liabilities should be protected as well. The same position is held in the CMI Draft Instrument on Transport Law,[510] where the carrier is responsible for the acts and omissions of all those who work under it.[511] From this perspective, the second view by the Shanghai Maritime Court is outdated and inappropriate. The solution of the Dalian Maritime Court and Guangzhou Maritime Court reflects the immediate interests and needs of stevedores. However it should be pointed out that the stevedore shall lose his right of limitation of liability if the damage he is responsible for is caused by an act or abstention done by him or one of his subordinates with the intention of causing damage, or his omission associated with understanding that damages may occur.

Despite that almost all stevedores are in effect subcontractors of the carrier in practice instead of "servants" as phrased in the CMC, the author trusts that, by revising the relevant Article, in the light of the practical experiences in trial of cases

[510] See The CMI Final Draft Instrument on Issues of Transport Law, at http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf.
[511] On condition that they act within the scope of their contracts of employment, or agency.

and on basis of absorption of international conventions, Chinese courts can try these cases justly and consistently.

5.4.3.4 How to Calculate the Limitation Amount

As stated above, under the CMC, the relevant package limitation is 667.67 SDR per package or unit and 2 SDR per kilogramme of gross weight, whichever is higher. The shipper can make other maximum amounts higher than the above by making an agreement with the carrier. If the shipper wants to obtain full cover for a particular cargo, he must declare the nature and value of such goods to the carrier before shipment and have this amount embodied on the bill of lading,[512] which, of course, will result in an increase in the freight rate. Because it might exceed the cost of insurance, so in fact it is rarely invoked.[513]

It is worth noting that any contract clause that is intended to replace the package limitation with a less amount will be null and void.[514] Besides, with respect to knowingly misstating the "nature and value" of the cargo, the provision under the CMC is different and moderate. The CMC simply states that the shipper shall indemnify the carrier against any loss "resulting from inadequacy of packing or inaccuracies in the information."[515] The shipowner still needs to compensate the shipper if the misstated cargo is damaged due to his negligence. Compared with the

[512] See Article 56 of the CMC.
[513] See J.F. Wilson, Carriage of Goods by Sea, 6th ed., 2008, p.204.
[514] See Article 44 of the CMC.
[515] See Article 66 of the CMC; See also Si Yu-zhuo, The Rights, Obligations and Liabilities of Consignor, Annual of China Maritime Law, Vol.12, 2001, p.20.

Hague-Visby Rules,[516] this opinion of the CMC accords with causal explanation and seems to be fairer.[517]

5.5 The Loss of Benefit of Limitation of Liability

5.5.1 Introduction

A final point that needs discussing with respect to the limit of liability is whether and under what conditions it can be broken. As we know, the right of limitation of the carrier's liability for loss of or damage to the goods as well as delay in delivery may be lost. In different international conventions or national laws, provisions in respect of the loss of benefit of limitation of liability are quite different. Detailed discussions are as follows.

5.5.1.1 Under Different Conventions

Under the Hague Rules, the limit of liability can be broken under following three cases which include: (1) if the carrier intentionally deviates unreasonably from the agreed or implied geographic route of the voyage, unless in saving or attempting to save life or property at sea or any reasonable deviation,[518] (2) the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading,[519] (3) by agreement between the carrier, master or agent of the carrier and the shipper another maximum amount may be fixed, provided that such maximum shall not be less than the figure named.[520]

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[516] Article 4 (5)(h) of the Hague-Visby Rules provides that: "Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading."

[517] See Fan Wei, The Measurement of Damages in Carriage of Goods By Sea, at http://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, taken on 06/04/2011.

[518] See Article 4(4) of the Hague Rules; See also Article 49 of the CMC.

[519] See Article 4(5) of the Hague Rules; See also Cheong Yeong-seok, Principle of Bill of Lading, Revision, Seoul: Textbooks, 2007, p.70.

[520] Ibid.

