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STUDY OF SELECTED LEGAL ISSUES OF THE TERMINAL OPERATORS FOR CARRIAGE OF GOODS BY SEA IN CHINESE LAW

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Study of Selected Legal Issues of the Terminal Operators for Carriage of Goods by Sea in Chinese Law

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A thesis submitted in partial fulfilment of the requirements for the degree of Master of Philosophy

May 2021

CERTIFICATE OF ORIGINALITY

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ABSTRACT

During the entire process of the carriage of goods by sea, the terminal operator (TO) plays a crucial role since it provides ancillary services such as loading, discharging and warehousing for clients before and after the voyage. In Chinese commercial practice, the consignee/shipper or carrier (or carrier's agent) concludes a terminal operation contract (TOC) or a port warehousing contract/ port storage contract (PWC/PSC) with the TO and pays for the services. Due to the repeal of "Rules on the Operation of Goods at Ports" (Ports Operation Rules) in 2016, the issues concerning the TOs are now tackled by general laws, such as the Civil Code of the People's Republic of China (CC) and Maritime Law of the People's Republic of China (CMC), which is definitely insufficient. Furthermore, with the development of the shipping industry and containerisation, disputes involving the TO have arisen in decades and will keep rising. However, there lacks a systematic legal study of the various legal issues that the TO may encounter in practice. Besides, there also lacks an in-depth analysis of the cargo claims involving the TOs, which is the most frequently occurred disputes in practice. There is some fragmented research about the TOs. Nevertheless, the CC is implemented this year (2021), and the CMC is under revision, which leads to some of the previous research being contrary to the possible legislation in the future, thus losing the reference value.

Against this background, this thesis, after summarising and analysing disputes that the TO may encounter in judicial practice in the past ten years (2010-2020), is dedicated to carrying out a comprehensive study of the most common cargo claims encountered by the TO, including the cargo damage/shortage, misdelivery and liability of the TO in these cases. We find that the current rules about TO's cargo claims are fragmented and ambiguous. Even with the new Civil Code regulations and the provisions in the revised CMC draft, these problems cannot be solved entirely. Therefore, the issues of TO's liability during its operation requires a more detailed explanation.

The contributions of this thesis are two-fold. Firstly, this thesis summarises the various legal disputes that the TO may encounter in its production and sorts out the existing legal rules and court judgments of these disputes, which can clarify to a certain extent the settlement of disputes related to terminal operations after the repeal of Ports Operation Rules. Secondly, this thesis delves into disputes in cargo claims faced by the TOs, including cargo damage/shortage and misdelivery. This thesis summarises the courts' views on some important issues in cargo claims, analyses the deficiencies of the existing laws, and provides suggestions for improving the rules.

PUBLICATIONS ARISING FROM THE THESIS

A. Journal publication

1. Haifan Yang and Ling Zhu, (2020). “Marine Terminal Operator’s Liability for Misdelivery: Chinese Law and Judicial Practice”, *Journal of Business Law*. Accepted.

B. Presented conference paper

2. Haifan Yang and Ling Zhu, “The Liabilities of the Marine Terminal Operator’s (MTO) Mis-delivery in Contract Law: Chinese Law and Practice” in Conference on the 28th Annual Conference of the International Association of Maritime Economists (IAME 2020), Hong Kong, PR China

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Table of Contents

ABSTRCT IV

PUBLICATIONS ARISING FROM THE THESIS VI

ACKNOWLEDGEMENTS VII

ABBREVIATIONS X

Chapter 1 Introduction ... 1
Background of the Research ... 1
Objectives and Structure of the Research ... 5
Research Methods ... 7
Chapter 2 Summary of the Judicial Cases ... 11
2.1 The Overview of the Cases involving the TO ... 11
2.2 Disputes that Have Little Relevance to the Substantial Facts ... 13
2.2.1 Jurisdiction Clause and Applicable Law Clause ... 13
2.2.3 Repeated Litigation ... 17
Chapter 3 General Aspects about Terminal Operators and the Cargo Claims ... 19
3.1 Introduction ... 19
3.2 Defining the Terminal Operator ... 20
3.3 The Legal Status of the Terminal Operator ... 21
3.4 Legal Frameworks Regulating the Cargo Claims ... 23
3.5 Understanding of Misdelivery and Cargo Damage/Shortage ... 24
3.5.1 Misdelivery ... 24
3.5.2 Cargo Damage/Shortage ... 27
3.6 TO's Period of Responsibility ... 28
3.7 Discussions ... 30
3.8 Conclusion ... 33
Chapter 4 Determination of the Contractual Liability for Cargo Claims ... 35
4.1 Introduction ... 35
4.2 The Conclusion of the Contract ... 35
4.3 TO's Liability for Misdelivery under Contract Law ... 37
4.3.1 The Terminal Operation Contract ... 37
4.3.2 The Port Warehousing Contract/Port Storage Contract ... 39

