

# A STUDY ON THE UPDATING OF THE LAW ON CARRIAGE OF GOODS BY SEA IN CHINA

James Zhengliang Hu\* and Siqi Sun\*\*

## 1 Introduction

Unlike in the common law countries such as the UK which has its COGSA 1971, China does not have a statute solely regulating the carriage of goods by sea. The law on carriage of goods by sea is mainly embodied in Chapter IV 'Contract of Carriage of Goods by Sea' in the Maritime Code of the People's Republic of China<sup>1</sup> (hereinafter referred to as 'the Maritime Code') was adopted in 1992 and came into force as of 1 July 1993. 23 years have passed since its adoption and it is commonly recognized in China that the Maritime Code need be updated by way of revision.<sup>2</sup> Chapter IV of the Maritime Code does not apply to domestic carriage of goods by sea. Besides, the Rotterdam Rules, i.e. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted, which may be deemed as indicating the international tendency of the law on the carriage of goods by sea.

In this paper, based upon an introduction to the current law on carriage of goods by sea in China, the authors analyse the necessity for the updating of the law on the carriage of goods by sea in China, discuss the main contents required for the updating especially from the perspective of the Rotterdam Rules based upon an analysis of the China's basic attitude towards the Rules. Anticipation of the revision of the Maritime Code including its Chapter IV is also made in this paper.

## 2 What is the Law on Carriage of Goods by Sea in China?

### 2.1 Sources of the Law

The law on carriage of goods by sea is embodied in: (a) Chapter IV of the Maritime Code which is applicable in the international carriage of goods by sea only;<sup>3</sup> (b) Chapter XVII 'Contract of Carriage' of the Contract Law which is applicable in every kind of carriage of goods; (c) the judicial interpretations promulgated by the Supreme People's Courts, e.g. the Provisions Relating Certain Issues of Application of Law in the Trial of Cases of Delivery of Goods without Original Bill of Lading, 2009 and the Provisions Relating Certain Issues in the Trial of Cases of Disputes over Freight Forwarding, 2012.<sup>4</sup>

### 2.2 The Hybrid Regime Contained in Chapter IV of the Maritime Code

China is not a party to the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. A hybrid regime has been adopted in Chapter IV of the Maritime Code which consists of: (a) the provisions of the carrier's liability regime including the obligations, liability and exemptions, limits of liability which are based upon the Hague-Visby Rules as amended by the 1979 SDR Protocol; (b) the definitions of carrier, shipper and actual carrier contained in the Hamburg Rules and the provisions thereof regarding the obligations and liabilities of the shipper and actual carrier, non-contractual claims, transport documents etc.; (c) some unique provisions different from either Rules regarding the period of responsibility of the carrier, definition of delay in delivery and measures of indemnity etc.

---

\* Ph.D., Professor of Law, Director of Institute of Maritime Law, Shanghai Maritime University; Lawyer & Partner, Shanghai Wintell & Co Law Firm. Email: james.hu@wintell.cn.

\*\* PhD candidate in maritime law, Shanghai Maritime University. Email: 461413517@qq.com.

<sup>1</sup> In this paper, "the People's Republic of China" or "China" refers to the Mainland China unless otherwise expressly indicated.

<sup>2</sup> Revision of the Maritime Code is necessitated by the facts including that the maritime shipping and trading situation in China and in the world, the contents of the principles followed in the making of the Maritime Code and the relevant domestic basic laws have undergone a significant development, that the Maritime Code does not apply to domestic carriage of goods by sea and lacks legal regime governing compensation for marine pollution damage from ships and that the admiralty judicial practice has demonstrated the existence of ambiguities, uncertainties and gaps in some aspects in the Maritime Code. See James Zhengliang Hu, 'The Chinese Maritime Code need to be modernized' (2015) 107 *Maritime China* 67.

<sup>3</sup> The carriage between or among the Mainland China, Taiwan, Hong Kong and Macau is in the nature of domestic carriage, but is currently treated as international carriage as they are of different jurisdictions in law.

<sup>4</sup> The domestic coastal carriage of goods and the carriage of goods in inland navigation were mainly regulated by the Regulations Governing Carriage of Goods by Waterways promulgated by the former Ministry of Communications in 2000 (known as '2000 Cargo Regulations'). However, the 2000 Cargo Regulations were recently abolished on 30 May 2016.

### 3 Why is Updating Needed?

In the opinion of the authors, the updating of the law on carriage of goods by sea is necessitated by the following main reasons:

#### 3.1 The Inapplicability of Chapter IV of the Maritime Code to the Domestic Carriage

Chapter IV of the Maritime Code does not apply to the domestic carriage of goods by sea. This was due to the existence of the differences between the legal regime applicable to the international carriage goods by sea and that to the domestic carriage of goods by sea at the time of 1992.<sup>5</sup> The application of the Contract Law to the domestic carriage of goods by sea causes significant differences in the carrier's liability regime between the international carriage and the domestic carriage. As time has gone on, there still exist differences, but the gap has become narrower and it has become practicable to make Chapter IV of the Maritime Code applicable to the domestic carriage of goods by sea. It is well recognized that the inapplicability of Chapter IV of the Maritime Code to the domestic carriage of goods by sea is inappropriate in consideration of that China has large-scaled domestic carriage of goods by sea<sup>6</sup> and that Chapter XVII of the Contract Law is too simple and lacks feasibility in practice. It is well recognized that the nature of the Maritime Code as a domestic law and Chapter IV thereof as the most important chapter logically requires its application to the domestic carriage of goods by sea.

