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A Study on the Actual Carrier in Carriage of Goods by Sea in Maritime Code of China

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중국해상법상의 해상물건운송 중 실제운송인에 관한 연구

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Abstract

Along with the development of marine transport, there emerged the concept of actual carrier. Actual carrier is a special subject in marine cargo transportation. The provisions regarding actual carriers have first been established in the Hamburg Rules and are introduced into the Maritime Code of PRC(hereinafter called the Code). But in China, because of different opinions in the legal interpretation of actual carriers, there is much divergence in practice. The purpose of this paper is to make a study on the definition of the actual carrier, the identity of the actual carrier and the liabilities of the actual carrier in the Code.

요 약

실제운송인은 해상물건운송 법률관계의 특수한 주체이다. 함부르크 규칙은 실제운송인 제도를 설립하였다. 중국해상법은 함부르크 규칙을 참조하고 실제운송인 제도를 도입하여 제4장에서 실제운송인에 관하여 규정하고 있다. 그러나 실제운송인에 대한 법리 해설과 사법실무에는 문제가 많이 생긴다. 본 논문은 중국해상법상 실제운송인의 의의, 실제운송인의 인정, 실제운송인의 책임에 관하여 연구하고자 한다.

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Ⅰ. Introduction

In modern shipping, the word "carrier" has become a "generic" term because it can mean a "shipowner", a "charterer", or a "demise charterer".[1] All these have different legal meanings and rights and responsibilities in maritime law. Hence, there is a cogent need for their proper identity.

Moreover, in the transshipment of cargo, there are invariably two carriers involved: the "original carrier" and the "transhipping carrier". These two should be properly defined to avoid conflict of rights and responsibilities, which these carriers have in transshipment cases.

However, neither the 1924 Hague Rules nor the 1968 Hague-Visby Rules has any specific provision to solve this problem. They failed to give due regard to the identity of a "carrier" and an "actual carrier". Neither did it define the rights and liabilities of these carriers in relation to the shipper of goods. These ambiguities and uncertainties imply that one major problem with both Hague Rules is that they failed to identify who the carrier is: Is he the shipowner? The charterer? The demise charterer? In a carriage of transshipment, is a carrier to be construed altogether as both the "original carrier" and "actual carrier"? The uncertain identity of the carrier under the Hague Rules leaves the cargo owner unable to determine who is the proper party from whom to seek redress.

The difficulty was taken up by the drafters of the Hamburg Rules. Article 1(2), art. 10 and art. 15(1)(c) of the Hamburg Rules together clear up a problem that has caused confusion and contestation in the past. In effect, these articles declare that the contracting carrier is responsible for the acts of the actual carrier. The claimant therefore does not now need to unravel the complicated contractual relations between the charterers and vessel owner before taking suit.

The Code modelled itself on the definition of "actual carrier" in the Hamburg Rules. and introduced the definition of actual carrier into Chapter 4 of the Code. And also the Code makes some provisions on the liabilities of the actual carrier. However, the different understanding of the provisions has led to some problems in practice.

The purpose of this study is to introduce and analyse, on the basis of the Code, the definition of the acutal carrier,and the requirements for constituting the actual carrier, the identity of the actual carrier under different circumstances and the liabilities of the actual carrier.

Ⅱ. Definition of the Actual Carrier

1. Definition of the Actual Carrier

The Hague Rules do not give any specific definition to the actual carrier. The carrier is merely defined at art. 1(a) as including "the owner or the charterer who enters into a contract of carriage with a shipper." In consequence, the cargo claimant usually has difficulty in deciding against whom he should take suit. The term used in the Hague Rules in relation to the carrier and the actual carrier is "the carrier and the ship"[2], which is applicable to the action *in rem* of the Anglo-American law system, but not applicable to the continental law system.

1) Albert Rodriguez Palacios, A Comparative Analysis of the Hague/Hague-Visby Rules and the Hamburg Rules, Beijing Conference on the Law of the World, 1990, p.56.
2) The Hague Rules Article Ⅲ 6 & 8; Article Ⅳ 1, 2, 3 & 5; Article 7.

Along with the development of modern marine transport, there emerged NVOCC(Non-Vessel Operating Common Carrier). The Hamburg Rules satisfied the need of the development of marine transport and established the definition of "actual carrier" on reference of the provision in Article 1(3) of the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara Convention 18 September 1961).[3] Article 1 (2) of the Hamburg Rules defines "actual carrier" as "any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".

