

Carrier's Obligations and Liabilities in International Sea Carriage: A Comparative Study of the Nordic Maritime Codes, Chinese Maritime Code and Rotterdam Rules

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Degree: International Master's Degree Programme in International Business Law

Date: 19 May 2014

Tiedekunta/Osasto - Fakultet/Sektion – Faculty Faculty of Law		Laitos - Institution – Department Master of International and Comparative Law
Tekijä - Författare – Author Zhou, Binling		
Työn nimi - Arbetets titel – Title Carrier's Obligations and Liabilities in International Sea Carriage: A Comparative Study of the Nordic Maritime Codes, Chinese Maritime Code and Rotterdam Rules		
Oppiaine - Läroämne – Subject International Business Law		
Työn laji - Arbetets art – Level Master's Thesis	Aika - Datum – Month and year May 2014	Sivumäärä - Sidoantal – Number of pages 85
Tiivistelmä - Referat – Abstract <p>This thesis is going to do a comparative study of the Nordic Maritime Codes, Chinese Maritime Code and Rotterdam Rules (United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea) with respect to carrier's obligations and liabilities imposed hereupon. The backgrounds for this study are the ambitious goals and controversial future of the Rotterdam Rules, the significant roles that the Nordic countries and China have played in international carriage of goods by sea, and the important position of the carrier's mandatory obligations and liabilities in this field. Through the comparative study, this thesis tries to disclose the similarities and differences between these legal regimes, to see what changes will be brought to the Nordic/Chinese maritime laws and what impact may be led to their shipping industries if they finally accept the Rotterdam Rules.</p> <p>Based on these backgrounds, the detail contents discussed in this thesis include: (1) the legislative history and scope of application; (2) period of carrier's responsibility; (3) carrier's obligations; (4) carrier's liability for physical loss of or damage to the goods; (5) carrier's liability for delay in delivery; (6) carrier's liabilities for deviation, deck cargo and live animals. Each of the NMCs, CMC and the Rotterdam Rules is respectively discussed in detail under each part. By comparing the regional solutions and the new international Convention, at the end of this thesis the possible future of the Rotterdam Rules is discussed from Nordic and Chinese perspectives of views.</p>		
Avainsanat – Nyckelord – Keywords Nordic Maritime Codes, Chinese Maritime Code, Rotterdam Rules, International Transport of Goods by Sea, Carrier's Obligations and Liabilities		
Säilytyspaikka – Förvaringställe – Where deposited University of Helsinki, Faculty of Law		
Muita tietoja – Övriga uppgifter – Additional information		

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Abbreviations

CMC	Chinese Maritime Code 1993
CMI	Comité Maritime International
CMR	United Nations Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)
Hague Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 15 August 1924)
Hague-Visby Rules	The Hague-Visby Rules-The Hague Rules as Amended by the Brussels Protocol 1968
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea (Hamburg, 30 March 1978)
NMCs	Nordic Maritime Codes 1994
Rotterdam Rules	United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea (23, September 2009)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Transport

1. Introduction and Background

With the birth of the new international Convention in international transport law, namely *the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (the Rotterdam Rules) in 2008, alternatives to the carrier's mandatory obligations and liabilities introduced by this new Convention have attracted wide discussion in both academic area and industry practice. Different countries, either large shipping countries or cargo interest countries, are cautious about their attitudes towards the Rotterdam Rules as the effect brought by changes of maritime law to their shipping industries is difficult to predict at this moment. This thesis is going to do a comparative study of the Nordic Maritime Codes, Chinese Maritime Code and Rotterdam Rules with respect to the carrier's mandatory obligations and liabilities imposed thereupon. The backgrounds for this study are the ambitious goals and controversial future of the Rotterdam Rules; the significant roles that the Nordic countries and China have played in international carriage of goods by sea, and the important position of the carrier's mandatory obligations and liabilities in this field. Through the comparative study, this thesis tries to disclose the similarities and differences between these legal regimes, to see what changes will be brought to the Nordic/Chinese maritime laws and what impact may be led to their shipping industries if they finally accept the Rotterdam Rules.

1.1 Multimodal Carriage and the Initial Goals of the Rotterdam Rules

There is no need to emphasize the importance of world trade and the convenience brought by the increasing amount of international transactions to our everyday lives. Goods are bought, sold and transported among the world. In order to meet commercial needs, people require convenient transport of goods and the shorter duration, the cheaper price, the better. As an old and traditional transport method, cargo carriage by sea has for a very long time been widely used in practice owing to its capacity to move large quantities of goods from one place to another at a comparably low price. Additionally, due to the containerization revolution taking place in shipping industry, the capacity of sea carriage is far greater than other modes of transport such as cargo carriage by road or by air.¹ In 2012, according to the record of the *United Nations Conference on Trade and Development* (UNCTAD), for the first time in history that the volume of international trade carried by sea has surpassed 9

¹ Donald G. Janelle and Michel Beuthe, 'Globalization and Research Issues in Transportation' (1997) 5 (3) *Journal of Transport Geography* 199.

billion tons mark.² Different kinds of goods have been transported by sea, including raw materials, agriculture commodities, industrial materials, manufactured goods and consumer goods.³ However, with the changing demands of the industry, nowadays sea carriage is seldom used as a sole mode to complete a cargo transport task but only as part of a multimodal transport operation where different modes of transport are utilized.⁴ Accompanying with economic globalization trend, transport distance becomes much longer and different stages contained in a transportation, such as loading, unloading, transshipping, and setting up of cargo, are expensive and time-consuming if they are operated though transport system not designed for multimodal carriage.⁵ Complex chains combing different modes of transportation are more reasonable and economic efficient.⁶ Furthermore, beyond the economic and efficient considerations, in some areas such as Europe and North America, the increasing cargo transportation by road is pressing the capacity limits of road networks and causing much environment pollution.⁷ Multimodal carriage of goods has been regarded as a wise choice in this context as it can combine different modes of transport to meet the demands of both economic growth and sustainable development.⁸ However, new legal problems which haven't been handled by current working legal instruments have emerged with the development of multimodal carriage. Certain commercial legislations have been expected to provide clear and predictable solutions to these problems identified in industry practice.⁹

The Rotterdam Rules have been produced under this situation. There are three initial goals of drafting this new born international Convention: to meet the industry's commercial needs; to update and modernize the prior legal regimes and fill in some of the gaps that have been raised in practice over the years; and ultimately to achieve broad uniformity in the law governing the international carriage of goods.¹⁰ Although haven't entered into force yet, as an international Convention which represents the result of almost four years of

² United Nations Conference on Trade and Development (UNCTAD), 'UNCTAD Statistics' (UNCTAD.org 2014) <<http://unctad.org/en/Pages/Statistics.aspx>> accessed 14 May 2014.

³ *ibid.*

⁴ Jannelle and Beuthe (n 1).

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ Ellen Eftestøl-Wilhelmsson, 'The Rotterdam Rules in A European Multimodal Context' (2010) 16 *Journal of International Maritime Law* 274.

⁹ Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell 2010) 1.

¹⁰ *ibid* 2-5.

preparatory work by the *Comité Maritime International* (the CMI) and eight years of intensive work by the *United Nations Commission on International Trade Law* (the UNCITRAL) and its Working Group on Transport Law, the Rotterdam Rules have attracted much attention and definitely worth studying from the academic perspective.¹¹

1.2 Nordic Maritime Codes and Chinese Maritime Code

China is a big sea carriage country, about 70 percent of carriages of goods in China have been completed by sea transport and the rise in the China's domestic demand has been one of the main forces driving the expansion of the international sea borne trade.¹² Additionally, lots of disputes arising from contract for carriage of goods by sea have been resolved in Chinese maritime courts or arbitration organizations every year. Nordic countries are also major shipping area among the world and they have been actively involving in regional and international legislations in this field. Nordic countries are used to be Contracting States of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (the Hague Rules) and now members of the *Hague Rules as Amended by the Brussels Protocol 1968* (the Hague-Visby Rules). Nordic Maritime Codes 1994 (the NMCs) are mainly legislated based on the Hague-Visby Rules with certain alternatives adopted from the *United Nations Convention on the Carriage of Goods by Sea* (the Hamburg Rules) providing such differences are not in conflict with the Hague-Visby Rules. China is not a member of the Hague Rules, Hague-Visby Rules or Hamburg Rules. But the Chinese Maritime Code 1993 (the CMC) is characterized as Hague-Visby Rules oriented and also affected by Hamburg Rules to certain degree. It seems that the NMCs and CMC should be quite similar with each other at the first glance. Nevertheless, many differences exist in close analysis. A comparative study of the NMCs and CMC is not only valuable for comparative legal research but also meaningful for the further development of trade and transport connections between Nordic countries and China, especially useful for lawyers and businessmen when resolving disputes arising from this field.

Moreover, although maritime law is probably regarded as one of the legal areas where international rules and customs are developed earliest and widely accepted, as international

¹¹ Michael F. Sturley, 'General Principles of Transport Law and the Rotterdam Rules' in Meltem Deniz Guner-Özbek (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the 'Rotterdam Rules'* (Berlin Heidelberg: Springer-Verlag 2011) 65.

¹² UNCTAD, 'UNCTAD Statistics' (n 2).

uniform solution hasn't been reached yet, it is still necessary to study regional solutions.¹³ Especially in the short term, a disclosure of differences between different legal regimes can let all participants of sea carriage know what their obligations are and what their liabilities will be when disputes are resolved in certain countries. As for the long term, a study of regional solutions is helpful in finding better harmonization method to achieve the goal of a uniform and predictable law which can further promotes the flow of international trade.¹⁴

1.3 The Key Status of the Carrier's Mandatory Obligations and Liabilities

The terms 'maritime law' covers various areas of law, including the law of carriage, safety, ship pollution, marine accidents, flag and registration, and so on.¹⁵ These different contents are reflected both in the NMCs and CMC and separate Chapters have been provided for international sea carriage. The Rotterdam Rules, as well as the Hague Rules, Hague-Visby Rules and Hamburg Rules, only govern legal issues regarding international sea carriage. Carrier's mandatory obligations and liabilities are core contents in this area as they are closely connected with the interests of the shipping industry, the export/import industry and even the banks financing such transactions.¹⁶ For instance, one important purpose of the Hague Rules is to establish the mandatory minimum liabilities for the sea carrier and protect cargo interests from extensive exemption clauses existing in liner carriages.¹⁷ It is even said that the entire point of the Hague/Hague-Visby and Hamburg Rules is to establish the legal regime governing the carrier's liability for loss of or damage to cargo.¹⁸ Although this opinion may be a little bit exaggerate and the Rotterdam Rules have provided more extensive rules, the key status of the carrier's obligations and liabilities haven't been changed. When evaluating the merits and defects of the Rotterdam Rules, the alternatives introduced to carrier's obligations and liabilities are still the focus of discussions.

¹³ Lars Gorton, 'Regional Harmonization of Maritime Law in Scandinavia' in Jurgen Basedow, Ulrich Magnus and Rudiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Berlin Heidelberg: Springer-Verlag 2012) 29-50.

¹⁴ Sturley, Fujita and Van der Ziel (n 9) 2-5.

¹⁵ Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian Maritime Law: the Norwegian Perspective* (3rd edn, Oslo: Universitetsforlaget) 23-25.

¹⁶ Jernej Sekolec, 'Foreword' in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010) xxii.

¹⁷ Hannu Honka, 'Introduction' in Hannu Honka (ed.), *New Carriage of Goods by Sea: the Nordic Approach Including Comparisons with Some Other Jurisdictions* (Åbo: Åbo Akademi University 1997) 3.

¹⁸ Sturley, Fujita and Van der Ziel (n 9) 77.

1.4 Summary

Based on these backgrounds, the detail contents discussed in this thesis include: (1) the legislative history and scope of application; (2) period of carrier's responsibility; (3) carrier's obligations; (4) carrier's liability for physical loss of or damage to the goods; (5) carrier's liability for delay in delivery; (6) carrier's liabilities for deviation, deck cargo and live animals. Each of the NMCs, CMC and the Rotterdam Rules is respectively discussed in detail under each part. By comparing the regional solutions and the new international Convention, at the end of this thesis the possible future of the Rotterdam Rules is discussed from Nordic and Chinese perspectives of views.

2. Legislative Histories of the Nordic Maritime Codes, Chinese Maritime Code and the Rotterdam Rules

The origin of legal rules in field of cargo carriage by sea can date back to the old English common law in 19th century. At that time, although common law itself only provided limited exceptions to carrier's liability for loss of or damage to the cargo, due to the abuse of the principle of 'freedom of contract' and the strength of the sea carrier in negotiation, extensive exemption clauses for the benefit of the sea carrier had been concluded in carriage contracts.¹⁹ In order to achieve a fairer balance between the interests of the carrier and shipper, compulsorily applicable laws were developed in response to this trend.²⁰ Carrier started to bear certain minimum mandatory obligations and liabilities according to law. In national legislation level, the US Hart Act 1893 obtained big achievement in this area and exercised influence on not only national maritime legislations of other countries but also international conventions. In international level, there were the Hague Rules, Hague-Visby Rules, and the Hamburg Rules which are still in force in different Contracting States today. During the legislative histories of the NMCs, CMC and the Rotterdam Rules, they have been affected by these international Conventions to vary degrees.

2.1 Legislative History of the Nordic Maritime Codes and Scope of Application

2.1.1 Legislative History of the NMCs

The words 'Nordic countries' are usually used to cover five countries which are Denmark, Finland, Iceland, Norway and Sweden. But in the term of Nordic Maritime Codes, Iceland has been excluded as its further geographical distance and less participation in cooperation

¹⁹ Stephen Girvin, *Carriage of Goods by Sea* (New York: Oxford University Press Inc. 2007) 14.02, 169-175.

²⁰ *ibid.*

of maritime legislation.²¹ Nordic cooperation in legislation exists due to many reasons, including political, cultural and historical aspects.²² From the historical perspective, Sweden was often regarded as a distinct country from the 12th or 13th century onwards and Finland was a part of Sweden at the very early time.²³ During the 14th century there was a Nordic Union of Denmark, Norway and Sweden with Margarethe as the common queen.²⁴ Later, Norway became a part of Denmark for many years and then lost to Sweden in the peace negotiations after the Napoleonic wars.²⁵ In 1890 Sweden lost Finland to Russia.²⁶ In 1905 the union between Norway and Sweden ceased and Norway became independent.²⁷ Finland gained its independence from the Soviet Union in 1917, after which the Nordic political-geographical scene has remained essentially as it is today.²⁸ All this history means that, on the one hand, when talking about Nordic Maritime Codes in 17th century, they are really Danish and Swedish.²⁹ And on the other hand, this background is the resource that Nordic countries have had close common legal tradition in some aspects, especially in private law area.³⁰ Although nowadays the opinion of a common Nordic legal system is debated and sometimes challenged, in the field of maritime law, there is still a high degree of harmonization not only in legislations but also in case law and in the legal doctrine.³¹ In some cases the judges from one Nordic country will even consider judgments or reasoning given by courts of other Nordic countries concerning similar disputes.³²

From the perspective of maritime legislative history, the Swedish Maritime Code was published in 1667 and strongly influenced by the Dutch, Lubeck and Danish law.³³ Danish Maritime Code was produced in 1561 and a new maritime code was enacted and contained in the Code of Christian V in 1683.³⁴ Although departed dramatically with present MNCs, both of these two legislations had already established stipulations on carriage of goods and

²¹ Hannu Honka, 'New Carriage of Goods by Sea - the Nordic Approach' in Hannu Honka (ed.), *New Carriage of Goods by Sea: the Nordic Approach Including Comparisons with Some Other Jurisdictions* (Åbo: Åbo Akademi University 1997) 15.

²² *ibid.*

²³ Gorton, 'Regional Harmonization of Maritime Law in Scandinavia' (n 13) 33.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid* 34-36.

³¹ Lars Gorton, 'Nordic Law in Early 21st Century – Maritime Law' (2010) Stockholm Institute for Scandinavian Law 1957-2010, 104-115.

³² *ibid* 108-115.

³³ *ibid* 105.

³⁴ *ibid.*

in the Swedish Maritime Code the liability of sea carrier was strict except for force majeure event.³⁵

When it comes to the end of 19th and the beginning of 20th century, the Swedish Maritime Code of 1891 replaced the code from 1864, Denmark had its Maritime Code of 1892, Norwegian Maritime Code was produced in 1893 and Finland had its Maritime Code in 1873 and introduced a new one in 1939.³⁶ These legislations were similar although not identical.³⁷ All of them established the carrier's strict liability and entitled the carrier with the right to limit his liability.³⁸

At the same time of early 20th century, the amount of international conventions increased. Both Hague/Hague-Visby Rules and Hamburg Rules had promoting impact on the development of the Nordic Maritime Codes. Started with the Hague Rules, close cooperation had existed between Nordic countries not only in preparatory work of this Convention with the CMI, but also in transformation of this Convention into national laws.³⁹ There were different approaches that a Signatory State could bring an international convention into force within the country.⁴⁰ The convention could become legally binding in the Signatory States by being enacted the convention text as a statute; or the state could incorporate the convention's principles in national legislations.⁴¹ Nordic countries chose the first route to make the Hague Rules applicable.⁴² Thus about ten years after the production of the Hague Rules, this Convention came into force in Sweden in 1936, in Denmark in 1937, in Norway in 1938 and in Finland in 1939.⁴³ It was not amalgamated into the existing articles of the Nordic Maritime Codes at that time, instead it became a separate new legislation and the previous Nordic Maritime Codes from the 1890's were still working in carriage between Nordic countries.⁴⁴ This is to say, there was a 'dual track' system existing in Nordic countries, with the peculiar feature that the protection which the

³⁵ *ibid.*

³⁶ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 15.

³⁷ Gorton, 'Nordic Law in Early 21st Century – Maritime Law' (n 31) 108-115.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Falkanger, Bull and Brautaset (n 15) 278-279.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 15-18.

⁴⁴ *ibid.*

carrier obtained automatically in international trade, was dependent upon an express contractual term in national trade.⁴⁵

When the Visby Protocol was produced, the Nordic countries ratified the 1968 Visby Protocol in their national legislation in early 1970's except for Finland, who ratified it only in 1985.⁴⁶ However, all of them implemented the Hague-Visby rules at about the same time.⁴⁷ The Nordic countries incorporated the Hague-Visby Rules into their national laws via the second approach mentioned above.⁴⁸ The 1979 Protocol concerning units of account was implemented in Nordic countries as well.⁴⁹ A two-tier liability system was applied for several years.⁵⁰ The Nordic countries applied both the Hague Rules and Hague-Visby Rules in accordance with specified stipulations on application until 1985 when the Hague Rules were denounced and the Hague-Visby Rules were solely applicable afterwards.⁵¹

The underlying motivation for producing the new Nordic Maritime Codes 1994 was the birth of the Hamburg Rules. When there was an increasing dissatisfaction with the existing liability rules established by the Hague/Hague-Visby Rules and amounts of liability grew in a number of countries, Nordic delegations actively took a part in working within the UNICITRAL to produce a new international legal instrument to address new arising problems.⁵² Within the Nordic area, in the late 1980's common efforts were undertaken to create a new maritime code.⁵³ Nordic governments issued instructions to their national maritime law committees to prepare new maritime legislations regarding carriage of goods by sea.⁵⁴ As at that time, the future of the Hamburg Rules was not quite clear, it was difficult to predict which country would join this Convention or even whether Nordic countries themselves would eventually join this Convention, they had to face the situation that, as the substantive, procedural and technical weaknesses of the Hague-Visby Rules became obvious, how the new Nordic Maritime Code could relate to the Hamburg Rules as far as possible without derogating from the Hague-Visby Rules.⁵⁵ The solution was that the

⁴⁵ Falkanger, Bull and Brautaset (n 15) 278.

⁴⁶ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 16.

⁴⁷ *ibid.*

⁴⁸ Falkanger, Bull and Brautaset (n 15) 278.

⁴⁹ *ibid.*

⁵⁰ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 15.

⁵¹ *ibid.*

⁵² Gorton, 'Regional Harmonization of Maritime Law in Scandinavia' (n 13) 38-40.

⁵³ *ibid.*

⁵⁴ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 16.

⁵⁵ Falkanger, Bull and Brautaset (n 15) 281.

Nordic countries remained to be the member of the Hague-Visby Rules, and to the extent that the Hamburg Rules were not in conflict with Hague-Visby Rules, those provisions of Hamburg Rules had been implemented into Nordic national laws.⁵⁶ The result was the new Nordic Maritime Codes issued in 1994 and became into force in the same year. In many parts no significant amendments were made in the new Nordic Maritime Codes, but Chapters 13 (general cargo) and Chapter 14 (charting) were new and meant substantial changes as compared to previous Maritime Codes.⁵⁷ This approach of solution to avoid possible conflicts between the Hague-Visby Rules and Hamburg Rules was not unfamiliar with the Nordic countries because as early as the Hague-Visby Rules were implemented in Nordic countries, several amendments had already been made as long as they did not violate the obligation as being states parties to the Convention. Furthermore, on some aspects, alternatives introduced by the Hamburg Rules were actually original and adopted from Nordic maritime laws.

In Nordic Maritime Codes 1994, Finland and Sweden use the same technical system which runs sections within each chapter, and Denmark and Norway have a continuous section throughout the whole codes.⁵⁸ Thus there are actually only two technical systems, namely the Finland-Sweden system and Norway-Denmark system.⁵⁹ I will refer to the article number of Finnish Maritime Code (F) and Norwegian Maritime Code (N) in this thesis. In order to distinguish the new Nordic Maritime Codes 1994 with the previous ones, in this thesis I generally use NMCs to represent the new Nordic Maritime Codes 1994 and terms such as ‘old NMCs’ or ‘previous NMCs’ are used to refer to previous Nordic Maritime Codes.

2.1.2 Scope of Application of the NMCs

Among all provisions provided by the NMCs regarding maritime related legal issues, Chapter 13 specifically applies to contract of carriage by sea except for carriage contract concluded in charter party.⁶⁰ But if bill of lading has been issued under charter party, the third party holder of such bill of lading is protected by the mandatory rules of this Chapter.⁶¹ There are no formal requirements of the contracts and any formation can be

⁵⁶ *ibid.*

⁵⁷ Gorton, ‘Regional Harmonization of Maritime Law in Scandinavia’ (n 13) 40.

⁵⁸ *ibid* 30-31.

⁵⁹ Honka, ‘New Carriage of Goods by Sea - the Nordic Approach’ (n 21) 16.