So far as the effect of law is concerned, by virtue of the Law on Legislation, 2000 as amended in 2015, Chapter IV of the Maritime Code as special law has priority over Chapter XVII of the Contract Law which is a general law. The above judicial interpretations are followed by the courts of law in China.

Moreover, China has a very large inland transport market.<sup>7</sup> Traditionally, the domestic carriage of goods by sea and that in inland navigation were/are governed by same laws and regulations. Therefore, there is a need and it is practicable to extend the application of Chapter IV of the Maritime Code to the carriage of goods in inland waterways adjacent to the sea in order to maintain the integrity of application of law in the whole domestic waterborne transport of goods.

#### 3.2 The Significant Developments in the Maritime Transport and Related Areas Since the Adoption of the Maritime Code in 1992

In the past 23 years, the maritime trade in, to or from China and the related industries in China areas have significantly developed along with the implementation of the reform and open policy in China and with the economic globalization and freedom of trade in the world.<sup>8</sup> At the same time, along with the fast development of containerization and multimodal transport of goods, most of the general cargoes and even part of the solid or

<sup>5</sup> The differences between the international carriage of goods by sea and the domestic carriage of goods by sea were: (a) the State transport plans should be followed in the domestic carriage, whereas there were no such plans in the international carriage; (b) the basis of the carrier's liability was based upon fault in the domestic carriage, whereas the carrier's liability based upon the Hague-Visby Rules was followed in the international carriage; (c) the carrier could not avail of any limitation of liability for loss of or damage to goods in the domestic carriage, whereas the limit of carrier's liability was based upon the Hague-Visby Rules in the international carriage; (d) the transport documents used in the domestic carriage were waybills, whereas bills of lading were used in the international carriage.

<sup>6</sup> By the end of 2015, there were 10,721 coastal ships with total DWT of 68.58 million tons. In 2015, the total quantity of cargo carried in coastal trade was 1.93 billion metric tons. See the Ministry of Transport, *Statistical Communiqué of Development in Transport and Communication Industry in 2015*. <[http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160506\\_2024006.html](http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160506_2024006.html)> accessed 28 May 2016.

<sup>7</sup> The inland waterways are as long as 127,000 km mainly in the Yangtze River located in the centre from west to east, the Pearl River located in the south from west to east, the Heilongjiang River located in the north from west to east and the Beijing-Hangzhou Grand Canal located in the east from north to south. Noticeably, the main inland waterways in the Yangtze River and the Pearl River are accessible by seagoing vessels and even large seagoing vessels. By the end of 2015, there were 152,500 inland vessels with total DWT of 124.94 million tons and 25,360 operating berths. In 2015, the total quantity of cargo carried in coastal trade was 3.46 billion metric tons. See the Ministry of Transport: *Statistical Communiqué of Development in Transport and Communication Industry in 2015*. <[http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160506\\_2024006.html](http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160506_2024006.html)> accessed 28 May 2016.

<sup>8</sup> According to the *Statistical Communiqué of the People's Republic of China on National Economic and Social Development in 2015* issued by the National Bureau of Statistics of China, the total import and export commodity trade volume of China in 1992 was USD165.53 billion and ranked 11<sup>th</sup> in the world. As a result of the constantly fast growth of economy in China, the total import and export commodity trade volume of China in 2015 reached USD3,959 billion which is 25 times of that in 1992 and ranked 1<sup>st</sup> in the world. About 90% of the imported and exported commodities to or from China are carried by sea. Such a development together with the growing domestic commodity trade greatly enhanced the maritime transport in China. In 2015, the total turnover of cargo in the scaled ports in China reached 12.75 billion metric tons and ranked 1<sup>st</sup> in the world for more than 10 years, and the turnover of containers reached 212 million TEUs. According to the *Review of Maritime Transport 2015* issued by UNCTAD, the number of vessels owned by the companies in the Mainland China was 4,966 with total DWT of 157,557,210 tons being 9.08% of the world merchant fleet and ranking 3<sup>rd</sup> in the world, while the number of vessels owned by companies in Hong Kong was 1,258 with total DWT of 75,321,271 tons being 4.34% of the world merchant fleet and ranking 7<sup>th</sup> in the world as of 1 January 2015.

liquid bulk cargoes are carried in containers. Containerization makes multimodal transport and even door to door service practicable to meet the requirements of the modern cargo trade. The requirement of cargo traders for timely delivery of cargo has become higher than ever besides their traditional requirement for safe arrival of cargo. In addition, the application of advanced technology of shipbuilding, navigation and communication makes ships bigger, more specialized and more modernized. Along with such technical developments, the maritime transport becomes quicker and safer, leading to the enhancement of the ability of human beings to overcome maritime perils. The above developments have also brought about the developments of the related industries besides shipping, cargo trading and port terminal operators, e.g. marine insurance, seafarers, ship management, logistics, ship finance, freight forwarding and other maritime auxiliary services, shipbuilding and even maritime disputes resolutions.