The Code imitated the Hamburg Rules and introduced the definition of "actual carrier" to Article 42 (2), which states that "'Actual carrier' means the person to whom the performance of carriage of goods, or part thereof, has been entrusted by the carrier, and included any other person to whom such performance has been entrusted under a sub-contract".

2. Conditions for Constituting the Actual Carrier

We will see from the definition in the Code that there are two conditions for constituting the actual carrier: the actual carrier shall accept the entrustment or sub entrustment from the carrier; and the actual carrier shall actually perform the carriage of the goods. However, relating to these two conditions, there exist different opinions about their interpretation.

1) the actual carrier shall accept the entrustment or sub entrustment from the carrier

As to "accept the entrustment or sub-entrustment from the carrier", generally thinking, it is not restricted only to the contract of agency by entrustment, but also includes the case where such performance has been entrusted to other persons.[4] But there is also strict interpretation to the entrustment and sub-entrustment in the definition of the actual carrier which states that only the person who concludes the agency contract with the carrier is the actual carrier.[5] The contract concluded between the charterer and the shipowner is not an agency contract but a charterparty. The contract concluded between the freight forwarder and the shipowner is not an agency contract, either, but a contract of carriage, in such case there exists no actual carrier.

2) the actual carrier shall actually perform the carriage of the goods

As to "actually performs the carriage of the goods", there are two kinds of opinions. One of them is that it means the actual carrier shall perform the carriage of goods by himself or entrust any other person to perform it instead.[6] The other kind of opinion is that it can only mean the former case.[7] According to the latter opinion, where the carrier entrusts another person with the carriage of the goods but the entrustee, again, entrusts the carriage of the goods with a third person under a sub-contract, the entrustee only accepts the entrustment from the carrier but he

3) 司玉琢・李志文, "對我國《海商法》下實際承運人責任的理解", 載《海商法研究》2000年第1輯, 法律出版社, p.21.
4) 交通部政策法規司編, 《〈海商法〉學習必讀》, 人民交通出版社, 1993, p.63.
5) 司玉琢・李志文, *op. cit.*, pp.22-23.
6) 韓立新, "國際海上貨運中實際承運人及其責任認定", 載《中國海商法年刊》第8卷, 大連海事大學出版社, pp.103-104.
7) 翁子明, "實際承運人和實際托運人的法定性", 載《中國海事審判年刊》1999年卷, 人民交通出版社, 1999, p.23.

does not perform the carriage of the goods by himself. In this case he does not satisfy the conditions for constituting the actual carrier stipulated in Article 42 (2) of the Code and thus he is not the actual carrier.

The Hamburg Rules defines "actual carrier" as "any person to whom the performance of the carriage of the goods, or of part of the carriage has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".[8] It can be obviously seen that this definition puts its stress on the carrier's entrustment from the relationship between the actual carrier and the carrier. Under the Hamburg Rules, whoever is entrusted or sub-entrusted (by the carrier), no matter whether he performs the carriage of the goods, is the actual carrier.[9] From the literal meaning of Article 42 of the Code, we can see, the two conditions to constitute the actual carrier, that is, to have been entrusted by the carrier and to perform the carriage of the goods, are very strict conditions. If they are interpretated too narrowly, the application scope of the actual carrier system will be greatly limited. On the basis of the above, the definition of the actual carrier in the Code should be interpreted as follows:

(1) The meaning "to have been entrusted or sub-entrusted by the carrier" should not be restricted only to such a case as "a procurative contract is concluded with the carrier". The reason for this is that, in practice, the contract concluded between the carrier and the person who performs the carriage of the goods is, as often is the case, a contract of carriage or a charter party, only on very few occasions, a contract of procuration. If only limited to the latter case, it is impossible to realize the legislative intent of the actual carrier system. On the contrary, there will occur the conflict and confusion between the concept of actual carrier and the concept of carrier's agent.

(2) "To perform the carriage of the goods" shall be understood as "to perform the carriage of the goods by himself". If the performance is entrusted with any other person, that is, sub-entrustment, the media-entruster is not the person to perform the carriage of the goods. Why the actual carrier shall be liable to the owner of the goods is because the carrier is in charge of the goods but the entrustee under the sub-entrustment is not really in charge of the goods. Therefore it is reasonable to interpretate the actual carrier as the person who actually performs the carriage of the goods.

