CHINA'S APPROACH TOWARD INTERNATIONAL CONVENTIONS:

THE IMPACT of the HAMBURG RULES on the MARITIME CODE of the PRC

by

LAI XU

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

What is the importance of the shipping industry to international commerce? What does
China's shipping industry look like? What are the major International Maritime Conventions that
dominate maritime legislation? What International Maritime Conventions has China adopted?
How has Chinese maritime legislation developed? What has been the impact of International
Conventions on the development of Chinese maritime legislation? These questions are
particularly significant, especially after China's entry into the World Trade Organization. Three
international conventions, the Hague Rules, the Hague- Visby Rules and the Hamburg Rules, are
the primary rules regulating the transport of goods by sea. Although China has not acceded to
any of these three conventions, Chinese maritime legislation makes some reference to these
conventions. This article will analyze the impact of these conventions on Chinese maritime
legislation and answer the questions above.

INDEX WORDS: Chinese Maritime Code, Hague Rules, Hague-Visby Rules, Hamburg Rules, Actual Carrier, Limitation of Action, International Convention, China, U.S.

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DEDICATION

To WENJIU XU& YOUMEI LI, my parents

Thank you for all you have done for me.

Best wishes for your 25th Anniversary.

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CHAPTER I

INTRODUCTION

"China's own maritime law was introduced only four years ago, but is among the most modern in the world and closely follows international practices."

Patrick Griggs, President of the International Maritime Law Committee

Since the early 1980s, when China adopted its" open-door" policy as a long-term strategy, the country's foreign trade with countries and regions around the world has grown dramatically.² To accommodate the needs of a steadily developing foreign trade, China's shipping industry has undergone rapid expansion in recent years.³ Over ninety percent of China's import and export goods are transported by sea, and the advantages China can reap from maritime transport are enormous.⁴

As a result, Chinese courts have been met with a growing number of disputes to review and adjudicate, and these disputes have involved both foreign and domestic litigators. Although China is becoming a major transportation and trade country, Chinese maritime laws and regulations relating to shipping are still not matched with the international community

¹ Courts Handle Maritime Cases, China Daily, September 22, 1998

² See China International Economic Consultants, INC., The China Investment Guide 1986 at 50. "China contains relationship with over 180 countries and regions in the world. In1984, the volume of the country's total import and expert was US \$ 53.5550 billion, an increase of 28% over the pervious year."

⁴ Research and Markets (http://www.researchandmarkets.com/reports/c79177) has announced the addition of "China Shipbuilding & Repairing Industry Report, 2007-2008".

⁵ Maritime Courts Shift to Nation's Judicial System, China Daily, July 1, 1999 [hereinafter Maritime Courts Shift].

standards. As China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations.

Within the last forty years, China has enacted over twenty shipping-related laws and regulations, including a Code of Maritime Law (Maritime Code or Code). China began drafting a maritime law in 1952 and although a first draft was completed in 1963, China did not have a formal or official Code until 1993. To create its Maritime Code, China borrowed heavily from some of the international conventions. China also examined various other international accords, adopting some provisions as written and changing others before incorporating them into the final document.

International maritime conventions such as The Hague Rules¹², the Hague-Visby Rules¹³ and the Hamburg Rules¹⁴, the Maritime Liens and Mortgages Convention, the Salvage Convention, and the Limitation of Liability Convention and the Arrest of Ships Convention have a very important impact in China. Most notably, the three Rules are the major international conventions regulating the carriage of goods by sea. Although China has not acceded to any of these three conventions, Chinese maritime legislation has made some reference to these conventions.¹⁵ Not

⁶ Courts Handle Maritime Cases, supra note1, "China must exchange information and reviews in a timely manner with foreign countries because China is a big transportation and trade country, said Vice Minister of Communications Zhang Chunxian."

⁷ Id.

⁸ See Maritime Law of The People's Republic of China [Maritime Code of PRC]. Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress

⁹ China's Socioeconomic Headache, the Nikkei Weekly, September. 4, 2000, at 18

¹⁰ See Frances Williams, Shipping Liberalization Push, FIN. TIMES, Oct. 6, 2000, at 12

¹¹ Id.

¹² 1924 International Convention for the Unification of Certain Rules of Certain Rules of Law Relating to Bills of lading, opened for signature Aug. 25, 1924, 51 Stat. 223, 120 U.N.T.S. 155, reprinted in 6 Benedict, [hereinafter Hague Rules].

¹³ 1968 Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, Cmnd. 6944, reprinted in 6 Benedict, [hereinafter Hague-Visby Rules].

¹⁴ U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, U.N. Doc. A/CONF.89/13 (1978) [hereinafter Hamburg Rules]

¹⁵ Shipping: Big League Hopes, China ECON. Rev. Dec. 23, 1999

only does the Chinese Maritime Code (Maritime Code of the PRC) incorporate many of these conventions, it also provides that the conventions acceded to by China have a "supreme" status among the different sources of law. ¹⁶ It is even suggested that Chinese maritime law is a conventional-based legal system. This article will analyze the impact of these conventions on Chinese maritime legislation. ¹⁷

The Maritime Code of the PRC has 278 articles. In addition to general and miscellaneous provisions, the Code regulates vessels, crew, charters, towage, salvage, collisions, general average, limitation of liability, marine insurance and the carriage of passengers. It was the largest statute China had ever enacted until the new Criminal Code in 1997 and it regulates a wide range of maritime shipping matters.

Chapter II of this article explores the importance of the shipping industry to international commerce and briefly introduces the development of the shipping industry in China by discussing three developing periods in the past fifty years.

In order to fully understand the origins of Chinese Maritime Code (Maritime Code of the PRC), we shall look at some important international conventions. Among these are: the Hague Rules of 1924, the Visby Protocol of 1968(Hague-Visby Rules), and the Hamburg Rules of 1978. These are the major international conventions in the area of maritime law, and establish the basic rules governing the liability of shippers and carriers in the movement of goods though

17 T.

¹⁶ Id

international commerce. Chapter III takes a brief look at the three conventions and their connections with Chinese laws.

As the Hamburg Rules are not widely accepted throughout the world, the problem regarding the status of port operators under the Hamburg Rules might be only a theoretical dilemma. In reality, the Hamburg Rules have significant superiority over The Hague and Hague-Visby Rules. The pros and cons of the Hamburg Rules will be discussed in Chapter IV, which includes an analysis of the impact of the Hamburg Rules on the Maritime Code of the PRC as well as a review of some articles illustrating the issue of an "actual carrier".

Chapter V takes a brief look at the introduction of "limitation of action" and compares limitation of action under the statues of different countries. This chapter goes on to explain the most important Chinese legal cases that raise this issue and analyze the influence of international conventions on the establishment and implementation of Chinese maritime law.

Chapter VI begins by examining the legislative history of Chinese maritime law and the development of legislation, most notably the development of the maritime court system. Chapter VII summarizes the important points discussed in this document and concludes that the Maritime Code of the PRC is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China's unique circumstances.

CHAPTER II

BACKGROUND

"Shipping is truly an international industry and will play an increasingly important role in the growth of international trade." 18

William A. O'Neil, International Maritime Organization (IMO) Secretary-General

i. A brief introduction to the international shipping industry

1. The role of the shipping industry in international commerce

The shipping industry plays an important role in international commerce; its importance is clearly visible even in our daily lives. ¹⁹

No matter where you may be in the world, if you look around you, it is probable that you will see something that either has been or will be transported by sea. There is every likelihood that the chair you are sitting on, the paper you are reading, the radio to which you may be listening, or even the clothes you are wearing have something in their content that has been carried on board a ship.²⁰

The advantage of choosing transportation by sea is that international commerce depends upon the timely and efficient movement of goods and passengers to and from the ports of

¹⁸ International Maritime Organization (IMO) Secretary-General William A. O'Neil, Building Maritime Partnerships, Message for World Maritime Day 2000, [hereinafter O'Neil]

¹⁹ Id. According to the Secretary-General, most people never consider the impact shipping has on their lives.

²⁰ Id. In an address of World Maritime Day 2000, IMO Secretary- General William O'Neil observed.

maritime nations.²¹ Consequently, the maritime transport service industry is a vital component of the global economy.²²

2. The importance laws and regulations in the shipping industry

Because the shipping industry has tremendous profit-generating potential, the industry is highly competitive.²³ With the continuous expansion of foreign trade, China's shipping industry is becoming increasingly important. Like most maritime countries in the world, China attaches great importance to the development of her merchant marine.²⁴ China's economically vital shipping industry has been growing continuously to meet the increasing demands of foreign trade.²⁵

In this competitive environment, shipping companies construct new port facilities, build larger, faster ships, and fund research to develop state-of-the-art, cargo-handling equipment in order to stay competitive.²⁶ The promulgation of new laws and regulations often accompanies changes in the physical characteristics of the industry.²⁷ These sizable investments in time and money intensify competition for market share and ultimately lead to conflict and confrontation.²⁸

ii. The development of a shipping industry in China

1. A brief introduction to the Chinese marine market

²¹ See Frances Williams, Shipping Liberalization Push, FIN. TIMES, Oct. 6, 2000, at 12

²² See John Zarocostas, U.S., Other WTO Members Support Proposal to Restart Maritime Services, J. COM., Oct. 6, 2000, at WP.

²³ See Thomas J. Schoenbaun, Admiralty and maritime law, St. Paul, Minn.: Thomson/ West, c2004, at 149

²⁴ See excerpt from the Seventh-year Plan of National Economical and Social Development of the P.R.C., (delivered by Zhao Ziyang at the Fourth Session of the Sixth National People's Congress on March 25, 1986, People Daily (Beijing) March 26, 1986) "Total volume of import and export trade reached US\$ 83 billion by 1990."

²⁶ See generally BILIANA CICIN-SAIN & ROBERT W. KNECHT, The Future of U.S. Ocean Policy 213 (2000). The U.S. Department of Transportation Maritime Administration (MARAD) hopes to revitalize the U.S. shipbuilding industry by making loans available to commercial shipyards for the construction of large passenger vessels. See DEPT. of TRANSP., Budget of the U.S. GOV'T, Fiscal Year 2001, at 223.

²⁷ Id. at 225

²⁸ Id.

China has over 18,000 km of coastline, 1000,000 kilometers of navigable inland waters and more than 700 ports.²⁹ From 1979, as a process of economic reform and reconstruction³⁰, China has opened its borders to the outside world while simultaneously and vigorously strengthening its legal system to meet new demands.³¹ In 1974, China's fleet³² was ranked twenty-third in size in the world, but by the end of 1984, China owned 1,262 vessels totaling 9,300,358 gross tons, and ranked in the top nine in size in the world's shipping community.³³

According to the International Maritime Organization (IMO), there are literally thousands of ships engaged in providing transport services internationally.³⁴ At least eighty percent of the world's trading goods are transported by ships.³⁵ For example, in the U.S. alone, the waterborne cargo industry contributes seventy-eight billion dollars each year to the U.S. Gross Domestic Product.³⁶ China's shipping industry is equally important to its economy; nearly ninety percent of the goods China imports and exports arrive or leave through Chinese ports,³⁷ and approximately seventy-five billion dollars in bilateral trade passes between U.S. and Chinese ports annually.³⁸

2. The three important periods of development in China's shipping industry

²⁹ See Green Jeanette, China and the law of the sea, air, and environment, Alphen aan den Rijn, The Netherlands; Germantown, Md.; USA: Sijthoff & Noordhoff, 1979

³⁰ Id at 129

³¹ Id

³² "Lloyd's of London estimated that in 1985, the world's merchant fleets had a cargo capacity of 600 million tons—170 million more than was needed." See "Ship building ought to be expanded," China Daily, June 13, 1986, at 4

³³ See The China Ocean Shipping Company, Materials on International Shipping 1(1985)

³⁴ Id. "Commercial vessels include passenger ships, container vessels, oil tankers, chemical tankers, gas carriers, bulk carriers and other cargo craft."

³⁵ See Id. According to MARAD, the United States maintains a private domestic fleet of over 44,000 vessels. The Impact of U.S. Coastwise Trade Laws on the Transp. Sys.: Hearing before the House Subcommand. On Coast Guard and Mar. Transp. of the Comm. on Transp. and Infrastructure, 104 Cong. (1996) (Statement of Albert J. Herberger, Mar. Adm'r. of MARAD)

³⁶ See Marine Board Committee on Ship's Ballast Operations, National Research Council, Stemming the Tide: Controlling

Introductions of Nonindigenous Species By Ships' Ballast Water 22 (1996)

³⁷ CICIN-SAIN & KNECHT, supra note 26, at 213.