The Hague-Visby Rules introduced a new paragraph in Article 4.5 of the Hague Rules. Under Article 4.5(e) of the Hague-Visby Rules, the carrier is not entitled to limit its liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that a damage would probably result, that is to say, the package and kilo limitations will be lost under the circumstances above. These acts or omissions above are considered to be severe faults. Moreover, because of the very heavy onus of proof which this provision imposes on the claimant, the provision is frequently referred to as "unbreakable limit". At the same time, in light of Articles 4(5) (a) and 4(5) (g) of the Hague-Visby Rules, the cases of above (2) and (3) in the Hague Rules also apply to the Hague-Visby Rules. As to the 1979 Protocol of the Hague-Visby Rules, except the unit of account, other provisions are the same as those in the Hague-Visby Rules surely including the loss of package limitation of liability.

Under the Hamburg Rules, the carrier is not entitled to the benefit of the limitation of liability provided for in Article 6 of this convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.[521] It is now clear that, compared with the Hague-Visby Rules, this convention added "the delay in delivery". In addition, the Hamburg Rules also provide that a servant or agent of the carrier is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably

[521] See Article 8.1 of the Hamburg Rules.

result.[522] In other words, the servant or agent of the carrier may lose the package or kilo limitation under the specific circumstances.

With respect of the Rotterdam Rules, the provisions as to the loss of limitation are quite detailed and specific. The author will discuss this issue in the latter part of this section.

5.5.1.2 Under Different National Laws

According to US COGSA36, the carrier shall not be entitled to the benefit of package or kilo limitation where (1) the nature and value of goods have been declared by the shipper before shipment and inserted in the bill of lading, (2) the carrier entered into an agreement with the shipper that another maximum amount than that mentioned in this paragraph may be fixed: Provided, that such maximum shall not be less than the figure above named.[523] Basically, the US COGSA36 coincides with the Hague Rules.

Senate COGSA99 states that the limit of liability can only be broken following Section 9(h)(3). The four cases listed under that section include (i) when the shipper declares the value of the goods before shipment and inserts it into the contract of carriage, (ii) when carrier and shipper agree on a greater amount of maximum liability, (iii) for service contracts and (iv) if it is proved that loss or damage resulted (a) from an act or omission of the carrier, within privity or knowledge of the carrier, done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; or (b) an unreasonable deviation if the carrier knew, or should have known, that the deviation would result in such loss or damage. Above part (a) of the fourth case is essentially a restatement of Article 4(5)(e) of the Hague-Visby Rules, however the drafters added "within privity or

[522] See Article 8.2 of the Hamburg Rules.
[523] See Section 4(5) of the US COGSA1936.

knowledge of the carrier". If this addition is interpreted by the courts as meaning the same thing as "from a personal act or omission of the carrier", then obviously the limit of liability will be nearly impossible to break. As for part (b), what constitutes a reasonable deviation is spelled out under Section 9(g), which states that only a deviation to save or attempt to save life or property at sea is deemed reasonable, while a deviation for the purpose of loading or unloading cargo and passengers is not a reasonable deviation.[524]

Under UK COGSA1971, neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.[525] It is worth noting that under English law, it must be the personal acts and omissions of the carrier himself, and the act of an employee is not enough for depriving the carrier of limitation. This is because once an ocean voyage has commenced the carrier has rather limited control over the acts and omissions of his servants and agents. Moreover, a shipowner should not be responsible for the fraud of his employee when he himself is not involved.[526]

Under the JICOGSA, in a case where it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result, the carrier is deprived of the benefit of the limitation of liability including package, unit or weight limitations.[527]

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[524] See Silviu Bursanescu, Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL's Draft Convention on the carriage of goods [wholly or partly] [by sea], at http://www.mcgill.ca/files/maritimelaw/Silviu_Bursanescu-MastersResearchProject.pdf, p.64, taken on 4/4/2011.

[525] See Article 4(5)(e) of the Hague-VIsby Rules.

[526] See Fan Wei, The Measurement of Damages in Carriage of Goods by Sea, at https://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, taken on 6/4/2011.

[527] See Article 13bis of the JICOGSA.

Besides, by virtue of Article 13(5) of this Act, the provisions of package or weight limitation shall not be applied where the kind and value of the goods has been declared by the shipper at the consignment of the goods for transport and inserted into the bill of lading if it is issued.