Ⅲ. Identity of Actual Carriers

The carrier is a relative concept to the actual carrier, the identity of the latter depends on the certainty of the former. The distinguishment of these two is quite complex according to the different means of carriage.

1. Identity of Actual Carriers in Liner Service

In case of liners, shipowners are usually the cargo carriers and the shipping space is booked direct from the shipowners or their agents. The shipowners, as the cargo carriers, manage to

8) The Hamburg Rules Article 1 (2).

9) This point can be found from the materials about the legislative background of the Hamburg Rules. 郭瑜, "論我國《海商法》中實際承運人制度的修改和完善", 載《海商法研究》2000年第2輯, 法律出版社, pp.156-157.

carry the cargo from one port to another and issue bills of lading. Therefore, there exist no actual carriers.

But exceptions exist under the following circumstances:

(1) Owing to the lack of ships, a liner company may, as a charterer, hire ships from others for liner service and issues bills of lading on its own behalf. The name of the ship owner does not appear in the bills of lading at all. Under such circumstance, to the cargo owner, the liner company is the contracting carrier and the shipowner is the actual carrier.

(2) Where the ship of the liner company encounters some fortuitous accident, the carrier is obliged to have the cargo transferred to the destination by other ships. Under such circumstance, the carrier to carry the cargo to the destination is the actual carrier.[10]

2. Identity of Actual Carriers under Voyage Charters

Under voyage charters the charterer, most commonly, uses the hired vessel by three different means and accordingly the actual carrier will be different.

(1) Where the charterer carries its own goods

In such case, though the bill of lading is issued to the charterer by the lessor, it is only a receipt for the goods and a document of title. The charterer and the lessor are bound to the charter party. When the bill of lading is transferred to the third party, the consignee, the bill of lading is a written evidence of the terms of the contract. In this case, to the consignee, the lessor is the carrier and there is no actual carrier.

(2) Where the charterer carries others' goods

The charterer collects the goods from the shipper and, on his own behalf, concludes the voyage charter party with the lessor. Under the charter party, where the bill of lading is issued by the charterer on his own behalf, the charterer is the contracting carrier and the lessor is the actual carrier. Where the bill of lading is issued by the lessor on his own behalf, which is the certificate of the contract of carriage between the lessor and the shipper, the lessor is the carrier, not the actual carrier.

(3) Where the charterer subleases the hired vessel

After the charterer has entered into the voyage charterparty, sometimes, for some reasons, the charterer subleases the ship by means of voyage charters. When the subcharterer carriers its own goods, the identity of the actual carrier is the same as the above (2). When the subcharterer carries others' goods, to the shipper, because the subcharterer is the person with whom the shipper concludes the contract of carriage, the subcharterer is the contracting carrier. However, the subcharterer entrusts the carriage of the goods to the charterer by means of the voyage contract B and the charterer subentrusts the carriage of goods to the lessor by means of the contract of carriage A. Thus, the charterer and the lessor are both the actual carriers. If a bill of lading is issued on behalf of the charterer, the charterer also becomes the carrier and the lessor is the actual carrier.

3. Identity of Actual Carriers under Time Charters

According to the provisions of the Code, the time charterparty and the bareboat charter are not

10) 韩立新, *op. cit.*, p.106.

contracts of carriage.[11] However, if there are no contrary provisions in a charter agreement, the charterer may sublease the hired vessel by means of voyage charter or time charter, or use the hired vessel as a liner to carry others' goods.[12] That is to say, there is also the need to identify the carrier and the actual carrier under a time charterparty.

(1) when the charterer uses the hired vessel for liner service

In this case, the charterer concludes the contract of carriage directly with the shipper and on occasion issues the bill of lading on his own behalf, thus the charterer is the contracting carrier and the shipowner is the actual carrier.

(2) when the time charterer subleases the hired vessel

For instance, the charterer enters a time charterparty with the lessor and then, as a disponent owner, concludes a voyage charterparty with the subcharterer. In this case, if the subcharterer carries its own goods and issues a bill of lading on the behalf of the time charterer, the time charterer is his contracting carrier and the lessor is its actual carrier; if the bill of lading is issued on the shipowner's behalf(which seldoms happens under time charters), there is no actual carrier.[13]

(3) when the time charterer subleases the hired vessel

For example, the lessor (the owner of the ship) leases the ship to the charterer A by a time charterparty, and the charterer A leases the ship to the charterer B by a time charterparty. The charterer B concludes, with the shipper (the cargo owner), a contract of carriage or a voyage charter party to engage in the carriage of goods. In this case, if the charterer B issues a bill of lading on its own behalf, the charterer B is the carrier and the charterer "A and the lessor are the actual carriers. If the bill of lading is issued on the charterer A's behalf, the charterer A is the carrier and the lessor is the actual carrier. If the bill of lading is issued on the charterer's behalf (which seldoms happens under time charters), there is no actual carrier.