⁶⁰ F§13:2, N§252; F§13:3, N§253.

⁶¹ F§13:3, N§253.

sufficient for the application of the NMCs.⁶² For example, only a receipt of the goods by the carrier may be regarded as a contract to apply the mandatory rules provided by the NMCs.⁶³ Bill of lading or other similar document of title is evidence of the carriage contract but not necessary for application.⁶⁴ However, the carriage contract needs to have certain connection with Nordic countries or other contracting countries of the Hague-Visby Rules. On this aspect the NMCs apply to three situations. Firstly, the NMCs apply to intra-Nordic cargo transport. NMCs are applicable to contracts of carriage by sea between Finland, Denmark, Norway and Sweden.⁶⁵ And in respect of transport of goods inside one of the Nordic countries, the law of that country shall apply.⁶⁶ Secondly, NMCs shall apply if: the agreed port of loading is located in a Contracting State of the Hague-Visby Rules; or the agreed port of discharge is located in a Nordic country; or one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in one of the Nordic countries; or the transport document has been issued in a Contracting State of the Hague-Visby Rules; or the transport document provides that the Hague-Visby Rules or any legislation based on this Convention shall apply.⁶⁷ Thirdly, when neither the agreed place of loading nor the agreed or actual place of delivery is in one of these four Nordic countries, the party may agree that the contract of carriage by sea shall be subject to the law of a Convention State.⁶⁸ Although not expressly provided, it should be presumed that this third situation only applies to cases which would otherwise be subject to the second situation.⁶⁹ Thus generally speaking, Chapter 13 of the NMCs applies to all international sea carriage with a Nordic link, such as within, to or from Nordic countries.⁷⁰ When the sea carriage is not connected with any Nordic country, Chapter 13 of the NMCs may still apply but the parties can otherwise agree to apply the law of another Hague-Visby Rules country.⁷¹

⁶² Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 30.

⁶³ *ibid.*

⁶⁴ F§ 13:1 (5), N§ 251 (5).

⁶⁵ F§ 13:2 (1), N§ 252 (1).

⁶⁶ *ibid.*

⁶⁷ F§ 13:2 (2), N§ 252 (2).

⁶⁸ F§ 13:2 (3), N§ 252 (3).

⁶⁹ Allan Philip, 'Scope of Application, Choice of Law and Jurisdiction in the New Nordic Law of Carriage of Goods by Sea' in Göran Melander (ed.), *Modern Issues in European Law: Nordic Perspectives. Essays in Honour of Lennart Pålsson* (Göteborg: Kluwer Law International 1997) 173-174.

⁷⁰ *ibid.*

⁷¹ *ibid.*

2.2 Legislative History of the CMC and Scope of Application

2.2.1 Legislative History of the CMC

Historically, China had always been a big seafaring country.⁷² As early as the Tang Dynasty (618-907 AD)⁷³ to Ming Dynasty (1368-1644)⁷⁴, China was renowned for its seaborne trade and advanced techniques in ship building industry.⁷⁵ However, Chinese maritime legislations developed quite late, mainly for that in history Chinese legislations concentrated much more on criminal law rather than commercial law. Drafting Chinese maritime law was more like a process of transplanting other countries' maritime legislations and existing international conventions rather than developing its own maritime rules.⁷⁶ In ancient times, mainly due to the geographical barriers, China's commercial communication with other countries was far less than that of today. For a very long time China had depended on its self-sufficient natural economy. Only started from the Opium War in the late Qing Dynasty (1644 – 1912)⁷⁷, China was forced to open its market to the world, the capitalist economy mode deeply impacted Chinese traditional natural economy mode and played a stimulating role on Chinese commercial and industrial business.⁷⁸ In the meanwhile, a broad and deep legal transplant from western countries took place in China and the concepts of commercial law and maritime law had been introduced during that time.⁷⁹ Started from then, modern Chinese maritime legislations began to develop.⁸⁰

The Qing Imperial Business Law, which means 'Commercial law of the Qing Dynasty authorized by the emperor', was the first independent commercial legislation in Chinese legal history in which a compile of Ship Act was provided to specifically regulate maritime related issues.⁸¹ This Ship Act contained 263 articles, most of which were transplanted from Japanese law and German law.⁸² Its content included the relationship between the

⁷² Huanning Wu, 'China and Maritime Law' (1988) 5 Maritime Law Association of Australia and New Zealand 19.

⁷³ Wikipedia, 'Tang Dynasty' (2014) <http://en.wikipedia.org/wiki/Tang_dynasty> accessed 13 May 2014.

⁷⁴ Wikipedia, 'Ming Dynasty' (2014) <http://en.wikipedia.org/wiki/Ming_dynasty> accessed 13 May 2014.

⁷⁵ Wu (n 72).

⁷⁶ *ibid.*

⁷⁷ Wikipedia, 'Qing Dynasty' (2014) <http://en.wikipedia.org/wiki/Qing_dynasty> accessed 13 May 2014.

⁷⁸ Hu Zhu, 'Legislation Evolution of China Maritime Law in 100 Years' (2010) 18 (4) Journal of Guangzhou Maritime College.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ Fuli Li and Ran Zhang, 'Chamber of Commerce's Commercial Legislation of the Qing Dynasty and the Qing Imperial Business Law' (Master thesis, Zhongnan University of Economics and Law 2010) <<http://fxylib.znufe.edu.cn/contents/155/590.html>> accessed 13 May 2014.

⁸² *ibid.*

ship and crew, ship contract, general average, and salvage at sea, etc.⁸³ This was the first time that the concept of maritime law had been adopted by Chinese law, and it was the start and basis of modern Chinese maritime legislation.⁸⁴ However, as the draft of Qing Imperial Business Law was purely an adoption of foreign laws, it was regarded as dramatically departed from the objective commercial reality and with little value in practice thus finally couldn't enter into force.⁸⁵

The Revolution of 1911 led to the collapse of the Qing Dynasty and the end of the feudal society in Chinese history.⁸⁶ Then the Republic of China had been established. On 18th November, 1926, the Beiyang government published the Seagoing Ship Act, the content of which had mostly followed the previous draft of Ship Act.⁸⁷ However, during that time Chinese civil wars frequently broke out and political power changed, this Act couldn't enter into force as well.⁸⁸ In 1929, Nanjing government began to draft the Maritime Code of the Republic of China.⁸⁹ Compared to previous Ship Act, except for keeping the rules transplanted from German and Japanese laws, in order to set up a more comprehensive structure and content, this code also adopted maritime related rules from common case law and international instruments.⁹⁰ This Maritime Code of the Republic of China successfully entered into force on 1st January 1933 and it was the first Chinese maritime legislation which could enter into force.⁹¹ However, as China's objective economic situation had also been ignored by this legislation, and due to the strong rejection from the Shanghai Commercial Association, it couldn't work as expected in practice.⁹²

After the establishment of the People's Republic of China, all the legislations of the Republic of China had been abolished, including the Maritime Code. Drafting a Chinese Maritime Code under the new government started with the prosperity of sea carriage industry in new China.⁹³ However, the legislative process was not as smooth as expected. The whole legislative process can be separated into four stages before the final publication

⁸³ *ibid.*

⁸⁴ Zhu (n 78).

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ Li and Zhang (n 81).

of the CMC.⁹⁴ First stage started from 1951 to 1963. In 1951, a professional group was formed as ‘People's Republic of China Maritime Law Drafting Group’ and initially undertook the task to draft a new Chinese Maritime Code.⁹⁵ They worked on this drafting project for about ten years and produced totally nine drafts until 1963.⁹⁶ Second stage started from 1964 to 1980, when the drafting work was interrupted because of the Culture Revolution.⁹⁷ The third stage was the restart of drafting work from 1981. The project continued and was in charged by the Ministry of Transportation under the Chinese State Council.⁹⁸ Four years later, the fifteenth draft was produced in 1985, after then the drafting process was hindered again due to a dramatically personnel changes of Chinese State Council.⁹⁹ The last legislative stage began in 1989, and after some modifications made to previous drafts, the twenty-ninth draft was approved by the State Council and adopted by the Standing Committee of the Seventh National Peoples’ Congress (the Chinese legislative authority) at their 28th Meeting on 7th November, 1992.¹⁰⁰ Then the current Chinese Maritime Code entered into force on 1st July, 1993. This CMC, compared with previous Chinese maritime legislations, was not only drafted based on existing foreign maritime laws and international conventions but also more practice oriented. During the legislative progress, several drafting meetings were organized in which experts from shipping industry were invited to attend.¹⁰¹ Their opinions had been largely respected and accepted by the drafting committees.¹⁰²

Nevertheless, that is not to say China didn’t have any legal instrument which could govern shipping or maritime related affairs before the enforcement of the CMC. Since the establishment of the People’s Republic of China, there were a number of rules and regulations working in this field.¹⁰³ For example, the Regulations for the Carriage of Goods by Water 1972, the Economic Contract Law 1981, and the Marine Environment Protection Law 1982, etc.¹⁰⁴ These rules and regulations, however, were inadequate to

⁹⁴ Yuzhuo Si, *Maritime Law Monograph* (2nd edn, Beijing: China Renmin University Press 2010) 1-4.

⁹⁵ *ibid* 2.

⁹⁶ *ibid*.

⁹⁷ Zhu (n 78).

⁹⁸ Si, *Maritime Law Monograph* (n 94) 2-5.

⁹⁹ *ibid*.

¹⁰⁰ Yuzhuo Si and Zuoxian Zhu, ‘On the Legal Status of Port Operators under Chinese Law’ (2005) 2 (7) US-China Law Review 1.

¹⁰¹ Si, *Maritime Law Monograph* (n 94) 2-5.

¹⁰² *ibid*.

¹⁰³ Wu (n 72).

¹⁰⁴ *ibid*.

meet the increasing demand of a sound system of maritime law.¹⁰⁵ The CMC was a big achievement in this context and today it is the most important Chinese legislation regulating legal issues concerning international sea carriage.

There is also another legal instrument which can be applicable to international contract for carriage of goods by sea, namely the Contract of the people's Republic of China' (Chinese Contract Law).¹⁰⁶ It started to regulate contract related legal issues from 1999.¹⁰⁷ The relationship between the Chinese Contract Law and the CMC is common law and special law.¹⁰⁸ This means that in respect to legal issues which are governed by both the CMC and Chinese Contract Law, the rules provided by the CMC should prevail apply. As for some basic principles of contract law and other issues which are not covered by the CMC, the Chinese Contract Law is supplementary applicable. For instance, when the implications of certain contract terms are unclear, the principles for explanation of contract provided by the Chinese Contract Law should be followed because the CMC does not provide rules on this aspect. Thus in practice, the Chinese Contract Law and CMC usually work collaboratively with each other in resolving disputes regarding carriage contract.

China is neither a Contracting State of the Hague/Hague-Visby Rules nor the Hamburg Rules. However, it can be seen from the historical story that when drafting the CMC, China actually didn't have much successful legislative experience in this field. During the drafting process, a basic principle of 'with certain reference to international conventions' was introduced.¹⁰⁹ Following this policy, the result is that large parts of the CMC have been substantively based on international conventions and shipping practices. The CMC is essentially Hague-Visby Rules orientated and with some Hamburg Rules alternatives.

2.2.2 Scope of Application of the CMC

Maritime transport of goods under the CMC means carriage of goods by sea, including sea-river and river-sea direct transport.¹¹⁰ Chapter IV specifically applies to international carriage of goods rather than transport of goods between the ports of the People's Republic of China.¹¹¹ Some kind of similar with certain Nordic countries (for example, Norway:

¹⁰⁵ *ibid.*

¹⁰⁶ Nianhong Zhang, *The Theory and Practice of Maritime Law* (Cunqiang Cai ed, Beijing: China Legal Publishing House 2013) 28-29.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Si, *Maritime Law Monograph* (n 94) 7.

¹¹⁰ CMC, Chapter I, Article 2.

¹¹¹ *ibid.*

N§276 last paragraph provides that ‘the present Section does not apply to contracts for carriage by sea in domestic trade in Norway’.), China has a ‘dual track’ system applying to carrier’s mandatory liabilities in international sea carriage and domestic coastal or inland water cargo carriage.¹¹² For domestic transport of goods, other legislations, such as the Rules Regarding Transport of Goods by Domestic Waterway 2001, the Chinese Contract Law and Chinese Civil Code are respectively applicable for different situations.¹¹³ Under domestic situation, the basis of the carrier’s liability is strict, which means that except for force majeure, the reason of the goods itself, and the fault of the shipper or consignee, the carrier should be liable for the loss of or damage to the goods.¹¹⁴ No other similar exceptions as provided in Chapter IV are available for domestic transport operators. And the main transport document used in domestic transport is sea waybill.¹¹⁵ However, in international sea carriage, the basis of the carrier’s liability is fault, a list of exception situations is provided and bill of lading is the dominant document. This ‘dual track’ system exists largely because when drafting the CMC, although it was accepted that rules applying for international sea carriage should be mostly in line with the fault based liability system established by international legislations, as in domestic transportation strict liability is provided for other modes of cargo transport, it was regarded as necessary to retain a separate strict liability system for domestic sea/water transport to keep the consistence of the liability system in domestic transport of goods.¹¹⁶ For history reasons, Chapter IV is applicable for contract for carriage of goods by sea between the mainland China and Hong Kong or Macao.¹¹⁷

‘Contract of carriage of goods by sea’ is defined as ‘a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another’.¹¹⁸ There are three kinds of contracts of carriage regulated by Chapter IV: contract of carriage evidencing by bill of lading or other similar document of title in liner trade; contract of voyage charter; and multimodal transport contract. The latter two types of contracts are regulated respectively by the Section 7 and Section 8 of the Chapter IV, under which separate definitions and specific rules are provided. Thus provisions provided by Section 1 to Section 6 of this Chapter are generally

¹¹² Si, *Maritime Law Monograph* (n 94) 17.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ CMC, Chapter IV, Article 41.

only mandatory applicable for the first type of contract. For voyage charter, provisions concerning carrier's obligations of seaworthiness and direct route are mandatory applicable to the ship owner while other provisions under the Section 1 to Section 6 regarding the rights and obligations of the contracting parties apply to the ship owner and the charterer only in the absence of relevant provisions or in the absence of different provisions provided by Section 7 as for the voyage charter.¹¹⁹

Multimodal transport contract under Section 8 is 'a contract under which the multimodal transport operator undertakes to transport the goods, against the payment of freight for the entire transport, from the place where the goods were received in his charge to the destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage'.¹²⁰ Multimodal transport operator (MTO) is 'the person who has entered into a multimodal transport contract with the shipper either by himself or by another person acting on his behalf'.¹²¹ These concepts have been adopted by the CMC from the *United Nations Convention on International Multimodal Transport of Goods 1980*.¹²² This Convention was held at Geneva in 1980 and was signed by 67 Convention States including China.¹²³ However, it has not become into force yet due to the lack of enough ratification.¹²⁴ Especially after the produce of the Rotterdam Rules, it is more likely that this Convention will never have a chance to enter into force in the future. Section 8 of the Chapter IV only provides rules concerning the period of the MTO's responsibility, the relationship between the Chapter IV and other legal instruments in multimodal carriage, but not provides substantive rules concerning MTO's obligations and liabilities. If the occurrence of loss or damage cannot be localized to a specific section of transport or can be located in the sea carriage part, the liabilities of the MTO will be decided according to the stipulations set out in other Sections of the Chapter IV.¹²⁵ As China provides different rules for domestic water/sea carriage and international sea carriage, they are treated as different modes of carriage accordingly provisions for

¹¹⁹ CMC, Chapter IV, Article 94.

¹²⁰ CMC, Chapter IV, Article 102(1).

¹²¹ CMC, Chapter IV, Article 102(2).

¹²² Si, *Maritime Law Monograph* (n 94) 117.

¹²³ *ibid.*

¹²⁴ *ibid.*, the Convention requires ratification of 30 States to become into force.

¹²⁵ CMC, Chapter IV, Article 105.

multimodal transport contract can apply to carriage which combines domestic water/sea transport of goods and international sea carriage.¹²⁶

2.3 The Drafting Process of the Rotterdam Rules and Scope of Application

2.3.1 Drafting Process of the Rotterdam Rules

The first successful international Convention in the field of cargo carriage by sea was the Hague Rules which provided a comparably uniform legal regime that governed a large majority of international shipments by the late 1930s.¹²⁷ However, although it had been wide-spread accepted, with the development of the industrial technology, the uniformity and success brought by the Hague Rules began to break down.¹²⁸ The CMI sponsored the first post-Hague efforts to address new arising problems in the late 1950's and after several meetings the Visby Amendments were produced in 1968.¹²⁹ Later on, in response to the change that gold standard was replaced by the Special Drawing Right (SDR) as 'unit of account' by the International Monetary Fund (IMF), in 1977 the CMI appointed an International Sub-committee to prepare draft protocols to replace limitation provisions.¹³⁰ The draft was adopted by a diplomatic conference in 1979.¹³¹ Then the SDR Protocol changed the Hague-Visby limitation by using SDR as 'unit of account'. The Hague Rules as amended by the Visby Protocol and the following SDR Protocol became the dominant legal regime for the carriage of goods by sea in the following years.¹³² Nevertheless, the industry never stopped changing with times. For instance, during the 1960's cargo started to be directly taken on and off the ship without the need to handle them separately during these phases.¹³³ In liner shipping industry the bill of lading had commercially lost much of its previous status and other documents and electronic data interchange had shown their commercial strengths.¹³⁴ With the effect of inflation, cargo interests gradually felt unsatisfied with the amount of limitation provided for the carrier's liability. The Hague/Hague-Visby Rules were inevitably in need of reform. A decade after the Hague-Visby Rules, a new international convention, which is usually called the Hamburg Rules today, was produced as an alternative to the Hague/Hague-Visby Rules.¹³⁵ The effort to

¹²⁶ Zhang (n 106) 49.

¹²⁷ Sturley, Fujita and Van der Ziel (n 9) 1.

¹²⁸ *ibid* 2.

¹²⁹ *ibid* 9-12.

¹³⁰ *ibid*.

¹³¹ *ibid*.

¹³² *ibid*.

¹³³ Honka, 'Introduction' (n 17) 3-4.

¹³⁴ *ibid*.

¹³⁵ Sturley, Fujita and Van der Ziel (n 9) 12.

draft the new Convention was initiated by the United Nations in 1968, when the UNCTAD requested its Committee on Shipping to create a Working Group on international shipping legislation.¹³⁶ This task was shifted to the UNCITRAL in 1971 and the final text was approved in 1978.¹³⁷ Although over 30 countries ultimately ratified the Hamburg Rules, as they never accepted sufficient support from major commercial countries, the Hamburg Rules had not been regarded as a really successful Convention in this field and been criticized as a legal instrument which was more about achieving political goals rather than meeting commercial needs.¹³⁸

No matter which Convention, the Hague/Hague-Visby Rules or the Hamburg Rules would probably be the prevailing legal regime in the field of international sea carriage, when it comes to 21st century, the container revolution, the widely use of electronic documents and increasing amount of door-to-door carriages caused new problems to shipping industry. The international community recognized that these previous international legal instruments couldn't meet contemporary requirements any more. In its Conference in Paris 1990, The CMI decided to place the subject of producing a more substantial revision of the Hague-Visby Rules on its agenda and took further efforts on it in the following years.¹³⁹ The UNCITRAL at its twenty-ninth session in 1996 also considered a proposal to include a review of current practices and laws in the area of international carriage of goods by sea in its working programme.¹⁴⁰ This proposal raised the purpose to achieve greater uniformity of law in this field.¹⁴¹ Later on, the President and past President of the CMI paid a visit to the Secretary of UNCITRAL with a view to 'explore the feasibility of a joint initiative for the purpose of creating a new uniform legislation which could replace both the Hague-Visby Rules and Hamburg Rules'.¹⁴² This meeting was very successful and marked the start of the cooperation between the CMI and UNCITRAL in international maritime legislation.¹⁴³ Following the meeting, the Executive Council of the CMI created an ad hoc International Sub-Committee and sent delegates to the forthcoming session of

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Girvin (n 19) 16.11, 191.

¹³⁹ Francesco Berlingieri, 'The History of the Rotterdam Rules' in Meltem Deniz Guner-Özbek (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the 'Rotterdam Rules'* (Berlin Heidelberg: Springer-Verlag 2011) 2.

¹⁴⁰ *ibid* 3.

¹⁴¹ *ibid* 3-4.

¹⁴² *ibid* 4.

¹⁴³ *ibid.*

UNCITRAL.¹⁴⁴ In the meanwhile when the CMI actively participated in the sessions of UNCITRAL in 2000, six sessions of the International Sub-Committee took place and a Draft Instrument had been produced and sent to the UNCITRAL Secretariat in 2001.¹⁴⁵ After considering a report from the Secretary General based on the work of the CMI, UNCITRAL decided to create a Working Group on Transport Law to undertake the task of reviewing the Draft Instrument prepared by the CMI.¹⁴⁶ The Working Group on Transport Law, devoted thirteen sessions to the preparation of the Draft Convention, during which three readings of the draft had taken place and four subsequent drafts had been prepared.¹⁴⁷ The Rotterdam Rules were ultimately produced in 2008 and the formal signing ceremony in Rotterdam took place in 2009.¹⁴⁸ Sixteen countries signed the Convention on 23rd September 2009 in the ceremony and 25 countries have signed it until now.¹⁴⁹ Denmark and Norway have signed it among Nordic countries, and for Asian area China is still in consideration.¹⁵⁰ Only two countries, namely the Spain and Togo, have ratified it.¹⁵¹ As the Rotterdam Rules themselves require that they will only enter into force when approximately one year after 20 countries has ratified it, they are still waiting for more acceptations and ratifications.¹⁵²

2.3.2 Scope of Application of the Rotterdam Rules

The Rotterdam Rules apply to contract for carriage of goods by sea in which ‘the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States’.¹⁵³ There is a ‘double international connection’ requirement as the terms used between the phrases ‘places of receipt and places of delivery’ of the carriage and ‘port of loading and port of discharge in the same sea carriage’ is ‘and’, which means that both the whole carriage and the partly sea carriage included in must be international. Additionally, in order to apply the Rotterdam Rules, any one or more of these places need to be located in a Contracting

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.* 6.

¹⁴⁷ *ibid.*

¹⁴⁸ Sturley, Fujita and Van der Ziel (n 9).