Noticeably, the economic globalization and freedom of trade is still in progress mainly as supported by the regional economic and trade integration processes. Typical examples of regional free trade agreements are EU, OECD, APEC, ASEAN, CAFTA, FTAA, NAFTA, ETFA, TPP, TTIP and FTAAP, either in operation or under negotiations. So far as China and some other countries are concerned, it needs to mention the strategic plan of the construction of “The Belt and Road”.<sup>9</sup> It’s quite understandable that the economic globalization and freedom of trade in the world not only enhances the seaborne trade, but requires more uniform commercial and technical rules in the maritime transport.

As a result of the significant developments in the maritime economy and trade and the related areas in China and in the world since the adoption of Maritime Code in 1992, modernization of the law on carriage of goods is required to reflect such developments, in particular, to follow the ever-growing trend of international uniformity of maritime law, to suit the reform of modes of transport (containerization, multimodal transport) and the fast-growing logistics, to promote maritime transactions and secure their efficiency, and to re-balance the ship interests, cargo interests and other interests in law. Besides, as China has become a power in terms of both maritime trade volume and merchant fleet in the world, such a position may require China to undertake more responsibilities of a big country in promoting the international uniformity of maritime law.

### 3.3 The Adoption of the Rotterdam Rules

The making of the Maritime Code followed the principle of taking into consideration of the tendency of international maritime legislation.<sup>10</sup> Several new international conventions which are either in force or not in force yet and represent or may hopefully represent the tendency of international maritime legislations have been adopted since the adoption of the Maritime Code. A typical example is the adoption of the Rotterdam Rules which, although an ongoing subject of debate in China and even in the international community, represents to some extent the tendency of international legislation on the carriage of goods by sea.

There are a lot of arguments in the academic circle regarding China’s attitude towards the Rotterdam Rules. One main view is in favour of China’s ratification of the Rules on the ground that the Rules are considered to be a comparatively advanced international convention and China should ratify, although the Rules are not perfect and have some deficiencies.<sup>11</sup> Another main view is that the contents of the Rules are too complicated and those innovative rules need to be tested in practice, and for these reasons, China should maintain a proactive and prudent attitude when considering ratification or not, i.e. China should not ratify the Rules at the present stage.<sup>12</sup> Several scholars are further of the view that, while China should not ratify the Rules at this stage, those reasonable, mature and advanced rules contained in the Rules should be adopted or used for reference when the Chinese Maritime Code is revised.<sup>13</sup>

---

<sup>9</sup> “The Belt and Road” or “B&R” stands for the Silk Road Economic Belt and the 21<sup>st</sup>-Century Maritime Silk Road. The Chinese government issued the Vision and Actions on Jointly Building the Silk Road Economic Belt and the 21<sup>st</sup>-Century Maritime Silk Road in March 2015.

<<http://www.mofcom.gov.cn/article/resume/n/201504/20150400929655.shtml>> accessed 2 May 2016.

<sup>10</sup> For example, Chapter IX “Salvage at Sea” is basically a copy of the 1989 Salvage Convention as the draftsmen of the Maritime Code realized that this Convention represented the tendency of international legislation on salvage at sea, although this Convention had not come into force yet in 1992. This Convention is now widely accepted in the world.

<sup>11</sup> Yuzuo Si, ‘Evaluation and prospects of the Rotterdam Rules’ (2009) 1(2) *Annual of China Maritime Law*, 3; Yuechuan Jiang and Shihui Yu, ‘Question of the questioned: how to evaluate the Rotterdam Rules’ (2014) 2 *Tsinghua Forum of Law*, 62 – 63.

<sup>12</sup> Yongjian Zhang, ‘How to evaluate the Rotterdam Rules’ (2010) 1 *Annual of China Maritime Law*, 25; Yingying Zou, ‘Understanding of the assessment of the Rotterdam Rules under the perspective of the Chinese law’ (2010) 11 *Law Science*, 108.

<sup>13</sup> James Zhengliang Hu, ‘The Chinese Maritime Code needs to be modernized’ (2015) 3 *Maritime China*, 67; Faqiang Yuan, ‘Prudent step forward: the attitude to be maintained by China towards the Rotterdam Rules’ (2013) 4 *Contemporary Law Review*, 139.

Needless to say, the attitudes of the shipping industry and the maritime trading industry are important for the Chinese government to make decision as to whether and when China shall ratify the Rotterdam Rules, although an industry's attitude is interests-oriented.

The shipping industry in China is of the view that, generally speaking, the provisions of the Rotterdam Rules in relation to the transport documents and electronic transport records and those for solving the practical issues commonly existing in shipping practice, e.g. provisions on delivery of goods in Chapter 9 will or may be beneficial to the shipping industry. However, the shipping industry as a whole does not support the Rules, because the industry, especially the small or even some medium-sized shipping companies, are not satisfied with the carrier's liability regime which increases the carrier's liability due to the deletion of nautical fault and fault in fire, and the increase of limits of liability. They are also not satisfied with the special rules for volume contracts in Article 80 which may put the medium-sized and small shipping companies in an unequal and less favourable position when facing large shippers.