Similar provision has been stipulated in the Korean Maritime Law. In accordance with Article 797 of the KCC, the carrier shall not limit his liability for compensation if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that damage would probably result. Moreover, at the time of delivery of the goods to the carrier by the shipper, the nature and value of the goods have been declared by the shipper and inserted in the bill of lading or other documents evidencing the contract of carriage, the package or kilo limitation shall not apply as well.

5.5.2 Provisions under the Rotterdam Rules

5.5.2.1 Basic Provisions

Article 61 of the Rotterdam Rules is divided into two subparagraphs, regulating the conditions for the loss of the right to limitation related to loss of or damage to goods under Article 59 and that related to loss caused by delay in delivery under Article 60.

Subparagraph 1 provides that the limitation of liability provided in Article 59 may not be invoked if the claimant proves that the loss resulting from breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with intent to cause such loss or recklessly and with knowledge that such loss would probably result.

Subparagraph 2 states that the right to limitation of liability under Article 60 may be lost if the claimant proves that the loss resulting from delay in delivery was

attributable to a personal actor omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

5.5.2.2 The "Personal Act or Omission"

This new Convention makes it clear that a personal act or omission of the person claiming a right to limit his liability is required in order to break the limit.[528] Since it requires a personal act by the person claiming a right to limit, the conduct of servants or agents is not an obstacle for the carrier to limit its liability. It can be concluded that breaking these limits will be even harder than before because an action of the servants, agents or subcontractors of the carrier will no longer suffice.[529] Nevertheless, it was stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage and the basis of a relatively high limitation amount.[530]

Some scholars expressed great dissatisfaction with the inclusion of the word "personal" before the phrase "act or omission", believing that it would make it too difficult for the cargo claimant to prove that the conditions for the provision had been fulfilled. But after discussed at length, the word was retained in the end.[531]

5.5.2.3 The Phrase "If the Claimant Proves"

As stated previously, "if it is proved" is found in the corresponding provision of the Hague-Visby Rules[532] and the Hamburg Rules.[533] However, in the

[528] See Article 61 of the Rotterdam Rules.
[529] See Silviu Bursanescu, Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL's Draft Convention on the carriage of goods [wholly or partly] [by sea], at http://www.mcgill.ca/files/maritimelaw/Silviu_Bursanescu-MastersResearchProject.pdf, p.65, taken on 4/4/2011.
[530] See UN Doc. A/CN.9/WG.11I/WP.56A/CN.9/WG.IIV526, paragraph 73.
[531] See Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Foods Wholly or Partly by Sea, 2010 Kluwer Law International BV. The Netherlands and M.F. Sturley, p.267.
[532] See Article 4(5)(e) of the Hague-Visby Rules.
[533] See Article 8 (1) of the Hamburg Rules.

Rotterdam Rules, the phrase "if the claimant proves" can be seen in Article 61, which raised many concerns because it was felt that this would place an extra burden on the cargo claimant. In fact, this phrase was provided here in order to balance the interests of parties. Obviously, under the new Convention, the burden of proof is on the claimant to prove that the party liable has lost his right to limitation.

As a result, it will be much more difficult to break the limits. Not only must the loss result from a personal act or omission of the party liable, but it must be established that the party either intended such loss or was reckless as to the consequences of its act or omission in the sense that it realized that such a loss would probably result.[534]

5.5.3 Provisions under the Chinese Maritime Code

5.5.3.1 Basic Provisions

On the whole, Articles 56 and 59 of the CMC set out three situations where the package limitation will not be available. They are:

(1) Where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading;

(2) Where a higher amount than the amount of limitation of liability set out in this section had been agreed upon between the carrier and the shipper;

(3) if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier, or the servant or agent of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

As to the above (1) and (2), there is no question. As to the third situation, there are three questions which would be discussed as follows.

[534] See J.F. Wilson, Carriage of Goods by Sea, 6th ed., London: Pitman Publishing, 2008, p.282.

5.5.3.2 Analysis of Intentional Loss

The first is in respect of intentional loss. It is easily understood that where the carrier or other person liable personally causes the loss, the limitation will not be available to him. This provision also applies to the actual carrier.[535] The reason for this is obvious. Nevertheless, when an actual carrier intentionally causes the loss, would the contracting carrier lose the right to limit as well?