³⁸ See Anna Wilde Mathews, U.S., China Square Off Over Shipping, The Asian Wall ST. J., Jan. 29, 1999, available at 1999 WL-WSJA 5426990; Tim Sansbury, US and China Start Slowly: Hopes Are High, J. COM., Sept. 23, 1999, at 4. "Recent estimates put the figure nearer to one hundred million."

Three major periods comprise the development for the past fifty years in China's shipping industry.

a. The Early Development Period

The People's Republic of China (PRC) has emphasized the development of a blue-water, globally-oriented shipping industry since its founding in 1949.³⁹ At that time, the Chinese Merchant Marine consisted of only fourteen vessels. 40 By 1961, China already owned approximately 1500 ocean-going vessels⁴¹ and increased its tonnage at an average rate of 13.6% per year, a rate greater than that of any other country in the world. 42 Also, China established the China Ocean Shipping Company (COSCO) to oversee the development of its merchant marine. 43

COSCO is a state-owned enterprise specializing in managing ocean-going ships of Chinese ownership. Today, COSCO is transporting a major portion of the country's total freight and is a significant operator in the world shipping market. 44 To offer liner and tramp services for carriage of container cargo, general cargo, and passengers, COSCO has opened many trade routes to a number of countries and regions.⁴⁵

Another shipping-related corporation under the Ministry of Foreign Economic Relations and Trade is the China National Chartering Corporation (SINO-CHART), established in 1951

³⁹ Mark S. Hamilton, Sailing In A Sea of Obscurity: The Growing Importance of China's Arbitration Commission, 3 Asian-Pac. L. & Pol'y J.10 at 40 See Kevin Li, Beijing Move to Harmonize Ship Arrest Rules and Procedures, LLOYD'S LIST INT'L, Mar. 1, 2000, a

⁴² Hamilton, supra note39

⁴³ Chunk Ling& Zhou Taizuo, Overseas Transport 25(1982) [hereinafter Overseas as Transport]; COSCO Introduction to China Ocean Shipping Company3 (1986)

⁴⁴ COSCO celebrates its 25th anniversary, 4 Maritime China (Spring 1986).

under the name China Overseas Transportation Corporation and renamed SINO- CHART in 1955. 46 SINO- CHART specializes in the chartering of ships throughout the world and has a good reputation throughout the international charter market. 47

b. The Fast- Developing Period (After entry into the WTO)

While the maritime transport service industry is important to all nations, it is particularly important to China. After entering the World Trade Organization (WTO), China's shipping industry has entered the "the fast-developing period".

In 1994, Chinese-owned and registered vessels were sailing to over 1100 ports in 150 countries. 48 In the last twenty years, China has become a major maritime transport service provider, but while China's emphasis on its shipping industry is relatively recent, its experience with alternative forms of dispute resolution is centuries-old. 49

It is often said that China's accession to the WTO has led to an exponential increase in world trade. ⁵⁰ The maritime transport service industry continues to account for the carriage of a significant percentage of that trade. ⁵¹ China is committed to becoming the world's leading provider of ships and shipping services, ⁵² and has invested heavily in improving its shipyards,

⁴⁶ See SINO- CHART, Introduction to China National Chartering Corporation.

⁴⁷ Id.

⁴⁸ See John SHIJIAN MO, Shipping Law in China 3 (1999). "The 1993 International Shipping Registrar ranked the People's Republic of China (PRC) as the 9th largest maritime transport service nation in terms of registered vessels. Hong Kong was 14th. Naturally, Hong Kong's reversion to Chinese control in 1997 augmented China's already formidable presence as a shipping power. However, China's commitment to the growth of its shipping industry began long before the return of Hong Kong. Since the 1950s, China has encouraged and financed numerous projects designed to increase capacity and improve efficiency."

⁵⁰ Brad L. Bacon, the People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma, 9 MINN. J. Global Trade 369, 369 (2000); Rob McKay, WTO Boost for Chinese Maritime Sector, LLOYD'S LIST INT'L, May 26, 2000, at 1

⁵² See McKay, supra note 5; See also George Lauriat, China Shipping: The Great Leap Forward 121 (1983).

ports, and port facilities.⁵³

c. The Steady- Developing Period

At the beginning of the 21st century, China's shipping industry entered into "the steady-developing period".

China's shipbuilding industry grew quickly during the first three quarters of 2007, and a variety of indicators have confirmed this growth.⁵⁴ The output of the shipbuilding industry amounted to 12.03 million DWT, a rise of 44 percent over the same period last year.⁵⁵ Over all, the exported shipping hit 9.77 million DWT, with 81 percent of shipbuilding output completed.⁵⁶ Recently, China has also revised its regulatory scheme in response to criticism calling into question the fairness and transparency of Chinese laws and procedures,⁵⁷ these changes also facilitates China's entry into the WTO.⁵⁸

⁵³ Id

⁵⁴ The Rising Trend of Market Demand Will Greatly Promote the Steady Growth of China's Shipbuilding According to 2007-2008 Report Business Wire January 10, 2008

⁵⁶ In addition, new shipbuilding orders reached 64.34 million DWT, up 120 percent from a year earlier. Of all, the exported shipping arrived at 57.22 DWT, a share of 89 percent in the new shipbuilding orders. The handheld shipbuilding orders were up to 129.35 million DWT, up by 111 percent year-on-year. Of all, the exported shipping got to 113.07 million DWT, accounting for 87 percent of handheld shipbuilding orders.

⁵⁷ Recent increases in admiralty actions are making new procedures for handing lawsuits necessary, particularly with the rise in the number of foreigners filing cases. Maritime Lawsuits, supra note 48. ⁵⁸ Id supra note 50

CHAPTER III

THREE MAJOR INTERNATIONAL MARITIME CONVENTIONS

The legal world of maritime transport is complicated, primarily due to the existence of three differing sets of rules that can be adopted and applied to carriage contracts either by cargo carriers or national legislation.⁵⁹ The 1924 Hague Rules are the first international mandatory rules creating uniform international maritime law, standardizing the rights and obligations of contracting parties, and protecting the future of bills of lading and ocean trade by establishing a balance between cargo and carrier interests. 60 In 1968, the Hague Rules were amended with the document referred to as the Hague-Visby Rules. 61 The Hague-Visby Rules underwent minor modification in 1977.⁶² The Hamburg Rules emerged in 1978 from the United Nations system (UNCITAL⁶³ and UNCTAD⁶⁴) and were born of political agreement rather than commercial compromise. 65 In addition, the Hamburg Rules, unlike the Hague Rules and Hague-Visby Rules, were drafted in the continental rather than the Anglo-American legislative style. 66

i. The Hague Rules

⁵⁹ See Barton S. Selden, Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look, 2 Ann. Surv. Int'l &

Comp. L. 111,122 (1995) ⁶⁰ Karan Hakan, the Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules. Lewiston, N.Y.: E. Mellen Press, 2004, at 27 ⁶¹ Tetley, M.C.C. 3 Ed. 1988, op. cit. at 1039

⁶² Id at 1010, "but not only in those rare cases when the Hague Rules apply and not when the Hague/Visby Rules apply."

⁶³ UNCITAL: Commission that formulates and regulates international trade in cooperation with the World Trade Organization

⁶⁴ UNCTAD: United Nations Conference on Trade and Development

⁶⁵ Hakan, supra note 60. at 35

⁶⁶ Id.

1. Introduction

The full name of Hague Rules is the "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", which recognizes the importance and utility of establishing by agreement certain uniform rules of law relating to bills of lading.⁶⁷

The Hague Rules represented the first attempt by the international community to find a workable and uniform means of dealing with the problem of ship owners regularly excluding themselves from all liability for loss of or damage to cargo.⁶⁸

2. Objective

The objective of the Hague Rules was to establish minimum mandatory liability of carriers which could be derogated. ⁶⁹ Under The Hague Rules, the shipper bears the cost of lost or damaged goods if it cannot prove that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo. ⁷⁰ The rules state certain basic responsibilities of the carrier and shipper, set forth exemptions from carrier liability and provide for limitation of carrier liability. ⁷¹

3. The U.S. Carriage of Goods by Sea Act

The Carriage of Goods by Sea Act has always played an important role in international trade.⁷² It is still the most convenient mode of carriage between two countries or geographical

⁶⁷ Hague Rules, supra note 12, doc. 1-1, at 1-2.1.

⁶⁸ Sturley, M., History of Cosca and Hague Rules, 22, J. Mar. L and Com.1.5

⁶⁹ Id. at 19

⁷⁰ Chester D. Hooper, The Hague and Hague-Visby Rules, 30 J. Mar. L. & Com. 153

^{&#}x27;1 Id.

⁷² See Peter KOH Soon Kwang,, Carriage of goods by Sea, Singapore, Butterworths, 1986, at 120

regions, ⁷³ The contract for any carriage of goods by sea is called a contract of affreightment ⁷⁴. It is concluded between the shipper and ship owner, who agree to provide a ship⁷⁵ for the carriage of goods from one destination to another, for a sum of money. ⁷⁶

In the United States, a different approach is being pursued; the Hague Rules are in effect in the United States through the Carriage of Goods by Sea Act (COGSA).⁷⁷

Based on the Hague Rules, COGSA was enacted in 1936, 78 and gives an ocean carrier 17 legal defenses to escape liability for loss of or damage to goods in transit, including unique protection against liability for losses caused by negligent navigation or management of the ship.⁷⁹ Court decisions have upheld ocean carriers' use of this defense.⁸⁰ COGSA's package limitation must apply to shipments bound for the United States, as Congress has mandated, absent evidence that the parties agreed to a higher limitation.⁸¹ In deciding these cases, courts analyze whether additional consideration from the shipper to the carrier supported the contract for a higher liability limit.82

The Hague-Visby Rules ii.

⁷³ Usually, the contract of affreightment is contained and evidenced either in a charterparty or a bill of landing. The legal issues in most shipping cases before the Commercial Court in London or the High Courts in Singapore, Kuala Lumpur and Hong Kong arise from chaterparties and bills of lading.

⁷⁵ A ship is defined in section24 (1) of the United Kingdom Supreme Court Act 1981 as "any description of vessel used in navigation" and a reference to a ship includes a reference to a hovercraft under section2 (1) of the United Kingdom Hovercraft

⁷⁶ This sum of money is called freight.

⁷⁷ 46 U.S.C. app. Ss 1300-1315 (1988)

⁷⁸ Michael F. Sturley, The Fair Opportunity Requirement Under COGSA Section4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act (Part II), 19 J. Mar. L. & Com. 157, 185-86 (1998)

⁷⁹ Allen, Betty B., Update Maritime Liability Rules, Transportation & Distribution, Vol.32, June, 1991, at 50.

⁸⁰ Trevor R. Jefferies, COGSA or Hague- Visby: Cargo Damage in International Shipments, 18 Hours. J. Int'l L. 767

⁸¹ William Tetley, The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law, 30 J. MAR. L. & COM. 595, 610 n.39 (1999) ⁸² Id.

1. Introduction

The full name of the Visby Rules is the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", and its purpose is to amend the International Convention for the unification of certain rules of law relating to bills of lading. ⁸³

2. Changes Made to the Hague Rules

The Visby Protocol was negotiated in 1968 to make two changes in the Hague Rules: (1) to define the term "package" and (2) to put an end to court litigation over whether the \$500 limitation of liability in the Hague Rules applies to each shipping unit or to an ISO container. The Protocol also changes the \$500 limitation to a monetary value known as Special Drawing Rights, which equates to a relatively insignificant increase. COGSA provides for a \$500 per package limitation to the carrier's liability, The Hague-Visby Rules limit a carrier's liability to about \$800 to \$900 per package, depending on the current price of gold. China has revised its own rules using some features of Hague Visby Rules, which has converted the 667 SDR to 700 RMB.

⁸³ Hague- Visby Rules, supra note 13, doc. No. 1-2, at 1-25.

⁸⁴ Chester D. Hooper, The Hague and Hague-Visby Rules, 30 J. Mar. & Com. 153

⁸⁵ Id, supra note 3, art. 2. "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 the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher."

⁸⁶ Id, supra note 13, art.5 (a)-(b)

⁸⁷ Update Maritime Liability Rules, supra note 79 at 2.

⁸⁸ Hague- Visby Rules, supra note 3, art.2.