4.4 TO’s Liability for Cargo Damage/Shortage under Contract Law 41
4.4.1 Contractual Liability in Cargo Damage 42
4.4.2 Contractual Liability in Cargo Shortage 43
4.5 Conclusion 46
Chapter 5 Determination of the Tortious Liability for Cargo Claims 47
5.1 Introduction 47
5.2 Elements of the Tortious Claims 48
5.3 Joint and several liability of the TO 49
5.4 TO’s Liability in Tort for Delivery against the Warehouse Receipt 51
5.5 Discussions about the Delivery Obligations in the Civil Law Fields 54
5.5.1 Does a TO Have the Statutory Obligation to Deliver against a Delivery Order? ... 54
5.5.2 Is a TO Liable for Delivery against a Warehouse Receipt rather than a Delivery Order? 56
5.6 Conclusion 57
Chapter 6 The Remedies for Cargo Claims and the Derogation of Liability 59
6.1 Introduction 59
6.2 The Remedies for Cargo Claims 59
6.3 Exclusion and Limitation of the Liability in Cargo Claims 62
6.3.1 Statutory Exclusion and Limitation of Liability in Cargo Claims 63
6.3.2 Special Agreements about Exclusion and Limitation of Liability in Contract 69
6.4 Discussions 72
6.4.1 The Amount of Compensation 72
6.4.2 Statutory Exclusion and Limitation of Liability for a TO in Cargo Claims 73
6.4.3 Contractual Terms and the Derogation Issue 76
6.5 Conclusion 81
Chapter 7 Disputes other than Cargo Claims 83
7.1 Introduction 83
7.2 Terminal Operation and the Personal Injury 83
7.3 Failure of the Payment and the Lien Right 86
7.3.1 Cases where the Clients Fail to Pay the Fee 86
7.3.2 TO’s Lien Rights 90
7.4 Conclusion 96
Chapter 8 Conclusions 98
Bibliography 102

Abbreviations

CC	Civil Code of the People's Republic of China
CL	Contract Law of the People's Republic of China
CMC	Maritime Law of the People's Republic of China
CPL	Civil Procedure Law of the People's Republic of China
FCR	Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships
General Principles of Civil Law	General Principles of the Civil Law of the People's Republic of China
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea, Hamburg 1978
HVR, Hague-Visby Rules	The Hague Rules as Amended by the Brussels Protocol 1968
Interpretation on CPL	Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China
Interpretation on FCR	Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I)
OTT Conventions	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Vienna 1991
Ports Operation Rules	Rules on the Operation of Goods at Ports

PL	Property Law of the People's Republic of China
Provisions	Provisions of the Supreme People's Court on Several Issues concerning the Application of Law during the Trial of Cases about Delivery of Goods without an Original Bill of Lading
PSC	Port Storage Contract
PWC	Port Warehousing Contract
RR, Rotterdam Rules	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Vienna 2009
SMPL	Special Maritime Procedure Law of the People's Republic of China
Summary 2005	Summary of the Second National Working Conference on Foreign-Related Commercial and Maritime Trials
TL	Tort Law of the People's Republic of China
TO	Terminal Operator
TOC	Terminal Operation Contract
Work Safety Law	Work Safety Law of the People's Republic of China

Chapter 1 Introduction

Background of the Research

1. In General

As a hub of water transportation, ports or terminals play an essential role in the carriage of goods. Before and after the floating in water, cargoes have to be loaded, discharged, handled, carried or stored in ports. Thus, port or terminal operation is an indispensable link to ensure the smooth progress and completion of the carriage. In the early stage, due to a small volume of freight, single cargo types and lower passenger demands, there is no need to use modern port facilities and specialised TOs. However, with the continuous increase in the volume of goods transported by waterways and the increasing complexity of the goods, the requirements for the scale, standards, and service scopes of port facilities continue to increase. All the requirements create a situation where the carrier and cargo owner cannot be self-sufficient for port operations, and thus TOs are born. Furthermore, due to the rapid development of containerisation, multimodal transport has become increasingly prosperous. Sea carriage has always occupied an extremely important position in multimodal transport; and thus port not only plays a vital role in the sea carriage, but it has become the hub of various modes of transportation. The importance of TOs in multimodal transportation is self-evident. In this context, research on the legal issues of TOs has become a very meaningful and influential topic.

Compared to TO's development in the shipping industry, the current law in China about the TO remains undeveloped. The "Rules on the Operation of Goods at Ports" (Ports Operation Rules),[1] governing the rights and obligations of TOs and the operation clients and the contracts between them, was repealed in 2016. Thus, the issues concerning the TOs are now tackled

[1] Order No. 10 [2000] of the Ministry of Communications, August 28, 2000, hereinafter referred to as Ports Operation Rules. The Rules were however repealed in 2016 by Decision of the Ministry of Transport on Repealing 20 Transport Rules, Order No. 57 [2016] of the Ministry of Transport.

mainly by the general laws, which are definitely not sufficient. In current Chinese law, the legal rules that regulate the TO are scattered throughout various legislations. The primary sources of legal rules regulating the operation of the TO are the 'Civil Code of the People's Republic of China' (CC),[2] 'Maritime Law of the People's Republic of China' (CMC)[3] and the relevant judicial interpretations and guidelines. Moreover, the procedural issues are mainly governed by the 'Civil Procedure Law of the People's Republic of China' (CPL),[4] 'Special Maritime Procedure Law of the People's Republic of China' (SMPL),[5] the 'Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships' (FCR)[6] and the relevant judicial interpretations and guidelines. Due to the lack of clear rules, the judicial practice in similar cases where the terminal operator is involved is different. For example, different courts may have different opinions about the legal status of the TO, the liability of the TO in cargo damage and also the rights of the TO for maritime liens.