With respect to this issue, the CMC is not entirely clear. On one interpretation, the provision appears to prevent only the culpable carrier from limiting its liability. Thus this interpretation results in the contracting carrier retaining the right to limit its liability. In effect, all is not lost for the contracting party, as it retains the ability to sue the defaulting actual carrier in tort.

However, this interpretation has the effect of shifting the risk of finding the offending actual carrier, suing him or her to judgment and enforcing judgment, on the goods owner rather than on the contracting party who is the one that elected to deal with the offending carrier in the first place and is best placed to guard against such losses. This is not consistent with the general operation which enables the contracting party to deal with, and look to, only the contracting carrier. Therefore, based on these reasons, a purposive interpretation might have the effect of eliminating the right of all carriers to limit if any one of the carriers involved in the transaction intentionally causes the loss. Also unclear is the situation where an employee of the carrier intentionally causes the loss.

In the author's opinion, the chief criterion for determining whether the carrier would lose the benefit of limitation is his behavior. Thus, if the carrier has no intention or gross negligence, he shall be entitled to the benefit of limitation. So the first interpretation, I think, is right.

[535] See Article 61 of the CMC.

5.5.3.3 Where the Carrier is A Company

Another issue discussed is that the term "carrier" generally refers to the person entering into a contract of carriage. Where that person is a company, or legal person, how to judge the personal intention or gross negligence of the carrier? No explicit provision exists in the CMC. It is likely that the loss will be seen to have been caused by the carrier where someone in a position of ultimate responsibility in the carrying company, or its alter ego, is directly implicated in the loss complained of.[536] In China, generally, he is the legal representative of the company or legal person, or the member of organ of legal person. That is to say, where that person is a company, only intention or gross negligence of these persons above can be considered as the fault of carriers in order to determine the loss of benefit of limitation.[537]

5.5.3.4 Gross Negligence and Recklessness

In Chinese law, recklessness had never been adopted as a term. Its meaning has not been discussed in either textbooks or judicial decisions. Chinese judges and scholars, however, generally interpret it as gross negligence.

Now an introduction of the Chinese legal background is needed here. Under general Chinese civil law, fault is required by law as a condition of liability. It is divided into two categories: intentional wrongdoing and negligence. Intentional wrongdoing refers to the situation where the defendant intended the consequences of his conduct. Negligence refers to the indifference or carelessness of the defendant producing a foreseeable result[538] and includes gross negligence and

[536] In respect of sea carriage, see The European Enterprise, Lloyd's Reports, Vol.2, 1989, p.182; See also Scrutton, Charterparties and Bills of Lading, 19th edition, 1984, p.480, note 27.
[537] See Zheng Lei, A Study on Limitation of Carrier's Liability in Carriage of Goods by Sea, World Shipping, No.3, 1999.
[538] See Wang Li-ming, Liability for Breach of Contract, 2nd ed., Beijing: China University of Political Science and Law Press, 2003, p.310.

general negligence.[539] This gross negligence amounts to recklessness mentioned in the CMC.

To establish gross negligence, it is held that any intolerable disregard for the lives, property or interests of others will do.[540] In Chinese judicial practice, the courts adopt this view more often.[541] On the whole, it becomes almost a matter of law to break limitation in certain type of cases, including issuing advanced bill of lading, antedated bill of lading, and delivery without bill of lading, etc.[542]

[539] See Han Shi-yuan, A Study on Damages for Breach of Contract, Beijing: Law Press, 1999, p.321.
[540] See Yang Li-xin, Damages in Tort, Beijing: Law Press, 1988, p.83; Guo Ming-rui, Civil Liabilities, Beijing: China Social Sciences Press, 1991, p.74.
[541] So when defendants do not have qualification for sea carriage or the vessel is uncargoworthy, this will be regarded as a solid proof of gross negligence without further enquiring, see China Sinotrans Co Tanggu v COSCO Tianjin International Freight Co Ltd, Tianjin Higher People's Court, 14th Jul 1999, Selected Cases of People's Courts (the Supreme Court ed. Vol.1 2002). It is also said by scholars that if the carrier is involved in delivery without bill of lading etc, it will be deemed as gross negligence directly, see Xu Xiao-xian, The Identification and Effect of Invalid Bills of Lading Contract, Ocean Transport, No.1,1994, p.34.
[542] See Fan Wei, The Measurement of Damages in Carriage of Goods By Sea, at http://eric.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW_fm.pdf?sequence=3, p.353, footnotes 5,6,7, taken on 06/04/2011.