The maritime trading industry in China (such as those firms involved in exports and related cargo interests) accepts the provisions of the Rules in relation to the carrier's liability regime, transport documents and electronic transport records. Especially, they welcome the deletion of nautical fault and fault in fire and the increase of limits of carrier's liability as these are in favour of their interests. However, they are of the view that the Rules were too complicated. Moreover, the small or even some medium-sized trading companies are not satisfied with: (a) the provisions of documentary shipper which may cause prejudice to the interests of FOB sellers; (b) the special rules for volume contracts in Article 80 which may put the small and even medium-sized trading companies in an unequal and less favourable position when facing large liner companies; (c) the provisions delivery of goods without surrender of transport documents or electronic transport record under Article 46 or 47 which may cause prejudice to the FOB sellers' right to be paid for the sale of goods; and (d) the provisions in Chapter 14 'Jurisdiction' and Chapter 15 'Arbitration' by which a choice of court agreement or an arbitration agreement contained in a volume contract may be binding upon a person who is not a party thereto without his consent and may consequently compel a consignee obey to the jurisdiction of a foreign court or arbitration in a foreign country.

In consideration of the current situations of the shipping and trading industry in China, especially most of the shipping companies and trading companies are small or medium-sized ones and do not have competitive advantages in the international shipping and trading market which the Rotterdam Rules may imply to require, and the potential influences which China's ratification of the Rules may bring about, China's ratification of the Rules at this stage seems not beneficial to the overall economic interests of China. Consequently, it is quite probable that China will not consider to ratify the Rules in the near future, but will still take a "wait-and-see" attitude towards the Rules, at least before the Rules come into force and are ratified by most of the China's major maritime trading partners. However, the advanced, reasonable, mature and practicable provisions of the Rules may need to be adopted or used for reference when the Maritime Code is revised in the near future in order to modernize the hybrid regime of carriage of goods by sea contained in Chapter IV of the Code.<sup>14</sup>

### **3.4 The Existence of Ambiguities, Uncertainties and Gaps in Chapter IV of the Maritime Code**

The admiralty practice in the ten maritime courts and the courts of appeals viz. the high people's courts of the municipalities directly under the State Council, provinces or autonomous regions in China in the past 23 years well demonstrated that Chapter IV of the Maritime Code has ambiguities and uncertainties and lacks detailed provisions on some issues, causing adverse effects in the application thereof.

In this regard, typical examples are the FOB seller's legal position and its rights and obligations, the legal position of a freight forwarder and delivery of goods without production of bills of lading.

As regards the FOB seller's legal position by virtue of Article 42 (3) of the Maritime Code,<sup>15</sup> a person who has delivered the goods to the carrier is defined as a shipper (actual shipper). and assumes the shipper's rights and obligations. However, Chapter IV does not differentiate rights and obligations from those of the shipper who has concluded a contract of carriage of goods by sea with the carrier, nor does it provide that the two shippers shall bear joint and several liability to the carrier or actual carrier.

---

<sup>14</sup> James Zhengliang Hu and Siqi Sun, 'China's attitude towards the Rotterdam Rules in the authors' view' in the *Papers Collection of the 8<sup>th</sup> International Conference on Maritime Law*, Dalian, China, October 2015.

<sup>15</sup> Art.42 (3) provides: "Shipper" means: (a) the person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; (b) the person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea."

As regards the legal position of a freight forwarder, freight forwarders as active intermediaries in the maritime transport of goods act either as a carrier/Non-Vessel Carrying Operator,<sup>16</sup> shipper, consignee or an agent of the shipper or consignee, as the case may be. Many disputes arise between a freight forwarder and a shipper/consignee or between a freight forwarder and a carrier/actual carrier in practice partly due to lack of explicit statutory provisions regarding the legal position of a freight forwarder and its rights and obligations.

As regards delivery of goods without production of bills of lading, Article 71 of the Maritime Code requires the carrier to deliver the goods against surrendering of an original bill of lading even in the case of a straight bill of lading. However, Chapter IV does not stipulate who is entitled to claim, who shall be liable, when the liability can be exempted and what can be claimed for etc. Many disputes arise from delivery of goods without production of bills of lading every year, which has substantial connection with the lack of such provisions.

### **3.5 The Lack of Mandatory Scope of Application of Chapter IV of the Maritime Code**

Unlike the law on the carriage of goods by sea in some other jurisdictions such as US COGSA of 1936 or the Hague or Hague-Visby Rules, Chapter IV of the Maritime Code does not have its scope of mandatory application by virtue of Article 269 in Chapter XIV 'Application of Law in Relation to Foreign-related Matters',<sup>17</sup> because the parties to a contract may reach an agreement as to the applicable law or the principle of closest connection shall apply in determining the applicable law in the absence of such an agreement. However, it is commonly recognized in the academic circle in China that Chapter IV of the Maritime Code should have its scope of mandatory application.

## **4 What Updating is Needed?**

The updating of the law on carriage of goods by sea shall be realized by way of revision of Chapter IV of the Maritime Code when the Code is revised. In the authors' view, revision of Chapter IV and the related provisions of the Maritime Code shall focus on the following aspects:

### **4.1 Extending the Scope of Application of Chapter IV of the Maritime Code**

The application of Chapter IV of the Maritime Code after revision shall be extended as a whole to the contracts of the domestic carriage of goods by sea or in inland navigable waters adjacent to the sea, but shall contain necessary special provisions applicable to the contract of the domestic carriage due to the differences between the international carriage and the domestic carriage<sup>18</sup> which still exist and cannot be unified at this stage. Such special provisions shall mainly include: (a) the carrier's strict liability regime; (b) no limitation of liability for loss or damage to goods and (c) use of water-borne waybill<sup>19</sup> as the main form of transport document. The above (a) and (b) will be in line with the Contract Law of 1999<sup>20</sup> which is applicable to the contract of the domestic water-borne carriage of goods. In the authors' view, other chapters of the revised Maritime Code shall also be applicable to the inland navigation in the same way.