⁸⁹ This would apply to claims outside China should be converted into the local currency from SDRs (on the basis that the conversion from RMBs should yield 667SDRs)

3. Influence on Chinese Maritime Law

Since 1924, the Hague Rules have been widely followed throughout the international maritime community and have had tremendous influence on seaborne trade. ⁹⁰ Nevertheless, China is not a signatory to the Hague Rules or the Hague-Visby Rules. For years, the bill of lading clauses of COSCO and CNFTTC (China National Foreign Trade Transportation Corporation) have been guided by the Hague Rules with respect to the rights, liabilities, responsibilities and immunities of the carriers. ⁹¹ Therefore, since current Chinese maritime practice adheres to the spirit and major provisions of the 1924 Hague Rules, it is those rules that should be the guiding force behind China's new maritime code. ⁹²

iii. The Hamburg Rules

In the early 1970s, it was apparent that we were entering the era of containerization.⁹³

Containerization offered great technological improvements in ocean transport, but would cause substantial detriment to cargo movement unless liability rules were updated.⁹⁴ To some extent, the Hague and Hague-Visby Rules do not meet the needs of international maritime law.⁹⁵ Hence, the Hamburg Rules were negotiated and finally adopted by a United Nations committee in 1978, and were subject to ratification by the trading nations.⁹⁶ The Hamburg Rules will be discussed in greater detail in the following chapter.

⁰¹¹⁰⁰

⁹⁰ U.S-flag carriers operate under these rules in spite of two more recent attempts to update ocean shipping rules. The Visby Protocol, however, has never been ratified by the U.S.

⁹¹ Curtis E. Pew et al., The Maritime Arbitration Commission of the People's Republic of China: Options and Strategies, 18 J. MAR. L. & COM. 351, 352 n.3 (1987)

⁹³ William Tetley, introduction, introductory remarks at the second William Tetley Maritime Law Lecture Series, Jan. 26, 2000
⁹⁴ Id. at 15

⁹⁵ Michael F. Sturley, Changing Liability Rules and Marine Insurance: Conflict Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence, 24 J. Mar. L. & Com. 119, 149 (1993)

96 Hamburg Rules, supra note 14

CHAPTER IV

THE HAMBURG RULES and the MARITIME CODE of the PRC

i. A Brief Introduction to the Hamburg Rules

1. The History and Background of the Hamburg Rules

Many years after Hague Rules were established, modification of the Hague Rules became necessary for various reasons, including the need to increase the limits of liability which under The Hague Rules had become commercially unrealistic.⁹⁷ Thus, the Visby Amendments were promulgated. The United Nations, through UNCTAD⁹⁸ and UNCITRAL, became the vehicle for this reexamination. The U.N. effort culminated in the International Convention on the Carriage of Goods by Sea of 1978, commonly known as the Hamburg Rules.⁹⁹

These rules provided many improvements over the Hague Rules, which had been adopted in the days of wooden sailing ships. ¹⁰⁰ The Hamburg Rules have not yet become the world's governing liability regime for maritime transport because 20 nations must ratify them before they attain treaty status. As of 1991, only 17 nations had done so. ¹⁰¹

2. The Hamburg Rules Are Not Widely Accepted Throughout the World

⁹⁷ Christof Luddeke & Andrew Johnson, The Hamburg Rules: From Hague Rules to Hamburg Rule Via Visby. 2d.ed, London: Lloyd's London Press, 1995

⁹⁸ See UNCTAD, The Economic and Commercial Implication of the Entry Into Force of the Hamburg Rules and the Multimodal Transport Convention (1991)

⁹⁹ Supra note 96, at 135

¹⁰⁰ Supra note 79

¹⁰¹ Id.

After a 14-year gestation period, the Hamburg Rules entered into force in November 1992. There are now 29 contracting states, several of which are land-locked. These 25 states are estimated to control a mere 1.5% of the world's fleet and only 3.2% of world trade, in contract to the Hague-Visby contracting states, which control 35% and 65%, respectively. 103

a. Nations That Have Ratified the Hamburg Rules 104

Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia Uganda, United Republic of Tanzania, and Zambia.

b. Nations With the Shippers' Council Supporting the Hamburg Rules

Austria, Australia, Belgium, Canada, Colombia, Demark, Finland, France, Germany, Hong Kong, Indonesia, Israel, Italy, India, Korea, Malaysia, Netherlands, Norway, Philippines, Portugal, Singapore, Spain, Sweden, Switzerland, Thailand, United Kingdom and United States.

ii. **Attitudes toward the Hamburg Rules**

From the countries listed above, it is easy to perceive the differing attitudes of shippers from countries around the world with respect to the Hamburg Rules.

1. Mistrust From the Big Shipping Countries

^{102 1978} United Nations Convention on the Carriage of Goods by Sea, opened for signature Mar. 31, 1978, 17 I. L. M. 608, reprinted in 6 Benedict on Admiralty doc. 1-3, at 1-32.6

George F. Chandler, After Reaching a Century of the Harter Act: Where Should We Go From Here?, 27 J. Mar. L. & Com. 43, 44 n. 8(1993) "As remarked about the first states to adopt Hamburg Rules: 'Seven of these countries are land-locked and most have no significant world trade.".

¹⁰⁴ See http://www.uncitral.org.

a. Hamburg Rules haven not been adopted by many countries

The United States is a Hague Rules country and has not moved to the Hague-Visby or the Hamburg Rules. ¹⁰⁵ In the late 1990s, the U.S. Maritime Law Association proposed a revision to update American law, but no progress was made legislatively. ¹⁰⁶ The United Kingdom has adopted the Hague-Visby Rules. Even after 30 years, the Hamburg Rules have not attracted a significant number of adherents.

b. Why Some Big Shipping Countries are Skeptical of the Hamburg Rules?

It is not surprising that the shipping industry would not eagerly accept the Hamburg Rules because they are more generous to shippers. They represented a significant shift of liability and burden of proof toward the carrier. 108

In any case, ship owners have an instinctive mistrust of the Hamburg Rules, because they are a creature of the United Nations, which has not been the shipping industry's favorite organization since the introduction of the liner code. However, given the fact that the rules are considered more favorable to shippers, shippers' own disenchantment with their impact is more thought-provoking. In the control of the liner code.

2. Superiority of the Hamburg Rule

¹⁰⁵ The Hague Rules are codified in the United States under the Carriage of Goods by Sea Act. See 46 U.S.C.A. app. §§1300-1315(West 1975)

¹⁰⁶ Id

Tony Gray, Cargo liability back on agenda: High-level meetings in bid to bring global uniformity closer as industry disenchantment with Hamburg Rules grows- Maritime cargo liability is once more being pushed to the front of the shipping industry's agenda. Lloyd's List, September 26, 1996

Brain Makins, the Hamburg Rules: A Casualty?, 96 Il Diritto Marittimo 637, 652 (1994)
 Id.

When comparing the Hamburg Rules to the Hague and Hague-Visby Rules, it is apparent that there is some fundamental difference between these two liability regimes such as the Hamburg Rules do not contain nautical fault and fire exceptions. The primary reason for favoring the Hamburg Rules is one of clarity of drafting; unlike the Hague and the Hague-Visby Rules, the Hamburg Rules are very clear.

As a provision, relieving a carrier from liability in a case of fault or neglect of his servant, or even fault of the master or the officers, in the navigation of a ship would, as a contractual stipulation, not be valid under most national legislations. Modern laws against unfair contract practices do not allow for such a waiver of main obligations of the carrier. The legal rule as contained in Hague and Hague-Visby Rules is not subject to the test under the unfair contract practices law, because it is based on an international convention having force of law.

It is an often-heard argument that adoption of the Hamburg Rules would raise legal doubts as compared to the well-established understanding and impact of the Hague and the Hague-Visby Rules. However, whenever a new system of liability is introduced, it takes time to be absorbed.¹¹⁷

¹¹¹ Supra note 105 at 3

¹¹² Id

Tetley, supra note 92, at 610. Most nations restrict coasting trade to national carriers, thus the application of national law. See Fading Borders of Commerce, AM. SHIPPER, Mar. 1, 2000, at 20

¹¹⁴ Id. at 611

¹¹⁵ See Williams, supra note 10

¹¹⁶ See Big League Hopes, supra note 15

¹¹⁷ Aviva Freudmann & Tim Sansbury, Maritime Talks Are Called for Once More, J. COM., Oct. 13, 1999, at 1.

It can be observed that the alleged clarity of the Hamburg Rules has not been seen by many of the significant shipping states as reason enough to abandon Hague and Hague-Visby Rules.¹¹⁸ Their reasoning is based on familiarity with the Hague and Hague-Visby Rules regime, rather than on anything fundamentally problematic with the Hamburg Rules.¹¹⁹

3. The Super Power Countries' New Attitude Toward the Rules

In the US, the Maritime Law Association is seeking amendments to the Carriage of Goods by Sea Act, including provisions of both the Hamburg Rules and the long-established Hague-Visby Rules. ¹²⁰ Importers and exporters have long endorsed the dramatic improvements contained in the Hamburg Rules. In the early 1980s, a total of 20 shippers' associations established a coalition, known as the Carmack Alliance, to support U.S. ratification of such rules. This powerful group later aligned with a support group known as American Shippers for the Hamburg Alliance (ASHA). ¹²¹

In the early 1990s, Australia¹²² and Canada¹²³ put the Hamburg Rules into effect. European, Japanese, and American shippers jointly called for a new global maritime cargo liability regime to be installed. It is not surprising that the shipping industry would like to have seen the

¹¹⁸ See generally Leo Delwaide, The Hamburg Rules: A Choice For the EEC? 96 II Diritto marittimo 74 (1994)

¹²⁰ B. Michael, Universal B/L, American Shipper (1995)

¹²¹ ASHA serves as an educational tool to keep shippers, legislative staffs, and administrative staffs informed on the advantage of the Hamburg Rules. It works for the ratification of the Hamburg Rules in an effort to regain U.S. leadership in world markets.

¹²² Carriage of Goods by Sea Act(1991). The Act came into force on October 31, 1991. The Act was due to become effective after October 31, 1994,; however, this has been deferred for three years. I. B. A. Sec. on Bus. Law, Mar. & Transp. L. Newsletter, July 1995, at 3.

¹²³ An Act Respecting the Transportation of Goods by Water, ch. 21, 1993 R.S.C. 369-401 (Can.)

Hamburg Rules put into effect, as they are more generous to shippers. They represented a significant shift of liability and burden of proof towards the carrier. 124

iii. Maritime Code of the PRC Adopts Some Articles from the Hamburg Rules

Unlike other countries, the Maritime Code of the PRC adopts some articles from the Hamburg Rules. One primary example is the Himalaya Clause, which addresses the liability of contracting and actual carriers.

1. Himalaya Clause¹²⁵

Paragraph 2 of Article 58 of the Maritime Code of the PRC, which is known as the legalized "Himalaya Clause," is closely modeled after Paragraph 2, Article 7 of the Hamburg Rules. Additionally, the provisions regarding actual carriers under the Maritime Code of the PRC are nearly identical to those of the Hamburg Rules, too. 127

Article 58 of the Maritime Code of the PRC:

The defense 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 action is founded in contract or in tort.

The clause takes its name from a decision of the English Court of Appeal in the case of Adler v Dickson (The Himalaya) [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158 [1].

¹²⁴ Gray, supra note 105

The claimant was a passenger on the S.S. Himalaya who had been injured when a gangway fell, throwing her onto the quayside below. The passenger ticket contained a non-responsibility clause exempting the carrier, so the claimant sued the master of the ship and the boatswain. The claimant argued that under the normal rules of privity of contract the defendants could not rely on the terms of a contract that they were not party to. However, the Court of Appeal declared that in the carriage of passengers as well as in the carriage of goods the law permitted a carrier to stipulate not only for himself, but also for those whom he engaged to carry out the contract. It was held as well that the stipulation might be express or implied. Ironically, on the facts before the court, it was held that the passenger ticket did not expressly or by implication benefit servants or agents and thus the defendants could not take advantage of the exception clause. However, after the decision, specially drafted Himalaya clauses benefiting stevedores and others began to be included in bills of lading.

The decision has subsequently been upheld several times by the Judicial Committee of the Privy Council, and is now accepted as settled law in most common law countries.

 $^{^{126}}$ See Leslie Tomasello Weitz, The Nautical Fault Debate (The Hamburg Rules, The U.S. COGSA 95, The STCW95, and The ISM Code), 22 Tul. Mar. L. J. 581 at 2 127 Id

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 action was within the scope of his employment or agency.