¹⁴⁹ United Nations Commission on International Trade Law (UNCITRAL), ‘Status: United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea (New York 2008)’ (UNCITRAL.org 2014)

<http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html> accessed 14 May 2014.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² The Rotterdam Rules, Article 94 (1).

¹⁵³ The Rotterdam Rules, Article 5 (1).

State.¹⁵⁴ Nationality of the vessel or any of the parties to the transaction is irrelevant to the application of the Rotterdam Rules.

The concept of ‘contract of carriage’ under the Rotterdam Rules is ‘a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another’.¹⁵⁵ The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage’.¹⁵⁶ This is to say that the Rotterdam Rules is a ‘maritime-plus’ international Convention which can apply to international carriage of goods with a sea leg. Generally, charter parties are excluded by the Rotterdam Rules. Charter parties existing in liner transportation and other contracts for the use of a ship or any space are excluded as well.¹⁵⁷ However, the Rotterdam Rules recognize and apply to situations in charter party when there is no charter party or other contract between the parties for use of a ship or of any space of the ship and a transport document or an electronic transport record is issued.¹⁵⁸

Because of the multimodal characteristic of the Rotterdam Rules, their scope of application issue is complicated. As the main focus of this thesis is the carrier’s obligations and liabilities, scope of application is not discussed in detail here. The relationship between the Rotterdam Rules and other legal instruments in multimodal carriage will be discussed later in part 3.3.2.

2.4 Sub-Conclusion

It can be seen from the legislative histories that, the changing demands of the shipping industry, the requirements of further harmonization and modernization of law are main motivate reasons for updating and producing new international instruments. Rules established by different legislations have reflected the industry requirements and legislative interests at their time. The historical developments of these legal regimes disclose the paths how the NMCs, CMC and the Rotterdam Rules have been drafted and developed, and how the diversities existing between different legal regimes are formed. As for their scopes of application, both NMCs and CMC provide separate Chapters for international carriage of goods by sea. There is possibility that in an international sea carriage case both the NMCs and CMC may be the governing law, for example in contract for carriage of goods by sea

¹⁵⁴ *ibid*

¹⁵⁵ The Rotterdam Rules, Article 1 (1).

¹⁵⁶ *ibid*.

¹⁵⁷ The Rotterdam Rules, Article 6 (1).

¹⁵⁸ The Rotterdam Rules, Article 6 (2).

between a Nordic country and China. And if the Rotterdam Rules enter into force but not implemented in Nordic/Chinese maritime laws, there may also be choice of law problem existing in carriage of goods by sea between a Nordic country/China and a Contracting State of the Rotterdam Rules.

3. Carrier's Period of Responsibility

The function of the carrier's period of responsibility is: the rules concerning carrier's obligations, liabilities, exemptions and limits of liabilities are mandatory applicable if the loss of or damage to the goods is occurred during the carrier's period of responsibility.¹⁵⁹ Period of responsibility is different with scope of application issue. The latter one deals with the question that whether certain types of sea carriage can be governed by certain legislation. Once the answer is affirmative, it comes to the period of responsibility issue that in accordance with this legislation, for what part of the carriage the carrier is mandatory responsible. The NMCs following the Hamburg Rules provide a port-to-port period of responsibility as it is regarded as not in conflict with the Hague-Visby Rules under which only a tackle-to-tackle period has been covered.¹⁶⁰ The CMC distinguishes different periods of responsibility regarding container carriage, non-container carriage and multimodal carriage with a sea leg.¹⁶¹ The Rotterdam Rules, in order to meet the requirement of modern industry practice, establish a door-to-door period of responsibility.¹⁶²

3.1 Nordic Maritime Codes

Although the carrier's period of responsibility under the Hague-Visby Rules is only tackle-to-tackle, according to the NMCs, the carrier is responsible for the goods while he is in charge of them at the port of loading, during the carriage and delivery them at the port of discharge.¹⁶³ Actually even before the port-to-port period of responsibility established by the Hamburg Rules has been adopted by the NMCs 1994, the Hague-Visby Rules was not interpreted by the exact words and the carrier's responsibility was not strictly limited to a tackle-to-tackle period in Nordic countries.¹⁶⁴ There were cases indicated that the carrier clearly had a mandatory duty to take reasonable steps to protect the goods at the port of

¹⁵⁹ Hongjun Shan, Yang Zhao and Yanmin Ge, 'Brief Analysis on Period of Liability of Carrier-Discussing Amendments of Article 46 of CMC' (2002) 13 (1) Annual of China Maritime Law.

¹⁶⁰ F§13:24, N§274; Hague/Hague-Visby Rules, Article I (e).

¹⁶¹ CMC, Chapter IV, Article 46, Article 105, Article 106.

¹⁶² The Rotterdam Rules, Article 12 (1).

¹⁶³ F§13:24, N§274.

¹⁶⁴ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 32.

discharge even when the goods were not located on board any more.¹⁶⁵ And the end of physical discharge was not to terminate the duty of the carrier for the goods, only when the carrier 'lost the control to the goods' his period of liability ended.¹⁶⁶ Thus although the new NMCs extend the carrier's responsibility to a port-to-port period, the carrier's situation is not substantively altered compared with the old NMCs. Additionally, the difference with Hague-Visby Rules may decrease if the contracting parties choose to define the period when the carrier is deemed to be in control of the goods.¹⁶⁷ From the Nordic perspective of view, because there is a non-mandatory provision provides that the actual shipper shall deliver the goods and the consignee shall receive the goods at the place indicated by the carrier, and as the mandatory rule regarding the carrier's period of responsibility requires that the carrier should be in charge of the goods, it is possible for the carrier to decrease his liabilities by defining his duties as to when he takes the goods in his charge and when the goods are no longer being in his charge.¹⁶⁸ However, not every such definition is valid and the factual 'in charge of the goods' cannot be transformed merely by the agreement of the parties.¹⁶⁹ For instance, if the goods are placed in the carrier's terminal at the port of loading, it cannot be agreed in advance that such goods are not treated as 'being in charge of the carrier'.¹⁷⁰

3.2 Chinese Maritime Code

3.2.1 Period of Carrier's Responsibility

According to the CMC, three different situations are distinguished as for the carrier's period of responsibility, two of which are applicable for pure sea carriage and the other one regulates multimodal carriage with a sea leg. In pure sea carriage, the carrier's responsibility with regard to the goods carried in containers, no matter the containers are provided by the carrier or shipper, covers a port-to-port period, starts from the time 'the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge'.¹⁷¹ The carrier's period of responsibility with respect to non-

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.* See also Tord Andersson, 'The Contract of Carriage by Sea in Liner Trade-the Swedish and English law' (Master thesis, Lund University 1999) <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1555805&fileId=1563778>> accessed 14 May 2014.

¹⁶⁸ F§13:5, N§255; F§13:9, N§259, F§13:24, N§274; Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 35.

¹⁶⁹ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 33-35.

¹⁷⁰ *ibid.*

¹⁷¹ CMC, Chapter IV, Article 46; Si, *Maritime Law Monograph* (n 94) 82.

containerized goods in pure sea carriage is tackle-to-tackle during which the carrier is in charge of the goods, ‘starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom’.¹⁷² The contracting parties are free to agree on the carrier’s obligations and liabilities for the period before loading and after discharge providing such agreement is made in accordance with Chinese Contract Law.¹⁷³ Besides, a door-to-door period of responsibility has been established for multimodal transport of goods with a sea leg. The MTO’s period of responsibility starts from the time when he takes the goods in his charge to the time of delivery.¹⁷⁴ Here is a slight legislative defect existing in the CMC.¹⁷⁵ As said earlier in part 2.2.2, the CMC describes ‘contract of carriage’ as a contract under which the carrier undertakes to carry the goods contracted for shipment by the shipper from ‘one port to another’.¹⁷⁶ But it only imposes a tackle-to-tackle period of responsibility for the carrier in non-container carriage. The area before loading and after discharge is left to the agreement between the parties and application of other laws.¹⁷⁷ This defect may impede the intended protection to cargo interests in non-container carriage as stipulations provided by the CMC as regard to carrier’s obligations and liabilities are not compulsorily applicable.¹⁷⁸

3.2.2 Multimodal Transport Contract

In multimodal transport contract, the MTO is responsible for a door-to-door period of carriage, but applicable laws or regulations for his liabilities are decided upon whether the occurrence of loss or damage can be located and in which part of the carriage it can be located. If the cause of the loss or damage could be located in a certain section of the whole transport, the provision of the relevant laws and regulations governing that specific section shall apply.¹⁷⁹ If the section of transport in which the loss of or damage to the goods occurs could not be ascertained, the MTO’s liability for such loss or damage shall be decided in accordance with the stipulations regarding the carrier’s liabilities and limits of liabilities set out in Chapter IV, Section 1 to Section 6.¹⁸⁰ That is to say, the CMC provides a ‘limited network application system’ or also called ‘modified network application

¹⁷² CMC, Chapter IV, Article 46.

¹⁷³ Si, *Maritime Law Monograph* (n 94) 82.

¹⁷⁴ CMC, Chapter IV, Article 103.

¹⁷⁵ Si, *Maritime Law Monograph* (n 94) 82-83.

¹⁷⁶ The CMC, Chapter IV, Article 41

¹⁷⁷ Shan, Zhao and Ge (n 159).

¹⁷⁸ *ibid.*

¹⁷⁹ CMC, Chapter IV, Article 105.

¹⁸⁰ CMC, Chapter IV, Article 106.

system'.¹⁸¹ It doesn't like the 'pure unified system' under which the carrier's liability is regulated by Chapter IV no matter whether occurrence of the loss or damage can be identified to certain section of the transport;¹⁸² neither does it like the 'pure network system' according to which the relevant laws and regulations can govern the specific section of the transport but no other provisions are available for non-localized loss or damage.¹⁸³ Under the 'limited network system', when the happening of the loss or damage can be identified to certain section of the transport, relevant laws or regulations regulating that section of transport will apply; otherwise the provision of Chapter IV will apply to fill the vacuum if the place where the loss or damage happens cannot be identified. However, when the occurrence of the loss or damage is located in a section of transport other than sea, stipulations of other relevant laws or regulations can be applicable only if they are governing the carrier's liabilities and limitations of liabilities issues.¹⁸⁴ Other rules provided by the CMC are still applicable and don't give priority to other legal instruments.

3.3 The Rotterdam Rules

3.3.1 Period of Carrier's Responsibility

In modern industry, it is common for the carrier to assume responsible for an entire transport from the place of the original shipment to the final destination.¹⁸⁵ It will be artificial to separate the whole carriage into several parts which are governed by different legal regimes.¹⁸⁶ A single coherent responsibility rule that covers the entire period of transport is more logical from legal perspective and more efficient from practical perspective.¹⁸⁷ Thus the Rotterdam Rules, in order to meet the requirements of current industry practice, set up a door-to-door period of responsibility which begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.¹⁸⁸ However, this period is not necessary to be door-to-door. It is closely tied to the contract of carriage concluded between the carrier and shipper.¹⁸⁹ The contracting

¹⁸¹ Mr. P. Neels, LL.M, 'The Rotterdam Rules and Modern Transport Practices: A Successful Marriage?' (2011) 1 Tijdschrift Vervoer & Recht 1

<<http://www.rotterdamrules.com/sites/default/files/pdf/The%20Rotterdam%20Rules%20and%20modern%20transport%20practices%20-%20a%20successful%20marriage.pdf>> accessed 13 May 2014.

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ The CMC, Chapter IV, Article 105.

¹⁸⁵ Jannelle and Beuthe (n 1) 199-206.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ The Rotterdam Rules, Article 12 (1).

¹⁸⁹ Sturley, Fujita and Van der Ziel (n 9) 86.

parties are free to agree on the time of the carrier's responsibility.¹⁹⁰ Under a port-to-port contract, the carrier's period of responsibility is only port-to-port while if the carrier contracts to provide a door-to-door carriage, his period of liability runs from door-to-door.¹⁹¹ As the Rotterdam Rules describe the 'contract of carriage' as a contract in which a carrier undertakes to carry goods from 'one place to another' rather than 'from one port to another' as provided by the CMC, no matter what period of responsibility has been agreed, the provisions under the Rotterdam Rules can be in consistent with each other. However, the Convention also sets up limit to this freedom of contract, which requires that the parties may not agree on a 'time of receipt' subsequent to the beginning of their initial loading under the contract of carriage and the 'time of delivery' cannot prior to the completion of their final unloading under the contract of carriage.¹⁹² This means that in a pure sea carriage, the shortest period of responsibility which can be agreed on by the parties is tackle-to-tackle. And in a multimodal carriage of goods with sea leg, the carrier must be at least responsible for the period when the goods are loaded on to the ship for the first voyage until the goods are discharged from the last voyage, not matter how many kinds of other transportations have been employed between. Furthermore, the Rotterdam Rules provide rules addressing the special situation when local law or regulations require the goods to be handed over to an authority or other third party.¹⁹³ In these cases the period of carrier's responsibility begins when the carrier collects the goods from the authority or other third party and ends when the carrier hands the goods over to the authority or other third party.¹⁹⁴

3.3.2 Multimodal Carriage with Sea Leg

Because of their extension to door-to-door carriage, there are inevitable conflicts between the Rotterdam Rules and legislations governing other modes of cargo transportation. The Rotterdam Rules provide two articles dealing with their relationships in multimodal carriage. Firstly, Article 26 stipulates that when the occurrence of loss, damage or delay in delivery can be located and completely takes place outside the sea carriage part, the Rotterdam Rules may concede their effect to other international instrument, providing three conditions can be satisfied: (a) if the shipper had made a separate and direct contract with the carrier in respect of this particular stage of carriage, such international instrument

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² The Rotterdam Rules, Article 12 (3) (a) (b).

¹⁹³ The Rotterdam Rules, Article 12 (2) (a).

¹⁹⁴ *ibid.*

would be applicable (a ‘hypothetical contract’ approach)¹⁹⁵; (b) such international instrument provides provisions specifically for the carrier’s liabilities, limitations of liabilities, or time for suit; and (c) the provisions on the carrier’s liabilities, limitations of liabilities or time for suit under such international instrument are mandatory and cannot be departed from by contract either at all or to the detriment of the shipper.¹⁹⁶ The term ‘other international instruments’ includes not only other international Conventions but also regulations of regional organizations such as EU regulations.¹⁹⁷ However, possibility to apply national laws is excluded by this article.¹⁹⁸ This exclusion has been criticized by some countries in which only national laws are available for domestic rail or road transportation.¹⁹⁹ In accordance with Article 26, the Rotterdam Rules may mandatorily apply to domestic rail or road transportation instead of national laws.²⁰⁰ This solution may lead to conflicts of law and the harmonization of liability system established within domestic cargo carriage may be interrupted.²⁰¹ However, drafting committee of the Rotterdam Rules believed that expanding Article 26 to include national laws would impede the level of harmonization that this Convention aimed to achieve.²⁰²

The incorporation of the liability provisions of other international instruments does not mean that the mandatory character of that instrument can affect the mandatory character of the Rotterdam Rules.²⁰³ Similar with the CMC, only the provisions concerning carrier’s liabilities, limitations and time bar related issues of other international instruments can be incorporated.²⁰⁴ The difference is that the CMC does not give prevail effect to time bar related rules of other legal instruments.

According to Article 26, a court of a Contract State of the Rotterdam Rules will have chance to apply liability provisions of other international instruments even it is not a state party to such instruments.²⁰⁵ Furthermore, the parties to the contract of carriage can

¹⁹⁵ Meltem Deniz Guner-Özbek, ‘Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Convention’ in Meltem Deniz Guner-Özbek (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Berlin Heidelberg: Springer-Verlag 2011) 129.

¹⁹⁶ The Rotterdam Rules, Article 26 (a) (b) (c).

¹⁹⁷ Guner-Özbek (n 195) 129.

¹⁹⁸ Zengjie Zhu, ‘Evaluation on the Rotterdam Rules’ (2009) 20 (1-2) *Annual of China Maritime Law* 9.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² Sturley Fujita and Van der Ziel (n 9) 68.

²⁰³ *ibid.* 69.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

derogate from Article 26 and stipulate in their contract that a fully uniform liability system will apply, or they may stipulate application of the liability provisions of other conventions than what has been provided under the Article 26, providing they respect the restrictions to freedom of contract set up by Article 79.²⁰⁶

Secondly, while Article 26 decides the applicable rules for carrier's liabilities in multimodal carriages, Article 82 deals with the conflict of conventions issue.²⁰⁷ These two articles, although closely connected, should be distinguished with each other. Article 26 can only decide applicable rules regarding carrier's liabilities, limitations and time bar issues while Article 82 decides which international Convention should apply in whole. If according to Article 82 the dispute should be settled by another international Convention, the Rotterdam Rules are not the basis for decision-making at all and there is not room to apply Article 26.²⁰⁸ Additionally, Article 26 gives primary effect to other international instruments which are in force when the loss or damage occurs but Article 82 only recognizes international Conventions which have already been in force when the Rotterdam Rules enters into force and to any future amendment to such conventions.²⁰⁹ These international Conventions provided by Article 82 includes any convention governing the carriage of goods by air, by road, by rail and by inland water, providing the requirements set up by these instruments as regard to their application to sea carriage can be met.²¹⁰ For instance, the Convention on the Contract for the International Carriage of Goods by Road (CMR) provides that it can be applicable to certain non-road carriage when goods remain loaded on a road carriage vehicle carried on board a ship.²¹¹ However, if the goods are unloaded from the road carriage vehicle for carriage by sea then the requirement of the CMR to apply to other mode of carriage is not satisfied, the Rotterdam Rules can

²⁰⁶ Uffe Lind Rasmussen, 'Additional Provisions Relating to Particular Stages of Carriage' in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010) 145.

²⁰⁷ Hannu Honka, 'Matters Not Governed by This Convention' in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010) 350-351.

²⁰⁸ *ibid.*

²⁰⁹ Guner-Özbek (n 195) 129-130.

²¹⁰ The Rotterdam Rules, Article 82 (a) (b) (c) (d).

²¹¹ The CMR, Article 2.

instead apply and under this situation, there still may be a return to apply liability related provisions of another convention according to Article 26 of the Rotterdam Rules.²¹²

3.4 Sub-Conclusion

A carrier may be exposed to different periods of responsibility under the NMCs, CMC, and Rotterdam Rules. For instance, a carrier who undertakes a non-container carriage by sea is mandatory responsible for a port-to-port period under the NMCs but only tackle-to-tackle period under the CMC. In addition, although both the CMC and Rotterdam Rules establish door-to-door period of responsibility for multimodal carriage of goods with a sea leg, as the CMC distinguishes the contract of carriage solely by sea and multimodal transport contract while the Rotterdam Rules only provide general period of responsibility for carrier no matter he undertakes a sole sea carriage or a multimodal carriage and give more effect to the parties' freedom of contract, the carrier's period of liability is not identical between the CMC and the Rotterdam Rules. For example, according to Rotterdam Rules contracting parties can agree on a tackle-to-tackle or port-to-port period of responsibility no matter it is a container carriage or not. But in accordance with the CMC, the period of responsibility for container carriage is minimum port-to-port. Based on the discussion of this Chapter, on the one hand the differences existing between the NMCs and CMC reveal the need of further harmonization in international level to provide international sea carrier with more predicable law. On the other hand, with the development of the door-to-door carriage, the provisions provided by the NMCs and CMC regarding the carrier's period of responsibility should be updated and modified to meet the new requirements of the industry practice. From this point of view, the Rotterdam Rules can be regarded as providing positive evolutions.

4. Carrier's Obligations.

Legal instruments in international carriage of goods by sea have set up certain mandatory obligations for the carrier which cannot be excluded by contract terms. In 19th century strict liability was imposed on the carrier with respect to his obligations such as seaworthiness of the ship, care for cargo and direct route.²¹³ Some of these obligations have been adopted by the Hague Rules but the strict liability has been changed.²¹⁴ In accordance with the Hague Rules the carrier can fulfill his obligation of seaworthiness by

²¹² Honka, 'Matters not governed by this Convention' (n 207) 352.

²¹³ Sturley, Fujita and Van der Ziel (n 9) 84.

²¹⁴ The Hague Rules, Article III (1) (2).

exercise ‘due diligence’ and satisfy the requirement of care for cargo by ‘properly and carefully’ perform the carriage.²¹⁵ In addition, the period of the seaworthiness obligation has been reduced to only ‘before or at the beginning of the initial voyage’ rather than ‘before or at the beginning of every shipment contained in a whole carriage’ as required by common law principle.²¹⁶ Furthermore, although argued by some scholars, it has been widely accepted that the status of the obligation of care for cargo has declined under the Hague Rules and not as important as the obligation of seaworthiness any more.²¹⁷ However, apart from these compromises, the carrier’s obligation of seaworthiness is still regarded as an ‘overriding obligation’ or ‘primary obligation’ which has significant position in deciding carrier’s liability.²¹⁸ The carrier cannot rely on available exemptions to his liability before he can prove that the requirement of seaworthiness obligation has been fulfilled.²¹⁹ The principle developed by the famous *Muncaster Castle case*,²²⁰ according to which the carrier’s duty to provide a seaworthy ship is non-delegable and the carrier accordingly is responsible even for the situation when an independent contractor fails to exercise due diligence to make the ship seaworthy, has been accepted by many national laws.²²¹ These obligations established and developed by common law and international conventions have been adopted by the NMCs, CMC and also the Rotterdam Rules. Nevertheless, the exact contents and legal status of these obligations are not identical under each legal regime.

4.1 Nordic Maritime Codes

The NMCs establish mainly four obligations for the carrier, including care for cargo, seaworthiness of the ship, notification of damage or loss and examination of the goods. Firstly, according to the NMCs, at the first place the carrier shall perform the carriage with due care and dispatch, care for the goods and in other respects safeguard the cargo owner’s interests from the receipt until the delivery of the goods.²²² In the previous NMCs a list of performances concerning carrier’s obligation of care for cargo was provided, including

²¹⁵ *ibid.*

²¹⁶ Sze Ping-fat, *Carrier’s Liability Under the Hague, Hague-Visby and Hamburg Rules* (Hague: Kluwer Law International 2002) 47-60.

²¹⁷ William Tetley, *Marine Cargo Claims* (3rd edn, Montreal, QC Canada: International Shipping Publications 1988) 551-553.

²¹⁸ *ibid.* 372.

²¹⁹ Ping-fat (n 216) 47-60.

²²⁰ *Riverstone Meat Co. Pty. Ltd. v Lancashire Shipping Co. Ltd. (Muncaster Castle)* [1961] 1 Lloyd’s Rep. 57.