Chapter 6 Conclusions and Suggestions

6.1 Conclusions

After a review of the whole contents of this dissertation, the following basic conclusions can be made:

(1) The carrier's liability is the core in international conventions on the carriage of goods by sea or related national laws. Generally, the carrier's liability regime includes many basic aspects, such as subject of liability, principle of liability, limitation of liability, etc. Under international conventions and national laws, the carrier has four basic obligations, i.e. seaworthiness, care of cargo, issue of bill of lading and non-deviation.

(2) Under international conventions or national laws, the subject of liability is the contractual carrier who, in return for the freight, assumes a duty to carry goods in his custody from one place to another by sea under the contract of carriage of goods. But it is not easy to determine who the contractual carrier is in practice. According to the Hague/Hague-Visby Rules, the definition of the carrier is not a particularly clear or exhaustive one. Under the Hamburg Rules and the Rotterdam Rules, this definition is clear and specific, which means a person that enters into a contract of carriage with a shipper. In practice, the scope of the carrier is wide-ranging. The shipowner, the charterer, the freight forwarder, the non-vessel operating common carrier (NVOCC) and the vessel manager can all become the carrier. Furthermore, the issuing of the bill of lading is always irregular, so that it is difficult to identify the carrier properly. Under the KCC, there are no specific and clear definitions of the carrier and actual carrier. The KCC amended in 2007 further

provides that when the time charterer is the carrier the shipowner will be liable for the cargo damage. In fact, China drew heavily from the Hamburg Rules when drafting the articles concerning the carrier involved in carriage. The definition of the carrier in Article 42(1) of the CMC is drawn verbatim from the Hamburg Rules. Generally speaking, the bill of lading will usually be the only document available to the consignee or cargo claimant to identify the carrier, so using the bill of lading to identify the carrier is the most general method. Demise and identity of carrier clauses are obsolete nowadays although they remain in use. The Rotterdam Rules adopted in 2008 by the UN General Assembly provide a new method to solve the issue of identifying the carrier. This new convention, by providing clear rules for identification of the defendant carrier, appears to address the call to give extensive protection to shippers.

(3) The principle of liability occupy the central position in any international convention or related national law, which decide the basic character and value orientation of the transportation law. As for the definition of the principle of liability, as up to today there is no worldwide-accepted uniform definition. The principle of liability of carrier (broad sense) includes four basic factors, namely, the principle of liability (narrow sense, namely imputation principle), the period of responsibility, the exception from liability and the burdens of proof.

(4) The principle of liability (namely imputation principle) is the dominant factor. It has its developing process, from strict liability to incomplete fault liability, then to complete fault liability. At present, the provisions in respect of principle of liability are different under different international conventions and national laws. Under the Hague/Hague-Visby Rules, as well as under the US COGSA36, the UK COGSA1971, the CMC, the KCC and the JICOGSA, the carrier shall be liable for

loss of or damage to the goods arising from the fault of the carrier, his employees or agents. Meanwhile, the carrier shall be entitled to the benefit of nautical fault exception and fire exception. This kind of the principle of liability is incomplete fault liability. By contrast, under the Hamburg Rules and the Rotterdam Rules, as well as the Senate COGSA99, if the carrier fails to prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of his servant or agent, etc., he is liable for loss of or damage to the goods, as well as for delay in delivery during the period of the carrier's responsibility. This is the complete fault liability.