The CMC has been undergoing amendment,[7] and the regulation about the TOs is one of the most important topics. Within the two versions of the draft, the relevant provisions on the definition and legal status of the TOs have been included, and the rules of the obligations, liabilities, and liens of the TOs have been stipulated. Although these provisions can, to some extent, deal with the legal puzzles about the TO in practice, whether these provisions are reasonable and well-designed needs further discussions. Previous studies have analysed certain aspects of the legal issues involving the TO, such as the legal status of the TO, limitation or exclusion of the liability of the TO, and lien rights of the TO. There lacks a systematic legal study of the various legal issues that the TO may encounter in practice, and the possible

[2] Order No. 45 of the President of the People's Republic of China, 01 January 2020, hereinafter referred to as CC.
[3] Order No. 64 of the President of the People's Republic of China, 01 July 1993, hereinafter referred to as CMC.
[4] Order No. 71 of the President of the People's Republic of China, Standing Committee of the National People's Congress, 01 July 2017.
[5] Order No. 28 of the President of the People's Republic of China, Standing Committee of the National People's Congress, 01 July 2000, Article 7 (2) of the SMPL.
[6] Order No. 36 of the President of the People's Republic of China, Standing Committee of the National People's Congress, 01 April 2011, hereinafter referred to as FCR.
[7] Maritime Law of the People's Republic of China (Revised CMC draft for comments), published in November 2018, Maritime Law of the People's Republic of China (Revised CMC draft for review), finished in December 2019.

connections among these disputes. In addition, due to the revision of the CMC, the ideas or opinions in some previous studies may be outdated or contrary to these suggested amendments of the CMC, and thus to some extent, lose their reference value.

2. *The Definition and Legal Status of the TOs*

In China, there lacks a definition of the TO in the current law, although it was once defined as a person who concludes an operation contract with the operating client. For the legal status, in Chinese judicial practice, the courts have adopted various approaches to understanding the TOs. Previously, when employed by the carrier, the TO is considered to be the servant of the carrier,[8] the agent of the carrier,[9] and also the actual carrier.[10] Moreover, when designated by the shipper or consignee, the TO can be considered as an independent contractor[11] who acts and is liable in its own name.[12] Since the legal status is tightly associated with the liabilities and rights of the TOs, the debates about its legal status are always fierce.

To tackle this dispute, Article 4.2 of the revised CMC draft for comments stipulates the TO as the actual carrier. However, doubts will be cast to this stipulation since it is inappropriate to consider the TO as the actual carrier when it merely takes on the warehousing obligations.[13] This "actual carrier" method is abandoned in the revised CMC draft for review, and consequently, there lacks rules about the legal status of the TO. The absence of legal status may lead to some uncertainties.

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[8] *China Shenyang Mine Machine Import and Export (Group) Corp v Hyundai Merchant Marine Co, Ltd and China Dalian Free Trade Zone Wantong Logistics Parent Company*, Dalian Maritime Court, (2001) Da Hai Fa Shang Chu No.246; See also Zuoxian Zhu, "The legal status of port operator under Chinese law", *Journal of Business Law* (2011) vol 8, pp. 737-748.

[9] See *Hebei President Shipping Co. Ltd (President Shipping) v Zhejiang Zheneng Port Operation Management Co. Ltd (Zheneng Port)*, Ningbo Maritime Court, (2016) Zhe 72 Min Chu No. 2211; Zhejiang High People's Court, (2018) Zhe Min Zhong No. 14; See also Richard W Palmer and Frank P DeGiulio, "Terminal Operations and Multimodal Carriage: History and Prognosis" *Tulane Law Review* (1989-1990) vol 64, issue nos. 2 & 3, pp 281-360, at p. 336.

[10] See *Haikou Port Container Terminal Co. Ltd. v Guangxi New Minhang Shipping Co. Ltd.*, Haikou Maritime Court, (2016) Qiong 72 Min Chu No. 4.

[11] See Jonathan Law, *Oxford Dictionary of Law* (8th edn, Oxford University Press 2015) 317.

[12] Zhu (n 8) 74; See also *Dalian Tariff-free Zone Wenda International Trade Co. Ltd. v Qingdao Qianwan Container Terminal Co. Ltd.*, Qingdao Maritime Court, (2001) Qing Hai Fa Shi Zi No.73; Shandong Province High People's Court, (2001) Lu Fa Jing Er Zhong Zi No.17.

[13] Yuzhuo Si and Zuoxian Zhu, "On the Legal Status of Port Operators under Chinese Law", *US-China Law Review* (2005) vol 2 (7), pp.1-13, at p.4.