4. Identity of Actual Carriers under Bareboat Charter

It is generally thought that, if a bill of lading is issued by the bareboat charterer, the bareboat charterer will be the carrier. If the bareboat charterer, within the charter period, subleases the hired ship by means of voyage charter or time charter, the identity of the actual carrier may refer to the above-mentioned manners to decide, only treat the bareboat charterer as the owner of the ship(the charterer).

5. Identity of Actual Carriers when the NVOCC intervenes

Along with the development of container transportation, there emerged NVOCC, which means the common carrier who collects and consolidates small shipments into a single lot but does not engage in transshipment. NVOCC is commonly a manager of multimodal transport. In practice, it is

11) Chapter 4 of the Code makes stipulations as to contracts of carriage of goods by sea, but the time charterparty and the hiring of ships are provided for in Chapter 6.

12) Article 137 of the Code.

13) 沈曉平, "有關實際承運人的几个法律問題", 載《中國海商法年刊》1998年卷, 大連海事大學出版社, p.265.

often treated as the freight forwarder.[14]

(1) when the NVOCC, as a manager of multi-modal transport, issues a through bill of lading, it is the contracting carrier and the carrier for each part of the carriage is the actual carriers.

(2) sometimes the NVOCC acts as a freight forwarder, who assembles and consolidates small shipments into a single lot and assumes responsibility for transportation of such property from point of receipt to point of destination.[15] The shipowner issues a bill of lading to the cargo owner. In such case the shipowner is the carrier and there is no actual carrier.

However, in shipping practice, NVOCC usually issues a bill of lading having the cargo owner as the shipper. Then NVOCC enters into a contract with the shipowner on his own behalf and the shipowner issues a bill of lading to NVOCC, having NVOCC as the shipper. In such case, to the cargo owner, NVOCC is the contracting carrier and the shipowner is the actual carrier because the shipowner is entrusted by the NVOCC to engage in the carriage of goods. Of course the NVOCC is also the shipper of the shipowner.[16]

Ⅳ. Liabilities of Actual Carriers

1. Liabilities Provided in Chapter Ⅳ Section 2

The responsbilities, liabilities, rights and immunities of the carrier stipulated in Article Ⅲ and Article Ⅳ of the Hague Rules are reflected in the Code as Section 2 of Chapter Ⅳ.[17] All the responsibilities, liabilities, rights and immunities of the carrier are included in the wording "responsibilities" used in the title of Section 2 of Chapter Ⅳ. The reason why the Code has chosen such wording is that it is greatly influenced by the Hamburg Rules.[18] Therefore the wording "responsibilities" used in Section 2 of Chapter Ⅳ, in its connotation, means the "responsibilities, liabilities, rights and immunities" of the carrier.[19]

In China, the legal basis for the responsibilities of the actual carrier is Article 61 of the Code which states that "The provisions with respect to the responsibility of the carrier contained in this Chapter shall be applicable to the actual carrier [20]." In its literal sense, all the provisions in Chapter Ⅳ Section 2 are likely applicable to the actual carrier and "the carrier" in the articles of this chapter can be taken place of by "the actual carrier". However, not all of these provisions are applicable to the actual carrier. Section 2 of Chapter 4 of the Code mainly contains the provisions relating to the period of responsibility, the duties of seaworthiness, care for cargo and no deviation, the immunity of responsibility and the limitation of responsibility. They are, in brief, as follows:

1) Duties of Seaworthiness, Care for Cargo and no Deviation

14) 韓立新, *op. cit.*, p. 111.
15) Henry Campbell Black, M. A., Black's Law Dictionary, p.460.
16) 韓立新, *op. cit.*, p.112.
17) The time bar is not stipulated in this chapter, but in Chapter 13.
18) Article 4 to Article 11 of the Hamburg Rules are almost correspondant to Section 2 of Chapter Ⅳ of the Code, only different in the chosen term, the Hamburg Rules use "Liability of the Carrier" while the Code uses "Carrier's Responsibilities".
19) 司玉琢・李志文, *op. cit.*, pp.23-24.
20) Here "this Chapter" means Chapter 4 of the Code.