---

<sup>16</sup> The concept of Non-Vessel Carrying Operator which is similar to Non-Vessel Operating Common Carrier (NVOCC) contained in the US Ocean Shipping Reform Act of 1998 is adopted in the Regulations on International Maritime Transport of 2001. According to the statistics provided by the Ministry of Transport, there were 5,529 registered Non-Vessel Carrying Operators on 22 January 2016. <[http://zizhan.mot.gov.cn/zfxxgk/bnssj/syj/201601/t20160122\\_1980596.html](http://zizhan.mot.gov.cn/zfxxgk/bnssj/syj/201601/t20160122_1980596.html)> accessed 2 February 2016.

<sup>17</sup> Article 269 of the Maritime Code provides: 'The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.'

<sup>18</sup> See above n 5.

<sup>19</sup> A water-borne waybill is defined as an evidence of contract of domestic water-borne carriage of goods and a receipt of goods by the carrier in Article 58 of the 2000 Cargo Regulations which was abolished recently. See above n 4.

<sup>20</sup> Article 311 of the Contract Law 1999 provides: 'A carrier shall be liable for damage to or destruction of goods during the period of carriage unless the carrier proves that the damage to or destruction of goods is caused by force majeure, by natural characters of the goods or reasonable loss, or by the fault on the part of the shipper or consignee.' Article 312 further provides: 'The amount of damage to or loss of the goods shall be the amount as agreed upon in the contract by the parties where there is such an agreement. Where there is no such an agreement or such an agreement is not nuclear, nor can it be determined according to the provisions of Article 61 of this Law, the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied. Where law or administrative regulations stipulate otherwise on the method of calculation of damages and on the limit of liability, those provisions shall be followed.'

## 4.2 Adopting the Reasonable and Mature Provisions of the Rotterdam Rules into Chapter IV of the Maritime Code

While China will still take a “wait-and-see” attitude towards the Rotterdam Rules as illustrated in 2.3 above, the reasonable and mature provisions of the Rules need be adopted to improve the hybrid regime contained in Chapter IV of the Maritime Code.

### 4.2.1 Acceptable Provisions

Besides part of the provisions which are acceptable regarding the carrier’s liability regime as illustrated in 4.2.2 *infra*, such provisions shall or may mainly include those regarding: (a) transport documents and electronic transport records (Ch.3 ‘Electronic Transport Records’, Ch.8 ‘Transport Documents and Electronic Transport Records’); (b) obligations of shipper (Ch.7 ‘Obligations of the Shipper to the Carrier’); (c) right of control (Ch.10 ‘Rights of the Controlling Party’) and transfer of rights (Ch.11 ‘Transfer of Rights’); (d) time for suit (Ch.13 ‘Time for Suit’). In particular, the adoption of the provisions regarding electronic transport records is helpful to meet the rapid use of electronic commerce in the maritime transport, although, unlike that the traditional rules of maritime law were based upon mature shipping practice, these provisions lack mature experience and consequently their enforceability seems not certain.

### 4.2.2 Pros and Cons of the Carrier’s Liability Regime

It seems clear that the following provisions of the Rotterdam Rules are acceptable and can wholly or partly be adopted into Chapter IV of the Maritime Code:

- (a) In Chapter 4 ‘Obligations of the Carrier’, Article 12 ‘Period of responsibility of the carrier’, Article 13 ‘Specific obligations’, Article 15 ‘Goods that may become a danger’ and Article 16 ‘Sacrifice of goods during the voyage by sea’;
- (b) In Chapter 5 ‘Liability of the Carrier for Loss, Damage or Delay’, Article 17 ‘Basis of liability’ regarding burden of proof in cargo claims and the listed exemptions of liability, Article 18 ‘Liability of the carrier for other persons’, Article 19 ‘Liabilities of the maritime performing party’, Article 20 ‘Joint and several liability’, Article 21 ‘Delay’, Article 22 ‘Calculation of compensation’ and Article 23 ‘Notice in case of loss, damage or delay’;
- (c) In Chapter 12 ‘Limits of Liability’, Article 60 ‘Limits of liability for loss caused by delay’, Article 61 ‘Loss of the benefit of limitation of liability’.

However, it is arguable that the following provisions of the Rules are not suitable to be adopted into Chapter IV of the Maritime Code:

- (a) In Chapter 4 ‘Obligations of the Carrier’, Article 14 ‘Specific obligations applicable to the voyage by sea’ regarding the carrier’s obligation to exercise due diligence to keep the ship seaworthy, crewed, equipped and supplied and cargo-worthy during the voyage. That is, it seems preferable to maintain the time of exercise of due diligence to be limited to the time before and at the beginning of the voyage.
- (b) In Chapter 5 ‘Liability of the Carrier for Loss, Damage or Delay’, deletion of the nautical fault<sup>21</sup> and the fault in fire<sup>22</sup> in subparagraph 3 of Article 17 ‘Basis of liability’.