3. *The Types of Disputes in Judicial Practice*

In addition to legal status, several disputes about TOs have also raised concerns. After reading the 185 Chinese judgements collected from an online database,[14] four types of legal issues are identified as being the most prominent ones. Three of them are disputes relating to the substantial facts of the case, namely cargo claims within the terminal operation, personal injury, and unsuccessful payment and lien rights. The last type includes the disputes that can be settled without much referring to the substantial facts of the case, such as the issues about the jurisdiction clause, the applicable law clause, the limitation period and the repeated action. Among these legal issues, the dispute about the cargo claims is the one that most frequently occurred, which accounts for more than 50% of all the disputes. Thus, after a brief summary of the existing judgments, the issues about cargo claims will be discussed in-depth.

4. *The Cargo Claims— Cargo Damage/Shortage, Misdelivery, and Liability*

All the cargo claims against the TO in China shall be raised either in contract law or in tort law. There are mainly two types of cargo claims in practice, namely cargo damage/shortage and misdelivery. Before analysing the liability of the TO in the cargo claims, whether the TO is responsible for the damages or misdelivery shall firstly be analysed. In terms of the cargo damage/shortage, the facts of the damages or losses are apparent. Disputes may arise in ascertaining when the damages actually happened and deciding the quantity of the shortage. As to misdelivery, it occurs when the TOs deliver the goods without bills of lading or delivery orders. Besides, the TO may also face dilemmas as to whom the goods should be delivered to when there are valid warehousing receipts and bills of lading or delivery orders. If the TO delivers to the holder of the bill of lading and delivery order, it will take the risk of breaching the warehousing contract and losing the right to request warehousing fees. When it comes to

[14] The data is collected from the Alpha Database, a pay-for-use legal intelligence operating system in China which contains the big data of current legal cases and statutes. See www.alphalawyer.cn.

the liability of the TO in cargo claims, the most debatable issues are about the limitation and exclusion of the liability. In the revised CMC draft for review, it is stipulated that the carrier's exclusion and limitation of liability can be invoked by the TO regardless of its legal status. However, whether this rule is reasonable deserves further discussion.

Objectives and Structure of the Research

Against this background, this thesis, after summarising and analysing the disputes that the TO may encounter in judicial practice in the past ten years (2010-2020), is dedicated to carrying out a comprehensive study of the most common cargo claims encountered by the TO and proposing suggestions for the reform and improvement of the legislation. These cargo claims include the cargo damage/shortage, misdelivery and liability of the TO in these cases. In order to achieve this research aim, there are six research objectives:

- To examine the development and adequacy of the legal framework for regulating the TO;
- To analyse the judicial cases involving the TO and identify the most distinctive disputes;
- To discuss TO's liability for cargo claims, including its contractual liability, tortious liability, and the limitation and exclusion of TO's liability during its terminal operation;
- To discuss the division of TO's liabilities in personal injury claims;
- To clarify the issues of non-payment and conditions for and scopes of TO's lien rights; and
- To evaluate the new rules in the CC and the proposed amendments in the revised CMC draft and discuss their adequacy; as well as propose suggestions for improvement, if necessary.

Accordingly, this thesis is divided into 8 Chapters. After this introduction Chapter, Chapter 2 is about a summary and a brief discussion of the collected cases involving the TO. It is concluded that there are three kinds of substantial disputes that the TO may encounter, including cargo claims, personal injury and also non-payment and lien right. Before discussing the most common disputes-the cargo claims in the subsequent chapters, Chapter 2 also discusses some defences that has little relevance to the substantial facts, which the TO may face or apply in judicial practice. These issues are also important because the courts will consider the substantial claims only when some of these issues have been sorted out in judicial practice.

Chapters 3 to 6 carry out an in-depth investigation of cargo claims. Accordingly, Chapter 3 firstly introduces some introductory issues and provides general information about the TO and its cargo claims, including the definition and the legal status of the TO, the legal framework of TO's cargo disputes, the definition and examples of cargo damage/shortage and misdelivery, and the period of responsibility of the TO. Then, in Chapters 4 and 5, the focuses are put on the determination of TO's contractual and tortious liability for cargo claims, respectively. For cargo damage/shortage, the main disputes in the context are about calculating the quantity of damage and the division of the liability. For misdelivery, a TO's delivery obligation will be discussed, such as to whom the goods shall be delivered; and who should be liable for misdelivery. Once the cargo damage/shortage or the misdeliveries are ascertained, the emphasis should then be put on the liability of the TO for the breach of its duty, including the remedies for cargo claims and TO's exclusion and limitation of liability in cargo claims in Chapter 6. Within the discussions from Chapters 3 to 6, the English rules and relevant international conventions will be referred to, wherever relevant, for comparison and contrast. The relevant international conventions in this thesis mainly refer to the Rotterdam Rules

(RR).[15] Compared to other international conventions governing sea carriage,[16] the RR is the only convention that contains specific rules regarding the delivery of goods and sets aside a separate chapter to discuss the issue of delivery.[17]

Chapter 7 focuses on the other two substantial disputes: personal injury, and non-payment and lien right. Accordingly, the criteria for work safety and the division of the liability for personal injury are discussed. For lien rights, the requirements of the "same legal relationship" and bona fide acquisition of the lien property will be examined.

Finally, Chapter 8 is the conclusion of this thesis. The findings in this paper show that although the rules regulating the TOs are scattered throughout several laws, regulations, judicial interpretation etc., they are however fragmented and vague in many aspects. It is thus concluded that with such an indispensable role being played by the TOs for the carriage of goods by sea, a set of rules specially and effectively regulating different aspects relating to a TO and its rights and obligations are necessary for Chinese law, and a number of recommendations are accordingly given.