Articles 47, 48 and 49 of the Code provide that the carrier shall

(1) exercise due diligence to 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;
(2) properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried;
(3) carry the goods to the port of discharge on the agreed or customary or geographically direct route.

2) Exceptions and Immunities

Generally speaking, the basis of liabilities for loss of or damage to cargoes are the same as those in the Hague Rules. The Code has adopted all the exceptions and immunities laid down in Art. Ⅳ, rule 2 of the Hague Rules. But the Code makes the burden of proof clear. Except for fire damage, the burden of proof is on carriers if they want to claim immunities.[21] Therefore, carriers have immunity for loss of or damage to cargo due to fire unless the claimants can prove that the loss was caused by the actual fault of the carrier.

3) Limits of Liability

The provisions regarding package limitation of liability for loss or damage to cargoes are the same as those in the Hague-Visby Rules, i.e., 666.67 units of account per package or unit or two units of account per kilo's weight of the goods lost or damaged, whichever is the higher.[22] The limit for damage due to delay is the sum of the freight. But, if the loss of or damage to the cargo and the delay happen at the same time, the limits of 666.67 units of account or two units of account will apply.[23] So we can see that only pure damage due to delay can get compensation not exceeding the freight.

If claims for compensation have been separately made against the carrier, the actual carrier and their servants or agents with regard to the loss of or damage to the goods, the aggregate amount of compensation shall not be in excess of the limitation provided for in Article 56 of this Code.[24]

4) Loss of the Right of Limitation

The Code uses the same wording as the Hague-Visby Rules for barring actual carrier's limitation. Article 59 of the Code provides that neither the actual carrier nor his employees or agents shall be entitled to the benefit of the limitation of liability provided for in Arts. 56 or 57 if it is proved that the damage resulted from an act or omission of the actual carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

2. Division of the Liabilities between Carriers and Actual Carriers

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

21) Art. 51 of the Code.
22) Article 56 of the Code.
23) *Ibid.*
24) Article 64 of the Code.

agency.[25] This is the legal liability of the carrier.

Furthermore, any special agreement under which the carrier assumes obligations not provided for in Chapter Ⅳ of the Code or waives rights conferred by Chapter Ⅳ of the Code shall be binding upon the actual carrier when the actual carrier has agreed in writing to the contents thereof.[26] That is to say, the owner of the goods cannot claim for damage under this special agreement, he can only claim to the carrier.

Where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier, the contract may nevertheless provide that the carrier shall not be liable for loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage.[27] Such a circumstance can only occur in multimodal transport. In such case the owner of the goods may only bring suit against the carrier because there is no contractual relationship between the owner of the goods and the actual carrier.

3. Joint and Several Liabilities of Carriers and Actual Carriers

Article 63 of the Code states that "Where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable within the scope of such liability." That is to say, the owner of the goods may ask for claims either to the carrier or to the actual carrier. Of course one of them who has paid for the compensation may undertake the recourse to the other.[28]

As to the recourse Article 65 of the Code provides that the provisions of Article 60 through 64 of the Code shall not affect the recourse between the carrier and the actual carrier.

4. Are Other Liabilities of Carriers Applicable to Actual Carriers?

Besides the above provisions, are the other provisions relating to the responsibility and duties of the carrier also applicable to the actual carrier? They are concretely put as follows:

(1) Duty of delivery of goods

Article 85 of the Code states that "Where the goods have been delivered by the actual carrier, the notice in writing given by the consignee to the actual carrier under Article 81[29] of this Code shall have the same effect as that given to the carrier, and that given to the carrier shall have the same effect as that given to the actual carrier." We can

25) Art. 60 para. 1 of the Code.
26) Article 62 of the Code.
27) Article 60 para2 of the Code.
28) Ibid., Article 65.
29) Article 81: Unless notice of loss or damage is given in writing by the consignee to the carrier at the time of delivery of the goods by the carrier to the consignee, such delivery shall be deemed to be prima facie evidence of the delivery of the goods by the carrier as described in the transport documents and of the apparent good order and condition of such goods.
Where the loss of or damage to the goods is not apparent, the provisions of the preceding paragraph shall apply if the consignee has not given the notice in writing within 7 cinsecutive days from the next day of the delivery of the goods, or, in the case of containerized goods, within 15 days from the next day of the delivery thereof.
The notice in writing regarding the loss or damage need not be given if the state of the goods has, at the time of delivery, been the subject of a joint survey or inspection by the carrier and the consignee.