Paragraph 2, Article 7 of the Hamburg Rules:

If such action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under this Convention.

2. The Substantive Issue --- The Actual Carrier

In most instances, the contracting carrier transports goods to their ultimate destination by himself. Sometimes, he may entrust the performance of the contract to another. This authority to delegate performance may be implied.¹²⁸

In *Captain Grego's*¹²⁹ case, this implied authority does not entitle the contracting carrier to contract with another carrier¹³⁰ on less favorable terms binding upon the shipper.¹³¹ Rather, the contracting carrier is always liable to shipper on the original contract as a principle, inasmuch as the on-carrier is merely deemed to perform the contract for and on behalf of the contracting carrier.¹³²

The actual carrier thus acts as a servant or agent of the contracting carrier. However, it is also possible that the latter signs the bill of the lading as agent for the actual carrier (who may or may not be named in the document). ¹³³ In this case, only the actual carrier must answer for loss or damage occurring during his performance of the contract. ¹³⁴ Where the actual carrier acts as

129 [1989] 2 Lloyd's Rep 63

¹²⁸ Id. at 17

¹³⁰ Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402 at 428 per Devlin J.

¹³¹ Id.

¹³² Id. The principle of vicarious liability is relevant in tort but not in contract

¹³³ Id.

¹³⁴ The contracting carrier is not personally liable as agent unless he has acted without authority: see Beatson Anson's Law of Contract (27th ed Oxford University Press Oxford 1998) p652. Nevertheless, the instant statement of the law is limited to contractual liability and does not cover the case of bailment or tortuous liability.

an independent contractor, it is unusual to include in the bill of lading a clause exempting the contracting carrier from liability for the former's act or omission in the performance of the contract. 135 As far as the liability is concerned, it is clear that the cargo-owner can only use the actual carrier in procession of the cargo provided the loss of damage occurred at the material time. 136

The three conventions have different definitions and statues regarding the actual carrier, which will be discussed briefly in the following paragraphs.

a. Hague/ Hague-Visby Rules

Neither the Hague nor the Hague-Visby Rules specifically deal with this aspect of liability and, on the basis that they do not form a complete code on sea carriage, ¹³⁷ common law continues to apply. 138 Under the Hague-Visby Rules, independent contractors (for example, the port operator) are expressly excluded from the scope of persons who are entitled to avail themselves of the defenses and limits of liability which the carrier is entitled to invoke. ¹³⁹ As there is no such exclusion in this paragraph 140, it may be interpreted that the independent contractors are entitled to such defenses and limits of liability provided for in this paragraph.¹⁴¹

¹³⁵ See UNCTAD Report on Bills of lading (TD/B/C.4/ISL/6/Rev.1) (United Nations New York 1971); UNCITRAL Working Group on International Shipping Legislation Report of the 5th session (A/CN.9/76) (United Nations New York 1973).

136 See also Colinvaux (ed) Carrier's Carriage By Sea (13th ed Stevens & Sons London 1982) vol 1 sects 418 ff. The actual carrier

may also be liable as bailee for reward

¹³⁷ Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asian) Pty Ltd (1980) 147 CLR 142 at 152-153 per Stephen J, at 157-159 per Mason & Wilson JJ.

138 Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja) (1998) 72 ALJR 1592

at 1629 per Callinan J, contra at 1396 per Gaudron Gummow & Hayne JJ, at 1621 per Kirby J.

¹³⁹ Hick v Rodocanachi (1891) 2 OB 626

¹⁴⁰ It refers to Paragraph 2 of Article 7 of the Hamburg Rules.

¹⁴¹ Ying Jing Ling, The Hamburg Rules and Interpretation, first edition (Foreign Trade Press, 1985), at 291 Some other scholars have similar opinion, see Xinping Zhang, Maritime Law, first edition (China Politics and Law University Press, 2002), at 323.

Given that the term "carrier" is restricted to the contracting carrier, notwithstanding its inclusive definition in Article I, it is fair to say that the Rules do not apply to, nor are they available to, the actual carrier unless he is a servant or an agent. The term "carrier" may also exclude a sub-contractor 143, a servant or an agent by express provision in the contract. 144

b. The Hamburg Rules

The Hamburg Rules aim to address the problem posed by charterers' bills of lading by expressly distinguishing the contracting carrier from the actual carrier where they are different parties.145

Article 10 of the Hamburg Rules: Liability of the Carrier and Actual Carrier

- 1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in 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.
- 2. 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. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.
- 3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.
- **4.** Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

¹⁴⁵ Ling, supra note139 at 292

¹⁴² See Sidney Cooke Ltd v Hapag-Lloyd Akt [1980] 2 NSWLR 587 at 595 per Yeldham J, citing J Gadsden Pty Ltd v Australian Coastal Shipping Commission (1977) 31 FLR 157 at 160-163 per Moffitt P, at 164-166 per Samuels JA.

^{143 (1989) 167} CLR 219 144 Id. at 229

- **5.** The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.
- **6.** Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

This article limits the responsibility of the actual carrier to the part of the carriage performed by him or his servants or agents while rendering the contracting carrier liable throughout the entire voyage. ¹⁴⁶ For example, if a forwarding agent has promised an unrealistic delivery date or accepted dangerous goods for carriage, the shipowner, as the actual carrier, will be deemed to have knowledge of such undertaking and will be rendered liable to the cargo-owner, accordingly. ¹⁴⁷

Although all the provisions of the Rules governing the liability of the contracting carrier are expressly rendered applicable to the actual carrier in such circumstances, ¹⁴⁸ it is debatable if the servants or agents employed by the actual carrier are also included in the definition of "actual carrier", ¹⁴⁹ given the additional reference to "any other person to whom such performance has been entrusted" and, furthermore, the delegation of such performance in article 10 (1) "whether or not in pursuance of a liberty under the contract of carriage by sea. ¹⁵¹

¹⁴⁶ See McGovern "The Practical and Economic Effects of Hamburg Rules from the point of view of a shipowner" CMI Colloquium on the Hamburg Rules (Vienna 1979), at 8

⁴⁷ Id.

¹⁴⁸ This also means that the cargo-owner has to prove that the loss during the portion of the carriage performed by the actual carrier: UNCTAD The Economic and Commercial Implications of the Hamburg Rules and The Multimodal Transport Convention (TD/B/C.4/315/Rev.1) (United Nations New York 1991) p121. With respect, it is difficult to see how this could be so in light of the principle of "presumed fault".

¹⁴⁹ Id. at 123

¹⁵⁰ McGovern, supra note 144

¹⁵¹ See Tetley "The Hamburg Rules – A Commentary" (1979) LMCLQ at 8 where article 10 is deemed a "major advance in the law"

According to the UNCTAD, the Hamburg Rules represent an improvement over The Hague/Hague-Visby regime insofar as the latter does not provide for the respective liability of the contracting and actual carriers. ¹⁵²

c. The Pivotal Issue

Why is the phrase "such servant or agent not being an independent contractor" deleted under the Hamburg Rules?

As we know, in imposing a uniform test of liability, the draftsmen of the Hamburg Rules were seeking to remove some of the incongruities and inconsistencies arising from ambiguous wording in the Hague-Visby Rules. In my view, the reasons for deleting the relevant phrase are likely as follows:

(1) The Difference Between "Servant" and "Independent Contractor"

The first reason for the deletion is that the wording of "such servant or agent not being an independent contractor" is problematic. It is difficult to be satisfied that the self-contradictory words "servant or agent of the carrier" ("such servant or agent not being an independent contractor") mean anything but a servant who does not work on a self-employed basis. ¹⁵³ If one acts on another's behalf as an agent, not being a servant, under contract, one must be an independent contractor. ¹⁵⁴ To give the words a meaning excluding a stevedore is absurd: stevedores are not even mentioned." ¹⁵⁵ Scrutton, T. E. ¹⁵⁶ points out: "Recourse to the French text

155 Caver's Carriage by sea, 13thed (Stevens & Sons, 1982), p.402.

¹⁵² Id. "This provision is, however, taken out of context as meaning 'regardless of the contracting carrier's agreement with the actual carrier".

¹⁵³ See Sturley, supra note 94, at 8.

¹⁵⁴ Id.

¹⁵⁶ Scrutton, T. E., Mocatta, A. A., Mustill, M. J., & Boyd, S. C. (1984). Scrutton on charterparties and bills of lading. London: Sweet & Maxwell.

is of no help. The equivalent to 'servant or agent' is Propose, a word elsewhere translated simply as 'servant'. There is no consistency in the use and translation of 'Propose' and 'servant'." ¹⁵⁷

Therefore, the point of the problem is to identify the difference between "an independent contractor" and a "servant".

Black's Law Dictionary defines "independent contractor" as follows:

"One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. It does not matter whether the work is done for pay or gratuitously. Unlike an employee, an independent contractor who commits a wrong while carrying out does not create liability for the one who did the hiring." ¹⁵⁸

Black's Law Dictionary explains "servant", to be::

"A person who is employed by another to do work under the control and direction of the employer. A servant, such as a full-employee, provides personal services that are integral to an employer's business, so a servant must submit to the employer's control of the servant's time and behavior."

In looking at the definitions provided by Black's, it is easily observable that the intention and extension of the independent contractor is quite different from that of the servant at common law. Therefore, the scope of persons who are servants cannot overlap with that of independent contractors. ¹⁶⁰

In my view, the function of the phrase "such servant not being an independent contractor" in The Hague-Visby Rules is used only to emphasize or reiterate this established principle of law. Accordingly, although this phrase has been deleted in the Hamburg Rules, the scope of servants still could not include independent contractors.

Article I (a) of the Hague Rules:

158 Bryan A. Garner, Black's Law Dictionary, Eighth Edition, p.785

¹⁵⁷ Id. at 459

¹⁵⁹ Id. at 1399

¹⁶⁰ See Scrutton, supra note 154

In this Convention the following words are employed with the meanings set out below: "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

However, this construction has been rendered irrelevant in the present context by frequent and distinct reference to "a carrier, master or agent of the carrier" in the Rules. ¹⁶¹ Thus, the safer view is that the term should be limited to the contracting carrier himself. ¹⁶² It follows that a bill of landing issued by a charterer and signed by or on behalf of the shipmaster becomes *prima facie* evidence ¹⁶³ of a carriage contract between the shipper and the shipowner. ¹⁶⁴ Where a "demise" clause is contained in the bill of landing, the contract will probably be considered as between the shipper owner and the shipowner (or demise – charterer), notwithstanding the fact that the document is signed by the charterer or his agent. ¹⁶⁵ On the other hand, a bill of lading issued by a time-charterer is probably binding upon him ¹⁶⁶ as the contracting party insofar as a circular indemnity clause is usually inserted into the document identifying the charterer's contractual standard and excluding any action by the shipper in tort or bailment against the shipowner who actually carries the cargo. ¹⁶⁷

(2) Whether the protection of the Hamburg Rules is applicable to the independent contractor is dependent upon the provisions of the actual carrier.

Secondly, and most importantly, whether the protection of the Hamburg Rules is applicable to the independent contractor is dependent upon the definitions of the actual carrier.

¹⁶¹ See Hague Rules, supra note 12, arts III IV & VI

¹⁶² See Kaleej International Pty Ltd v Gulf Shipping Lines Ltd (1986) 6 NSWLR 569 at 573-576 per Samuels JA

¹⁶³ Id. at 521

¹⁶⁴ The role of the shipowner could also be the demise-charter, particularly when the shipper is not aware of the existence of the charterparty.

¹⁶⁵ See the Berkshire [1974] 1 Lloyd's Rrp 185 at 185-189 per Brandon J

¹⁶⁶ Here "him" is supposed to be the shipowner.