Research Methods

As for the research methods, both the legal case study and comparative law study are employed within the desk research in light of the ambiguous statutory rules. In desk research, primary resources and secondary resources are both used. For primary sources, based on the hierarchy of the law, this study consults the resources of the international conventions, regional treaties, and national laws. According to the fields of law, this study refers to resources in the areas of

[15] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) Vienna, 2009.
[16] Such as The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968 (Hague-Visby Rules) and United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) Hamburg, 30 March 1978.
[17] See Francesco Berlingieri, "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules" (UNCITRAL 5-6 November 2009), p60. https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (last access on 16 July 2020).

contract law, tort law, property law, maritime law, civil procedure law, and the conflict of laws. In addition, various secondary sources are analysed to help understand and evaluate the existing practice, such as law dictionaries, law books, industrial reports, and journal articles about the terminal operation.

1. *Legal Case Study*

In terms of the study of the legal case in Chinese law, although the principle of precedent is not available in the Chinese legal regime, judicial practice is essential for applying and understanding the statutory rules. In cases there lacks clear refereeing rules or no uniform refereeing rules, the court may search for the judgments of similar cases to consult. If there are guiding cases in similar facts released by the Supreme People's Court,[18] the lower people's court shall make a judgment by reference to the guiding cases. For other searched cases, they can be served as a reference for the court to make judgments.[19] In this study, we also consider some relevant cases from English law. The English legal system obeys the rule of precedent based on the *stare decisis*.[20] Accordingly, rules and principles in the precedent case must be followed, if not otherwise distinguished or overruled, in a similar subsequent case. The legal case is an indispensable part of English law research. For the English legal case study, this part will consult reported legal cases from the database, such as *BAILII*,[21] *Westlaw UK*[22] and *i-law* (Informa),[23] to seek interpretations and clarifications on rules about the TOs.

In the beginning, the keyword "Terminal Operator" in Chinese (港口經營人) is input into the Alpha Database, and the case type is limited to "civil law case", then the time is limited to one

[18] See http://www.court.gov.cn/shenpan-gengduo-77.html for guiding cases (last accessed on 15 August 2020).
[19] Guiding Opinions on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases, The Supreme People's Court, effective from July 31, 2020.
[20] Charles W. Collier, "Precedent and Legal Authority: A Critical History", *Wisconsin Law Review* (1988) pp. 771-825, p. 782, available at http://scholarship.law.ufl.edu/facultypub/675, (last access on 16 August 2020).
[21] See https://www.bailii.org/databases.html, (last access on 16 August 2020).
[22] See https://legalsolutions.thomsonreuters.co.uk/en/products-services/westlaw-uk.html, (last access on 16 August 2020).
[23] See https://www.i-law.com/ilaw/index.htm;jsessionid=AB7723679F273F4A0D2FD4E795B80007, (last access on 16 August 2020).

decade of approximately from the year 2010 to 2020. Within the search results, only the cases where the TOs participated in the proceedings are counted. This step aims to summarise the main disputes of the TOs and the corresponding judicial practices and seek better interpretations and clarifications of the statutory law in different legal issues.

2. A Comparative Law Study

When one tries to improve the legal system of his country or region, no matter he is a legislator or a scholar, it has become obvious that an external outlook on the other side of the borders through a comparative study is vital, since the discipline of law is becoming more cosmopolitan in a 'globalised' environment[24] and the increasing recognition of non-state law is challenging the concept of 'legal system'.[25] In practice, a legal solution may be reached by diverging roads based on different legal concepts, legal rules and legal procedures of different countries.

For the comparative study, the current law relating to the TO is compared with the two versions of the revised CMC draft. Meanwhile, the English rules and relevant international conventions are referred to, wherever relevant, for comparison and contrast. The English law rules will be analysed for comparison all the time. Several reasons can justify the choice of English law. First of all, considering English courts' expertise in maritime law, as well as their efficiency and integrity, the English court and the English law are designated by many shipping and insurance companies in the dispute resolution clauses of their standard forms. Secondly, according to the structural method, the comparison between the different legal systems helps to have a better understanding of legal disputes, to look at issues from multiple perspectives, and to find a common ground. In Particular, English law can demonstrate the evolution of legal viewpoints on some issues from its legal cases, which can be largely referred to. Thirdly, the

[24] Marie-Luce Paris, 'Chapter 3 The Comparative Method in Legal Research: The Art of Justifying Choices' in Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016).
[25] Mark Van Hoecke, "Methodology of Comparative Legal Research", *Law and Method*, December 2015, DOI: 10.5553/REM/.000010, see https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001 (last access on 15 August 2020).

English legal system is also followed by many commonwealth countries and regions, such as Hong Kong, Singapore, and Australia, where many famous international ports locate. While studying English law, a general understanding of the laws of other countries can also be obtained. Except for analysing English law, the international conventions and laws of other countries will also be studied, if necessary, to each specific issue.