²²¹ Olof Riska, ‘Shipowner’s Liability for Damage Caused by the Negligence of An Independent Contractor Performing Work for the Ship’ in Kurt Grönfors (ed.), *Six Lectures on the Hague Rules* (Gothenburg: Gothenburg School of Economics and Business Administration Publication 1967) 93-94.

²²² F§13:12(1), N§262(1).

loading, handling, stowing, carrying, keeping, caring for and discharging the goods.²²³ Whereas the new NMCs instead only generally provide carrier's essential obligation of performing the carriage but this is not an intention to substantively alter the old NMCs.²²⁴ The obligation of 'care for cargo' is connected with the carrier's liability for loss of or damage to the goods and 'due dispatch' is usually closely connected with carrier's liabilities for delay in delivery and deviation. Secondly the carrier shall ensure the seaworthiness of the ship, which means that the ship need to be 'properly manned and equipped and that the holds, refrigerated and cold-storage storerooms and other parts of the ship where goods are stored are in a proper condition for receiving, carrying and preserving the goods'.²²⁵ The word 'seaworthiness' should be understood in a broad way under the NMCs which contains not only the seaworthy of the ship but also competency of the crew and cargo worthy.²²⁶ The time for the carrier's obligation of seaworthiness is only 'at the commencement of the voyage' and it can be discharged by excising 'due diligence'.²²⁷ In practice the principle set up by the *Muncaster Castle* case seems not completely agreed by the Nordic courts.²²⁸ The NMCs seem not requiring of the carrier so much on this aspect. On the basis of some cases decided in Nordic courts, the carriers were regarded as fulfilling their duties if they had acted with due diligence in choosing the independent contractor for inspecting the ship.²²⁹ Thirdly, the NMCs require the carrier to notify the sender or other person indicated by the sender at the earliest opportunity regarding any loss of or damage to the goods.²³⁰ Lastly, the NMCs impose the carrier with obligation of a reasonable degree to examine whether the goods are packed in such a way as to not suffer damage or be apt to cause damage to any person or property.²³¹ As far as a container or a similar article of transport is concerned, the carrier is not obliged to inspect it internally, unless there is reason to suspect that there is some further problem with the internal stowage.²³² Such reason may be, for example, the container has obviously had previous experience of defect.²³³ Whether the carrier has fulfilled this obligation should be

²²³ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 38.

²²⁴ *ibid.*

²²⁵ F§13:12(2); N§262(2).

²²⁶ *ibid.*

²²⁷ F§13:26; N§276.

²²⁸ *Riverstone Meat v Lancashire Shipping Co. (Muncaster Castle)*. (n 220). See also Riska (n 221) 93-94.

²²⁹ Andersson (n 167).

²³⁰ F§13:12(3), N§262(3).

²³¹ F§13:6(1), N§256(1).

²³² Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 40.

²³³ *ibid.*

decided based on the shipping realities and the practical possibilities in container ports must be taken into consideration.²³⁴

Moreover, the NMCs provide three exceptions to carrier's obligations. Firstly, a not properly informed carrier may unload, render innocuous or destroy dangerous goods without any liability to pay compensation when circumstances so requires, and in this situation the shipper is liable for the carrier's loss resulting from such carriage of dangerous goods.²³⁵ And even the carrier is informed about the dangerous nature of the goods, if they become an actual danger for person or property, the carrier may still unload, render innocuous or destroy such goods without any liability to pay compensation, but under this situation the shipper is no longer liable for any loss caused to the carrier.²³⁶ Secondly, the carrier is not liable for loss resulting from measures to save life or from reasonable measures to save vessels or other property at sea.²³⁷ Thirdly, the NMCs recognize that in practice the carrier and shipper can agree on that part of the carrier's traditional obligations is performed by the shipper and the carrier thus can be exempted from liability for the performances or fault of the shipper.²³⁸

4.2 Chinese Maritime Code

Under the CMC, the carrier also bears mainly four kinds of obligations, which are: (1) seaworthiness of the ship, (2) care for the cargo, (3) direct route, and (4) delivery of goods in agreed time and at agreed port.²³⁹ Similar with the NMCs, the obligation of seaworthiness includes seaworthy of the ship, competency of the crew and cargo worthy.²⁴⁰ The carrier shall make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.²⁴¹ The CMC specifically list the obligation of care for the cargo is 'to load, handle, stow, carry, keep, care for and discharge the goods carried'.²⁴² The time for the carrier's obligation of seaworthiness is 'before and at the beginning of the voyage' while the time for the obligation of caring for cargo covers the whole carriage. Carrier's obligation of

²³⁴ *ibid.*

²³⁵ F§13:41, N§291.

²³⁶ *ibid.*

²³⁷ F§13:25, N§275.

²³⁸ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 35.

²³⁹ CMC, Chapter IV, Article 47, Article 48, Article 49, Article 50.

²⁴⁰ Si, *Maritime Law Monograph* (n 94) 84.

²⁴¹ CMC, Chapter IV, Article 47.

²⁴² CMC, Chapter IV, Article 48.

seaworthiness can be fulfilled by exercising ‘due diligence’ and the obligation of care for cargo can be satisfied by ‘properly and carefully’ performing the carriage.²⁴³ Carrier is not liable for ‘latent defect’ of the ship which cannot be discovered by due diligence.²⁴⁴ In contrary to the Nordic view, the principle set up by the *Muncaster Castle case* has been widely accepted by Chinese maritime courts.²⁴⁵ From Chinese perspective of view, the obligation of seaworthiness is non-delegable and the carrier is liable for other people, including his servants, agents and even independent contractor’s failure to exercise due diligence in making the ship seaworthy, even though the carrier has fulfilled the requirement of ‘due diligence’ in choosing the independent contractor.²⁴⁶ The CMC explicitly establishes the carrier’s obligation of direct route to carry the goods to the port of discharge on the agreed or customary or geographically direct route.²⁴⁷ This obligation is not an innovation of the CMC. It closely connected with the carrier’s liability for deviation and similar obligation has also been imposed by NMCs as ‘due dispatch’ of the goods.²⁴⁸ Not any deviation is a violation of the direct route obligation and only unreasonable deviation may lead to the carrier’s liability. Deviation in order to save or attempt to save life or property at sea can be regarded as reasonable under the CMC.²⁴⁹ Additionally, the CMC requires the carrier to deliver the goods in agreed time and at agreed port, otherwise the carrier may be liable for pure economic loss resulting from his delay in delivery.²⁵⁰ Carrier’s liabilities for deviation and delay in delivery under the CMC are discussed in detail in Chapter 6.2 and 7.1.2.

Three exceptions are provided by the CMC for the carrier’s obligations. Firstly, the carrier is exempted from liability for landing, destroying or rendering innocuous the dangerous goods when circumstances so requires.²⁵¹ If the shipper fails to inform the carrier about the dangerous nature of the goods, the shipper shall be liable for loss suffered by the carrier in such carriage.²⁵² Moreover, notwithstanding the carrier’s knowledge of the nature of the dangerous goods, he may still have such goods landed, destroyed or rendered innocuous without compensation if they become an actual danger to the ship, the crew, and other

²⁴³ CMC, Chapter IV, Article 47, Article 48.

²⁴⁴ CMC, Chapter IV, Article 51 (11).

²⁴⁵ *Riverstone Meat v Lancashire Shipping Co. (Muncaster Castle)*. (n 220). See also Zhang (n 106) 409.

²⁴⁶ Zhang (n 106) 409.

²⁴⁷ CMC Chapter IV, Article 49.

²⁴⁸ F§13:12(1); N§262(1).

²⁴⁹ CMC, Chapter IV, Article 51 (7).

²⁵⁰ CMC, Chapter IV, Article 50 (1).

²⁵¹ CMC, Chapter IV, Article 68.

²⁵² *ibid.*

person on board or to other goods.²⁵³ But the properly informed carrier will need to be liable for his contribution in general average and the shipper will not be liable for the loss suffered by the carrier.²⁵⁴ Secondly, although not explicitly stipulated, in practice the CMC also recognizes the possibility that the carrier and shipper can agree on that the shipper is responsible for loading, handling, stowage or unloading the goods. The carrier is not liable for damage or loss resulting from the shipper's fault.²⁵⁵ However, if the ship becomes unseaworthy because of improperly stowage, even if the stowage is performed by the shipper, the carrier is still liable for his failure to fulfil the obligation of seaworthiness.²⁵⁶ Thirdly, carrier is not liable for measures to save or attempt to save life or property at sea.²⁵⁷ This is a little bit different with the NMCs under which the measure to save vessels or other property needs to be reasonable.²⁵⁸

4.3 The Rotterdam Rules

Firstly the Rotterdam Rules fills the theoretical gap left by previous international Conventions as well as the NMCs and CMC that the carrier has his basic obligation to perform the core contract.²⁵⁹ The carrier must, subject to the Rotterdam Rules, perform the core obligation under its contract: carry the goods to the place of destination and deliver them to the consignee.²⁶⁰ Secondly the carrier has the obligation from receipt to delivery to perform every aspect of the contract and to care for cargo, including 'receive, load, handle, stow, carry, keep, care for, unload and deliver the goods'.²⁶¹ These listed performances are not specific to any one mode of transport but generally apply throughout the carrier's period of responsibility to inland or maritime carriage.²⁶² Thirdly the carrier has obligation of seaworthiness of the ship which is specifically applicable to the voyage by sea.²⁶³ The term 'seaworthiness' almost contains the same details as that of the NMCs and CMC except for that under the Rotterdam Rules, the carrier's obligation of cargo worthy extends not only to the traditional holds but also to 'containers supplied by the carrier'.²⁶⁴ A

²⁵³ *ibid.*

²⁵⁴ *ibid.*

²⁵⁵ Si, *Maritime Law Monograph* (n 94) 86-87.

²⁵⁶ *ibid* 87

²⁵⁷ CMC, Chapter IV, Article 51 (7).

²⁵⁸ F§13:25; N§275.

²⁵⁹ Sturley, Fujita and Van der Ziel (n 9) 79.

²⁶⁰ The Rotterdam Rules, Article 11.

²⁶¹ The Rotterdam Rules, Article 13.

²⁶² United Nations Commission on International Trade Law (UNCITRAL), 'Working Group III, 2002-2008: Transport Law' (UNCITRAL.org 2014) 9th session Report para.117

<http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html accessed 14 May 2014.

²⁶³ The Rotterdam Rules, Article 14.

²⁶⁴ Sturley, Fujita and Ziel (n 9) 84.

significant innovation of the Rotterdam Rules as for the carrier's obligation is that the time for the obligation of seaworthiness has been extended from 'before and at the beginning of the voyage' to 'before, at the beginning of, and during the voyage by sea'.²⁶⁵ Undoubtedly this extension has increased the burden of the carrier who has to bear the risk of being liable for loss of or damage to the cargo resulting from unseaworthiness of the ship occurs during the voyage. However, this does not mean that the requirement to exercise 'due diligence' is necessarily the same throughout the whole voyage.²⁶⁶ The obligation to exercise due diligence 'before and at the beginning of the voyage' under the Rotterdam Rules will be almost the same as that required by the NMCs and CMC.²⁶⁷ But the requirement of due diligence 'before and at the beginning of the voyage' is different with that of 'during the voyage'.²⁶⁸ It is reasonable to accept that the carrier's obligation of 'due diligence' during the voyage is less expected than before or at the beginning of the voyage.²⁶⁹ As the Rotterdam Rules stipulate that the carrier should be liable for the breach of his obligations caused by the acts or omissions of any performing party which means person who performs or undertakes to perform any of the carrier's obligations under a contract of carriage, he is liable for other people's failure to ensure the seaworthiness of the ship if these people can be categorized into 'performing party'.²⁷⁰

Apart from these obligations, there are three exceptions provided by the Rotterdam Rules to the carrier's obligations. Firstly, the Rotterdam Rules expressly allow contracting parties to shift the carrier's obligations for loading, handling, stowing, or unloading the goods to the appropriate cargo interests that will either perform it or arrange for its performance.²⁷¹ This is owing to the reason that there are some situations the shipper or the documentary shipper or the consignee is better qualified to assume some of these obligations and due to the frequently use of free in and out (FIO) or free in and out stowed (FIOS) clauses in practice.²⁷² As mentioned earlier, these clauses and agreements, although not explicitly provided by the NMCs and CMC, are also recognized in practice by Nordic countries and China.²⁷³ Under the Rotterdam Rules, if the parties require such arrangement, they need to

²⁶⁵ The Rotterdam Rules, Article 14.

²⁶⁶ Sturley, Fujita and Van der Ziel (n 9) 85.

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

²⁶⁹ UNCITRAL (n 262) 9th Session Report para 43; 12th session Report para 149.

²⁷⁰ The Rotterdam Rules, Article 18.

²⁷¹ UNCITRAL (n 262) 9th Session Report paras 43, 120-127; 16th Session Report paras 204-208; 19th Session Report paras 52-54; 21st Session Report paras 44-49; 2008 Commission Report paras 56-58.

²⁷² Sturley, Fujita and Van der Ziel (n 9) 90.

²⁷³ F§13:5, 13:18; N§255,268; Si, *Maritime Law Monograph* (n 94) 84.

refer this into the contract particulars.²⁷⁴ However, although there are several variants are possible to shift some obligations, a FIO clause does not affect the carrier's period of responsibility.²⁷⁵ Except for what has been shifted to the shipper, the carrier remains responsible for other matters during his period of responsibility.²⁷⁶ Additionally, a FIO clause does not excuse a carrier from liability for his own actions.²⁷⁷ Sometimes a FIO clause simply allocates costs.²⁷⁸ For example, the shipper pays separately for the service of loading or unloading which is still performed by the carrier or sub-carrier, and if the damage happens during loading or unloading, the carrier is still responsible notwithstanding the FIO clause.²⁷⁹ If the shipper assumed responsibility for loading, this responsibility is subjected to ordinary rules and the shipper is not regarded as person for whom the carrier is liable under Article 18(d), because the shipper is definitely not act 'whether directly or indirectly at the carrier's request or under the carrier's supervision or control'.²⁸⁰ The shipper or consignee should bear the loss or damage by themselves. Secondly, the carrier is not liable for sacrifice of the goods during the voyage at sea.²⁸¹ The Rotterdam Rules permits the carrier to take reasonable measures to avoid a serious risk even though the measures taken may be contrary to his obligations established by Article 11, 13 and 14.²⁸² The carrier is not liable for such measure when the sacrifice is reasonable made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.²⁸³ But this exception is only valid when the sacrifice is made during the voyage by sea rather than other parts of the carriage.²⁸⁴ The third exception is about goods that may become a danger.²⁸⁵ The carrier is exempted from liability for his decline to receive or to load the goods, or take other reasonable measures to unload, destroy, or render goods harmless, if the goods are or reasonably appear likely to become an actual danger to persons, property or the environment. Comparing with the NMCs and CMC, there is no pre-conditions as for whether the carrier has the knowledge of

²⁷⁴ The Rotterdam Rules Article 13 (2).

²⁷⁵ UNCITRAL (n 262) 16th Session Report paras 204-205; 21st Session Report para 47.

²⁷⁶ Philippe Delebecque, 'Obligation of the Carrier' in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly By Sea* (Netherlands: Wolters Kluwer 2010) 85.

²⁷⁷ UNCITRAL (n 262) 9th Session Report paras 125-127; 16th Session Report para 206; 19th Session Report para 53; 21st Session Report paras 44-45.

²⁷⁸ Sturley, Fujita and Van der Ziel (n 9) 91.

²⁷⁹ The Rotterdam Rules, Article 17 (3) (i).

²⁸⁰ Sturley, Fujita and Van der Ziel (n 9) 85.

²⁸¹ The Rotterdam Rules, Article 16.

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ *ibid.*

²⁸⁵ The Rotterdam Rules, Article 15.

this dangerous nature or not. A proposal was made to limit the carrier's right under Article 15 by providing that he could rely on this exception only if he was not aware of the dangerous nature of the goods.²⁸⁶ But this proposal was finally not accepted as limiting the carrier's rights to situations in which the carrier could prove his unawareness of the dangerous nature of goods would be tantamount to shifting the risk in carrying dangerous goods from the shipper to the carrier.²⁸⁷ The last two exemptions should be considered in conjunction with Article 17 (3) (o) which decides the carrier's potential liabilities regarding dangerous goods and sacrifice of the goods during the sea voyage.²⁸⁸

4.4 Sub-Conclusion

Although generally speaking the NMCs, CMC and Rotterdam Rules seem stipulating similar structures for carrier's obligations, in which firstly carrier's key obligations of seaworthiness of the ship and care for cargo are established, then exceptions to obligations concerning dangerous goods, measures to save life or property at sea and fault of the shipper are provided, the exact requirements of these obligations and exceptions are different under each legal regime. For instance, compared with the NMCs, the carrier's obligation of seaworthiness is stricter under the CMC because of the acceptance of principle established by the *Muncaster Castle case*. The Rotterdam Rules, by extending the time of the carrier's obligation of seaworthiness to cover the whole voyage, impose the heaviest burden on the carrier as for his mandatory obligation. Even though this extension of seaworthiness obligation can be justified by the development of modern shipping technology and more exceptions to the carrier's obligations are provided, nowadays it is an important consideration when potential Contracting States are assessing the evolutions introduced by the Rotterdam Rules. This difference is also worth noting for the Nordic countries and China as they only require the carrier to fulfill an obligation of 'initial seaworthiness of the ship'. The extension of this obligation to cover the whole carriage means a demand of higher level shipping technology and management in industry which may not be reached by every country, especially some less developed countries.

²⁸⁶ Delebecque (n 276) 90.

²⁸⁷ *ibid.*

²⁸⁸ Sturley, Fujita and Van der Ziel (n 9) 93.

5. Carrier's Liability for Physical Loss of or Damage to the Goods, Exemptions and Burden of Proof

Although in traditional common law the carrier's liability was almost strict, after the international legislative activities have prospered in this field, the carrier's basis of liability has been eased to fault and this change has been followed by many national laws. But such fault based liability is not identical among all of them. The Hague/Hague-Visby Rules establish an incomplete fault based liability system as under the situation of nautical error exemption and fire exemption, carrier may not be liable for loss of or damage to the goods which can be attributed to his fault.²⁸⁹ The Hamburg Rules, by deleting the exceptions provided by the Hague/Hague-Visby Rules, instead establishing a complete fault based liability system.²⁹⁰ The NMCs, CMC and Rotterdam Rules also provide fault based liability for the carrier but many differences exist in their liability systems and burden of proof rules.

5.1 Nordic Maritime Codes

The NMCs basically follow the incomplete fault based liability system established by the Hague/Hague-Visby Rules. Generally the carrier's liability is based on fault except for nautical error and fire unless caused by fault or neglect of the carrier personally.²⁹¹ Although a list of excepted events or environments has been provided by the Hague/Hague-Visby Rules, only the nautical error exemption, fire exemption and the so called q-clause have been retained by the NMCs while other exceptions have been dropped. According to the nautical error exemption, the carrier is not liable for loss or damage resulting from fault or neglect of the master, any member of the crew, the pilot or any other person performing work in the vessel's service in the navigation or in the management of the vessel.²⁹² In Nordic law error in the navigation or the management of the vessel is deemed to exist if it is connected with the interests or safety of the vessel.²⁹³ Any other fault is defined as commercial fault for which the nautical error exemption cannot apply.²⁹⁴ Fire exemption is to avoid the carrier's liability for fire unless caused by the actual fault or privity of the carrier.²⁹⁵ Thus the carrier is only liable for fire caused by himself or his senior employees. Q-clause is a general rules provided by the Hague/Hague-

²⁸⁹ Yuzhuo Si and Hai Li Henry, 'The New Structure of the Basis of Liability for the Carrier' (2009) 14 (1/2) Uniform Law Review 931.

²⁹⁰ Ibid.

²⁹¹ F§13:25, 26, N§275, 276.

²⁹² F§13:26 (1), N§276 (1).

²⁹³ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 47.

²⁹⁴ Ibid.

²⁹⁵ F§13:26 (2), N§276 (2).

Visby Rules under which, except for other specifically listed exception perils, the carrier is not liable for any other causes of loss or damage arising without his actual fault or fault or neglect of his privity, or his agents or servants.²⁹⁶ Instead of keeping as a separate exception clause, the q-clause has been upgraded as a general umbrella protection under the NMCs.²⁹⁷

Because the Hague/Hague-Visby Rules don't explain burden of proof rules in an explicit way but only focus on liability issues, there are different opinions with respect to the legal function of these exceptions in allocating the burden of proof between the cargo claimant and carrier. Some scholars hold the opinion that, except for the general q-clause, these exceptions amount to 'prima facie exculpations' for the carrier.²⁹⁸ This means that if the carrier can prove the cause of loss or damage is one of these events or environments, he is presumed no fault and it is for the cargo claimant to prove that the occurrence of such event or environment is contributed by the fault or neglect of the carrier, his servants or agents.²⁹⁹ While some others support the opinion that these exception clauses are only 'false burden of proof rules' which means they actually have no legal or practical value.³⁰⁰ They can only be used by the carrier as normal evidences proving the cause of loss or damage.³⁰¹ The judge has right to freely evaluate evidences provided by the carrier or cargo claimant and may ascribe evidential weight to these events or circumstances if he feels convinced that they should have such evidential effect.³⁰² And the judge may rely on presumptions of fact other than those reasons enumerated in the catalogue as well.³⁰³ From Nordic perspective of view, these catalogues, although have been gladly accepted as basis for judgments by previous Nordic courts, are unnecessary specifically listed as they are not the final or single factor in deciding the carrier's liability.³⁰⁴ There is always a constant need to analyze whether the carrier has been at fault or not.³⁰⁵ The 'prima facie exculpations' theory is not supported as it is a basic principle in Nordic countries that the judge is absolutely free in his evaluation of the evidence brought before him by the

²⁹⁶ Hague/Hague-Visby Rules, Article IV (2) (q).

²⁹⁷ F§13:25, N§275.

²⁹⁸ Sjur Braekhus, 'The Hague Rules Catalogue' in Kurt Grönfors (ed.), *Six Lectures on the Hague Rules* (Gothenburg: Gothenburg School of Economics and Business Administration Publication 1967) 23.

²⁹⁹ *ibid.*

³⁰⁰ *ibid.*

³⁰¹ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 42-46.

³⁰² *ibid.*

³⁰³ *ibid.*

³⁰⁴ *ibid.* 46.