---

<sup>21</sup> Nautical fault means an act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship as provided for in Article 4(a) of the Hague-Visby Rules. Article 51 (1) of the Maritime Code contain similar provisions, i.e. “Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship”. The deletion of the fault in the management of the ship in Article 17 of the Rotterdam Rules is identical to the provision of the carrier’s continuous obligation to exercise due diligence during the voyage in Article 14.

<sup>22</sup> Article 4(b) of the Hague-Visby Rules provides “Fire, unless caused by the actual fault or privity of the carrier” as an exemption of liability. Article 51 (2) of the Maritime Code contains similar provisions, i.e. “Fire, unless caused by the actual fault of the carrier”. These provisions mean that the carrier is not liable for loss of or damage to goods caused by the fault in causing or extinguishing fire on-board committed by the master, mariner, pilot or the servants or agents of the carrier.

(c) In Chapter 12 ‘Limits of Liability’, Article 59(a) regarding package or unit limit of carrier’s liability, i.e. the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher. Noticeably, the above limits of carrier’s liability are for breach of its obligations under the Rotterdam Rules, but not limited to loss of or damage to goods. By comparison, the amount of 875 SDR per package or other shipping unit is 31% higher than the Hague-Visby package limit of 666.67 SDR and 5% higher than the Hamburg package limit of 835 SDR. The amount of 3 SDR per kilogram of the gross weight of the goods is 50% higher than Hague-Visby kilo limit of 2 SDR and 20% higher than the Hamburg kilo limit of 2.5 SDR. It seems clear that the limits of liability provided for in the Rotterdam Rules are beyond the current commercial need in China. This is demonstrated by the statistics that in 2015, the total value of the imported and exported commodity in China was RMB24574 Yuan<sup>23</sup> or USD3,959 billion and the total volume of the imported and exported goods discharged in the Chinese ports was 3.664 billion metric tons.<sup>24</sup> Therefore, the average value of goods carried by sea in 2015 was USD3,959 billion ÷ 3.664 billion tons ÷ 1,000 = USD1.08 or about 0.72 SDR per kilogram. The value of the goods carried in container liner transportation is normally higher and the Rotterdam Rules are mainly applicable in such transportation. However, the figure of 0.72 SDR per kilogram proves that the limit of 3 SDR per kilogram in the Rotterdam Rules is excessively high and that the limit of 2 SDR per kilogram in the Hague-Visby Rules as amended by the 1979 SDR Protocol or in the Maritime Code remains appropriate, let alone the Rotterdam Rules are also applicable between the carrier/maritime performing party and the consignee under the contract of carriage evidenced by or contained in a transport document or electronic transport record issued under a charterparty or other contracts for the use of a ship or of any space thereon.

### 4.2.3 Unacceptable Provisions

It seems clear that China is not in favour of the provisions of the Rotterdam Rules regarding the following aspects and these provisions shall not be adopted in Chapter IV of the Maritime Code:

#### (a) Documentary shipper

A documentary shipper is defined in Article 1(9) as ‘a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.’ According to the provisions of Article 35 ‘Issuance of the transport document or the electronic transport record’, an FOB seller shall be a documentary shipper, i.e. named as “shipper” in the transport document or electronic transport record and assumes the shipper’s rights and obligations according to Article 33 ‘Assumption of shipper’s rights and obligations by the documentary shipper’, but subject to the shipper’s consent. That is, an FOB seller shall not have any rights against the carrier or maritime performing party if the shipper does not consent to naming an FOB seller as “shipper” in the transport document or electronic transport record. By virtue of the definition of shipper contained in Article 42 (3) of the Maritime Code<sup>25</sup>, a person who has delivered the goods to the carrier is a statutory shipper and assumes the shipper’s rights and obligations without the need of the contractual shipper’s consent. A considerable part of the commodities is exported on FOB term by small or medium-sized companies and as a result, protection of FOB sellers’ interests is of particular importance in China by way of expressly stipulating the FOB seller’s legal position and its rights and obligations. Obviously, the provisions of the Rotterdam Rules regarding the documentary shipper cannot service such a purpose.

#### (b) Volume contract

Article 80 ‘Special rules for volume contracts’ of the Rotterdam Rules allows a volume contract to conditionally derogate from the mandatory provisions of the Rules set forth in Article 79 thereof. As a result, as between the carrier and the shipper, a volume contract may provide for greater or lesser rights, obligations and liabilities than

<sup>23</sup> See the National Bureau of Statistics of China, *Statistical Communiqué of the People's Republic of China on National Economic and Social Development in 2015*,

[http://www.stats.gov.cn/tjsj/zxfb/201602/t20160229\\_1323991.html](http://www.stats.gov.cn/tjsj/zxfb/201602/t20160229_1323991.html)> accessed 28 May 2016.

<sup>24</sup> See the Ministry of Transport, *Statistical Communiqué of Development in Transport and Communication Industry in 2015*.

<[http://zizhan.mot.gov.cn/zfxxgk/bnssj/zhghs/201605/t20160506\\_2024006.html](http://zizhan.mot.gov.cn/zfxxgk/bnssj/zhghs/201605/t20160506_2024006.html)> accessed 28 May 2016.