¹⁶⁷ See Davies & Dickey Shipping law 2nd ed LBC Information Services Sydney 1995) at 334-335

As we know, the doctrine of privity of contract¹⁶⁸ is upheld by the Hague-Visby Rules, under which the independent contractor, who is not the party to the contract of carriage of goods by sea, is not entitled to the defenses and limits of liability of the carrier.¹⁶⁹ But the privity of contract doctrine has been broken under the Hamburg Rules, which hold the actual carrier (not contracting carrier), who is typically an independent contractor, to be subject to liability for loss of or damage to the goods.¹⁷⁰

Recognizing this, it might be easier to understand why Article 7.2 of the Hamburg Rules has deleted the phrase "such servant or agent not being an independent contractor" which has been used by the Hague-Visby Rules. ¹⁷¹ Under the Hamburg Rules, whether one independent contractor is entitled to avail himself of the defenses and limits of liability available to the carrier should be determined by the provisions relevant to the actual carrier. ¹⁷² In other words, insofar as an independent contractor can be identified as the actual carrier; he is entitled to avail himself of the defenses and limits of liability of the carrier. ¹⁷³

3. Himalaya Clause Clarifies the Hamburg Rules

The Hamburg Rules resolve the problem of the Himalaya Clause in Article 4, which extends the responsibility of the carrier from port to port, while Article 10 holds the carrier

¹⁶⁸ The doctrine of privity in contract law provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it.

¹⁶⁹ See, e.g., Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, 1993 AMC 2842 (4th Cir. 1993)

¹⁷⁰ See Id.

¹⁷¹ Hamburg Rules, supra note 14, art. 7(2)

¹⁷² Id. art. 8(1)

¹⁷³ Id.

responsible for the acts of the actual carrier, who, by the definition in Article 1(2), 174 would include the stevedore and the terminal agent.

In fact, as compared to the Hague-Visby Rules, the Hamburg Rules have further legalized the "Himalaya Clause". This legalization is achieved in two different ways:

- (1) Article 7.2 provides automatic Himalaya protection only for the servant or agent of the carrier, which is a direct legalization of the Himalaya clause. ¹⁷⁵
- (2) The rule of the actual carrier also embodies the Himalaya protection, which is for some independent contractors who perform the carriage of the goods or part thereof entrusted by the carrier, whereas it is indirect and somewhat implied.¹⁷⁶

Under the Hamburg Rules, the port operator should be regarded as the actual carrier provided for in Article 1.2, not the servant or agent of the carrier provided for in Article 7.2. Since the relevant provisions of Maritime Code of THE PRC regarding this issue are modeled after the Hamburg Rules, a similar conclusion might be drawn under the Maritime Code of the PRC. 177

¹⁷⁴ Article 1.2 of the Hamburg Rules provides: "'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."

¹⁷⁵ The MLA Proposal through the adoption of a broad definition of the term "carrier" extends the statutory exemptions and

¹⁷⁵ The MLA Proposal through the adoption of a broad definition of the term "carrier" extends the statutory exemptions and limitations of liability to all parties engaged in performing the contract of carriage (including ocean carriers, stevedores, terminal operators, freight forwarders, etc.), thereby adopting a statutory Himalaya Clause. MLA Proposal, supra note 173, s 1(a).

¹⁷⁶ See Id.

Regarding whether the port operator may be treated as the actual carrier under the Hamburg Rules and CMC, and detailed analysis, further see this paper "IV. The port operator: the actual carrier under CMC".

CHAPTER V

LIMITATION OF ACTION: THE INFLUENCE OF INTERNATIONAL CONVENTIONS ON CHINESE LAW

i. **Introduction to Limitation of Action**

"Limitation of Action" refers to a regime under which, if a party to an action neglects or fails to exercise his right for a certain period, his title shall become defective with respect to its legal effect.178

In China, limitation of action is an extinctive prescription, as may be seen from substantive laws such as the General Principles of Civil Law, Contract Law and the Maritime Code of the PRC. ¹⁷⁹ In nature, the limitation of action regarding carriage of cargo by sea in China is also an extinctive prescription, both for cargo claims filed by cargo owners against carriers and for recovery claims filed by carriers against the third party liable. 180 Furthermore, it is a special limitation of time different from the general two-year limitation of action prescribed in the General Principles of Civil Law. 181

ii. **Limitation of Action Under the Statues of Different Countries**

1. Chinese Law

¹⁷⁸ See Thomas J. Schoenbaun, Admiralty and maritime law, St. Paul, Minn.: Thomson/West, c2004, at 149

¹⁷⁹ In the civil law system, the regime of limitation of action is stipulated in substantive laws. But in the Anglo-American law system, the limitation of action is generally considered as procedural issue and stipulated in procedural laws or separate laws.

180 Hon. Zhang Xianwei, Comment on the Legal Regime of Limitation of Actions Regarding Carriage of Cargo by Sea in China, 37 J. Mar. L. & Com.261, at 1 ¹⁸¹ Id.

The limitation period regarding the carriage of cargo by sea prescribed in the Maritime Code of the PRC is a rule of time limitation laid down in regard to the field of maritime carriage, which has extinctive particularity compared with other fields. Under Paragraph 1 of Article 257 of the Maritime Code of the PRC, the limitation period for claims against the carrier with regard to the carriage of cargo by sea is one year, and that for recovery (subrogation or indemnity) claims is three months. 182

Paragraph 1, Article 257 of the Maritime Code of the PRC:

Article 257 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 time-barred 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.

Considering the stipulation of the Maritime Code of the PRC that the consignee must fulfill the obligation of taking delivery of the cargo in due course and such complicated procedures as assignment of bills of lading and payment of money are involved in international trade, if the limitation period counts from the time when the obligees (mainly cargo owners) know or should know, then it may likely lead to failure of delivery of the cargo in due course, which would give rise to more disputes. ¹⁸³

In the "Special Procedural Law for Maritime Action of 1999", it is further provided that claimants may contest in writing the limitation petition before the court. It provides that a

¹⁸³ Id.

¹⁸² Ni Chun Nan, On Improvement of the Regime of Limitation of Time in Maritime Code of PRC," published in Maritime Trial, Issue 2 of 1998.

petition for limitation can be initiated before or during the suit. However, it must be invoked before the judgment of the first trial.¹⁸⁴

Article 106 of the Special Procedural Law for Maritime Action of 1999:

Where an interested party objects the application of an applicant for constituting a limitation fund for maritime claims liability, the party shall, within seven days from the date of the receipt of the notice or within thirty days from the date of the public announcement for those who have not received the notice, raise the objection in written form to the maritime court. After receiving a written objection submitted by the interested party, the maritime court shall examine it and make an order within fifteen days. Where the objection is established, it shall order the application of the applicant to be rejected; if the objection is not established, it shall order to approve the applicant to constitute a imitation fund for maritime claims liability. Where the parties are not satisfied with an order, they may file an appeal within seven days from the date of the receipt of the order. The people's court of second instance shall make an order within fifteen days from the date of the receipt of appeal petition.

Thus, the statute of limitation for limitation petitions also ties to the prescriptions for various maritime actions as provided in the Maritime Code of the PRC.¹⁸⁵ For example, Article 261 of the Maritime Code of the PRC provides that the statute of limitation for claims arising out of collisions between vessels is two years from the date of casualty.¹⁸⁶ It is worth nothing that prescriptions contained in the General Principle of Civil Law¹⁸⁷ shall be applied if the Maritime Code of the PRC is silent. ¹⁸⁸

Article 261 of the Maritime Code of the PRC:

The limitation period for claims with regard to collision of ships is two years, counting from the day on which the collision occurred. The limitation period for claims with regard to the right of recourse as provided for in paragraph 3 of Article 169 of this Code is one year, counting from the day on which the parties concerned jointly and severally paid the amount of compensation for the damage occurred.

2. International Conventions

¹⁸⁴ Article 101 of the Special Procedural Law for Maritime Law Actions of 1999

¹⁸⁵ See Ni Chun Nan, supra note 182

¹⁸⁶ Article 261 of CMC read as ""

¹⁸⁷ Lexis/Nexis, China Law No.346

¹⁸⁸ See Ni Chun Nan, supra note 182, "For example, with respect to seaman's claims for personal injury and death, no time bar is provided under the CMC. Therefore, the prescription of personal injury and the death claims under the General Principles of Civil Law maybe applied analogously."

Generally speaking, limitation of liability can be invoked in one of the two ways. Limitation proceedings maybe pursued independently of liability proceedings. ¹⁸⁹ For example, in an American case, *Sana For Sana v. Hawaiian Cruises*, *Ltd.*, ¹⁹⁰ the court stated that defense of limitation of liability may be raised by two methods. The first method allows a vessel owner to petition for limitation of liability within six months of written notification of possible claims. ¹⁹¹ Alternatively, the second method allows limitation to be pleaded as a defense in answer to an earlier filed damage suit. ¹⁹² Similarly, in *Grindle v. Fun Charters, Inc.*, ¹⁹³ the court held that limitation of shipowners' liability defense may be asserted as an affirmative defense in any court.

3. U.S. Law

In the United States, concursus is regarded as one of the primary purposes of the limitation law.¹⁹⁴ Concursus provides a concourse for determination of liability arising out of marine casualties where asserted claims exceed the value of the vessel, under which effective marshaling of assets can be achieved.¹⁹⁵ For example, in *Complaint of Mohawk Associates v. Furlong*, *Inc.*, ¹⁹⁶ the court held that if the potentially liable shipowner claimed protection under the Limitation of Liability Act, the district court was authorized to stay all other proceedings against the shipowner and to direct all potential claimants to file the claims against the shipowner with

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¹⁸⁹ Xia Chen, Limitation of Liability for Maritime Claims: A Study of U.S. Law, Chinese Law, and International Conventions, Boston: Kluwer Law International, c 2001 at 106

¹⁹⁰ Sana for Sana v. Hawaiian Cruises, Ltd. ,961 F.Supp.236(D. Hawaii 1997)

¹⁹¹ See Xia Chen, supra note 107

¹⁹² Id

¹⁹³ See Grindle v. Fun Charters, Inc., 962 F. Supp.1248 (D. Hawaii 1996)

¹⁹⁴ See e.g., Anderson v. Nadon, 360 F. 2d 53 (9th Cir. 1986); Matter of Garvey Marine, Inc. 909 F. Supp. 560(N.D. Ill. 1995), where the court stated that the purpose of Limitation of Vessel Owner's Liability Act is to provide for the marshaling of assets and the distribution pro rata of an inadequate fund among claimants none of whom can be paid in full.

¹⁹⁵ See generally, Graydon S. Staring, "Limitation Practice and Procedure", 53 Tul. L. Rev. 1134(1979).

¹⁹⁶ Complaint of Mohawk Associates and Furlong, Inc., 897 F. Supp. 906 (D. Md.1995)

the district court within a specified period of time. 197 As a matter of fact, by operation of the Limitation Act, the posting of security in a limitation proceeding is in and of itself a restraint of other proceedings without the need for any other court orders.¹⁹⁸

The time limit for limitation proceedings originally was prescribed in the 1936 Amendment to the Limitation of Liability Act of 1851. It was later incorporated in Rule F of the Supplemental Rules of Civil Procedure. Prior to these rules, shipowners could seek limitation of liability at any time, even after the liability issue had been determined by judgment. 199 Rule F (1), however, provides that "not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court ... for limitation of liability pursuant to stature". 200 The purpose of the time bar for shipowners' filing petitions for limitation is to require that shipowners, in order to gain the benefit of the right to the limit liability, act promptly.²⁰¹

4. English Law

The legal consequences of the above-mentioned two methods of invoking limitation of liability may be very different. ²⁰² For example, under English law, if limitation is merely invoked as a form of defense in a liability action, the defense may only affect the particular claims brought in that liability action. In comparison, if an independent limitation proceeding is initiated; it is effective upon all potential claims against the same limitation fund. ²⁰³

¹⁹⁷ 28 U.S.C. 1333. Originally, it was provided by in Section9 of the Judiciary Act of 1789 as follow: "District courts ... shall also have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of common law remedy, where the common law is competent to give it." ¹⁹⁸ Graydon S. Staring, "Limitation Practice and Procedure", 53 Tul. L. Rev. 1134(1979).

¹⁹⁹ See, e.g., Cincinnati Gas & Electric Co v. Abel, 533 F. 2d 1001, cert. denied, 429 U.S. 858 (1976)

²⁰⁰ Rule F of Supplemental Rules of Civil Procedure.

²⁰¹ Complaint of Morania Barge No. 190, Inc., 690 F.2d 32 (2d Cir. 1982)

²⁰² Christopher Hill, "Maritime Law", London: Lloyd's of London Press Ltd., 4th ed., c1995, at 414 ²⁰³ Id.

iii. The Influence of International Conventions on the Establishment and Implementation of Chinese Maritime Law

1. The Influence of International Conventions and Customary Practices

Article 214 of the Maritime Code of the PRC provides a bar to other actions once the limitation fund has been constituted by the person responsible or by anyone on behalf of such person.²⁰⁴ It is a simplified version of Article 13 of the Convention on Limitation of Liability for Maritime Claims (LLMC) of 1976 with respect to barring other actions.²⁰⁵

Article 214 of the Maritime Code of the PRC:

Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.