³⁰⁵ *ibid.*

parties.³⁰⁶ They also think that as ‘false burden of proof rules’ the catalogue of exceptions has no legal or practical value at all because it cannot encroach on the judge’s free evaluation of the evidence and return to the old ‘legal’ or ‘formal’ system of evidence.³⁰⁷ The Nordic countries analyze the function of this catalogue by way of history in which these exceptions were done in the bill of lading to narrow the carrier’s strict liability in English law.³⁰⁸ And these exceptions (except for nautical error exemption and fire exemption) later accepted by Harter Act 1893 and then the Hague Rules were constructed only to cover circumstances for which no blame could be put on the carrier, his agents or servants.³⁰⁹ Thus the q-clause can in fact embrace all the exceptions and a specific list is not really needed.³¹⁰ It is regarded as not substantively change the approach of Hague/Hague-Visby Rules to delete most of these exemptions, if the nautical error exemption and fire exemption have been remained.³¹¹

Seaworthiness is treated as primary obligation under the NMCs. In order to claiming exemption from liability, the carrier must prove due diligence has been exercised to fulfill his obligation of seaworthiness.³¹² But unseaworthiness that has arisen after the beginning of the voyage is treated under ordinary rules and subject to nautical error exemption and fire exemption.³¹³

The issue of concurrent causation and apportionment of liability is neither explicitly addressed by the Hague Rules nor the Visby Protocol.³¹⁴ A ‘Vallescura Rule’ was established in case *Schnell v Vallescura* which was heard in the US Supreme Court in 1934.³¹⁵ In this case, the court expressed the opinion that the carrier should bear all liability because he could not establish the respective degree of the cargo damage caused by two reasons.³¹⁶ He could only be relieved of part of his liability if he could prove exactly which part of the loss or damage was not attributed to his liability.³¹⁷ Although according to this ‘Vallescura Rule’, apportionment of liability became possible, the burden of proof was so

³⁰⁶ Braekhus (n 298) 23.

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

³⁰⁹ *ibid.* 29.

³¹⁰ *ibid.*

³¹¹ Honka, ‘New Carriage of Goods by Sea - the Nordic Approach’ (n 21) 46.

³¹² F§13:26, N§276.

³¹³ Honka, ‘New carriage of goods by sea - the Nordic approach’ (n 21) 46.

³¹⁴ Frank Stevens, ‘Apportionment of Damages under the Rotterdam Rules’ (2011) 17 *Journal of International Maritime Law* 343.

³¹⁵ *Schnell & Co. v S. S. Vallescura* (1934) 293 US 296, 303-304.

³¹⁶ *ibid.* See also Stevens (n 314) 347.

³¹⁷ Stevens (n 314) 347.

difficult that in practice the carrier was almost always fully liable even if there were concurrent causes of loss.³¹⁸ Moreover, because of the primary status of the obligation of seaworthiness, if unseaworthiness of the vessel is one of the causes of the loss or damage, the carrier was no longer entitled to invoke other exempted perils.³¹⁹ Under this situation, the possibility of concurrent causation and apportionment of liability was almost excluded.³²⁰ The ‘Vallescura Rule’ has been adopted by the NMCs. According to F§13:25 and N§275, when fault or neglect on the part of the carrier combines with another cause to produce loss, the carrier is liable only to the extent that the loss is attributable to such fault or neglect. But the carrier bears the burden to prove to what extent the loss is not attributable to fault or neglect on his part.

Thus the carrier’s liability system and burden of proof rule established by the NMCs are: (1) In all cases, the cargo claimant should first prove the existence of loss of or damage to the goods and it has happened during the carrier’s period of responsibility, and the scope of the loss or damage (‘prima facie case’).³²¹ (2) The carrier then needs to prove (a) he has exercised ‘due diligence’ to fulfilled his obligation of seaworthiness; and (b) the cause of the loss, damage or delay is nautical error or fire on board; or the loss or damage is not caused by his fault or fault of his servants or agents.³²² (3) The cargo claimant can further prove the lack of caring for cargo, or to disprove the evidences provided by the carrier such as lack of due diligence or existence of fault.³²³ If in stage (2) the carrier proves the cause of the loss or damage is fire, the cargo claimant has to prove that the fire is caused by the actual fault of the carrier or of his privity.

5.2 Chinese Maritime Code

The basis of carrier’s liability under the CMC is also incomplete fault. Generally the carrier is presumed fault and liable if the loss of or damage to the goods occurs during his period of responsibility.³²⁴ And a list of exceptions for carrier’s liability is provided under Article 51. These exception perils can be categorized into three groups. Firstly, Article 51(1) and Article 51(2) protect the carrier from liability with regard to nautical error and fire unless caused by the actual fault of the carrier. Secondly, Article 51 (3) (4) (5) (6)

³¹⁸ *ibid.*

³¹⁹ *ibid* 343-359.

³²⁰ *ibid.*

³²¹ Honka, ‘New Carriage of Goods by Sea - the Nordic Approach’ (n 21) 36.

³²² Tetley (n. 217) 373-374.

³²³ *ibid.*

³²⁴ CMC, Chapter IV, Article 51.

provide exception events or environments which are not under the control of the carrier or shipper, including force majeure and perils, dangers and accidents of the sea or other navigable waters; war or armed conflict; act of the government or competent authorities, quarantine restrictions or seizure under legal process; strikes, stoppages or restraint of labour. Thirdly, Article 51 (7) (8) (9) (10) (11) (12) are situations where the loss or damage is resulted from the act or omission of the shipper, the nature of the goods, or something else cannot attribute to the carrier's fault, including: saving or attempting to save life or property at sea; act of the shipper, owner of the goods or their agents; nature or inherent vice of the goods; inadequacy of packing or insufficiency of illegibility of marks; latent defect of the ship not discoverable by due diligence; any other causes arising without the fault of the carrier or his servant or agent. Although not identical in numbering, there is no substantive difference between the CMC and the Hague/Hague-Visby Rules with respect to these exception perils. Even the q-clause of the Hague/Hague-Visby Rules is not upgraded by the CMC but remains separately listed under clause (12). The CMC does not treat these exceptions as 'prima facie exculpations'. But in contrary with the NMCs, the CMC recognize the values of these exceptions as 'false burden of proof rules' and retain them in its articles. Article 51 last paragraph provides that 'the carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in sub-paragraph (2) (fire unless caused by the actual fault of the carrier), bear the burden of proof'. Thus these exceptions are treated as options for the carrier to prove the cause of the loss or damage and he needs further to prove he is not at fault in causing these events or environments to avoid liability.³²⁵

Under the CMC, the relationship between the obligations set up by Article 47, 48, 49 (seaworthiness, care for cargo and direct route) and the catalogues of exception perils provided by Article 51 is not clearly written down. Different with the NMCs, the CMC does not require that the carrier must fulfill his obligation of seaworthiness before depending on the exception clauses.³²⁶ Thus in practice, the question whether the obligation of seaworthiness and care for cargo are treated as 'overriding obligations' is controversial.³²⁷ One opinion is that the principle of 'overriding obligation' has been adopted by the CMC, while others claim that the legal position of the carrier's obligation is

³²⁵ Yuzhuo Si, 'New Structure of the Basis of Liability for the Carrier-An Analysis on the Provisions under the Rotterdam Rules in Respect of Basis of Liability for the Carrier' (2009) 20 (3) *Annual of China Maritime Law* 1.

³²⁶ Si, *Maritime Law Monograph* (n 94) 129.

³²⁷ *ibid.*

not superior to exceptions.³²⁸ Furthermore, among the people who support the ‘overriding obligations’ theory, some agree that both the obligation of seaworthiness and care for cargo are primary obligations, while others declare that only the seaworthiness is primary obligation.³²⁹ This sub-argument is actually original from the controversial status of the obligation of care for cargo under Hague/Hague-Visby Rules.³³⁰ It seems the mostly supported opinion in China is that seaworthiness is overriding obligation under the CMC.³³¹ This is because on the one hand, the carrier’s basis of liability and the exception catalogues are both drafted in line with the Hague/Hague-Visby Rules.³³² It is reasonable to accept that the principle of ‘overriding obligation’ established by the international Conventions is also adopted by the CMC.³³³ On the other hand, as it is widely agreed that under the Hague/Hague-Visby Rules the obligation of care for cargo is not regarded as overriding obligation, the CMC should also follow this approach.³³⁴ In addition, as the behind rationale for these exception perils is that the carrier should not be liable for events or environments which are out of his control and cannot be attributed to his fault, and because the time for the obligation of seaworthiness is before or at the beginning of the voyage when the carrier can control the condition of the ship, it is reasonable to accept that he should not be entitled to exception perils for the initial seaworthiness of the ship.³³⁵ Therefore, according to the CMC, the carrier’s obligation of seaworthiness should prevail to the exemptions and he need to prove the requirement of ‘due diligence’ has been fulfilled for seaworthiness before depending on exceptions to his liability, while the obligation of care for cargo should be subject to the exceptions.³³⁶

‘Vallescura Rule’ has also been adopted by the CMC.³³⁷ Article 54 provides that where loss or damage or delay in delivery has occurred from causes from which the carrier or his servant or agent is not entitle to exoneration liability, together with another cause from which the carrier can exoneration liability, the carrier is only liable for part of the loss or

³²⁸ *ibid.* See also Zhenhui Xie, ‘The Carrier’s Duty of Seaworthiness in China’s Maritime Law’ (2003) 6 *Law Journal* 87.

³²⁹ Xie (n 328).

³³⁰ Jian Shen and Jinggen Chen, ‘On the Paramount Obligation of the Contract for the International Carriage of Goods by Sea’ (2011) 22 (2) *Annual of China Maritime Law* 85.

³³¹ Si, *Maritime Law Monograph* (n 94) 129.

³³² *ibid.* See also Xin Wang, ‘On the Relationship Between the Carrier’s Obligations and Immunities in CMC’ (1993) 4 *China Annual Maritime Law* 102.

³³³ *ibid.*

³³⁴ Xie (n 328).

³³⁵ Zhengliang, Hu, ‘Contract for the International Carriage of Goods by Sea’ in Yuzhuo Si (ed.), *Maritime Law* (3rd edn, Beijing: Law Press China 2012) 105.

³³⁶ Si, *Maritime Law Monograph* (n 94) 129.

³³⁷ *Schnell & Co. v S. S. Vallescura* (n 315).

damage, providing he can prove that to what extent the loss or damage is caused by other reasons.

Thus the liability system and burden of proof rule under the CMC are: (1) The cargo claimant needs to firstly prove the existence of loss or damage which has occurred during the carrier's period of responsibility and the scope of the loss or damage, etc. ('prima facie case'). (2) The carrier then is presumed at fault and needs to prove: (a) he has exercised 'due diligence' to make the ship seaworthiness; and (b) the cause of the loss, damage or delay is one or more of the events or environments listed under Article 51 (1) to (12) and he is not at fault for the occurrence of such event or environment (except for fire exemption). (3) The cargo claimant can further disprove the evidence provided by the carrier. But if the carrier in stage (2) proves the loss or damage is caused by fire on board, the claimant needs to prove that the fire is caused by the actual fault of the carrier (reversed burden of proof here).³³⁸

5.3 The Rotterdam Rules

The basis of the carrier's liability under the Rotterdam Rules is still fault, but a complete fault based liability system. Chapter 5 of the Rotterdam Rules provides the mechanism for determining the carrier's liability for loss of or damage to the goods. The core provision of this Chapter is Article 17, which provides a step-by-step approach outlining the framework for evaluating claims and defenses.³³⁹ This is another important evolution of the Rotterdam Rules since neither previous international convention in this field nor the NMCs and CMC provide such a clear step-by-step burden of proof mechanism. When negotiating the final text of the Article 17, whether the traditional list of excepted conditions under the Article IV (2) of the Hague/Hague-Visby Rules should be retained was widely discussed.³⁴⁰ Some drafting committee members argued that the traditional catalogues would be a beneficial part of the proposed convention, others viewed these excepted perils as simply superfluous illustrations of the general principle that the carrier was not liable for loss or damage not caused by his own fault or the fault of a person for whom he was responsible.³⁴¹ The UNICITRAL ultimately agreed to retain the traditional catalogues on the theory that the list of excepted perils played a useful role in common law countries and did no harm in

³³⁸ CMC, Chapter IV, Article 51 (2).

³³⁹ Sturley, Fujita and Van der Ziel (n 9) 96.

³⁴⁰ UNCITRAL (n 262) 10th Session Report para 39; 12th Session Report paras 117-118; 14th Session Report para 35; 19th Session Report para 68.

³⁴¹ Sturley, Fujita and Van der Ziel (n 9) 100-101.

civil law countries.³⁴² In addition, another recognized advantage of remaining these exceptions was that the international community applying the new Convention in the future would be able to rely on established and dense jurisprudence based on the existing of these listed exceptions.³⁴³

The intricate allocation of burdens of proof and multi-step process to determine the ultimate allocation of responsibility provided by Article 17 are as follows:

(1) At the first stage, the cargo claimant should show that he has suffered a loss and the relevant event has taken place during the carrier's period of responsibility ('prima facie case').³⁴⁴

(2) At the second stage, once the claimant has established a 'prima facie case', the carrier is presumed fault and the burden of proof is shifted to his side if he wants to be exempted from liability according to Article 17(2) and 17(3). The carrier can either choose to prove that the cause of the loss of or damage to goods is not attributable to his fault or to the fault of any person for whom he is liable under the Rotterdam Rules, or to prove that one or more of the events or environments listed in Article 17 (3) (a) to (o) has caused or contributed to the loss or damage.³⁴⁵ Article 17(2) is an upgraded q-clause and under the Rotterdam Rules it is an umbrella protection. Article 17(3) provides a specific list of events or circumstances which bring alternatives on mainly six aspects compared to the exceptions provided by the NMCs and CMC. Firstly the most obvious and notable difference is that the nautical error exemption has been deleted. Under the Rotterdam Rules the carrier is no longer exempted from liability for fault of the Master, crew members, pilot or servant in the navigation or management of the ship. The omission of the nautical error exemption is considered as being justified by the development of the technology in shipping industry.³⁴⁶ As nowadays it is possible for the carrier to control the navigation and management of the ship during the voyage, it is unreasonable to still protect him from the traditional nautical error liability.³⁴⁷ The second change is that the traditional fire defense has been significantly modified. The Rotterdam Rules treat the fire situation the same way

³⁴² *ibid.*

³⁴³ Alexander von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010) 102.

³⁴⁴ The Rotterdam Rules, Article 17 (1).

³⁴⁵ The Rotterdam Rules, Article 17 (2) (3).

³⁴⁶ Von Ziegler (n 343) 102-103.

³⁴⁷ *ibid.*

as any of other excepted perils, and the phrase ‘unless caused by the actual fault or privity of the carrier’ has been dropped.³⁴⁸ Thus under the Rotterdam Rules the carrier is still exonerated from liability for unexplained fires but no longer for fires which can be proved caused by the fault of any person he is responsible for.³⁴⁹ This change is significant as the group of people for whom the carrier is responsible has been largely extended by the Rotterdam Rules. The third difference is about salvage at sea. The CMC only generally excuses the carrier from liability for ‘saving or attempting to save life or property at sea’,³⁵⁰ and the NMC requires the measures to save vessels or other property at sea being reasonable.³⁵¹ The Rotterdam Rules, moving one step further, address this aspect in three consecutive provisions. The public policy in favor of protecting human life is so strong that ‘saving or attempting to save life at sea’ is a defense without regard for whether the effort is reasonable.³⁵² Trying to save property is limited to use ‘reasonable measures’.³⁵³ And probably due to the occurrence of several terrible environment damage caused by well-known maritime disasters, a new defense as for ‘reasonable measures to avoid or attempt to avoid damage to the environment’ is produced.³⁵⁴ The fourth difference is about the situation that part of the carrier’s traditional obligation has been shifted to the shipper.³⁵⁵ The carrier is not liable for the performance or fault of shipper if such arrangement has been agreed.³⁵⁶ This exception is not provided by the NMCs and CMC. The fifth difference is about the shipper’s obligations. CMC only generally provides one exception that the carrier is not liable for act of the shipper, owner of the goods or their agents.³⁵⁷ The Rotterdam Rules modifies this exception to the new provision covers ‘act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable’.³⁵⁸ In addition, the Rotterdam Rules provide exception to carrier’s liability as for ‘insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier’.³⁵⁹ The last difference

³⁴⁸ The Rotterdam Rules, Article 17 (3) (f).

³⁴⁹ Sturley, Fujita and Van der Ziel (n 9) 105.

³⁵⁰ The CMC, Chapter IV, Article 51 (7).

³⁵¹ F§13:25; N§275.

³⁵² The Rotterdam Rules, Article 17 (3) (l).

³⁵³ The Rotterdam Rules, Article 17 (3) (m).

³⁵⁴ The Rotterdam Rules, Article 17 (3) (n). See also Sturley, Fujita and Van der Ziel (n 9) 106.

³⁵⁵ The Rotterdam Rules, Article 13 (2).

³⁵⁶ The Rotterdam Rules, Article 17 (3) (i).

³⁵⁷ The CMC, Chapter IV, Article 51 (8).

³⁵⁸ The Rotterdam Rules, Article 17 (3) (h).

³⁵⁹ The Rotterdam Rules Article 17 (3) (k).

concerns dangerous goods and sacrifice of goods during the sea voyage.³⁶⁰ This difference is not substantive as these two exceptions are similar permitted by the CMC and NMCs. The only difference is that the Rotterdam Rules explicitly put them into the catalogue of defenses and make the exception provisions more comprehensive.³⁶¹

(3) If the carrier can successfully discharge his burden of proof in the second stage, in the third stage Article 17(4) and 17(5) provide three routes for the cargo claimant to rebut the carrier's defense. Firstly, Article 17(4) permits the claimant to prove that a fault for which the carrier is responsible has caused the events or circumstances listed in Article 17(3) and used as defense by the carrier. Through this route, if the cargo claimant's proof becomes a direct proof of fault or negligence, the carrier should finally be liable for the loss or damage.³⁶² Secondly, Article 17(4) provides that the cargo claimant can prove there are other causes contributed to the loss of or damage to the goods. Under this situation, the carrier still has opportunity to relieve from liability by proving lack of fault following the process of the second stage. The third route is provided by Article 17(5) which deals with the carrier's obligation of seaworthiness. The legal status of the seaworthiness obligation has been changed by the Rotterdam Rules. The carrier is no longer required to prove he has fulfilled the obligation of seaworthiness before replying on exceptions and it is for the cargo claimant to prove that the loss or damage is resulted from unseaworthiness of the ship.³⁶³ But only a probability of causation between the unseaworthiness of the ship and loss of or damage to the cargo is enough in this context.³⁶⁴ Exceptions provided in stage two are not efficient once the claimant can prove that the loss or damage was caused or contributed to by the carrier's breach of seaworthiness obligation.³⁶⁵ Moreover, under this route, the carrier can still rely on exception perils if he can further prove that the loss or damage or delay is not resulted from unseaworthiness of the ship, or he has fulfilled the requirement of 'due diligence'.³⁶⁶

³⁶⁰ The Rotterdam Rules, Article 17 (3) (o).

³⁶¹ Sturley, Fujita and Van der Ziel (n 9) 110.

³⁶² *ibid* 106-107.

³⁶³ The Hague-Visby Rules Article 4 (1).

³⁶⁴ Von Ziegler (n 343) 108.

³⁶⁵ Michael Tsimplis, 'Liability of the Carrier for Loss, Damage or Delay' in Baatz Debattista Lorenzon and Serdy Staniland Tsimplis (eds.), *The Rotterdam Rules: A Practical Annotation* (London: Informa 2009) 17-06, 48.

³⁶⁶ The Rotterdam Rules, Article 17 (5) (b).

The ‘Vallescura Rule’ has been altered by the Rotterdam Rules.³⁶⁷ Although Article 17(6) of the Rotterdam Rules still provides that the carrier is liable only for the part of loss or damage that is attributable to the event or circumstance for which he is liable pursuant to this article, the carrier is no longer required to bear the whole burden of proof regarding the loss or damage resulting from other causes. The Rotterdam Rules establish a new rule in accordance with which the carrier and shipper should follow the same approach as provided by Article 17 to allocate the burden of proof as for allocating responsibility in multiple causation cases.³⁶⁸

5.4 Sub-conclusion

It can be seen from above analysis that with respect to the carrier’s liability for physical loss of or damage to the goods, there are many differences between the NMCs, CMC and Rotterdam Rules. The basis of the liability is different; the legal position of the obligation of seaworthiness is different; the evidential effect of exception perils is different; the burden of proof rule is different; and the rule applicable for concurrent causation and apportionment of liability is different. The most controversial alternative introduced by the Rotterdam Rules may be the deletion of the nautical error exemption and the modification of fire exemption, which are considered as largely increasing carrier’s mandatory liability. This change is also significant for Nordic countries and China as both of them have provided these two exemptions for the sea carrier in their maritime codes. However, comparing with the NMCs and CMC, the carrier’s burden of proof has been reduced by the Rotterdam Rules. For instance, the catalogue of excepted events or circumstances is regarded as ‘prima facie exculpations’ under the Rotterdam Rules and the carrier needs not to prove his non-fault to discharge his burden of proof if the cause of the damage or loss is one of the exception situations. Additionally, carrier’s burden of proof is decreased for concurrent causation and apportionment of liability as well. Thus it may be difficult to say whether the differences between the Rotterdam Rules and the NMCs/CMC would be benefits or disadvantages for the carrier’s interests. However, it can be reasonably concluded that if Nordic countries and China is going to implement the Rotterdam Rules into their national laws, not only the written legislations need to be modified, but also their judges need to get used to the new burden of proof rules and the different evidential weights of exception perils. Additionally, judgments from previous cases may be changed and some jurisprudence may not be depended on any more.

³⁶⁷ *Schnell & Co. v S. S. Vallescura* (n 315).

³⁶⁸ *Sturley, Fujita and Van der Ziel* (n 9) 118.