find from this article that the duty to deliver the goods is also applicable to actual carriers under the following conditions: the actual carrier obtains the entrust from the carrier to deliver the goods, the period of responsibility containing the segment of the delivery of the goods; and the actual carrier actually performs the delivery of the goods. In accordance with Article 46 of the Code, the responsibilities of the carrier with regard to the goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerized goods covers the period during which the carrier is in charge of the goods, provided that there is any other agreement between the shipper and the carrier, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom. But the distinction between them is that during the above-mentioned period of responsibility, the carrier, whether he has actually performed the duty to deliver the goods or not, he remains responsible for the entire carriage. But the actual carrier is only responsible for the carriage performed by him.[30]

(2) Right of handling dangerous cargo

Article 68 of the Code provides that "At the time of shipment of dangerous goods, ...in case the shipper fails to notify the carrier or notified him inaccurately, the carrier may have such goods landed, destroyed or rendered innocuous when and where circumstances so require." "Notwithstanding the carrier's knowledge of the nature of the dangerous goods and his consent to carry, he may still have such goods landed, destroyed or rendered innocuous, ... when they become an actual danger to the ship, the crew and other persons on board or to other goods." For the safety of the ship, the crew and other persons on board, the right of handling dangerous goods must be entrusted to the actual carrier. Article 13 of the Hamburg Rules clearly stipulates that both the carrier and the actual carrier have the right to handle dangerous goods.

(3) Right of lien

As the lessor under voyage charter or the carrier of through carriage or multimodal transport is the actual carrier, where the actual carrier has paid the reasonable expenditure for the cargoes and the general average expenditure, he has the right of lien of the cargo. The actual carrier has the right of lien not because it is entrusted by the law to him but because he is one of the two parties of the contract of carriage.[31]

(4) Limitation of actions

Article 257 of the Code only stipulates that the limitation period for claims against the carrier with regard to the carriage of goods by sea is one year. Furthermore, within the limitation period or after the expiration thereof, if the person allegedly liable has brought up a claim of recourse against a third person, that claim is time-barred at the expiration of 90 days. But the Code does not clearly state whether the limitation period is applicable to the actual carrier or not. The reasonable interpretation of it should be that the one year's limitation of time is also applicable to the actual carrier. If not, there may appear the

30) Art. 60 of the Code.
31) 司玉琢・李志文, *op. cit.*, p.27.

following problems: during the period exceeding one year but less than two years, the consignee brings up a claim against the actual carrier, after the court's judgement, the actual carrier brings recourse to the carrier. At this time, if the 90 days' recourse time bar is applicable to the actual carrier, it means the limitation time for the carrier is extended to two years. If the carrier pleads one year's limitation of time for claims against the actual carrier, the 90 days' time bar for bringing up a claim of recourse stipulated in Article 257 of the Code will lose its significance.

V. Conclusion

This paper gives an analysis on the definition of the actual carrier, the identity of the actual carrier and the liabilities of the actual carrier, and also puts forward some problems arising from the ambiguities and uncertainties of some of the provisions of the Code.

As conclusion this paper tries to find solutions to these problems and put forward some suggestions on the basis of the Code and some international conventions as the following:

1. Owing to the divergence on the interpretation of the definition of "actual carrier", it would be better to insert "actually" before "to perform the carriage of the goods" so as to make it clear to identify the actual carrier.

2. Because of the ambiguities and uncertainty of the scope of the liabilities of the actual carrier, it would be reasonable for the Code to state clearly which liabilities are applicable to the actual carrier and which ones are not, and also limit the liabilities of the actual carrier within those related to the carriage of goods, on which we can follow the example of COGSA'1999.

3. The right of the actual carrier to ask the shipper, the consignee or the holder of the bill of lading for freight should be clearly stipulated in the Code. And so does the right of lien of the cargo carried by the actual carrier.

4. The legislative intent of the actual carrier system is to enhance the safeguard of the cargo owner. Therefore, the actual carrier should be entitled to have dangerous cargo landed, destroyed or rendered innocuous when and where circumstances so require, because the right of disposal is granted by statute.