<sup>25</sup> See above n 15.

those imposed by the Rules. Article 80(2) provides the conditions for derogation.<sup>26</sup> Article 80(4) indicates the rights and obligations which cannot be derogated, i.e. the rights and obligations provided for in Article 14(a) & (b), Articles 29 & 32 or the liability arising from the breach thereof, and the liability arising from an act or omission referred to in Article 61. Article 80(5) further provides that a volume contract that derogates from the mandatory provisions can be conditionally binding upon any person other than the shipper subject to its express agreement.<sup>27</sup>

Furthermore, by virtue of Article 67(2) of Chapter 14 'Jurisdiction', an exclusive choice of court agreement contained in a volume contract may conditionally be binding upon a person that is not a party to the volume contract without its agreement.<sup>28</sup> Similarly, by virtue of Article 75(4) of Chapter 15 'Arbitration', an arbitration agreement contained in a volume contract may conditionally be binding upon a person that is not a party to the volume contract without its agreement.<sup>29</sup>

Although volume contracts are widely used in the form of service contracts in the modern liner transportation, the provisions of Article 80 of the Rotterdam Rules are not appropriate to be adopted into Chapter IV of the Maritime Code because derogation of a volume contract from the mandatory provisions may cause prejudice to the interests of the so many small or medium-sized shipping companies or cargo traders and even the overall national economic interests for the following reasons:

- (i) It seems clear that the derogation of a volume contract from the mandatory provisions adheres to the traditional principle of freedom of contract and is based upon the presumption that the parties to a volume contract have equal or similar bargaining powers and the contract is concluded based upon detailed negotiations. In reality, however, this is not always the case. Quite possibly, a volume contract is concluded between a large container lines company and a small or medium-sized cargo trader or vice versa, in which case the parties to a volume contract do not have equal or similar bargaining powers. In addition, the contract is possibly concluded not based upon detailed negotiations, especially where the parties to a volume contract do not have equal or similar bargaining powers. In China, most cargo traders and shipping companies are small or medium-sized ones and do not have equal or similar bargaining powers when facing large shipping companies or cargo traders.
- (ii) A volume contract that derogates from the mandatory provisions can be conditionally binding upon any person other than the shipper subject to its express agreement. In practice, such an express agreement may possibly be made not wholly in the own will of a small or medium-sized consignee. Instead, he is compelled to make the agreement due to its weak bargaining power.

(c) Delivery of goods without production of transport documents;

Noticeably, China has become the largest commodity export country in the world and as mentioned in paragraph (a) above, a considerable part of the commodities is exported on FOB term by small or medium-sized companies and as a result, protection of FOB sellers' interests is of particular importance. Delivery of goods without

---

<sup>26</sup> Article 80(2) provides: 'A derogation pursuant to paragraph 1 of this article is binding only when: (a) The volume contract contains a prominent statement that it derogates from this Convention; (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations; (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.' Article 80(3) further provides: 'A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.'

<sup>27</sup> Article 80(5) provides: 'The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that: (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.'

<sup>28</sup> Article 67(2) provides: 'A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if: (a) The court is in one of the places designated in article 66, paragraph (a); (b) That agreement is contained in the transport document or electronic transport record; (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and (d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.'

<sup>29</sup> Article 75(4) provides: 'When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if: (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article; (b) The agreement is contained in the transport document or electronic transport record; (c) The person to be bound is given timely and adequate notice of the place of arbitration; and (d) Applicable law permits that person to be bound by the arbitration agreement.'



production of bills of lading is quite common, especially in the carriage of liquid or containerized goods and in the short sea trades. As a result of such delivery, a seller's interest may be prejudiced because possibly he has not been paid for the sale of goods and has to pursue a claim against the carrier and/or the buyer/consignee. In practice, however, pursuing such a claim may prove difficult as the carrier and/or the buyer may be financially incapable or the claim has to be pursued in a foreign jurisdiction. Thus, delivery of goods without production of bills of lading should be prohibited or at least strictly restricted for the purpose of protecting the interests of the sellers in case of bills of lading. This is why Article 71 of the Maritime Code requires the carrier to deliver the goods against surrendering of an original bill of lading even in the case of a straight bill of lading. It can be anticipated that before the widespread use of electronic transport documents in the future, delivery of goods without production of bills of lading will still exist and even becomes more common as ships sail faster due to the development of technology and shipbuilding and maritime transport. Thus, the necessity of such protection shall remain unchanged.

Article 46 or 47 of the Rotterdam Rules allows delivery of goods without production of transport document or electronic transport record to some extent.

By virtue of Article 46, when a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods, the carrier may deliver the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of that article and such delivery shall discharge the carrier from its obligation to deliver the goods under the contract of carriage; if a non-negotiable transport document does not indicate that it shall be surrendered in order to obtain delivery of the goods, the carrier may deliver the goods upon the proof of the consignee's proper identity.

By virtue of Article 47, when a negotiable transport document or a negotiable electronic transport record has been issued that expressly states that the goods may be delivered without surrender of the transport document or the electronic transport record, the carrier may deliver the goods without surrender of the negotiable transport document or without demonstration of a negotiable electronic transport record, but upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of that article and such delivery shall discharge the carrier from its obligation to deliver the goods under the contract of carriage to the holder.