6. Carrier's Liability for Delay in Delivery

Delay may result in loss for the cargo owner in essentially two ways. First, the goods may be damaged or destroyed because the transport takes too long.³⁶⁹ For example, fresh fruit decays if the journey takes too long a time. Under this situation, the rules relating to physical loss of or damage to goods should apply. The second way is that the goods arrive in the destination in good condition, but as it is too late for the agreed time, the market condition has changed and the cargo interests suffer a pure economic loss.³⁷⁰ One outstanding example is carriage of Christmas gifts or other seasonal products. The second situation is regulated by the provisions regarding 'delay in delivery'. Traditionally, transit speed was not the principal issue in sea carriage and parties who desired a speedy transportation would typically choose other modes of transport such as air carriage.³⁷¹ Sea carriage was usually advantage in its capacity of carrying large cargo and low price.³⁷² Thus the Hague Rules do not explicitly address the issue of delay. Although there were two proposals to address the issue of delay when negotiating the Visby protocol, they were not successfully retained in the final text.³⁷³ However, with the development of the shipping industry, the 'just in time' shipping procedure has been produced to ensure that a carrier will deliver goods shortly before an industrial consignee requires them in the manufacturing process or a retailer wishes to display them on the store shelves.³⁷⁴ If the system works properly, the consignee can save lots of costs in inventory while if the system breaks down, a late delivery may result in substantial losses.³⁷⁵ The Hamburg Rules are the first international Convention in maritime transport field establishes carrier's liability for delay in delivery.³⁷⁶ Similarly, all of the NMCs, CMC and Rotterdam Rules provide rules concerning carrier's liabilities not only for physical loss of or damage to the goods but also for pure economic loss resulted from delay in delivery.

6.1 Nordic Maritime Codes

According to the NMCs, if the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time agreed upon, or without such agreement, in a reasonable time, the carrier is liable for loss resulting from this delay in

³⁶⁹ Falkanger, Bull and Brautaset (n 15) 313-314.

³⁷⁰ *ibid.*

³⁷¹ Sturley, Fujita and Van der Ziel (n 9) 119-120.

³⁷² *ibid.*

³⁷³ *ibid.*

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

³⁷⁶ The Hamburg Rules, Article 5.

delivery.³⁷⁷ The contracting shipper can cancel the carriage contract if the delay amount to a fundamental breach of the contract.³⁷⁸ Although not specifically mentioned by the Hague/Hague-Visby Rules, the carrier's liability for delay in delivery had been already considered by the previous NMCs in the early 1970's.³⁷⁹ At that time in Nordic laws, if the delay in delivery had been transferred into physical loss or damage to the goods, as the first type of delay mentioned above, the general rules concerning carrier's liability for loss of or damage to the goods should apply.³⁸⁰ Delay damage which led to pure economic loss had independent meaning according to the old NMCs, but the basic rules still followed what was stipulated for physical loss or damage.³⁸¹ In addition to the mandatory Nordic system concerning delay in delivery, there was a non-mandatory rule stating that same rules would apply to other kinds of carrier's delay, such as delay happening on the approach voyage to the port of loading or through overbooking on the line's ships.³⁸² But it was possible to exclude this delay liability by proper exemption contracting clause.³⁸³ The new NMCs merely repeat the familiar concept of delay and set up it as mandatory liability, except that technically liability for delay in delivery is regulated independently in the NMCs 1994.³⁸⁴ The old non-mandatory stipulation concerning liability in damages for other delay than delay in delivery is not included in the Chapter 13 of the NMCs 1994 but repeated as far as voyage charting is concerned.³⁸⁵

General rules for deciding carrier's liability for physical loss or damage to the goods are also applicable to delay in delivery.³⁸⁶ If the goods cannot be delivered within 60 days following the agreed time or reasonable time, the goods are regarded as lost.³⁸⁷ In accordance with this rule of conversion from delay to total loss, when total loss occurs due to the mere fact that the delivery time is too late, the location of the goods might be known.³⁸⁸ The cargo interests then have the option to choose either claiming compensation based on delay or total loss in this situation as the terms 'may treaty the goods as lost' used

³⁷⁷ F§13:28, N§278.

³⁷⁸ F§13:14, N§264.

³⁷⁹ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 93.

³⁸⁰ *ibid.*

³⁸¹ *ibid.*

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ *ibid.*

³⁸⁵ F§14:31, N§351.

³⁸⁶ F§13:28, N§278.

³⁸⁷ F§13:28 (3), N§278 (3).

³⁸⁸ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 95

by the NMCs.³⁸⁹ There is no rule for how to evaluate the amount of compensation for delay delivery, thus the general causality rules and rules for calculating physical damages are applied.³⁹⁰ Additionally, according to the NMCs, pure economic loss resulting from delay in delivery is not the object of limits of liability.³⁹¹ Other loss resulting for delay in delivery is regulated by general rules on limits of liability for physical loss or damage (except for Denmark as Danish Maritime Code includes a completely similar stipulation D§280.2 as found in the Hamburg Rules Article 6 (1) (b) with respect to the limitations to carrier's liability for delay in delivery.).³⁹²

6.2 Chinese Maritime Code

Under the CMC, general rules for deciding carrier's liability for physical loss of or damage to the goods also apply to delay in delivery. Article 50 (1) describes 'delay in delivery' as 'occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon'. The difference with the NMCs is that there is no word addressing the situation that no agreed time of delivery exists but the goods haven't been delivered in a time which could be reasonable required of a diligent carrier. There are different views with respect to the carrier's liability in such case. One opinion is that Article 50 (1) of the CMC is an absolute definition of the terms 'delay in delivery' in international sea carriage.³⁹³ Other delays in delivery, including carrier fails to deliver the goods in a reasonable time, are not regarded as 'delay in delivery' in this context and don't lead to the carrier's liability.³⁹⁴ Although Chinese Contract Law generally provides that under a contract of carriage 'the carrier shall safely carry the passenger or cargo to the prescribed destination within the prescribed time or within a reasonable time',³⁹⁵ as the CMC is special law, the provisions provided by it should be prevail applicable in contract for international carriage of goods by sea.³⁹⁶ Thus absolute definition of 'delay in delivery' in the CMC excludes the application of related provision provided by the Chinese Contract Law.³⁹⁷ According to this opinion, the carrier is not liable for pure economic loss resulting

³⁸⁹ *ibid* 97.

³⁹⁰ *ibid* 96.

³⁹¹ *ibid* 94.

³⁹² *ibid* 96.

³⁹³ Xin Xu, 'Discussion the Concept of Delay in Delivery' (2002) 25 (5) *World Shipping* 32.

³⁹⁴ *ibid*.

³⁹⁵ Chinese Contract Law, Article 290.

³⁹⁶ Xu (393).

³⁹⁷ *ibid*.

from his failure to deliver the goods in a reasonable time.³⁹⁸ Another view is that the Article 50 (1) of the CMC is not an absolute definition of ‘delay in delivery’ but only provide one situation of ‘delay in delivery’ which can be governed by the CMC.³⁹⁹ Other kinds of delays not covered by the CMC are regulated by the Chinese Contract Law.⁴⁰⁰ In accordance with this opinion, the carrier is still liable for pure loss resulting from his failure to deliver the goods in a reasonable time as required by the Chinese Contract Law.⁴⁰¹ However, under this situation the carrier is not entitled to exemptions and limitations provided by the CMC. In fact, no matter which opinion is employed, the problem concerning carrier’s liability for his failure to deliver the goods in a reasonable time cannot be satisfactorily resolved in practice. Based on the first theory, the carrier is not liable for delay in delivering the goods in a reasonable time and the loss of the cargo interests cannot be compensated. This solution may lead to the result that the carrier will not conclude any agreed time for delivery in the carriage contract on purpose to avoid liability for delay, and this would impede the intended protection to cargo interests. However, according to the second theory, the carrier will be not only liable but also lose his rights of exemptions and limits to his liability provided by the CMC.⁴⁰² In accordance with the Chinese Contract Law, the carrier will be liable for the amount which ‘shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract’.⁴⁰³ This amount may largely exceed the limitation set up by the CMC and lead to an unreasonable result that the carrier will bear heavier liability when no time of delivery has been agreed in the carriage contract than when a delivery time has been expressly agreed.⁴⁰⁴ When drafting the CMC, the purpose of not providing rules concerning carrier’s liability for his failure to deliver the goods in a reasonable time was to encourage contracting parties to negotiate the time of delivery, expressly conclude it in their contract and to avoid uncertainty in

³⁹⁸ Xu (n 393). See also Si, *Maritime Law Monograph* (n 94) 87. in which the author expresses his support to this opinion.

³⁹⁹ Wenguang Zhang, ‘On Deficiencies of the Standards of Delay in Delivery Stipulated in the Chinese Maritime Code’ (2008) 19 (1) *Annual of China Maritime Law*.

⁴⁰⁰ *ibid.*

⁴⁰¹ *ibid.*

⁴⁰² *ibid.*

⁴⁰³ Chinese Contract Law, Article 113.

⁴⁰⁴ Hong Zhao, ‘Consideration on Modifying the Rules Concerning Delay in Delivery’ (2002) 2 *People’s Justice* 54.

explaining the term ‘reasonable time’.⁴⁰⁵ However, it seems that this encouragement does not work well in practice and even causes more problems.⁴⁰⁶

The CMC also provides that the goods may be treated as lost when they has not been delivered within 60 days from expiry of the time for delivery.⁴⁰⁷ Nevertheless, this provision has different effect compared with the NMCs because the CMC set up specific limitation to carrier’s liability for pure economic loss resulting from delay in delivery. The liability of the carrier for the pure economic is limited to an amount equivalent to the freight payable for the goods so delayed.⁴⁰⁸ If the loss of or damage to the goods has occurred concurrently with the delay in delivery, the rules concerning limits to carrier’s liability for physical loss applies.⁴⁰⁹ In contrary with the NMCs where general rules are applicable for calculating both physical loss or damage and loss resulting from delay in delivery, distinguishing delay in delivery and conversion total lost is important in calculating loss and limitation of liability under the CMC.

Liability for delay in delivery is not mentioned by Section 8 for multimodal transport contract. Article 105 and 106 only establish the MTO’s liability for loss of or damage to the goods. Thus MTO is not liable for pure economic loss resulted from delay in delivery.⁴¹⁰

6.3 The Rotterdam Rules

The Rotterdam Rules also limit the carrier’s liability for ‘delay in delivery’ to his failure to deliver the goods within the time agreed in the contract of carriage.⁴¹¹ The carrier is not liable for not delivering the goods within the time that can be reasonable to expect of a diligent carrier.⁴¹² The Rotterdam Rules leaves the decision of delay only to the agreement between the parties. But the agreement need not to be explicit, it is enough if there is an implied agreed time exist.⁴¹³ Determination and explanation of these implicitly agreements

⁴⁰⁵ Zhang (n 399).

⁴⁰⁶ *ibid.*

⁴⁰⁷ CMC, Article 50 (4).

⁴⁰⁸ CMC, Chapter IV, Article 57.

⁴⁰⁹ *ibid.*

⁴¹⁰ Si, *Maritime Law Monograph* (n 94) 117.

⁴¹¹ The Rotterdam Rules, Article 21.

⁴¹² United Nations Conference on Trade and Development (UNCTAD), ‘Commentary by the UNCTAD Secretariat Draft Instrument on Transport Law’ (UNCTAD.org 2014) Draft Instrument WP.39 Article 16(1), UNCTAD/SDTE/TLB/4, 13 March 2002. <<http://unctad.org/en/Docs/posdtetlbd4.en.pdf>> accessed 14 May 2014.

⁴¹³ Sturley, Fujita and Van der Ziel (n 9) 123.

are left to applicable national laws.⁴¹⁴ For example, in absence of an expressly clause, the applicable law of contract may imply a promise to deliver at a particular time based on a carrier's published schedule or an agent's marketing representations.⁴¹⁵ The Rotterdam Rules do not provide provision concerning when the delayed goods will be treated as lost. Thus the goods are treated as delayed as long as the carrier has effective control over the goods.⁴¹⁶ Although both the Rotterdam Rules and CMC can be applicable for multimodal carriage with a sea leg, different with the CMC, the rules concerning pure economic loss resulting from delay in delivery provided under the Rotterdam Rules are generally applicable to both pure sea carriage and multimodal carriage with a sea leg.

Burden of proof rules concerning carrier's liability for physical loss or damage of the goods are also applicable to economic loss resulting from delay in delivery. Thus in case of delay in delivery, the cargo interests should at first stage prove the existence of an agreed time of delivery and the fact that the goods are not delivered by then.⁴¹⁷ The carrier then needs to explain the causes for the delay.⁴¹⁸ The carrier's liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed.⁴¹⁹ Similar with the CMC, when the delay in delivery causes not only pure economic loss but also physical loss or damage of the goods, compensation and limitation for the part of physical loss or damage should be calculated in accordance with provisions concerning carrier's liability for physical loss or damage of the goods.⁴²⁰ The total amount payable cannot exceed the limitation in respect of the total loss of the goods concerned.⁴²¹

6.4 Sub-Conclusion

On the aspect of carrier's liability for delay in delivery, besides different amounts on limits of liability, there are several other differences between the NMCs, CMC and Rotterdam Rules. Firstly, when no express or implicit delivery time has been agreed, only the NMCs impose liability for the carrier if the goods cannot be arrived in a reasonable time. The CMC and Rotterdam Rules only care about what has been agreed between the parties. Thus under the CMC and the Rotterdam Rules it is important for the cargo interests to

⁴¹⁴ Von Ziegler (n 343) 121-124.

⁴¹⁵ Sturley, Fujita and Van der Ziel (n 9) 124.

⁴¹⁶ Von Ziegler (n 343) 123.

⁴¹⁷ *ibid* 121-124.

⁴¹⁸ *ibid*.

⁴¹⁹ The Rotterdam Rules, Article 60.

⁴²⁰ *ibid*.

⁴²¹ *ibid*.

conclude, explicitly or implicitly, an delivery time in the carriage contract. Secondly, the CMC and Rotterdam Rules provide specific limitation to carrier's liability for economic loss resulting from delay in delivery while no similar rule is provided by the NMCs. Thirdly, the NMCs and CMC provide that the delayed cargo is regarded as lost if the carrier has not delivered them within 60 days from expiry of the time for delivery. This conversion from delay to total loss is crucial when calculating the compensation amount and limitation of compensation. Generally speaking, although all of the NMCs, CMC and Rotterdam Rules establish carrier's liability for delay in delivery, in fact the carrier's actual liability, calculation of compensation and limitation of liability for delay in delivery are quite different if they are decided in accordance with different legal regimes.

7. Carrier's Liabilities for Deviation, Deck Cargo and Live Animals.

Except for liabilities for general loss of or damage to the goods and delay in delivery, in international sea carriage area most of legal instruments also impose the carrier with specific liabilities for deviation, deck carriage and transport of live animals. Stipulations deciding carrier's liabilities for these carriages are special and needed to be discussed separately because they are different with general liability system and burden of proof rules. Carrier's liabilities for deviation and deck carriage is not governed by fault based liability rule and exemptions and limitations to his general liabilities may not be available. In addition, different burden of proof rules are provided for deciding carrier's liability for carriage of live animals.

7.1 Carrier's Liability for Deviation.

Deviation was traditionally treated as a serious breach of carriage contract. It was reasonable for the cargo interests to expect that the cargo was carried by the agreed or custom route. By deviating a ship, the insured cargo interests might lose his benefits under the insurance contract,⁴²² and the cargo might be physically exposed to more risks of loss or damage.⁴²³ A carrier could not deviate from agreed voyage route unless for the purpose of avoiding perils of war, saving life or carrying out necessary repairs.⁴²⁴ Thus according to earlier common law, the carrier might lose the right for any benefits provided under the carriage contract in intentioned unreasonable deviation, and some judges even treated such

⁴²² Ping-fat (n 216) 108.

⁴²³ Margaret M. Lennon, 'Deviation Then and Now—When COGSA's per Package Limitation Is Lost' (2002) 76 (2) St. John's Law Review 437. See also Rasmussen (n 206) 134.

⁴²⁴ Ping-fat (n 216) 108.

deviation as ‘fundamental breach of contract’ (similar concept can be found in civil law as ‘resolution’)⁴²⁵ for which the carrier could not even claim freight or payment under the contract.⁴²⁶ The Hague Rules don’t explicitly provide provisions regarding consequences of unreasonable deviation but only exempt the carrier from ‘any deviation in saving or attempting to save life or property at sea or any reasonable deviation’.⁴²⁷ It implicitly provides that any intentional deviation not specifically allowed under the Hague Rules may be an infringement of the carrier’s mandatory obligations.⁴²⁸ The Hamburg Rules have no provisions specifically mention the word ‘deviation’ but generally provide that ‘the carrier is not liable, except for general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea’.⁴²⁹ One difference with the Hague/Hague-Visby Rules is that according to the provision of the Hamburg Rules, the deviation to save property is subject to a ‘reasonability’ test as ‘the measure to save property at sea’ is required to be reasonable. Neither the Hague/Hague-Visby Rules nor the Hamburg Rules clearly state how deviation is to be defined and give leeway for national variations.⁴³⁰

7.1.1 Nordic Maritime Codes

From the Nordic perspective of view, generally when deciding deviation there must be some kind of geographical departure from normal route, and a time factor may arise such as the ship having slowed down en route and in all cases there have to be an intention to deviation.⁴³¹ Deviation is usually connected with the carrier’s basic obligation to perform the carriage with ‘due dispatch’.⁴³² The word ‘deviation’ is not specifically mentioned in the NMCs.⁴³³ However, this is not to say that deviation has not been considered by the Nordic maritime law. This concept has existed in Nordic maritime legislations for a very long time. For instance, the Norwegian Maritime Code 1893 section 98 had already contained provision on deviation: ‘the ship must not deviate unless in an attempt to save human life or to save any ship or goods, or due to any other reasonable grounds.’⁴³⁴ But the new NMCs decide not to use the word ‘deviation’ because ‘the starting point for the

⁴²⁵ Tetley (n 217) 104.

⁴²⁶ Ping-fat (n 216) 108.

⁴²⁷ Hague/Hague-Visby Rules, Article IV (4).

⁴²⁸ Rasmussen (n 206) 134.

⁴²⁹ The Hamburg Rules, Article 5 (6).

⁴³⁰ Tetley (n 217) 755.

⁴³¹ Honka, ‘New Carriage of Goods by Sea - the Nordic Approach’ (n 21) 99.

⁴³² F§13:12.1, N§262.1

⁴³³ Falkanger, Bull and Brautaset (n 15) 315-317.

⁴³⁴ *ibid.*

concept of deviation, namely that a particular voyage route is contractual, is difficult to support given the condition in general carriage today. The main question is instead whether the carrier has chosen a reasonable voyage plan, and whether the cargo reaches its destination within a reasonable time.⁴³⁵ The old Code's section 98 has been regarded as appropriate to voyage charters but fitting poorly in modern general cargo carriage.⁴³⁶ Deviation concerning chosen routes is nowadays not a primary concern in liner traffic.⁴³⁷ Additionally, as the NMCs establish carrier's liability for delay in delivery and lots of deviation finally results in delay in delivery, some cases can be decided in accordance with provisions relating to delay in delivery.⁴³⁸ The real meaning of deviation liability, according to Nordic perspective, lies in the question of causal connection.⁴³⁹ During an unreasonable deviation any loss may make the carrier liable unless he proves that the loss is not resulted from the deviation or the loss would have occurred even if deviation has not taken place.⁴⁴⁰ The carrier's liability for unreasonable deviation does not have to be decided according to the general presumed fault liability rules.⁴⁴¹ Thus nautical error and fire exemptions are not applicable for the carrier who commits an unreasonable deviation, nor can the provisions about limitations of liability apply.⁴⁴² But the general one year time-bar is still available.⁴⁴³ In addition, the exemption contained in F§13:25(2) and N§275(2) which protects the carrier from liability for loss resulting from measures to rescue persons or reasonable measures to salvage ships or other property at sea can be applicable to deviation. Thus under the NMCs, in order to avoid liability, the carrier need to prove the deviation is reasonable except for deviation in order to save life at sea which is not subject to reasonability test.⁴⁴⁴ Although 'due dispatch' is mandatory obligation under the NMCs, the concept of reasonable deviation can be specified by carriage contract.⁴⁴⁵ But this freedom of contract and the validity of such specification are limited by sensible commercial need and with consideration the interests of the goods.⁴⁴⁶

⁴³⁵ *ibid.*

⁴³⁶ *ibid.*

⁴³⁷ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 102-105.

⁴³⁸ *ibid.*

⁴³⁹ *ibid.*

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid.*

⁴⁴² *ibid.*

⁴⁴³ *ibid.*

⁴⁴⁴ *ibid.*

⁴⁴⁵ *ibid.*

⁴⁴⁶ *ibid.*

7.1.2 Chinese Maritime Code

Direct route is explicitly established as one of the carrier's mandatory obligations under the CMC.⁴⁴⁷ The carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route.⁴⁴⁸ In CMC, deviation only means 'geographic deviation'.⁴⁴⁹ Deviation in saving or attempting to save life or property at sea or any other reasonable deviation is not regarded as breaching the carrier's obligation of direct route.⁴⁵⁰ Other deviations which are not allowed by the CMC may lead to the carrier's liability. However, whether the carrier who has committed an unreasonable deviation can still enjoy the exemptions and limitations of liability provided by the CMC is not clearly regulated by itself. According to Chinese Contract Law Article 94, there are five situations when a contract can be dissolved (except for the situation that there is agreed condition for dissolution and the contract is dissolved because the condition is satisfied⁴⁵¹): (1) the aim of the contract cannot be attained because of force majeure; (2) before the period of performance expires, either party clearly indicates by word or by act that it will not discharge the principal debts; (3) either party delays the discharge of the principal debts and still fails to discharge them within a reasonable period of time after being urged; (4) either party delays the discharge of debts or is engaged in other illegal activities and thus makes realization of the aim of the contract impossible; (5) any other circumstances as provided for by law.⁴⁵² Article 97 further provides that 'after the dissolution of a contract, for those clauses not yet performed, the performance shall cease. For those already performed, the party concerned may, in accordance with the situation of performance and the nature of the contract, demand their restoration to the original status or take other remedial measures, and have the right to claim compensation'. The general idea for this article is that once the contract has been dissolved, it is regarded as not valid from the very beginning except for clauses regarding settlement and liquidation, and everything should be turned back to the original situation before the performance of the contract.⁴⁵³ Thus whether deviation will lead to the loss of benefits enjoyed by the carrier under the contract depends on how serious the deviation is. If the deviation leads to 'make realization of the aim of the contract impossible', such unreasonable deviation can be regarded as 'illegal

⁴⁴⁷ CMC, Chapter IV, Article 49.

⁴⁴⁸ CMC, Chapter IV, Article 49 (1).

⁴⁴⁹ *ibid.*

⁴⁵⁰ CMC, Chapter IV, Article 49 (2).