The comparative study is used throughout this thesis. For example, when analysing the legal status of the TO, the attitudes of the Chinese courts towards the legal status of the TOs based on the legal cases as time goes by will be analysed through the comparative historical analysis. Meanwhile, the relevant methods of understanding the legal status of the TO in the international conventions, such as the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (OTT Convention),[26] the Hague-Visby Rules (HVR), the Hamburg Rules and the Rotterdam Rules, will be analysed. Besides, the national law of other jurisdictions, such as English law, is used for comparison. By identifying similarities and differences among different laws, a comparative study will thus help observe each method's advantages and drawbacks and gain a more in-depth understanding of the legal status of the TO. The comparative law study is also applied in understanding the definition of a TO, the remedies for the TO in cargo claims and the limitation and exclusion of TO's liability.

[26] United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (OTT Convention), Vienna, 19 April1991, Explanatory Note by the UNCITRAL secretariat, this note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes; it is not an official commentary on the Convention.

Chapter 2 Summary of the Judicial Cases

2.1 The Overview of the Cases involving the TO

Disputes involving TOs have risen continuously over the decades. It is on record that the number of cases of disputes involving TOs decided by the Chinese courts has risen from approximately 10 cases per year prior to 2013 to approximately 50 cases per year since 2016.[27] However, since the repeal of the Ports Operation Rules in 2016, there is a lack of specific rules which regulate the TO and the terminal operation. This lack of certain rules leads to many different kinds of disputes in judicial practice.

In order to figure out the kinds of disputes that the TOs may be involved in, the reported cases are searched and collected from an online database (last accessed on 31 March 2020).[28] When typing "terminal operator" in Chinese as the keywords and confining the disputes as to the "civil lawsuits", more than 300 judgments showed up as a result. After having read all the judgments, 185 decisions in which the TO is the participants of the proceedings are selected, and the decisions are divided into groups based on the substantial disputes. Although, due to the limitation of the database itself, those cases may fail to cover all lawsuits that happened to the TOs during the designated period, one may still conclude that the findings can roughly show the types of disputes that the TO may most frequently involve in. Among the 185 judgments, it is easy to find out that the cargo claims, which is numbered 101 in total, are the most frequently occurred category of dispute. The second category is about the unsuccessful payment of the clients, which accounts for 50 out of 185 cases. In these cases, the TO were usually the claimants and claimed against the contractual parties (clients) for operation fee or storage fee. Meanwhile, the TO may also request the lien rights if possible. Moreover, during

[27] See the Alpha Database, a pay-for-use legal intelligence operating system which contains the big data of current legal cases and statutes. See www.alphalawyer.cn.
[28] Ibid.

the terminal operation process, there is a high possibility of having some operation accidents without obeying work safety rules and thus leading to personal injury. The disputes related to the compensation for the personal injury occurred 13 times in total. The remaining disputes, which happened less than 10 each, such as disputes in the pledge of the terminal operation rights, in the ship docking contract and in the ship-terminal collision, are not considered in this thesis (See Figure 1). In addition, among the 101 Cargo Claims, 37 judgments are about the mis-delivery of the TOs; 64 judgments are about the cargo damage/shortage within the TOC or PWC (See Figure 2).

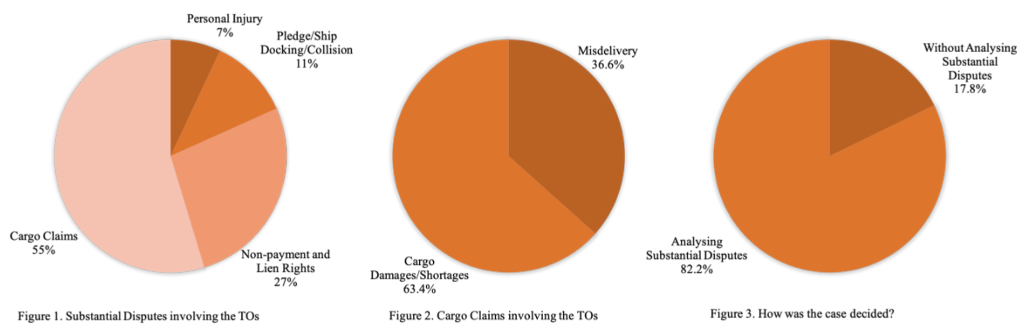

Figure 1. Substantial Disputes involving the TOs

Figure 2. Cargo Claims involving the TOs

Figure 3. How was the case decided?

For court proceedings, before hearing substantial disputes, the judges sometimes may decide some issues without referring to substantial facts first, so as to decide whether to proceed with the substantial disputes and which law shall be applied to hear the case. In cases involving the TO, the disputes also occur in issues such as the jurisdiction of the forum, the applicable law and the statute of limitations. There are 33 judgments in total which discussed the disputes that bear little relevance to the substantial facts (See Figure 3). Against this background, this chapter will introduce these disputes that occurred involving the TOs before further discussions on substantial disputes.

2.2 Disputes that Have Little Relevance to the Substantial Facts

To interrupt the lawsuits and secure their rights, the defendants may raise some defences before the judge analysing the substantial facts in court proceedings, including the defences based on the jurisdiction clause, applicable law clause, the statute of limitations, and repeated litigation.