Article 13(1) of LLMC:

Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

2. The Characteristics of Limitation of Action in China

a. Legislation Affecting Shipowners' Interests

Like other large shipping nations that not only pass laws favorable to shipowners but also establish policies preferential to shipowners, China tends to adopt legislation that weighs heavily in favor of shipowners' interests in order to develop the shipping industry and encourage people

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²⁰⁴ See Xia Chen, supra note 109

²⁰⁵ See Id. at 110

to engage in this risky industry. 206 China took great pains to developing her shipping industry shortly after the open policy was adopted. During the drafting of the Maritime Code, China introduced international conventions, international shipping practices and advanced legislation abroad, and, considering that China is a major shipping nation, laid down various regulations favorable to shipowners' interests. 207

b. Protecting the Security of Transactions

Protecting the security of transactions in the shipping industry is an important focal point in creating a regime of limitation of action, and can be usually achieved by establishing the principle of a legally prescribed time limitation. ²⁰⁸ That means it is the law, rather than the agreement between parties, that shall provide for the period, the type, and the legal effect of time limitation. 209 In other words, the principle of a legally prescribed time limitation is closely related to the protection of the safety of transactions.²¹⁰

Nevertheless, there are exceptions to such a principle. For example, under some foreign laws, there exist agreements between parties to extend the time limitation. This is a breakthrough and an exception to the principle of a legally prescribed time limitation.²¹¹ Regarding the carriage of cargo by sea, it is common for parties to agree on an extension of the time limitation in agreements, which is allowed in the Hague-Visby Rules as well as the Hamburg Rules.²¹²

²⁰⁶ See, Zhang Xianwei, supra note 179

²⁰⁷ Jin Zheng Jia (editor), Comment on and Analysis of Typical Maritime Cases in China, Law Publishing House, 1998, at 301

²⁰⁸ Guo Chen Fang, On the Effect of Agreement on Extension of Limitation of Time Between Parties to Bills of Lading Contracts of Carriage", published in Maritime Trial, Issue 4 of 1993

209 Id. "Establishment of this principle may clearly inform the parties to civil actions of the consequence of failure to exercise

their rights in due course before expiry of the prescribed limitation period."

²¹⁰ See Id, i.e., "rendering their rights forfeited or unprotected by law"

²¹¹ Yang Zhao Nan, "Probing into the stipulation concerning the One-Year Limitation Period in Carriage of Cargo by Sea," published in Annual of Maritime Law (1996) , Dalian Maritime University Publishing House, at 175 ²¹² See Id. at 176

Furthermore, this is also a customary international practice and may be regarded as an international shipping practice. ²¹³

Therefore, such extension of time limitation should be allowable with some restrictions, such as a stipulation that the parties cannot extend the limitation more than once or for more than one year. ²¹⁴ This practice can reflect the principle of "giving priority to efficiency with due consideration to fairness" ²¹⁵. This can both safeguard the rule of autonomy of will and prevent the rights of agreeing on extension of the limitation from being over exploited. ²¹⁶

To create the regime of limitation of action regarding the carriage of cargo by sea in China, it may be best to emphasize the safety of transactions and the principle of a legally prescribed time limitation while allowing the parties to extend the time limitation by agreement under certain conditions.

c. Establishing a Regime of Time Limitation Fits the Practical Conditions of China

With the deepening of China's Reform & Open Policy as well as the changes in economic patterns, large amounts of foreign funds have been introduced into China's economy, and there has seen a sharp increase of import and export trade volume.²¹⁷ It is apparent that China has become a major trading nation in the world, which was not unforeseen when the Maritime Code

²¹³ See Guo Chengfeng, supra note 207

²¹⁴ See Yang Zhao Nan, supra note 210, at 181

²¹⁵ Id.

²¹⁶ See Id. at 182.

²¹⁷ It was reported in Nikkei News dated 5 April 2005, that updated statistics in trading from the WTO show that the import & export trading volume of China was 851.2 billion USD in 2003, ranking the fourth place in the world next to Japan(in 3rd place). The imported volume was up to 412.8 billion USD, increased by 40% in comparison with the pervious year, making China preponderate over UK, France and Japan and rank in third place next to USA and Germany. It was predicted that the import & export trading volume of China would probably preponderate over Japan in 2004.

was formulated a decade ago.²¹⁸ The regime of limitation of action for claims regarding the carriage of cargo by sea was created under the influence of a social and economic environment in China that is now unfit for China's practical conditions and therefore should be revised.²¹⁹

Therefore, the Chinese maritime courts have accumulated judicial experience relating to the time limitation for claims regarding the carriage of cargo by sea through their years of judicial practice, and some experience has been reaffirmed in the form of judicial interpretation by the Supreme People's Court.²²⁰ These rules for time limitation have also been reaffirmed or supplemented at the time of revising the Maritime Code.²²¹

3. Related Cases

a. Case Addressing the Limitation Period

China Packing Import & Export Corporation Shandong Branch ("China Packing Co.") vs. Hecny Transportation Limited ("Hecny Ltd.")²²²

This dispute arose from delivery of cargo without original bills of lading between China Packing Co. vs. Hecny Ltd. Hecny Ltd. delivered the cargo without original B/L on 22 March 2000. Cargo documents were rejected and returned to China Packing Co. owing to discrepancy on 20 July. The original bill of lading was obtained by China Packing on September 20. China Packing Co. brought a suit against Hecny Ltd. on July 31, 2001.

The Qingdao Maritime Court held that the limitation period for the disputes arising from delivery of the cargo without original bills of lading should count from "the day on which the cargo should have been delivered," that is, from the reasonable date on which Hecny Ltd. should have delivered the cargo to the holder of the B/L. The day on which China Packing Co. requested that Hecny Ltd. deliver the cargo against the original B/L and on which Hecny Ltd. failed to do so should be the starting time for counting the limitation period. China Packing Co. could not prove when they requested delivery of the cargo by after they received the rejected documents. Thus, the day when they obtained the original B/L, September 20, 2000 should be taken as the

²¹⁸ See Yang Zhao Nan, supra note 210, at 182

²¹⁹ Id.

²²⁰ Fu Xu Wei (Editor), Notes and Explanation of Maritime Code of PRC, People's Court Publishing House, at 470

²²² See Civil Judgments (2001) GHFSZ No. 6651, YGFJERZZ No. 13

earliest date that they were able to request Hecny Ltd. to deliver the cargo, from which the oneyear period had not expired by the time China Packing Co. initiated the action.

The Maritime Code of the PRC, which adopts an objective standard by providing "the day on which the cargo was delivered or should have been delivered" as the starting point of the limitation period without consideration of the subjective standard of "knowledge" of the obligees, is regarded as a law favorable to the interests of carriers. It is reasonable for the limitation period for disputes arising from delivery of the cargo without original bills of lading to count from "the day on which the cargo should have been delivered." 224

In this case, the cargo arrived at the destination port in normal conditions and could have been delivered. The vessel arrived at the destination port on March 21, 2000, at which time the cargo could be delivered. As there was a period of 10 days during which the cargo was stored at the destination port free of charge, the day on which the free storage period expired should be regarded as the reasonable date on which the cargo should have been delivered. ²²⁵ The day on which the cargo should have been delivered was April 1, 2000, from which the limitation period started counting. ²²⁶ The lawsuit brought by the claimants was obviously time-barred. ²²⁷ In the case, where the cargo was confiscated by customs, the limitation period for the claim filed by the

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²²³ Lai Shang Bin, Study on the Issue concerning Back-Dated Bills of Lading, published in Special Study on Maritime Law, Zhongshan University Publishing House, at 156.

²²⁴ See Id. "The day on which the cargo was delivered" means the day on which the carrier actually delivers the cargo to the consignee. "The day on which the cargo should have been delivered" refers to a reasonable date on which the carrier should deliver the cargo to the consignee where no cargo has been actually delivered due to loss of the cargo but assuming that the cargo would have arrived at the destination port in normal conditions.

²²⁵ Weng Zi Ming and Fu Jun Yang, "The Limitation of Time for Dispute arising from Delivery of Cargo without Original B/L

Weng Zi Ming and Fu Jun Yang, "The Limitation of Time for Dispute arising from Delivery of Cargo without Original B/L Commences from the Day on Which the Cargo should have been Delivered" published in *Annual of Chinese Maritime* Trials (2003), PP603-604, People's Communication Publishing House.

226 Id.

See Yang Zhao Nan, supra note 210. The Shanghai Maritime Court held the same view in the dispute over the contract of carriage of cargo by sea (Phoenix International Freight Services Ltd. Vs. Shanghai Huayuan Economic Development Crop.)

cargo owner against the carrier should also count from the day on which the cargo should have been delivered, the day when the vessel arrived at the destination port. 228

b. Cases Addressing Choice of Law

C. Melchers GMBH & Co. vs. Guangzhou Ocean Shipping Company²²⁹

This dispute arose from delivery of cargo without the original bill of lading between C. Melchers GMBH & Co. and Guangzhou Ocean Shipping Company. The Guangzhou Maritime Court held that the Hague Rules should apply to the case concerning the limitation of action, and the limitation period should be one year. The appellate court held that C. Melchers GMBH & Co. brought the claim for delivery of the cargo without the original bill of lading in tort, thus the PRC law should apply.

This is a leading case involving choice of law that was decided before the Maritime Code was implemented.²³⁰ Since this dispute arose before the Maritime Code was brought into effect, it should be governed by the General Principles of Civil Law concerning the limitation of action, and thus the limitation period should have been two years.²³¹ What the court of appeals implied was obvious: once the Maritime Code was brought into force, the stipulations of the Maritime Code concerning the limitation of action should apply.²³²

In cases of concurrence between breach of contract and tort regarding the carriage of cargo by sea, the parties have discretion to sue the carriers for tort, because Paragraph 1 of Article 257 of the Maritime Code stipulates "the carriage of cargo by sea" rather than "the contract of carriage of cargo by sea." 233 Moreover, Paragraph 1 of Article 58 further provides that that the

²²⁸ Li Shou Qin and Zhang Xian Wei, "Selected Cases" published in Annual of Chinese Maritime Trials (2001), PP553, People's Communication Publishing House.
²²⁹ See Civil Judgments (1983), GHFSZ No.57, YGFJERZZ No.82

²³⁰ Jin Zheng Jia (editor), "Comment on and Analysis of Typical Maritime Cases in China," PP312-322, Law Publishing House,

²³² Hu Zheng Liang and Han Li Xin, On the Limitation of Time for Recovery Claims Filed by Carriers against the Third Persons Regarding Carriage of Cargo of Cargo by Sea, published in Annual of Chinese maritime Trails (1999), People's Communication Publishing House, at 43. ²³³ Id.

above stipulations should apply to tort disputes and should not be limited to the claims of breach of contract only. ²³⁴

Paragraph 1, Article 58 of the Maritime Code of the PRC:

The defense 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 cargo covered by the contract of carriage of cargo by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort.

²³⁴ See Jin Zheng Jia, supra note 227

CHAPTER VI

CHINESE MARITIME LEGISLATION

Legislative History of Chinese Maritime Law i.

To provide a background against which to assess significant aspects of Chinese maritime legislation, it is necessary to have a statutory framework in mind.

1. Legislative Background

In 1949, a maritime law drafting committee was established. By 1963, nine drafts had been prepared, but the drafting work came to a complete halt during the Cultural Revolution.²³⁵ It was not until 1981 that the drafting committee was reconstituted and the drafting work resumed. On the basis of the work done, the Committee summarized the practical experiences of sea-borne trade over the past 30 years in light of the latest developments in international shipping legislation, including maritime-related bilateral agreements negotiated and signed by the PRC with other countries.²³⁶ The Committee completed another six drafts (10th to 15th), and a new revised (16th) draft, which is the final draft. ²³⁷

During the process of making legislation, a series of questions have arisen for discussion in legal and shipping circles. In order to reach a consensus before starting to draft a piece of maritime legislation, a symposium on maritime law was convened and various ideas and

²³⁵ Lixing Zhang, Shipping Law and Practice in China—Legal Analysis of the Draft Maritime Law Code and Maritime Jurisdiction, 14 Tul. Mar. L.J. 209

²³⁶ Id. at 1 ²³⁷ Id.

opinions were presented on each subject. The discussion covers the principles, scope and style of the maritime legislation.

a. The Purpose and Principles of Maritime Legislation

Before the Maritime Code, the then-existing rules and regulations still fell far short of what China, as a coastal and port state, should have achieved in legislative terms, taking into consideration the relative economic significance of the shipping industry in China's foreign trade and the needs generated by her drive for modernization and cooperation with the outside world.²³⁸ It was therefore unanimously agreed that establishment of a legislative framework for regulating maritime activities was of utmost importance and should be of the highest priority.