5. The Hamburg Rules and the Code stipulate that, where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable, but only within the scope of such liability. Whether the actual carrier is liable for compensation or not depends on whether the cargo owner can prove that the loss of the cargo occurs while the cargo is in the actual carrier's charge during such part of the carriage, which will bring difficulty to the cargo owner. It would be reasonable to place the duty of proof on the actual carrier. If the actual carrier fails to prove that the loss of the cargo does not occur while the cargo is in his charge, he and the carrier shall jointly and severally be liable for the compensation.

6. The legislative intent of the actual carrier system is to enhance the safeguard of the cargo owner. Now the actual carrier is defined in the Code so that it will be possible to proceed against a single carrier. In my personal opinion, the following should be taken into account by the cargo claimant while making his choice against whom he should take suit:

(1) Except that the carrier is a briefcase company or has declared bankruptcy, it would be favourable, all the time, to bring suit against the carrier. Because according to Article 60(1) of the Code, where the performance of the carriage or part thereof

has been entrusted to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage and the carrier shall be responsible, in relation to the carriage performed by the actual carrier, for the act or omission of the actual carrier and of his servant or agent acting within the scope of his employment or agency. This is the carrier's responsibility granted by statute. What's more, subject to Article 62 of the Code, where the carrier and the shipper conclude any special agreement under which the carrier assumes obligations or waives rights shall not be binding upon the actual carrier when the actual carrier has not agreed in writing to the contents thereof. That is to say, the cargo owner shall not claim an indemnity against the actual carrier under such special agreement and he can only claim against the carrier.

(2) Article 60(2) of the Code states that, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier, the contract may nevertheless provide that the carrier shall not be liable for loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Thus, the cargo owner can only claim against the actual carrier.[32] Such case often happens in multimodal transport, in which there is no contract relationship between the cargo owner and the actual carrier and therefore the cargo claimant can only bring suit against the actual carrier in tort.

(3) In accordance with Article 63 of the Code, where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable within the scope of such liability, that is, the cargo owner may claim the indemnity either against the carrier or against the actual carrier. Of course, one of them, after the indemnity, may exercise his recourse against the other. But the burden of proof rests on the cargo claimant. The cargo claimant shall prove that both the carrier and the actual carrier are liable for compensation.

However, if the loss or damage can be shown by the actual carrier to have arisen or resulted from one of the twelve causes provided for in Article 51 in the Code or in the carrier's charge, the actual carrier may disclaim responsibility for such loss or damage. And, therefore, the cargo owner cannot claim against the actual carrier.

In addition, what the cargo owner should take into account is that he should observe carefully the contents of the revelant charterparty and the bill of lading so as to make sure of the responsibilities of the carrier and the actual carrier.

Reference Materials

1) William Tetley, The Hamburg Rules - A Commentary
2) L. Li, The Maritime Code of the People's Republic of China, Lloyd's Maritime And Commercial Law Quarterly, Part 2, May 1993
3) William Tetley, Identity of the Carrier - The

32) Of course, if the cargo owner cannot claim against the actual carrier, he also has the right to claim against the carrier.

Hague Rules, Visby Rules, UNCITRAL
4) Albert Rodriguez Palacios, A Comparitive Analysis of the Hague/Hague - Visby Rules and the Hamburg Rules
5) John Richardson, The Hague and Hague - Visby Rules, LLP Limited, 1998
6) 司玉琢・李志文, "對我國《海商法》下實際承運人責任的理解", 載《海商法研究》2000年第1輯, 法律出版社
7) 郭瑜, "論我國《海商法》中實際承運人制度的修改和完善", 載《海商法研究》2000年第2輯, 法律出版社
8) 翁子明, "實際承運人和實際托運人的法定性", 載《中國海事審判年刊》1999年卷, 人民交通出版社, 1999
9) 交通部政策法規司編, 《〈海商法〉學習必讀》, 人民交通出版社, 1993
10) 韓立新, "國際海上貨運中實際承運人及其責任認定", 載《中國海商法年刊》第8卷, 大連海事大學出版社
11) 沈曉平, 有關實際承運人的几个法律問題, 載《中國海商法年刊》1998年卷, 大連海事大學出版社
12) 李唯軍, 論我國海商法第63條的適用, 載《中國海商法協會通訊》1999, 3