There are different opinions as to principle of liability. Some scholars hold that the incomplete fault liability should be retained in order to reduce the carrier's risks and further prompt the development of shipping industry. Other scholars and cargo interests, however, hold that the incomplete fault liability is an unfair and unreasonable system and the complete fault liability should be adopted. In the author's opinion, the incomplete fault liability has no longer reflected the realities of modern shipping, whereas the complete fault liability is in conformity with the principle of fairness from the perspective of jurisprudence. Thus, like the Rotterdam Rules, the removal of the fault exception and the adoption of a complete fault liability regime would reflect the development of the international shipping legislation and, would in addition keep the legislations up to date with the demands of the times.

(5) The period of responsibility of the carrier is a basic concept in the transport laws, and it is requisite to determining the carrier's liability. It means a period during which the carrier shall be responsible for the violation of obligation and for the loss of or damage to the goods arising from it. Generally speaking, the period of

responsibility of the carrier begins when the carrier receives the goods and ends when the goods are delivered, so the moments when goods are received and delivered by the carrier ought to be ascertained. Receipt of goods means to obtain direct or indirect possession of goods through a mutual legal transaction made between the carrier and the shipper. Delivery of goods means transfer of direct or indirect possession of goods from the carrier to the consignee. It is worth noting that the period of responsibility, in many cases, may not coincide with the period of application of the conventions.

Neither the Hague Rules nor the Hague-Visby Rules directly deal with the period of responsibility of the carrier. It was generally acknowledged that the period of responsibility of the carrier is from loading on to discharging the goods from the ship, which is commonly referred to as "tackle to tackle" or "rail to rail". In addition, the parties concerned are liberty to make any agreement over their respective rights and liabilities prior to the loading on and subsequent to the discharge from the ship. The Hamburg Rules abandon the "tackle to tackle" rule and provide that the carrier's responsibility covers the period during which he is in charge of the goods at the port of loading, during the carriage and at the port of discharge, namely, "port to port" rule. Under the Rotterdam Rules, the period of responsibility, which differs from those of the Hague-Visby Rules and Hamburg Rules, begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered. It is also called a "door to door" principle. Provisions similar to those in the Hague/Hague-Visby Rules in respect of the period of responsibility can be found in the US COGSA36 and the UK COGSA1971. Under the JICOGSA, the period of responsibility is from the time of receipt of the cargo prior to loading to delivery of the cargo after discharge. Moreover, special

agreements relating only to the carrier's responsibility for the periods between receiving and loading of the cargo and between discharge and delivery of the cargo are permitted, provided that such agreements are set out in the bill of lading. In the KCC, the period of responsibility covers the time from receiving the goods to delivering them. But, unlike the JICOGSA, any special agreement between the parties that reduces or exempts any obligation or liability of the carrier before loading or after unloading shall be null and void. In China, the goods are divided into two types, i.e. container goods and non-container goods. As to the former, the period of responsibility is from taking over the goods at the port of loading to delivering them at the port of discharge. As to the latter, the period is from loading to unloading, namely, "tackle to tackle" principle. Through comparative analysis, it is concluded that, with regard to the period of responsibility, there are lots of problems which need to be modified and improved in the CMC.

(6) Exception from liability originated from compromises between carrier and cargo interests. The Hague/Hague-Visby Rules list seventeen specific defenses which exonerate the carrier from liability from loss or damage to goods. Among the 17 exception clauses, only nautical fault and fire fault clauses really belong to exception from liability, the rest should be called excepted perils. Similar provisions could be seen in the US COGSA36, the UK COGSA1971, the KCC, the JICOGSA and the CMC. They all remain the nautical fault exception and fire fault exception, as well as a list of exception clauses. The Hamburg Rules do not include any list of exceptions and provide that the carrier shall be liable for loss or damage to the goods unless he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Under the Rotterdam Rules, the carrier is able to be relieved of liability if he proves one or

more of 15 listed exceptions, which are similar to those in the Hague/Hague-Visby Rules. Whereas, like the Hamburg Rules, the Rotterdam Rules also cancel the famous nautical fault exception and fire fault exception. Compared with the Hague/Hague-Visby Rules, this is a significant change.