It was agreed that two main principles should be followed in the drafting of the maritime legislation. First, the law should be beneficial to the development of the maritime transport industry of China and the increase and expand economic and trade relations with foreign countries. Second, the legislation should be drafted on the principle of independence, equality and mutual benefit, and should take into account existing international shipping practice.²³⁹

b. The Title of the Legislation

Most experts agreed that the title of a law must be closely related to the objects over which the law exercises its regulatory function. However, there were different opinions on the scope of matters defined or regulated by this law.

Some scholars believed that the maritime legislation should define and regulate the entire

²³⁹ Draft Maritime Code, art.14

²³⁸ See Hamilton, supra note 39, at 15

maritime relationship; It should be entitled "maritime law" or "maritime code". ²⁴⁰ Others argued that the function of the law was primarily to define and regulate the relations between carriers and shippers arising from the carriage of goods by sea. ²⁴¹ Therefore, the title of the law should be the "maritime transportation law. " Still others thought the operation of merchant vessels is the core of all maritime activities, and that therefore the title "merchant shipping law" or the "code of merchant ships" would be the right name to use. ²⁴² Finally, the name of "Maritime Code of People's Republic of China" was passed by Committee of the National People's Congress (NPC).

c. How Did the NPC Pass the Maritime Code of the PRC?

The Standing Committee of the National People's Congress is the highest organ of state power and law making authority.²⁴³ The Maritime Code of the PRC was adopted by the NPC on November 7, 1992 and came into force on July 1,1993. In 1994, China's maritime litigation rules outlining the main procedures for litigation in China's Maritime and Superior Courts were drafted and submitted to the Standing Committee of the NPC for examination and approval, .²⁴⁴

ii. The Development of Chinese Maritime Law

As part of an ambitious law-making program, a great number of shipping-related laws and regulations have been promulgated since 1979. These regulations constitute of a major part of

²⁴⁰ See Zhang, supra note 234, "including, for example, ship registration"

²⁴¹ Id.

²⁴² Id.

²⁴³ On September 15,1954, The First Plenary Meeting of the First National People's Congress (NPC) was held in Beijing. On September 20, 1954, the first constitution of the PRC and the Organic Law of the National People's Congress were enacted and promulgated. The next day, the NPC also enacted and promulgated the Organic Law of the State Council, the Organic Law of the People's Courts, the Organic Law of the People's Procuracies, and the Organic Law of Local People's Congresses and Local People's Committees at All Levels. Finally, these laws gave a legal basis to establish a governmental structure for the PRC based on the socialist ideology

²⁴⁴ Id.

²⁴⁵ Muzhu Shen, "A New Commentary Study, Beijing: China Politics and Law University of Legal Studies Press, c 1989, at p19

Chinese foreign economic legislation, which total 260 laws in all.²⁴⁶ Among them, 83 are shipping-related laws and regulations, including 45 customs regulations.²⁴⁷ After many years of considerable efforts by the legislators, the Chinese Maritime Code undoubtedly has had a significant impact on the shipping industry and has set forth legal guidelines for maritime commerce.²⁴⁸

1. A Separate Set of Procedures for Maritime Litigation

Problems with the Code have already prompted a fundamental shift in China's approach to maritime regulation. For example, jurisdiction and arbitration procedures are not regulated under the rules of the Maritime Code.²⁴⁹ Prior to July 1, 2000, the provisions of the Civil Procedure Code governed such issues.²⁵⁰ Because the CPC did not adequately address the special needs of maritime law, the Supreme People's Court frequently found it necessary to supplement the CPC by promulgating ad hoc procedures for dealing with uniquely maritime problems.²⁵¹ Consequently, a Maritime Procedure Law (MPL) was enacted.²⁵² The new Maritime Procedure Law was designed to assist with the implementation of the existing Maritime Code by providing

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²⁴⁶ Id. at 21.

²⁴⁷ See Zhang, supra note 234

²⁴⁸ Id

²⁴⁹ Tetley, supra note 24, at 610 n.40.

²⁵⁰ Code of Civil Procedure of The People's Republic of China [CPC] (Adopted by the Fourth Session of the Standing Committee of the Seventh National People's Congress), available at http://www.qis.net/chinalaw/lawtran1.htm (last visited Apr. 19, 2002); Before the CPC and the Arbitration Law were enacted, arbitration was regulated by the CCP, government decrees, statutes, regulations and custom. Lauchli, The PRC's New Maritime Procedure Law, The Bull of The JAPAN Shipping Exchange, INC., Sept. 2000, at 33 [hereinafter Morgan, Maritime Procedure Law]. One of the early problems with maritime litigation in China was the tendency of local courts to accept cases, even though the judges were inexperienced in maritime law. Foreign parties legitimately questioned their impartiality because pressure from influential local companies normally prompted their decision to hear the case. Consequently, China set up a network of maritime courts in 1984 to create centers of maritime law expertise.

For example, the arrest and forced sale of vessels. Claire Morgan, New China Maritime Law to Impact on Shipping Litigation, Lloyd's List Int'l, June 28, 2000, § Law, at 6.

²⁵² Maritime Procedure Law of The People's Republic of China [MPL] (Adopted by the Thirteenth Session of the Standing Committee of the Ninth National People's Congress), available at http://www.com-law.net/findlaw/marine/maritime1.htm (last visited June 9, 2002).

"detailed procedural rules tailored to maritime litigation."²⁵³ While the MPL "affirms the unique status of the maritime courts" and extends their jurisdiction to injunctive relief in support of maritime claims,²⁵⁴ it does not give maritime courts exclusive jurisdiction over maritime cases.²⁵⁵ This omission may give rise to additional problems, particularly when the adjudicative panel or arbitral tribunal does not know or understand maritime issues and maritime law. By enacting the MPL, China has signaled its recognition of the unique nature of maritime issues and suggested that it will continue to improve its rules and procedures; perhaps increased trade will prompt another fundamental shift in policy.

Until July 1, 2000, when the Special Maritime Procedure Law (SMPL) became effective, maritime litigation procedure in China was governed by general laws of civil procedure and by a variety of judicial interpretations and provisional documents issued by the Supreme People's Court (SPC) dealing with issues such as maritime dispute jurisdictions and the arrest of ships.²⁵⁶

2. Modifications to the Maritime Code of the PRC

China's Maritime Code is a constructive attempt to standardize its regulations so foreign shipping agents and owners can understand and comply with its regulatory scheme.²⁵⁷ Because the Code is relatively new,²⁵⁸ China can expect to modify or make additions to its provisions to accommodate changing conditions within the shipping industry.²⁵⁹ Indeed, China recently

²⁵³ Morgan, Maritime Procedure Law, supra note 36, at 33.

²⁵⁴ Id. at 34

²⁵⁵ Although such a provision was suggested, the Standing Committee of the NPC did not put it in the final draft. Id. at 34 n.5; see also infra note 183 and accompanying text ²⁵⁶ The Special Maritime Procedure Law of the PRC was adopted at the 13th meeting of the Standing Committee of the 9th

²⁵⁶ The Special Maritime Procedure Law of the PRC was adopted at the 13th meeting of the Standing Committee of the 9th session of the National People's Congress of China (NPC, legislator) on the 25th of December 1999.

MO, supra note 6, at 16 (MO provides an English translation of China's Maritime Code at pages 429- 474)

²⁵⁸ Id.

²⁵⁹ Id.

amended the Code ²⁶⁰ to incorporate substantial provisions of the International Convention on Arrest of Ships of 1999. ²⁶¹ This willingness to conduct periodic reviews of the Code, to listen to criticisms and make changes where necessary indicates that the Chinese are prepared to amend the Code when and where appropriate. ²⁶²

3. Maritime Courts in China

Since 1984, ten maritime courts have been established in ten port cities along the coast²⁶³ namely (from north to south) Dalian, Tianjin, Qingdao, Shanghai, Ningbo, Xiamen, Guangzhou, Haikou, Beihai, and Wuhan, which is not on the coast but a port city along the Yangtse River.²⁶⁴ A maritime court's position is equivalent to that of an intermediate people's court and its appellate court is the higher court of the province or the metropolitan city directly under the central government (such as Shanghai and Tianjin). These Maritime Courts are responsible to the Standing Committees of the People's Congress in the municipalities where they are located. The judicial work of Maritime Courts is subject to supervision by the Higher People's Courts in their respective localities, which also provide an appellate function.²⁶⁵

a. The Establishment of the Maritime Courts

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²⁶⁰ China to Draft Law on Maritime Lawsuits, China Bus. Info. Network.(CBNET), Aug. 25, 1999 [hereinafter Maritime Lawsuits].

²⁶¹ U.N. International Maritime Organization Diplomatic Conference on Arrests of Ships, Mar. 12, 1999, available at http://www.unctad.org/en/special/imo99ou.htm (last visited Apr. 19, 2002) China also consolidated a number of the existing rules and procedures. Li, supra note 21

²⁶² Ren Jianxin, Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China, in Contract, Guanxi, and Dispute Resolution in China at 363.

²⁶³ See Maritime Courts Shift, supra note5; Courts Getting Tougher, supra note 102.

²⁶⁴ The Decision of The Standing Committee of The National People'scongress on the Establishment of Maritime Courts in Coastal Port Cities was passed on Nov. 14, 1984.

²⁶⁵ International conventions may apply directly if there is no appropriate domestic law or regulation. Chinese courts may also apply common international practices and commercial usage in the absence of local conventions and domestic practice. The party alleging the application of a common practice or commercial usage has the burden of providing that customary rules are established and accepted by a majority of the international community of nation.

In the 1980s, the Chinese government brought forward an ambitious plan to make China a world center for both maritime transportation and maritime dispute resolution. Between 1980 and 1998, the annual growth rate of Chinese ships in tonnage was 7.7% while the world average growth rate was only 1.3%. The maritime cases heard by the Chinese maritime courts for adjudication grew from 753 cases in 1990 to 5,166 cases in 1998.²⁶⁶

b. Purpose of Establishing the Maritime Courts

The initial purpose of establishing the maritime courts was to respond to the rise in maritime disputes and the needs for special expertise in adjudicating maritime cases. In 1978, China began to reestablish its judicial system, but in early 1980s, China still lacked qualified judges. 267 Therefore, the establishment of the maritime courts solved this problem by concentrating all maritime litigation within the maritime courts. Soon after China began its economic reform and adopted its open-door policy, Chinese foreign trade and the Chinese shipping industry have expanded rapidly.²⁶⁸

c. The Development of Maritime Courts in China

As early as 1985, when the Standing Committee of the NPC passed the resolution to establish the maritime courts, the resolution also gave the maritime courts the authority to adjudicate all first instance maritime cases involving carriage by sea and river. ²⁶⁹ In 1989, the SPC promulgated the Rule on the Jurisdiction of the Maritime Courts, which further defined the

²⁶⁶ The Rising Trend of Market Demand Will Greatly Promote the Steady Growth of China's Shipbuilding According to 2007-2008 Report, Business Editors, Maritime Writers, January 10, 2008, Thursday

²⁶⁷ Courts Handle Maritime Cases, supra note1

Fang Shen, Are you Prepared for This Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgment in China, 72 UMKC L. Rev. 215, at16

jurisdiction of the maritime courts. ²⁷⁰ The scope of the maritime courts' jurisdiction is later confirmed, detailed, and expanded by the SMPL. In addition to what the CPL has provided regarding territorial jurisdiction, the SMPL has further provided for free choice of Chinese jurisdiction by the parties in dispute, thus, even though a given dispute may not occur within Chinese territory, a Chinese maritime court should have jurisdiction over the dispute if the written agreement of the parties so provides. For any issues not covered by the SMPL, the CPL will apply. 271 The SMPL covers the main issues frequently involved in maritime litigation, including jurisdiction, arrest of ships, injunctions, preservation of evidence, security, and service of court documents, trial and other related procedures. ²⁷² The SMPL also provides a comprehensive set of rules designed to meet the special requirements of maritime litigation.²⁷³

d. The Task of the Communication and Transport Division

In March of 1987, the Communications and Transport Division of the Supreme People's Court was established to strengthen maritime judicial work and supervise the administration of justice by the Maritime Courts and the Higher People's Courts. Its main objectives are as follows: 274

- 1. To hear cases of first instance which have major influence nationwide, and which are transferred by the Higher People's Court.
- 2. To try cases on appeal from judgments and rulings of the Higher People's Courts and cases on retrial.
 - 3. To supervise the administration of justice in all maritime courts and Higher People's Courts.