⁴⁵¹ Chinese Contract Law, Article 93.

⁴⁵² Chinese Contract Law, Article 94.

⁴⁵³ Chinese Contract Law, Article 98.

activities' and the cargo interests can dissolve the contract according to Article 94(4) of the Chinese Contract Law. Once the contract is resolved, it is regarded as not existing from the very beginning and the carrier will lose benefits enjoyed both under the contract and the CMC. However, based on cases decided in Chinese Maritime Courts, the time-bar rule provided by the CMC is still available.⁴⁵⁴

7.1.3 The Rotterdam Rules

The Rotterdam Rules provide neither definition for 'deviation' nor specific consequences for un-allowed deviation. State party to the Rotterdam Rules may maintain or introduce national doctrines on deviation and may provide the legal consequences for deviation.⁴⁵⁵ Thus an unreasonable deviation can still be treated as a fundamental breach of the contract in accordance with certain national principles. However, the Rotterdam Rules allow the carrier retain right to invoke any defense or limitation provided by the Rotterdam Rules, unless he loses his right of limitations or defenses according to Article 61 which is about 'loss of the benefit of limitation of liability'.⁴⁵⁶ The reference to 'any defenses' also includes carrier's possibility to relieve his liability in the case of measures to save or attempt to save life at sea or in the case of reasonable measures to save or attempt to save property at sea.⁴⁵⁷

Furthermore, as some national laws consider deck carriage or delay as quasi-deviation, such kind of quasi-deviation also needs to be dealt with in relation to the Rotterdam Rules.⁴⁵⁸ This means that the carrier can still enjoy right to invoke any defense or limitation provided by the Rotterdam Rules in quasi-deviation. However, if a deck carriage is considered as quasi-deviation in national law but can be categorized to one type of deck carriage that is allowed by the Rotterdam Rules, national rules cannot be followed in this situation and the rules provided by the Rotterdam Rules concerning deck cargo shall apply.⁴⁵⁹

7.2 Carrier's Liability for Deck Cargo.

At common law, similar with deviation, a carrier who carried the cargo on deck without authorization was regarded as a fundamental breach of the carriage contract and might

⁴⁵⁴ Ping Guo, 'Analyzing and Discussions of the Implication and Legal Effect of Deviation' (1998) 24 (2) Journal of Dalian Maritime University 65.

⁴⁵⁵ The Rotterdam Rules, Article 24.

⁴⁵⁶ *ibid.*

⁴⁵⁷ The Rotterdam Rules, Article 17 (3) (l) (m).

⁴⁵⁸ Rasmussen (n 206) 135.

⁴⁵⁹ *ibid* 137.

accordingly lose any benefits provided under the carriage contract.⁴⁶⁰ In some countries, unauthorized deck carriage was regarded as quasi-deviation (non-geographic deviation) because the main object of the carriage contract was defeated or the contract had not been performed in its essential aspects, and such deck carriage would lead to similar consequences as unreasonable geographic deviation.⁴⁶¹ This old approach seemed reasonable as the cargo carried on deck was deemed to be exposed to more risks which were not expected by the cargo interests.⁴⁶² However, nowadays with the development of shipping industry, there are some operational economic reasons for carrying the cargo on deck.⁴⁶³ For example, the cargo may be too large to be stowed in the hold, or the cargo is dangerous in nature and needed to be carried on deck.⁴⁶⁴ Legal issues concerning authorized deck cargo are excluded by the Hague/Hague-Visby Rules by defining ‘goods’ to exclude ‘cargo which by the contract of carriage is stated as being carried on deck and is so carried’.⁴⁶⁵ Consequently, the carrier is free to rely on non-responsibility clauses in the bill of lading providing the deck carriage is stated on the bill of lading and the cargo is actually carried on deck.⁴⁶⁶ As for deck cargo which is not stated in the bill of lading, the Hague/Hague-Visby Rule are silent on this question and old common law principle continues to apply in this context.⁴⁶⁷ The Visby Protocol keeps this area unchanged while Hamburg Rules provide specific provision concerning deck cargo. Certain kinds of deck carriage are permitted by the Hamburg Rules.⁴⁶⁸ And where the deck carriage is allowed, the ordinary fault based liability rules will be applicable for deciding carrier’s liability.⁴⁶⁹ But if the deck carriage is in contrary with what have been recognized by the Hamburg Rules, the main rule on liability does not apply and the carrier may be liable merely because of such deck carriage.⁴⁷⁰

7.2.1 Nordic Maritime Codes

From Nordic perspective of view, the risks associated with deck cargo had been traditionally considered so great that placement of the cargo on deck without a contractual

⁴⁶⁰ Tetley (n 217) 656.

⁴⁶¹ Ping-fat (n 216) 127.

⁴⁶² *ibid.*

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*

⁴⁶⁵ The Hague/Hague-Visby Rules, Article I (c).

⁴⁶⁶ Ping-fat (n 216) 128.

⁴⁶⁷ *ibid.*

⁴⁶⁸ The Hamburg Rules, Article 9 (1).

⁴⁶⁹ The Hamburg Rules, Article 9 (3).

⁴⁷⁰ *ibid.*

basis was regarded as serious breach of contract.⁴⁷¹ Under certain situation carriage of deck cargo was even equated with unlawful deviation.⁴⁷² When implementing the Hague-Visby Rules into the old NMCs, although authorized deck cargo was excluded from the application of the Hague-Visby Rules, Nordic countries had provided an optional right for the carrier to carry the cargo on deck if this had been agreed on by both parties and the goods had been actually carried on deck.⁴⁷³ Under the situation where deck cargo was allowed, the carrier was liable for loss of or damage to the deck cargo in accordance with the Hague/Hague-Visby Rules and did not bear a stricter liability than that.⁴⁷⁴ After the Hamburg Rules entering into force, the NMCs 1994 follow the Hamburg Rules to provide specific provisions concerning deck cargo. If (a) there is an agreement to carry the cargo on deck and the agreement is inserted into the bill of lading or other similar transport documents; or (b) if the usage of the trade allows carriage on deck; or (c) if the deck cargo is required by statutory rules or regulations, the ordinary liability system and limits of liability will apply to decide the carrier's liability for the loss of or damage to the goods.⁴⁷⁵ When goods are carried on deck and this in in contrary to the situations allowed by the NMCs, the carrier will be liable for loss resulting solely from the fact that the goods are carried on deck and he will lose defenses provided by Section 275 to Section 278, including 'the loss was not due to his or her personal fault or neglect or anyone for whom he or she is responsible', 'losses resulting from measures to rescue persons or reasonable measures to salvage ships or other property at sea', 'only part of loss can be attributed to the carrier', 'nautical error exemption and fire exemption', 'fulfill due diligence to seaworthiness' and special rules concerning live animals and delay in delivery. But the carrier may still have the right to limit his liability except for that he has breached an express agreement that the goods cannot be carried on deck.⁴⁷⁶ Nevertheless, the time-bar defense is always available for him.⁴⁷⁷

There are two points that the NMCs have been influenced by the Hamburg Rules compared with the old NMCs.⁴⁷⁸ One is that the NMCs, like Hamburg Rules, require the loss is

⁴⁷¹ Falkanger, Bull and Brautaset (n 15) 300

⁴⁷² *ibid.*

⁴⁷³ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 58.

⁴⁷⁴ *ibid.*

⁴⁷⁵ F§13:34, N§284.

⁴⁷⁶ *ibid.*

⁴⁷⁷ Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 105.

⁴⁷⁸ *ibid.* 60.

caused solely by carriage on deck.⁴⁷⁹ If the carrier can prove that loss of or damage to the cargo would still happen even if he has carried them under deck, or there is another cause contributed to the loss or damage, he can still possibly avoid liability.⁴⁸⁰ Another is that there is only a possible but not an automatic loss of right to limitation.⁴⁸¹ In previous Nordic laws, the carrier would lose his right to limit liability in any situation that he carries the cargo on deck in contrary with allowed conditions.⁴⁸² But in the new NMCs, in situation that the deck cargo is not in contrary with express agreement, the carrier has a continuous right to limit his liability and the loss of this right is decided in accordance with relating article under the NMCs.⁴⁸³ But if the deck cargo is in contrary to an express agreement for carriage of goods under deck, the right of limitation is lost without discretion.⁴⁸⁴

7.2.2 Chinese Maritime Code

According to the CMC, the carrier can ship the goods on deck if: (1) he comes into an agreement with the shipper; or (2) complies with the custom of the trade; or (3) complies with the relevant laws or administrative rules and regulations.⁴⁸⁵ It is not required that the agreement of deck carriage need to be stated in transport document. The CMC distinguishes loss or damage caused by the special risks involved in the deck carriage from loss or damage caused by usual risks of sea carriage.⁴⁸⁶ When the goods have been shipped on deck in accordance with one of these three conditions, the carrier is not liable for the loss of or damage to the goods caused by the special risks involved in such carriage. Ordinary fault based liability rules will be applicable to decide the carrier's liability for loss of or damage to the goods caused by usual risks of sea carriage. If the carrier in breach of any of these conditions to carry the goods on deck, main fault based liability rules will not apply and he will be liable for the loss of or damage to the goods caused by the special risks involved in such carriage solely because of his violation of the CMC.⁴⁸⁷ However, in this situation, his liability for other loss or damage will be still decided based on general fault based liability rules. The carrier who has committed an unlawful deck carriage may retain his right of limitation to his liability and the CMC does not provide a provision

⁴⁷⁹ *ibid.*

⁴⁸⁰ *ibid.*

⁴⁸¹ *ibid.*

⁴⁸² *ibid.*

⁴⁸³ *ibid.*

⁴⁸⁴ *ibid.* 61.

⁴⁸⁵ CMC, Chapter IV, Article 53.

⁴⁸⁶ *ibid.*

⁴⁸⁷ *ibid.*

concerning when the carrier is deemed to lose the right of limitation. All cases will be decided based Article 59, according to which the right of limitation will be lost if it is proved that the loss or damage or delay resulted from an act or omission of the carrier or his servant or agents done with intention or recklessness.

7.2.3 The Rotterdam Rules

Article 25 of the Rotterdam Rules provides exceptions to the main rule that the goods should be carried under deck and these exception rights to carry goods on deck are always subject to the general obligation of the carrier to care for the goods.⁴⁸⁸ Furthermore, the Rotterdam Rules distinguish various situations in which goods can be carried on deck.⁴⁸⁹ Article 25 (1) (a) allows goods to be carried on deck if it is so required by law. For instance, certain safety regulations may require that dangerous goods are allowed to be carried only on deck. Article 25 (1) (b) recognizes that goods can be carried on deck if they are carried in or on containers or vehicles which are fit for deck carriage and when the decks are specially fitted to carry those containers or vehicles. Article 25 (1) (c) permits that goods can be carried on deck in accordance with the contract of carriage, or the customs, usages, or practices of the trade in question. For example, certain wood product and large pieces of equipment may be customarily carried on deck.⁴⁹⁰ The agreement of deck carriage need not to be express and stated in the transport document.⁴⁹¹ However, if a third party has acquired a negotiable transport document in good faith, the carrier cannot invoke an agreement regarding deck carriage unless the contract particulars state that the goods may be carried on deck.⁴⁹² Article 25 (1) (a) and (c) actually establish the similar situations when deck cargo are permitted as provided by the NMCs and CMC, while Article 25 (1) (b) recognizes one more situation that in practice goods are sometimes carried on deck for technical, operational, or commercial reasons.⁴⁹³ This additional situation is important as it makes the rule in line with industry practice with regard to carriage of containers on modern container ships and carriage of vehicles on modern roll-in and roll-off ships.⁴⁹⁴ The normal fault based liability rules of the Rotterdam Rules also

⁴⁸⁸ Rasmussen (n 206) 138.

⁴⁸⁹ Sturley, Fujita and Van der Ziel (n 9) 126.

⁴⁹⁰ Rasmussen (n 206) 141.

⁴⁹¹ The Rotterdam Rules, Article 25 (1) (c).

⁴⁹² The Rotterdam Rules, Article 25 (4).

⁴⁹³ Sturley, Fujita and Van der Ziel (n 9) 128.

⁴⁹⁴ Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (General Assembly of the AMD, Marrakesh 5-6 November 2009) 43

<http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf accessed 14 May 2014.

apply to the deck carriages that are permitted by Article 25(1) (a) (b) (c). Furthermore, if the deck carriage is performed in accordance with Article 25 (1) (a) and (c), the carrier is exempted from liability for loss of or damage to the goods or delay in delivery that is caused by the special risks involved in such carriage of goods on deck.⁴⁹⁵ Although under the additional situation provided by Article 25 (1) (b) the carrier is not entitled to this special exemption, he is not regarded as seriously breaching his mandatory obligation and his liability is decided in accordance with ordinary fault based rules and general exceptions and limitations of liability are available for him. If the goods are carried on deck in contrary with what have been provided by Article 25 (1) (a) (b) (c), the carrier will be liable for loss of or damage to the goods or delay in delivery that is exclusively cause by such deck carriage and is not entitled to the defenses provided in Article 17, which is about the carrier's liability and exemptions.⁴⁹⁶ But the carrier may still be protected by the limits of liability provision except he breaches an express agreement that the goods should be carried under deck or commits the deck carriage with intension or recklessness.⁴⁹⁷ Compared to the NMCs and CMC, the Rotterdam Rules tolerant more deck carriages. In addition, the Rotterdam Rules explicitly provide that the carrier is also liable for delay in delivery caused by not permitted deck carriage.⁴⁹⁸ As for burden of proof issue, it is for the carrier to show that the loss or damage was caused by the special risks of deck carriage of the goods in question.⁴⁹⁹

7.3 Carrier's Liability for Live Animals

Live animals are excluded by the Hague/Hague-Visby Rules but regulated by the Hamburg Rules.⁵⁰⁰ Pursuant to Article 5(5) of the Hamburg Rules, if the carrier proves that he has complied with any special instructions given to him by the shipper with respect to the live animals, he is not liable for loss, damage or delay resulting from any special risks inherent in their carriage. All of the NMC, CMC and Rotterdam Rules provide specific rules for carrier's special obligation and liability for carriage of live animals.

7.3.1 Nordic Maritime Codes

According to the NMCs, the carrier is not liable for loss or damage to live animals if: (a) he can prove that he has complied with any special instructions given to him; and (b) the

⁴⁹⁵ The Rotterdam Rules, Article 25 (2).

⁴⁹⁶ The Rotterdam Rules, Article 25 (3).

⁴⁹⁷ The Rotterdam Rules, Article 25 (5), and Article 59 (1).

⁴⁹⁸ The Rotterdam Rules, Article 25 (2) (3).

⁴⁹⁹ The Rotterdam Rules, Article 25.

⁵⁰⁰ Berlingieri, 'A comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 494) 44.

loss or damage is resulted from any special risks inherent in such carriage.⁵⁰¹ Although it looks like a rule adopted from the Hamburg Rules, it actually reflects the Hague Rules ideas that the carrier is not liable for loss of or damage to the goods due to their inherent vice or due to the act or omission of the shipper.⁵⁰² But the additional burden of proof rule is an influence of the Hamburg Rules.⁵⁰³ It is the carrier who needs to prove that he have complied with any special instructions given to him as regard to carrying the live animals and the loss or damage is caused by inherent risk of this carriage.⁵⁰⁴ Only a probable causation is enough for this purpose.⁵⁰⁵ Different with unreasonable deviation and unauthorized deck carriage, in carriage of live animal the carrier will not lose any defense or limitation of liability provided under the NMCs even if the loss or damage is resulted from his failure to follow any special instruction given to him.

7.3.2 Chinese Maritime Code

The concept of 'goods' expressly includes live animals under the CMC.⁵⁰⁶ Similar rules with the NMCs are provided that the carrier is not liable for the loss of or damage to the live animals arising or resulting from the special risks inherent in such carriage providing he can prove that (a) he has fulfilled the special requirements of the shipper with regard to the carriage of the live animals, and (b) under the circumstances of the sea carriage the loss or damage has occurred due to the special risks inherent.⁵⁰⁷ Additionally, if the carrier fails to follow the special instruction given to him, the general fault based liability rules including exemptions and limitations will apply to decide his liability and he is not exposed to stricter liability as for such carriage of live animals.⁵⁰⁸

7.3.3 The Rotterdam Rules

The Rotterdam Rules permit contracting parties to exclude or limit the obligations or the liabilities of the carrier if the goods are live animals.⁵⁰⁹ And this freedom is not subject to Article 79 which is about restriction to the parties' freedom of contract.⁵¹⁰ However, any such exclusion or limitation is not effective if the cargo claimant provides that the loss of or damage to the goods or delay in delivery resulted from an act or omission of the carrier

⁵⁰¹ F§13:27; N§277.

⁵⁰² Honka, 'New Carriage of Goods by Sea - the Nordic Approach' (n 21) 61.

⁵⁰³ *ibid.*

⁵⁰⁴ *ibid.*

⁵⁰⁵ *ibid.*

⁵⁰⁶ CMC, Chapter IV, Article 42 (5).

⁵⁰⁷ CMC, Chapter IV, Article 52.

⁵⁰⁸ *ibid.*

⁵⁰⁹ The Rotterdam Rules, Article 81.

⁵¹⁰ *ibid.*

or of a person for whom the carrier is responsible and done with intention or recklessness.⁵¹¹ In fact the Rotterdam Rules hold a different attitude towards carriage of live animals with the NMCs and CMC.⁵¹² The NMCs and CMC focus on regulating the liability of the carrier on this issue while the Rotterdam Rules actually grant the contracting parties more freedom of contract and give the carrier more possibilities to exclude or limit his obligations and liabilities.⁵¹³ Moreover, carrier's liability for delay in delivery is expressly included in the provision of the Rotterdam Rules regarding carriage of live animals.⁵¹⁴

7.4 Sub-Conclusion

Under the NMCs deviation is related to carrier's obligation of 'due dispatch' of goods. Deviation in order to rescue persons or reasonable deviation to salvage ships or other property at sea are permitted by the NMCs, otherwise the merely fact of an unreasonable deviation may lead to the carrier's liability and loss of his rights concerning exemptions and limitations to the liability. The CMC explicitly establishes carrier's obligation of direct route, but except for indirectly exempt carrier from liability for deviation in saving or attempting to save life or property at sea or any other reasonable deviation, it does not provide legal consequences for unreasonable deviation. Thus the carrier's rights to exceptions and limitations of liability provided by the CMC are decided by Chinese Contract Law, according to which the question that whether the deviation is 'so serious that making realization of the aim of the contract impossible' is crucial. The Rotterdam Rules provide neither definition nor legal consequences for deviation but leave them to national laws. Nevertheless, no matter how deviation is treated in national stipulations, the carrier can retain rights to invoke any defense or limitation provided by the Rotterdam Rules.

Both the NMCs and CMC follow the Hamburg Rules to permit several kinds of deck carriages. Two major differences between them are: firstly, comparing with the NMCs, when the deck carriage is in accordance with an agreement between the contracting parties, the CMC does not require such agreement to be stated in the transport document. Secondly, the NMCs provide that the carrier will be deemed to lose his right of limitation

⁵¹¹ *ibid.*

⁵¹² Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 494) 44.

⁵¹³ *ibid.*

⁵¹⁴ The Rotterdam Rules, Article 81 (a).

to his liability if he has committed a deck carriage in contrary with an agreement of not carrying the goods on deck, while no similar rule is provided by the CMC and the carrier's right of limitation is decided in accordance with general rule. The Rotterdam Rules recognize more types of deck carriages, especially adding the situation that in practice goods are sometimes carried on deck for technical, operational, or commercial reasons. Although carrier cannot avoid liability for loss of or damage to the goods or delay in delivery resulting from the specific risks of such carriage in this additional situation, compared to the NMCs and CMC, the carrier is no longer treated as behaving in contrary to law thus can keep entitled with general exemptions and limitations to his liabilities.

Carrier's liability for carriage of live animals is different with that for deviation and deck carriage, as under both the NMCs and CMC carrier's liability for carriage of live animals is decided based on general fault liability system. However, burden of proof rule is different. Both the NMCs and CMC require the carrier to prove he has followed special instructions given to him and the loss of or damage to the goods is resulted from the special risks contained in such carriage. The Rotterdam Rules give more freedom to the contracting parties regarding carriage of live animals. The parties can even agree to exclude or limit carrier's obligations and liabilities notwithstanding the restrictions to freedom of contract.

Furthermore, different with the NMCs and CMC, carrier's liability for delay in delivery is explicitly imposed by the Rotterdam Rules for deviation, deck carriage and transport of live animals. Based on the discussion of this Chapter, it can be said that the Rotterdam Rules are actually more benefit for the carrier on these aspects. Carrier is more protected for deviation and more freedom is entitled for deck carriage and transport of live animals.

8. Conclusion and Future Perspective of the Rotterdam Rules

The Rotterdam Rules introduce lots of alternatives compared with the NMCs and CMC with regard to carrier's mandatory obligations and liabilities. For instance, the carrier's period of liability has been extended, the time for the obligation of seaworthiness has been prolonged, and the nautical error exemption has been deleted. These changes, although are designed to meet the change of the industry practice, lead to the countries' hesitation in joining this new international Convention. Large shipping countries may think that the carrier's burden has been significantly increased by the Rotterdam Rules while cargo interests countries may not prefer to the complicated burden of proof system and the

omission of the ‘Vallescura Rule’⁵¹⁵ which will increase the shipper’s burden in claiming compensation. The prospective future of the Rotterdam Rules, in which modernized and harmonized rules applying in international carriage of goods with a sea leg are established, and the predictability and efficiency of international commercial transport operations are improved, do not prevent fears that the timid progress towards an increase of the carrier’s liability and limits of liability might lead to a fiasco similar to the result of the Hamburg Rules.⁵¹⁶ And if the Rotterdam Rules proved to be unsuccessful, the incorporation of a new regime that has no real chance to contribute to the uniformity of law will most probably generate more confusion in international commerce.⁵¹⁷ Furthermore, as any change of law may affect the development of the shipping industry and even the economic interests of the country, it takes time for each country to carefully assess every alternative brought by the Rotterdam Rules before deciding whether to sign and ratify it. Moreover, the acceptance process becomes more complicated due to political considerations and the varying power of each country in the field of shipping industry. Thus nowadays a unified attitude towards the Rotterdam Rules hasn’t been reached yet.