2.2.1 Jurisdiction Clause and Applicable Law Clause

Under Chinese civil procedure law, even if the parties can agree on the jurisdiction clause, only foreign-related cases are allowed to agree on a foreign jurisdiction clause or applicable law clause.[29] The first issue that may arise in the context is whether the case is a foreign-related case. Based on the Interpretation on CPL, a case is a foreign-related case when one of several requirements in Article 522 of the Interpretation on CPL is satisfied.[30] In one case, the defendant believed that according to Article 522 (3) of the Interpretation on CPL, the case was a foreign-related case and the jurisdiction clause was valid since the actual place of the delivery of the subject matter was outside China. However, the courts held that the provision in the Interpretation on CPL refers to the fact that the subject matter rather than the place of performance of the delivery is outside the territory of China, and thus the case was a domestic case and the jurisdiction clause in the contract was invalid.[31] Similarly, in another case where the disputes are about the validity of the applicable law clause, the courts held that the parties could not agree on an applicable law clause since neither was there a foreign-related civil

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[29] Inferred from Article 34 of the CPL, for jurisdiction of domestic cases, all the courts that can be chosen by the parties are Chinese court. For the applicable law clause, see Articles 2 and 3 of FCR.

[30] Article 522 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Interpretation No. 5 [2015] of the Supreme People's Court, Supreme People's Court, 4 February 2015, hereinafter referred to as Interpretation on CPL:
Under any of the following circumstances, the people's court may determine a case as a foreign-related civil case:
(1) Either party or both parties are foreigners, stateless persons, foreign enterprises or organizations.
(2) The habitual residence of either party or both parties is located outside the territory of the People's Republic of China.
(3) The subject matter is outside the territory of the People's Republic of China.
(4) The legal fact that leads to the establishment, change or termination of civil relationship occurs outside the territory of the People's Republic of China.
(5) Any other circumstance under which a case may be determined as a foreign-related civil case.

[31] See *Guizhou Huiling Technology Co., Ltd. v Jinrui Tongchuang (Guizhou) Technology Co., Ltd.*, Guiyang Intermediate People's Court, (2019) Qian 01 Min Xia Final No. 23.

relationship nor were there explicit legal provisions on the choice of applicable laws on the foreign-related civil relationship by the parties.[32]

2.2.1.1 Jurisdiction Issue

Although contractual parties can agree on a jurisdiction clause in both domestic and foreign-related civil relationships, in most cases, the forum selection clause in a TOC or a PWC will be null and void. For these contracts, the exclusive jurisdiction of the court at the place where the harbour is located is settled in law.[33] Indeed, it is normal practice for the courts to support the exclusive jurisdiction in cases involving terminal operation in current judicial practice. There is only one case in which the parties agreed that the court of the plaintiff's domicile should have jurisdiction in the PWC. This agreement was supported by the court, since the party who insisted on the exclusive jurisdiction of the court at the place where the port locates failed to prove that the damages exactly occurred within the port area.[34]

2.2.1.2 Applicable Law Issue

In a foreign-related case, disputes also occur in the application of the applicable law clause. Based upon the principle of party autonomy, the parties shall have the rights to agree on the applicable law of the case, and the courts shall respect the parties' choice.[35] However, the agreement about the applicable law shall be null and void if it breaks the mandatory rules in Chinese law[36] or harms the public social interests of China.[37] In cases where no applicable law is chosen, for contractual claims, the laws at the party's habitual residence whose fulfilment of

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[32]Article 6 of Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I), Interpretation No. 24 [2012] of the Supreme People's Court, Supreme People's Court, 01 July 2013, hereinafter referred to as Interpretation on FCR.
See *Jinyili (Dongguan) Real Estate Development Co., Ltd. v Shenzhen Jianda Construction Engineering Co., Ltd.*, Dongguan Intermediate People's Court, (2016) Yue 19 Min Final No.7645.
[33] See Article 33 (2) of the CPL and Article 7 (2) of the SMPL.
[34] See *Tangshan Port Logistics Co., Ltd. v Beixin Group Xiamen International Trade Co. Ltd*, Beijing First Intermediate People's Court, (2015) Yi Zhong Min (Shang) Final No. 09115.
[35] See Article 41 of the FCR; See also *Shanghai Mingdong Container Terminal Co., Ltd. v Hanjin Shipping Co. Ltd,* Shanghai Maritime Court, (2016) Hu 72 Min Chu No. 2829.
[36] Article 4 of the FCR.
[37] Article 5 of the FCR.

obligations can best reflect the characteristics of this contract or other laws that have the closest relation with this contract shall apply.[38] For example, in a TOC, the operation client is a company registered in Hong Kong. Without an applicable law clause, the Chinese law shall be applied as the most proper law, since TO's fulfilment of obligations can best reflect the characteristics of the TOC, and the habitual residence of the port locates in China.[39] For tortious claim, the laws at the place of tort or the mutual habitual residence shall be applied to the disputes.[40]

Moreover, in most cases, the disputes involving the TOs are closely connected to the carriers in the carriage contracts since the victims also have the right to seek remedies from the carriers rather than from the TOs. Under the current CMC, even though the parties are allowed to agree on the applicable law for the carriage contract,[41] the problems will be whether the agreement of the applicable law may lead to the derogation of Chapter 4 of the CMC and thus become invalid.[42] This puzzle will be solved by the revised CMC, where the rule that the CMC shall be applied mandatorily in cases where the departure or the destination port is located in China is stipulated.[43] However, since the contracts between the carriers/shippers/consignees and the TOs fall outside the scopes of the carriage contracts, whether the validity of the applicable law clause between the carriers/shippers/consignees and the TO shall be affected by the mandatory rule is uncertain.