²⁷⁰ The Rule of the SPC on the Jurisdiction of the Maritime Court promulgated on May 13, 1989, which was superseded by the Several Rules of the SPC on the Jurisdiction of the Maritime Courts promulgated on August 9, 2001. ²⁷¹ KX Li & CWM Ingram, Maritime Law and Policy in China 1 (London: Cavendish Publishing, 2002).

²⁷³ Courts Handle Maritime Cases, supra note1

²⁷⁴ Lixing Zhang, supra note 246

CHAPTER VII

CONCLUSION

52 States, including almost all of the world's major maritime nations, are either parties to the Hague-Visby Rules or have the Rules in their national laws. 29 States are parties to Hamburg Rules²⁷⁵: they are mostly developing States. It is very unlikely that any major shipping nation will become a party to the Hamburg Rules.

These days there always comes the question that which regime China should adopt: the Hague-Visby or Hamburg? In fact, the competition between Hague-Visby Rules and Hamburg Rules reflects the competition between carrier interests and cargo interests.²⁷⁶

The Hamburg Rules has been strongly opposed by ship owning interests as it is feared that they would tend to increase carrier's liability and therefore affect the cost of insurance.²⁷⁷ Those critical of the Hamburg Rules fear that the application of the Rules so favor cargo interests to such an extent that increased claims will be encouraged, resulting in increased carrier liability.²⁷⁸

On the other hand, the Hamburg Rules have been equally strongly supported by shipper interests who believe they set a fairer balance between the responsibilities of carrier and

²⁷⁵ Supra note 104.

²⁷⁶ See Id, "It is clear that there are at present three regimes that regulate the carriage of goods by sea: the Hague, Hague-Visby, and Hamburg Rules. The Hague Rules, however, appear to be no more relevant to the contemporary world even though a few former colonies and small entities (excluding the United States of America) are still parties to them."

²⁷⁷ See Leslie W. Taylor, "Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level", (1999) 8 Currents Int'l Trade L.J. 32, 34.
²⁷⁸ Id.

shipper.²⁷⁹ From a pure legalistic point of view, the Hamburg Rules appear to be much more comprehensive and much better in terms of giving solutions to the defects or shortcomings of the other two regimes. ²⁸⁰ At the same time, it is to be admitted that when compared to either the Hague Rules or the Hague-Visby Rules, the Hamburg Rules are clearly in favor of the shipper.²⁸¹ It is, therefore, not surprising that the Rules have not been warmly received by ship-owners and their insurers.²⁸²

Neither of the two competing regimes can attract the overwhelming majority of States. The primary objective of the unification of the law governing carriage of goods by sea has already been frustrated by the conflict of interests within the shipping industry itself.

It's often known that China is a major maritime State that applies the Hamburg Rules, but in fact, China is not part to either Hamburg Rules or Hague-Visby Rules. Then why China has borrowed bunch of provisions from the Hamburg Rules.

Since China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations. The Chinese Maritime Code leans heavily towards the Hamburg Rules, while retaining a few important Hague-Visby principles²⁸³ in regulating the carriage of goods by sea. It also contains some provisions on multimodal

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²⁷⁹ See Mankabady, S., (ed.), The Hamburg Rules on the Carriage of Goods by Sea, 1978; Tetley, W., [1979] LMCLQ 1.

²⁸⁰ See Johnsen, Neils F., "A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)", (1996) 70 Tulane Law Review, 2051.

²⁸¹ See Thomas J. Schoenbaum, Admiralty and Maritime Law, 2nd. ed., 1994, 548-49

²⁸² See Supra note 280

The major rules of the Code reflecting the Hague/Visby Rules are the due diligence obligation of the carrier (art. 47); the carrier's duty to care for the cargo (art. 48); the one-year time for suit (art. 257); the tackle-to-tackle period of responsibility for non-containerized goods (art. 46); the excepted perils (art. 51); the rule on deviation (art. 49, second sentence); and the 666.67 SDR per package and 2 SDR per kilo limitations (arts. 56 and 277).

transport resembling, in general, those of the Multimodal Convention 1980, and a number of original provisions on other matters. ²⁸⁴

China, as the ship owning interests, regardless of the incorporation of Hamburg provisions in the maritime code is still reluctant to make the Hamburg Rules a part of their law, which suggest that China is still holding on to the past with iron grip. ²⁸⁵ Objections based on the dropping of negligence in navigation exception, and uncertainty in litigation is still vehemently rehearsed. Political origins of the instrument have also played a dominant role in its dismissal as an undesirable convention. ²⁸⁶ Therefore, the Chinese practice appears to be the hybrid regime of both Hamburg and Hague-Visby, supplemented by special innovative rules adapted to suit China's unique circumstances.

Analyzing the international practice, especially that of the major trading partners of China, in order to be able to determine which regime is the best for China: the Hague-Visby, the Hamburg, or a hybrid of the two. It is in the best interest of China to adopt a hybrid regime of the Hague-Visby and Hamburg Rules, taking into account the fact that China is still a nation of shippers rather than shipowners. China has unilaterally adopted a hybrid of Hague-Hague Visby-Hamburg Rules.

Today China is widely recognized throughout the world as a major shipping nation. Scholars always predict China to be the "Asian world power of the future, the superpower of the next

²⁸⁴ See, Hamilton, Mark S., "Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission", (2002) 3 Asian Pacific Law and Policy Journal, 10.

²⁸⁵ See Tan Lee Meng, The Law in Singapore on Carriage of Goods by Sea,2nd.ed., Butterworths Asia, Singapore, 1994, 316. ²⁸⁶ Id.

century. ²⁸⁷ China has this potential, but it must continue to improve its laws and legal system if it hopes to attain a preeminent position as a world power. China's recent efforts to improve its legal system have already been fruitful. Parties are no longer afraid to take their disputes to Chinese courts and the quality of legal representation is improving. Nonetheless, traditional attitudes toward dispute resolution still linger. ²⁸⁸ This willingness to conduct periodic reviews of the Code, to listen to criticisms and to make changes where necessary, indicates that the Chinese are prepared to amend the Code when and where appropriate.

With the world's continuing reliance on maritime transport and China's increasing importance as a provider of maritime transport services, the Maritime Code of the PRC has had a profound influence on international commerce. The Maritime Code of the PRC is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China's unique circumstances.²⁸⁹

Due to a variety of convention-based rules, there is an urgent need for the harmonization of liability regimes in the field of carriage of goods by sea. To this end, some experts and scholars suggest drafting a new instrument on transport law. In May 1998, the Committee Maritime International (CMI) finally decided to drop any attempt to amend the Hague-Visby Rules. It decided to initiate a new project. On December 10, 2001, the CMI adopted its "Draft Instrument on Issues of Transport Law", and delivered it to UNCITRAL for further action. Based on the

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²⁸⁷ See Bobby K. Y. Wong, Traditional Chinese Philosophy and Dispute Resolution, 30 HONG KONG L.J. 304, 306-07 (2000); Urs Martin Lauchli, Cross-Cultural Negotiation, with a Special Focus on ADR with the Chinese, 26 WM. MITCHELL L. REV. 1045, 1065-66 (2000); Michael T. Colatrella, Jr., "Court-Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs, 15 OHIO ST. J. ON DISP. RESOL. 391, 395-96 (2000); see also Robert F. Utter, Dispute Resolution in China, 62 WASH. L. REV. 383, 383-85 (1987).

²⁸⁹ See Supra note 284

Draft Instrument of the CMI, the UNCITRAL's Working Group III (Transport Law) has commenced its new mega project on the preparation of its "Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]" (UNCITRAL Draft Convention).²⁹⁰

The UNCITRAL Draft is to be a Multipurpose Convention, comprising of complicated and demanding subjects – multi-modal carriage, negotiability, electronic commerce, freight, lien, etc. ²⁹¹ It is indeed an enormous task to draft such a convention and the ambitious project is a long way from completion. ²⁹² It aims to join various components of international carriage of goods by land and sea including multimodal carriage, negotiability, electronic commerce, freight, liens, right of control, transport documents, liability, delivery, on-carriage ashore etc. into one international convention (UNCITRAL Draft Convention). ²⁹³

The important question is whether it is realistic to expect the nations of the world to adopt such a document in the near future when some countries have failed to agree on 'port to port' (Hamburg, 1978) or multi-modal carriage (The multi-modal Convention, 1980²⁹⁴).

Chinese Governments has expressed its main concern in the current draft, if some shippers have sufficient negotiating power to be able to conclude fair contracts, how the draft convention will impact on small and medium shippers.

²⁹¹ See Tetley, William, "Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ' 99", MLA CLE Presentation, New York, May 2, 2003, http://tetley.law.mcgill.ca

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²⁹⁰ See "Draft Instrument on the Carriage of Goods [Whole or Partly] [by Sea]", UNCITRAL Working Group III (Transport Law), Twelfth Session, Vienna, 6-17 October 2003, Doc. A/CN.9/ WG.III/WP.32

²⁹² See Id. "The UNCITRAL Draft Convention is designed to replace the many regimes currently in use including the Hamburg Rules, Hague Rules, and Hague-Visby Rules (as well as other regional variations such as Nordic State Maritime Code and the Maritime Code of China). With the closing date (14 April 2008) for country submissions come and gone, the next step involves UNCITRAL considering the final text of the Daft Convention in June 2008."

More than twenty years have passed and the Multi-modal Convention 1980 was ratified by only 10 States. Ratification by 30 States is required to bring it into force.

The context in the current draft may enable a contracting party to evade the substance of the Draft Convention by replying upon the form of a carriage contract. The Draft Convention was originally dubbed the "door-to-door" convention, but now it can more accurately be described as a "maritime-plus" convention.²⁹⁵ The current text is so different from current international law and so complicated that the potential for lengthy and costly litigation is high. As this litigation will be domestic, there remains the potential for the uniformity of the international law to be undermined by having provisions interpreted differently in different countries. ²⁹⁶ The draft convention may be read as giving greater weight to carrier interests rather than striking an equitable balance between the interests of shippers and carriers.²⁹⁷

Although the UNCITRAL Draft Convention is a valiant effort, it is deemed by some persons to be exceedingly complicated and therefore difficult to understand and put into effect by many carriers and practitioners. It seems a long way to go before the "new" carriage Convention will be finalized. Nevertheless, UNCITRAL is in the early stage of its negotiations on a new international convention that may some day replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, the instrument on Transport Law will either clarify the world of maritime law or add a fourth instrument of choice in the near future.

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²⁹⁵ Id.

²⁹⁶ See Robertson, David W. and Sturley, Michael F., "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits", (2003) 27 Mar. Law, 495.

APPENDIX 1:

ABBREVIATIONS (ALPHABETICALLY)

ASHA American Shippers for Hamburg Alliance

CMI Committee Maritime International

CNFTTC China National Foreign Trade Transportation Corporation

COGSA Carriage of Goods by Sea Act

CTD Communications and Transport Division

IMO International Maritime Organization

MPL Maritime Procedure Law

NPC National People's Congress

SPC Supreme People's Court

UNCITAL Commission that formulates and regulates international trade in cooperation with the

World Trade Organization

UNCTAD United Nations Conference on Trade and Development

APPENDIX 2:

MAIN LEGISLATION RELEVANT TO THIS THESIS

CHINA:

Chinese Maritime Code of 1992, English translation is available in "Maritime Code of People's Republic of China", Beijing: Law Press, 1993.

The General Principles of Civil Law of 1986 of the People's Republic of China, English translation is available on Lexis/Nexis, China Law No.346

THE UNITED STATES:

The Maritime Law Association of the United States, Doc.619 (1979)

28 U.S.C. 1333

INTERNATIONAL CONVENTIONS:

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug.25, 1924 (The Hague Rules), reprinted in 6 Benedict on Admiralty, Doc. No. 1-1 (7th ed. 1993)

Protocol to Amend the International Convention for Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Feb.13 1968 (The Visby Amendment)

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