8.1 Nordic Point of View

NMCs basically follow the Hague-Visby Rules as Nordic countries are Contracting States to this international Convention. This also means that the Rotterdam Rules bring lots of alternatives to current NMCs. Although Nordic countries historically cooperated closely not only in international Convention negotiating process, but also in later transformation of Conventions into national legislations, owing to the differences in the development of their maritime industries, they are now holding different views to the Rotterdam Rules.⁵¹⁸ On the one side, Denmark, as one of the largest container operation country in the world, seems to be the most receptive to the Rotterdam Rules among Nordic countries.⁵¹⁹ The Danish Maritime Law Committee has prepared a report and draw up a draft bill concerning the amendment of the Danish Merchant Shipping Act regarding the Rotterdam Rules.⁵²⁰ And the purpose of these actions is, through the future ratification of the Rotterdam Rules

⁵¹⁵ *Schnell & Co. v S. S. Vallescura* (n 315).

⁵¹⁶ Lorena Sales Pallarés, ‘A Brief Approach to the Rotterdam Rules: Between Hope and Disappointment’ (2011) 42 (3) *Journal of Maritime Law & Commerce* 453.

⁵¹⁷ *ibid.*

⁵¹⁸ Gorton, ‘Regional Harmonization of Maritime Law in Scandinavia’ (n 13).

⁵¹⁹ *ibid.*

⁵²⁰ Mette Christensen, ‘Danish Maritime Law Committee’ (Danish Maritime Authority) <<http://www.dma.dk/ABOUTUS/Sider/DanishMaritimeLawComm.aspx>> accessed 14 May 2014.

in Denmark, to help bring about the enforcement of this new Convention.⁵²¹ Norway, which also remains a large ship owning country, although not as active as Denmark, has gradually accepted this new Convention.⁵²² The Norwegian Maritime Law Commission has recommended that, when USA and large US States have ratified this new Convention, Norway should ratify the Rotterdam Rules in order to secure and promote a uniform legal regulation of carriage of goods internationally.⁵²³ On the other side, Finland and Sweden have been more cautious with the Rotterdam Rules because they are presently rather insignificant merchant fleets' countries.⁵²⁴ Thus nowadays when talking about Nordic countries' attitude towards the Rotterdam Rules, they may not uphold a common approach.⁵²⁵ However, the Nordic countries are still following their tradition of cooperating in legislation area, such as participating in international Convention work and collaborating in national legislations among various state bodies and among private organizations.⁵²⁶ In addition, the cooperation is more extensive in academic research and education area.⁵²⁷ Some people are still optimistic about the future cooperation between Nordic countries in transforming the Rotterdam Rules into national legislations if this Convention will be successfully accepted by international community.⁵²⁸

8.2 Chinese Point of View

The more onerous liability imposed by the Rotterdam Rules on the carrier will definitely lead challenges to Chinese shipping industry. As a large shipping country and trading country, China has the largest port throughput among the world during the last five years.⁵²⁹ China has many big shipping companies such as COSCO, China Shipping, Sinotrans, etc. However, there are also a huge amount of medium and small shipping companies in China. The vessels owned by these medium or small shipping companies are not adequately equipped in terms of technical developments.⁵³⁰ Additionally, the

⁵²¹ Gorton, 'Regional Harmonization of Maritime Law in Scandinavia' (n 13).

⁵²² *ibid.*

⁵²³ Justis-OG Beredskapsdepartement, 'Gjennomføring av Rotterdamreglene i sjøloven' (Regjeringern.no 2012) <<http://www.regjeringen.no/nb/dep/jd/dok/nouer/2012/nou-2012-10/2/4.html?id=678430>> accessed 14 May 2014.

⁵²⁴ Gorton, 'Regional Harmonization of Maritime Law in Scandinavia' (n 13).

⁵²⁵ *ibid.*

⁵²⁶ *ibid.*

⁵²⁷ *ibid.*

⁵²⁸ *ibid.*

⁵²⁹ Zhenglaiang, Hu, 'Three Macro Issues Concerning the Rotterdam Rules' (Institute of Maritime Law, Shanghai Maritime University, 06 September 2010)

<<http://smuiml.shmtu.edu.cn/dynamic.php?act=show&id=166>> accessed 14 May 2014.

⁵³⁰ Yin Yang, 'The Abolition of the Nautical Fault Exemption: To Be or Not To Be' (Master thesis, Lund University 2011)

performance of Chinese crews regarding technical know-how, and standard of seamanship with respect to maritime safety and protection of marine environment, are all in need of vastly improvement.⁵³¹ The extended period for carrier's obligation of seaworthiness and deletion of nautical error exemption are major disadvantages for these Chinese shipping companies. If China joins the Rotterdam Rules, it may improve the competitive abilities of some big shipping companies as they are professional and well equipped in ship condition and personnel, but the benefits of these medium and small shipping companies will be sacrificed.⁵³² Moreover, the complicated burden of proof rules established by the Rotterdam Rules may lead to the increase of costs in maritime litigations and arbitrations which cannot be afforded by these medium and small shipping companies. The possible result that large amount of medium and small shipping companies go bankrupt may in turn lead to the increase of the unemployment rate. This is neither a future anticipated by the shipping industry nor a result expected by the Chinese government.

Nevertheless, in contrary with current CMC which is a machinery adoption of existing international legal instruments, China has actively participated in the negotiation progress of the Rotterdam Rules.⁵³³ This means that on the one hand, the requirements of Chinese shipping industry have been heard and considered during the drafting progress, and on the other hand, the legislative background and rationale behind these stipulations introduced by the Rotterdam Rules have been more understood by China. In addition, as can be seen from the discussion of this thesis, the CMC has some obvious defects and been regarded as out of date for the modern shipping industry. The acceptance of the Rotterdam Rules may be considered as an opportunity for China to update its maritime code and to make it in line with international legislations. As for the shipping industry, in order to meet the increasingly fierce competitions, both the technical condition of ships and education level of ship crews are needed to be improved even without considering the Rotterdam Rules.⁵³⁴ Furthermore, according to Article 269 of the CMC, the parties to a carriage contract may choose the law applicable to such contract. And if the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.

<<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1969992&fileId=1975378>> accessed 13 May 2014.

⁵³¹ *ibid.*

⁵³² Hu, 'Three Macro Issues Concerning the Rotterdam Rules' (n 529).

⁵³³ Yuzhuo Si and Jinlei Zhang, 'An Analysis and Assessment on the Rotterdam Rules in China's Marine Industry' (Dalian Maritime University, 26 August 2012)

<<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Prof.%20Si%20Yuzhuo%20Qand%20Dr.%20Zhang%20Jinlei.pdf>> accessed 14 May 2014.

⁵³⁴ *ibid.*

Thus even if China refuse joining the new Convention, the Rotterdam Rules may be passively applicable in China if the contracting parties have made such choice, or any country who has close trade relationship with China, such as US, has joined the Rotterdam Rules and according to the carriage contract the law of this country should apply. Thus generally speaking, although worrying about the possible disadvantages that will be brought by the Rotterdam Rules, most of people believe that China will finally accede to this new Convention in a proper time.⁵³⁵

8.3 Future Perspective of the Rotterdam Rules

It can be concluded that many differences exist between the NMCs, CMC and the Rotterdam Rules with respect to the carrier's mandatory obligations and liabilities. On the one hand, in a contract for international carriage of goods by sea between Nordic countries and China, the carrier may be exposed to different obligations and liabilities according to different applicable maritime codes. These conflicts and differences reveal the need of further harmonization of law in the field of international sea carriage. On the other hand, as carrier's mandatory obligations and liabilities are significant for the development of shipping industry, export and import industry and even for banks financing such transactions,⁵³⁶ when considering whether to join the Rotterdam Rules, prudent considerations are necessary for both the Nordic countries and China.

It seems that at this moment it is not easy to predict whether all of the Nordic countries and China will eventually accept the Rotterdam Rules. However, it is obvious that the diversities existing between the NMCs and CMC are disadvantages for the future development of international trade and transportation of goods between Nordic countries and China. Additionally, with the development of shipping industry, the defects and weaknesses of the NMCs and CMC will become more and more obvious and indeed in need of updating and modification. Although not perfect and never satisfy the interest of every state, the Rotterdam Rules is the result of ten years hard work of international society.⁵³⁷ Delegations from both Nordic countries and China have actively participated in the drafting progress and devote their contributions to the birth of this new Convention. If it is proved to be not successful, as the lack of uniformity largely due to the fact that the legal regime governing the carriage of goods by sea is connected to a variety of stockholders' interests which are not easy to reconcile, it may take much longer time for

⁵³⁵ *ibid.*

⁵³⁶ Sekolec (n 16) xxii.

⁵³⁷ Si and Zhang (n 533).

the international community to produce another legislation in this field.⁵³⁸ The diversities between the Nordic maritime law and Chinese maritime law will even increase as different solutions may be adopted to deal with new emerging problems from the shipping industry. Thus as for my opinion, Nordic countries and China, after deliberately considerations, may both eventually take positive attitudes towards the Rotterdam Rules. Especially considering current situation that the Denmark and Norway have already signed this Convention and the European Parliament has been actively encouraging its Member States to join it.⁵³⁹ And the positive action of the US may affect the final decision of China because of their close trade relationship.⁵⁴⁰ In turn, as major trade and shipping countries among the world, if Nordic countries and China have accepted the Rotterdam Rules, other countries may be more confident for the future of this Convention. If the Rotterdam Rules can eventually manage to enter into force and achieve their initial goals, it must be a large step forward in the development of international multimodal transport of goods, and also a big achievement of international transport law.

⁵³⁸ Sekolec (n 16) xxi.

⁵³⁹ UNICITRAL (n 149). See also Eftestøl-Wilhelmsson (n 8).

⁵⁴⁰ Si and Zhang (n 533).

Bibliography

Andersson T, 'The Contract of Carriage by Sea in Liner Trade-the Swedish and English law' (Master thesis, Lund University 1999)

<<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=1555805&fileOid=1563778>> accessed 14 May 2014.

Berlingieri F, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (General Assembly of the AMD, Marrakesh 5-6 November 2009) 43

<http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf> accessed 14 May 2014.

--'The History of the Rotterdam Rules' in Guner-Özbek M D (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the 'Rotterdam Rules'* (Berlin Heidelberg: Springer-Verlag 2011).

Braekhus S, 'The Hague Rules Catalogue' in Grönfors K (ed.), *Six Lectures on the Hague Rules* (Gothenburg: Gothenburg School of Economics and Business Administration Publication 1967).

Delebecque P, 'Obligation of the Carrier' in Von Ziegler A, Schelin J and Zunarelli S (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly By Sea* (Netherlands: Wolters Kluwer 2010).

Eftestøl-Wilhelmsson E, 'The Rotterdam Rules in A European Multimodal Context' (2010) 16 *Journal of International Maritime Law* 274.

Falkanger T, Bull H J and Brautaset L, *Scandinavian Maritime Law: the Norwegian Perspective* (3rd edn, Oslo: Universitetsforlaget).

Girvin S, *Carriage of Goods by Sea* (New York: Oxford University Press Inc. 2007).

Gorton L, 'Nordic Law in Early 21st Century – Maritime Law' (2010) *Stockholm Institute for Scandinavian Law 1957-2010*, 104.

--'Regional Harmonization of Maritime Law in Scandinavia' in Basedow L, Magnus U and Wolfrum R (eds), *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Berlin Heidelberg: Springer-Verlag 2012) 29.

Guner-Özbek M D, 'Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Convention' in Guner-Özbek M D (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Berlin Heidelberg: Springer-Verlag 2011).

Guo P, 'Analyzing and Discussions of the Implication and Legal Effect of Deviation' (1998) 24 (2) *Journal of Dalian Maritime University* 65.

Honka H, 'Introduction' in Honka H (ed.), *New Carriage of Goods by Sea: the Nordic Approach Including Comparisons with Some Other Jurisdictions* (Åbo: Åbo Akademi University 1997).

--'New Carriage of Goods by Sea - the Nordic Approach' in Honka H (ed.), *New Carriage of Goods by Sea: the Nordic Approach Including Comparisons with Some Other Jurisdictions* (Åbo: Åbo Akademi University 1997).

--'Matters Not Governed by This Convention' in Von Ziegler A, Schelin J and Zunarelli S (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010).

Hu Z, 'Three Macro Issues Concerning the Rotterdam Rules' (Institute of Maritime Law, Shanghai Maritime University, 06 September 2010)

<<http://smuiml.shmtu.edu.cn/dynamic.php?act=show&id=166>> accessed 14 May 2014.

--'Contract for the International Carriage of Goods by Sea' in Yuzhuo Si (ed.), *Maritime Law* (3rd edn, Beijing: Law Press China 2012).

Jannelle D G and Beuthe M, 'Globalization and Research Issues in Transportation' (1997) 5 (3) *Journal of Transport Geography* 199.

Justis-OG Beredskapsdepartment, 'Gjennomføring av Rotterdamreglene i sjøloven' (Regjeringern.no 2012) <<http://www.regjeringen.no/nb/dep/jd/dok/nouer/2012/nou-2012-10/2/4.html?id=678430>> accessed 14 May 2014.

Lennon M M, 'Deviation Then and Now—When COGSA's per Package Limitation Is Lost' (2002) 76 (2) St. John's Law Review 437.

Li F and Zhang R, 'Chamber of Commerce's Commercial Legislation of the Qing Dynasty and the Qing Imperial Business Law' (Master thesis, Zhongnan University of Economics and Law 2010) <<http://fxylib.znufe.edu.cn/contents/155/590.html>> accessed 13 May 2014.

Mr. P. Neels, LL.M, 'The Rotterdam Rules and Modern Transport Practices: A Successful Marriage?' (2011) 1 Tijdschrift Vervoer & Recht 1
<<http://www.rotterdamrules.com/sites/default/files/pdf/The%20Rotterdam%20Rules%20and%20modern%20transport%20practices%20-%20a%20successful%20marriage.pdf>>
accessed 13 May 2014.

Mette Christensen, 'Danish Maritime Law Committee' (Danish Maritime Authority)
<<http://www.dma.dk/ABOUTUS/Sider/DanishMaritimeLawComm.aspx>> accessed 14 May 2014.

Pallarés L S, 'A Brief Approach to the Rotterdam Rules: Between Hope and Disappointment' (2011) 42 (3) Journal of Maritime Law & Commerce 453.

Philip A, 'Scope of Application, Choice of Law and Jurisdiction in the New Nordic Law of Carriage of Goods by Sea' in Melander G (ed.), *Modern Issues in European Law: Nordic Perspectives. Essays in Honour of Lennart Pålsson* (Göteborg: Kluwer Law International 1997).

Ping-fat S, *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules* (Hague: Kluwer Law International 2002).

Rasmussen U L, 'Additional Provisions Relating to Particular Stages of Carriage' in Von Ziegler, Schelin J and Zunarelli S (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010).

Riska O, 'Shipowner's Liability for Damage Caused by the Negligence of An Independent Contractor Performing Work for the Ship' in Grönfors K (ed.), *Six Lectures on the Hague Rules* (Gothenburg: Gothenburg School of Economics and Business Administration Publication 1967).

Sekolec J, 'Foreword' in Von Ziegler A, Schelin J and Zunarelli S (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010).

Shan H, Zhao Y and Ge Y, 'Brief Analysis on Period of Liability of Carrier-Discussing Amendments of Article 46 of CMC' (2002) 13 (1) *Annual of China Maritime Law*.

Shen J and Chen J, 'On the Paramount Obligation of the Contract for the International Carriage of Goods by Sea' (2011) 22 (2) *Annual of China Maritime Law* 85.

Si Y, 'New Structure of the Basis of Liability for the Carrier-An Analysis on the Provisions under the Rotterdam Rules in Respect of Basis of Liability for the Carrier' (2009) 20 (3) *Annual of China Maritime Law* 1.

-- *Maritime Law Monograph* (2nd edn, Beijing: China Renmin University Press 2010).

--and Zhang J, 'An Analysis and Assessment on the Rotterdam Rules in China's Marine Industry' (Dalian Maritime University, 26 August 2012)

<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Prof.%20Si%20Yuzhuo%20and%20Dr.%20Zhang%20Jinlei.pdf> accessed 14 May 2014.

--and Zhu Z, 'On the Legal Status of Port Operators under Chinese Law' (2005) 2 (7) *US-China Law Review* 1.

--and Henry H H, 'The New Structure of the Basis of Liability for the Carrier' (2009) 14 (1/2) *Uniform Law Review* 931.

Stevens F, 'Apportionment of Damages under the Rotterdam Rules' (2011) 17 *Journal of International Maritime Law* 343.

Sturley M F, 'General Principles of Transport Law and the Rotterdam Rules' in Guner-Özbek M D (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the 'Rotterdam Rules'* (Berlin Heidelberg: Springer-Verlag 2011) .

--and Fujita T and Van der Ziel G, *The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell 2010).

Tetley W, *Marine Cargo Claims* (3rd edn, Montreal, QC Canada: International Shipping Publications 1988).

Tsimplis M, 'Liability of the Carrier for Loss, Damage or Delay' in Lorenzon B D and Tsimplis S S (eds.), *The Rotterdam Rules: A Practical Annotation* (London: Informa 2009).

United Nations Commission on International Trade Law (UNCITRAL), 'Status: United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea (New York 2008)' (UNCITRAL.org 2014)

<http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html> accessed 14 May 2014.

--'Working Group III, 2002-2008: Transport Law' (UNCITRAL.org 2014) 9th session Report para.117

<http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html> accessed 14 May 2014.

United Nations Conference on Trade and Development (UNCTAD), 'Commentary by the UNCTAD Secretariat Draft Instrument on Transport Law' (UNCTAD.org 2014) Draft Instrument WP.39 Article 16(1), UNCTAD/SDTE/TLB/4, 13 March 2002. <

<http://unctad.org/en/Docs/posdtetlbd4.en.pdf>> accessed 14 May 2014.

--'UNCTAD Statistics' (UNCTAD.org 2014) <<http://unctad.org/en/Pages/Statistics.aspx>> accessed 14 May 2014.

Wang X, 'On the Relationship Between the Carrier's Obligations and Immunities in CMC' (1993) 4 China Annual Maritime Law.

Wikipedia, 'Ming Dynasty' (2014) <http://en.wikipedia.org/wiki/Ming_dynasty> accessed 13 May 2014.

--'Qing Dynasty' (2014) <http://en.wikipedia.org/wiki/Qing_dynasty> accessed 13 May 2014.

--'Tang Dynasty' (2014) <http://en.wikipedia.org/wiki/Tang_dynasty> accessed 13 May 2014.

Von Ziegler A, 'Liability of the Carrier for Loss, Damage or Delay' in Von Ziegler A, Schelin J and Zunarelli S (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contract for the International Carriage of goods Wholly or Partly by Sea* (Netherlands: Wolters Kluwer 2010).

Wu H, 'China and Maritime Law' (1988) 5 Maritime Law Association of Australia and New Zealand 19.

Xie Z, 'The Carrier's Duty of Seaworthiness in China's Maritime Law' (2003) 6 Law Journal 87.

Xu X, 'Discussion the Concept of Delay in Delivery' (2002) 25 (5) World Shipping 32.

Yang Y, 'The Abolition of the Nautical Fault Exemption: To Be or Not To Be' (Master thesis, Lund University 2011)

<<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1969992&fileId=1975378>> accessed 13 May 2014.

Zhang N, *The Theory and Practice of Maritime Law* (Cai C ed, Beijing: China Legal Publishing House 2013).

Zhang W, 'On Deficiencies of the Standards of Delay in Delivery Stipulated in the Chinese Maritime Code' (2008) 19 (1) Annual of China Maritime Law.

Zhao H, 'Consideration on Modifying the Rules Concerning Delay in Delivery' (2002) 2 People's Justice 54.

Zhu H, 'Legislation Evolution of China Maritime Law in 100 Years' (2010) 18 (4) Journal of Guangzhou Maritime College.

Zhu Z, 'Evaluation on the Rotterdam Rules' (2009) 20 (1-2) Annual of China Maritime Law 9.

Table of Cases

Riverstone Meat Co. Pty. Ltd. v Lancashire Shipping Co. Ltd. (Muncaster Castle) [1961] Lloyd's Rep.57.

Schnell & Co. v S. S. Vallescura (1934) 293, U.S. 296.

Legislation

Chinese Legislation

Contract Law of the People's Republic of China 1999

--Article 93, 94, 98, 113, 290.

Economic Contract Law 1981

General Principles of the Civil Law of the People's Republic of China 1986

Maritime Code of the People's Republic of China 1993

--Chapter I Article 2;

Chapter IV Section 1 Article 41, 42, 43, 44, 45;

Section 2 Article 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59;

Section 3 Article 68;

Section 7 Article 92, 94;

Section 8 Article 102, 103, 104, 105, 106.

Marine Environment Protection Law 1982

Regulations for the Carriage of Goods by Water 1972

Rules Regarding Transport of Goods by Domestic Waterway 2001

Waterway Transport Regulations of the People's Republic of China 2014

U.S. Legislation

The Harter Act 1893

Nordic Countries' Legislation

Danish Merchant Shipping Act (No. 170 of 1994 with later amendments up to Act No. 856 of 2010)

--D§280.2.

Finnish Maritime Code (No. 674 of 1994 with later amendments up to Act No. 325 of 2004)

--F§13:1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 18, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 41.

Norwegian Maritime Code (No. 39 of 1994 with later amendments up to Act No. 10 of 2010)

--N§251, 252, 253, 254, 255, 256, 257, 258, 259, 261, 262, 263, 264, 268, 274, 275, 276, 277, 278, 279, 280, 281, 283, 284, 291.

Swedish Maritime Code (MC 1994:1009 with later amendments up to Act 2006:74)

International Convention

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 15 August 1924)

--Article I, II, III, IV, IX, X.

The Hague-Visby Rules-The Hague Rules as Amended by the Brussels Protocol 1968

--Article I, II, III, IV, IX, X.

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 30 March 1978)

--Part I Article 1, 2;

Part II Article 4, 5, 6, 8, 9;

Part III Article 13.

United Nations Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea (23, September 2009)

--Chapter 1 Article 1, 3, 4;

Chapter 2 Article 5, 6, 7;

Chapter 4 Article 11, 12, 13, 14, 15, 16;

Chapter 5 Article 17, 18, 19, 20, 21, 22, 23;

Chapter 6 Article 24, 25, 26;

Chapter 7 Article 32;

Chapter 12 Article 59, 60, 61;

Chapter 17 Article 82.

United Nations Convention on International Multimodal Transport of Goods 1980
(Geneva, 24 May 1980)

United Nations Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)

--Article 2.