It cannot be denied that the permissible delivery of goods without surrender of the transport document or the electronic transport record may facilitate timely delivery of goods at destination. However, such delivery may cause prejudice to the sellers' especially the FOB sellers' right to be paid for the sale of goods. In particular, where an FOB seller is not a documentary shipper, it has no right to claim against the carrier in the case of delivery of goods without surrender of the transport document or the electronic transport record. When the goods cannot be timely delivered after their arrival at the place of destination, the carrier is entitled to take action in respect of the goods at the risk and expense of the person entitled to the goods pursuant to Article 48 'Goods remaining undelivered', which reduces the necessity for delivery of goods without surrender of the transport document or the electronic transport record.

Thus, based upon the situation of commodity export in China and from the perspective of balancing the interests of the sellers, especially the FOB sellers, and the carriers, it is advisable not to adopt into Chapter IV of the Maritime Code Articles 46 & 47 which stipulate the carrier's permissible delivery of goods without surrender of the transport document or the electronic transport record.

#### (d) Jurisdiction and arbitration

As illustrated in 3.3 above, an exclusive choice of court agreement contained in a volume contract by virtue of Article 67(2) of Chapter 14 'Jurisdiction' or an arbitration agreement contained in a volume contract by virtue of Article 75(4) of Chapter 15 'Arbitration' may conditionally be binding upon a person that is not a party to the volume contract without its agreement and thus compels a consignee in China to be involved in a litigation or arbitration in a foreign country. Consequently, the interests of small or medium-sized shipping companies or cargo traders and even the overall national economic interests may be prejudiced. However, jurisdiction and arbitration are procedural issues and thus irrelevant to the Maritime Code.

### **4.3 Removing the Ambiguities and Uncertainties and Filling in the Gaps Existing in Chapter IV of the Maritime Code**

As mentioned in 3.4 above, the admiralty practice in the implementation of Chapter IV of the Maritime Code demonstrated the existence of ambiguities and uncertainties and lacks detailed provisions on some issues. Thus, the revision of this Chapter has a task to remove the ambiguities and uncertainties and to fill in the gaps to solve the matters which often give rise to disputes in practice and to enhance its enforceability.

So far as the examples in this regard as illustrated in 3.4 above are concerned: (a) as regards the FOB seller's legal position and its rights and obligations, it is advisable to strip the actual shipper from the definition of shipper and define it as a consignor and to stipulate a consignor's rights and obligations based upon its delivery of goods for carriage to a carrier and maritime performing party together the shipper's joint and several liability where the consignor fails to perform its obligations; (b) as regards the legal position of a freight forwarder, rules may be abstracted from the Provisions on Certain Issues regarding the Trial of Cases of Disputes over Maritime Freight Forwarding, 2012 which stipulates freight forwarder's legal position according to the nature of its acts and form part of the provisions of Chapter IV after revision thereof; (c) as regards delivery of goods without production of bills of lading, it seems unnecessary to require surrendering of a straight bill of lading for taking delivery of goods and rules may be abstracted from the Provisions on Certain Issues regarding the Application of Law in the Trial of Cases of Delivery without Original Bills of Lading, 2009 to be part of the provisions of Chapter IV after revision thereof.

### **4.4 Stipulating Mandatory Scope of Application of Chapter IV of the Maritime Code**

As illustrated in 3.5, the Chapter lacks mandatory scope of application. It seems advisable to stipulate in Chapter XIV 'Application of Law in Relation to Foreign-related Matters' after revision the Maritime Code that Chapter IV shall be applicable to the international carriage of goods wholly or partly by sea to or from China, unless the parties to a contract has chosen the law of another jurisdiction as the applicable law, provided that the application of such a law shall not make the Chinese shipper or consignee less favourable than under Chapter IV of the Maritime Code.

## **5 Expectation of Revision of the Maritime Code**

Under the Chinese legislative system, as a principle, the making or revision of a law should first be listed in the national legislation plan which is made in every five years. The revision of the Maritime Code has not been listed in the national legislation plan yet mainly due to the limited resources of national legislation. However, the need for revision of the Maritime Code, especially Chapter IV thereof, is well recognized by the academic circle, the relevant industries and the judicial circle. The Ministry of Transport which was responsible for the drafting of the Maritime Code has been strongly proposing the revision and has designated maritime law experts to do research on the revision thereof to form basis for the revision in the near future. Hopefully, the revision of the Maritime Code will be listed in the national legislation plan in the coming years and the work of revision will officially start by virtue of such a plan.

## **6 Conclusions**

From the above analysis, the following conclusions may be drawn:

- (a) The updating of the law on carriage of goods by sea in China is necessitated by the inapplicability of Chapter IV of the Maritime Code to the domestic carriage, the significant developments in the maritime transport and related areas since the adoption of the Code in 1992, the adoption of the Rotterdam Rules, the existence of ambiguities, uncertainties and gaps in this Chapter and the lack of mandatory scope of application thereof;
- (b) Chapter IV of the Maritime Code shall be updated mainly by way of extending its scope of application to the contracts of carriage of goods in coastal waters and in the inland waters adjacent to the sea, adopting the reasonable and mature provisions of the Rotterdam Rules to improve the hybrid regime contained in this Chapter while China takes a "wait and see approach" towards the Rules, removing the ambiguities and uncertainties and filling in the gaps existing in this Chapter and stipulating its mandatory scope of

application;

- (c) Hopefully, the revision of the Maritime Code including its Chapter IV will be listed in the national legislation plan in the coming years through which the law on carriage of goods by sea will be modernized.