The nautical fault exception and fire fault exception are not only the important exceptions from liability, but also the symbols of principle of liability. The nautical fault may be divided into two types, namely, fault in the navigation and fault in the management of the ship. In practice, however, it is more meaningful and often difficult to distinguish between nautical fault and commercial fault. A simple rule is called the "criterion of benefit" which depends on the actual purpose of the measures. The fire exception, like the nautical fault exception, is also a product of special times. Although, these two exceptions have already been established in many conventions and national laws except the Hamburg Rules and Rotterdam Rules, in the author's opinion, deleting them will be the developing prospect in the future.

(7) The burden of proof is a duty placed upon a party to prove or disprove a disputed fact and a matter of great significance, which may affect the outcome of the dispute. Meanwhile, the allocation of the burden of proof is crucial to the overall allocation of risk between the parties during transit. Therefore, it should be clear and certain. The order of proof is not explicitly set out in the Hague/Hague-Visby Rules, only some hints can be found in particular articles. Under the Hamburg Rules, the allocation of burden of proof is relatively clear and the liability of the carrier is based on the principle of presumed fault. Essentially, under the above three conventions, once a cargo claimant has established a loss, the burden of proof is on the carrier. The Rotterdam Rules have constructed a new structure of the

allocation of burden of proof, which is made up of three presumptions of carrier's fault, namely, the presumption at fault in respect of carrier's duty of care of goods, the presumption of carrier's no-fault within the listed excepted perils, and the presumption of carrier's fault as to seaworthiness obligation. Moreover, the Rotterdam Rules provide for the allocation of burden of proof respectively to the cargo claimant and the carrier in details and in a practical way. Under the CMC, although the provisions in relation to the allocation of burden of proof are not clear, after detailed analysis it seems obvious that they are very close to those in the Rotterdam Rules.

(8) There are two different limitations of liability in maritime law, the carrier's limitation and the general limitation. In case of loss or damages to the goods, the carrier's liability is limited to certain amounts of damages. The word "package" should be construed according to its plain meaning as well as the main objective expected from the package limitation. Consequently, any wrapper (enveloping its contents in such a way that a prudent carrier cannot see through them) is a package regardless of its size, weight and volume. Unless the contents of a container, pallet or other Article designed for carriage has been stowed with the participation or under the supervision of the carrier, his servants or agents, or these contents have been enumerated in the transport document, or a prudent carrier can identify them in any other way, it should be deemed a package. The unit of account should be certain, uniform and stable. The market value of gold is the one of the unit of account. Surely, the most important unit of account is SDR value which is firstly introduced by the 1979 Protocol. At present, SDR value is widely used under the Hamburg Rules, Rotterdam Rules, and many national laws. The limitation set forth in the conventions or national laws are not applicable when the nature and the value

of the goods have been declared by the shipper before the shipment and inserted in the bill of lading. Nevertheless, this option has not been used frequently because shippers inevitably always prefer buying cheaper cargo insurance to paying higher freight. At the same time, agreements modifying the figures of the limits are valid, provided the agreed figures do not reduce the limit set forth in the conventions or national laws. Those who are entitled to the benefit of the limitation of liability may lose the benefit if the claimant proves privity or recklessness. That is, the carrier, his servants and agents are deprived of their rights to limit liability for their own conscious faults. The conventions or national laws do not affect carriers' rights under any statute regarding the limitation of the liability of ship owners, so carriers are allowed to invoke the limitation of liability under the applicable convention or national law on the carriage of goods by sea, and if this limit is higher than the general limit, the general limit may be invoked.

6.2 Suggestions

On the basis of the study of this dissertation, I would like to give some suggestions for perfection of the laws and practice of China.

(1) China should strength the comparative study of carrier's liability regime between different countries and international conventions, especially the Rotterdam Rules. Only in this way, common stances can be found, differences can be discovered, and advantages and disadvantages can be identified. The comparison can establish sound basis for reform of laws and practice. In the course, we should absorb the reasonable contents of laws of other countries and relevant international conventions. In transplanting the rules of another country or international convention, special attention should be paid to the systematic study of the rules and

enough attention should also be paid to our own legal traditions.

(2) For the perfection of provisions as to the subject of liability in the CMC, I provide the following unripe suggestions: (a) Amend and perfect the definition of the carrier, namely, "carrier" means a person that enters into a contract of carriage with a shipper; (b) Using the provisions of the Rotterdam Rules for reference, establish the concepts of "performing party" and "maritime performing party"; (c) Provide that if a carrier is identified by name in the contract particulars, any other information in the bill of lading relating to the identity of the carrier shall have no effect; (d) Deny the validity of the demise clause and the identity of the carrier clause in identifying the carrier; (e) If no person is identified in the contract particulars as the carrier, the registered owner of the ship is presumed to be the carrier. He may rebut the presumption of being the carrier by identifying the carrier and indicating its address.

(3) With respect to the principle of liability of the CMC, I suggest that: (a) Abandon incomplete fault liability and establish the complete fault liability in respect of the principle of carrier's liability. The carrier shall be liable for loss of or damage to the goods if he has fault; (b) Abolish the nautical fault exception and fire fault exception, meanwhile, retain the list of exceptions clause; (c) Adopt three presumptions like those in the Rotterdam Rules, i.e. the presumption at fault about carrier's duty of care of goods, the presumption of carrier's no-fault within the listed excepted perils and the presumption of carrier's fault as to seaworthiness obligation.

With regard to the period of responsibility, I suggest that Article 46 of the CMC should be amended as: "The responsibilities of the carrier with regard to the goods carried covers the entire period during which the carrier is in charge of the

goods, starting from the time the carrier has taken over the goods, until the goods have been delivered. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge except as otherwise provided for in this Section.

The provisions of the preceding paragraph shall not prevent the carrier from entering into any agreement concerning carrier's responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship."

Accordingly, Article 48 of the CMC should be revised into: "Except as otherwise provided for in Article 51 of this chapter, the carrier shall properly and carefully receive, load, handle, stow, carry, keep, care for, discharge and deliver the goods carried."

(4) For the perfection of provisions as to the limitation of carrier's liability in the CMC, I suggest that: (a) Confirm clearly by legislation that the carrier who misdelivered cargo could not limit his liability; (b) Continue to adopt SDR as the unit of account, amend Article 277 of the CMC such as adding the method to convert SDR to other currency, and make this article be in line with the practice of the State Bureau of Foreign Exchange Administration; (c) Grant stevedores rights of package limitation although they are subcontractors of the carrier; (d) Retain the limit level of 667.67 SDR per package or unit and 2 SDR per kilogram of gross weight which is different from provisions in the Rotterdam Rules; (e) The chief criterion for determining whether the carrier would lose the benefit of limitation is his own behavior.

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Acknowledgements

First, I am grateful to my supervisor, Prof. Chung Dae. I appreciate his assistance in all academic matters. I am deeply moved by his warmth, kindness, ability and knowledge. Without him, I cannot complete my study in Korea Maritime University and cannot finish the dissertation. I am forever indebted to him.

I would like to express my gratitude to Prof. Cheong Yeong-seok, Prof. Park Eun-gyoung, Prof. Kwak Kwan-hoon and Prof. Ji Sang-gyu for their hard work in reviewing my dissertation and good suggestions for revising it.

Many thanks are also due to all those who help me and make my study a happy experience. For lack of space, I can only mention some of them: Prof. Lee Yong-hee, Prof. Kim In-yu; my colleagues in Qingdao University Prof. Park Yeong-hee, Prof. Wang Sheng-song, Prof. Wang Cheng-ru, Prof. Wang Guo-zheng, Prof. Ding Jin-guang, Ms. Sui Zhen-wei; Chinese students Mr. Shao Yan-bo, Mr. Xuan Shan-wen, Miss Jia Rui, Mr. Zhang Hong-chao, Miss Su Ming, Mr. Li Shang-ming, Miss Li Wen; my good friend Mr. Liu Shou-jian, etc.

My profound gratitude and thanks go to my parents for inculcating me the dedication and discipline to achieve whatever I undertake with confidence and distinction. I am deeply grateful to my mother-in-law, my wife and my daughter. During the course of my study, my wife has not only well performed her duty of her job, but also well taken care of our family. I want to especially point out that the loveliness of my daughter encourages me to do everything better.