2.2.2 Statute of Limitations

[38] Article 41 of the FCR.
[39] See *Shenzhen Chiwan Petroleum Base Co., Ltd. v Huirong (Hong Kong) Shipping Co., Ltd.*, Guangzhou Maritime Court, (2018) Yue 72 Min Chu No. 345. See also *Zhanjiang Port China Shipping Container Terminal Co., Ltd. v Hong Kong Donggang Freight Service Co., Ltd.*, Guangzhou Maritime Court, (2002) Guang Hai Fa Chu Zi No. 12; and *Chiwan Container Terminal Co., Ltd. v Hanjin Shipping Co. Ltd*, Guangzhou Maritime Court, (2018) Yue 72 Min Chu No. 224.
[40] Article 44 of the FCR.
[41] Article 269 of CMC.
[42] Article 44 of the CMC.
[43] Article 51 of the revised CMC draft for review.

During the court proceedings, the defendant may sometimes argue that the statute of limitations of the case is expired, and thus he shall no longer undertake the liability. Before the enactment of General Provisions of the Civil Law of the People's Republic of China (General Provisions, Invalidated by the CC in 2021),[44] the statute of limitations regarding the civil rights protection is two years without otherwise stipulated by law,[45] and the TOC and property infringement cases fall into this scope.[46] In terms of the PSC and personal infringement cases, the limitation of action is one year.[47] However, after the General Provisions and the CC, without otherwise regulated by a special law, the statute of limitations for all the civil cases is extended to three years, which means the one-year and two-year statute of limitations in the General Principles was invalidated.[48] The limitation period shall start upon the time when the entitled person knows or should know that his rights have been infringed.[49]

Sometimes, especially in the cargo claims, both the TO and the carrier can be litigated against. For claims against the carrier, the statute of limitations for the carriage of goods by sea contract is one year only, counting from the day on which the cargoes were delivered or should have been delivered by the carrier.[50] However, the claims against the TO shall have a three-year limitation period based on the CC. Thus, after the expiration of the statute of limitations for the carriage contract, the victims may claim against the TO who has a longer limitation period and the TO may face loads of claims. In this situation, when the carrier is the ultimate tortfeasor,

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[44] Order No. 66 of the President, National People's Congress, 01 July 2017, invalidated by the CC.

[45] See Article 135 of the General Principles of the Civil Law of the People's Republic of China, Order No. 37 of the president of the People's Republic of China, National People's Congress, 01 January 1987, invalidated by the CC, hereinafter refer to as General Principles.

[46] The cases in point are *The Tokio Marine & Nichido Fire Insurance Co., (China) Ltd. (Guangdong Branch) v Changsha Jixing Container Terminal Co., Ltd*, Hubei High People's Court, (2019) E Min Final No. 391 and *China Continent Property Insurance Co., Ltd. (Hainan Branch) v Sinotrans Guangdong Zhanjiang Company and Zhanjiang Port International Container Terminal Co., Ltd*, Guangzhou Maritime Court, (2016) Yue 71 Min Chu No. 69.

[47] Article 136 of the General Principles of Civil Law, the Limitation of Action shall be one year on cases concerning the following: (1) claims for compensation for bodily injuries; (4) loss of or damage to property left in the care of another person.
See *Cardolite Chemical (Zhuhai) Co., Ltd., v Zhuhai International Container Terminals (Gaolan) Co., Ltd.*, Guangdong High People's Court, (2017) Yue Min Final No. 418, where the statute of limitation for the PSC is one year.

[48] Article 188 of the General Provisions and Article 1 of Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Extinctive Prescription Rules in the General Provisions of the Civil Law of the People's Republic of China.

[49] Article 137 of the General Principles of Civil Law, a Limitation of Action shall begin when the entitled person knows or should know that his Rights have been infringed upon. However, the people's court shall not protect his Rights if 20 years have passed since the Infringement. Under special circumstances, the people's court may extend the Limitation of Action.

[50] Art 257 of the CMC; see also *Cardolite Chemical (Zhuhai) Co., Ltd.,* (n 47) and *Sinoma Supply Chain Management Co., Ltd. v Yangpu Huahong Shipping Co., Ltd.*, Shanghai Maritime Court, (2013) Hu Hai Fa Shang Chu No. 1294; Shanghai High People's Court, (2014) Hu Gao Min Si (Hai) Final No. 67; Shanghai High People's Court, (2015) Hu Gao Min Si (Hai) Zai Final No. 1.

the TO still has at least 90 days' period from the date the TO has settled the compensation or the date the TO receives the copy of the complaint from the court to recourse from the carrier, regardless of the expiration of the one-year period.[51] Moreover, in terms of the marine insurance contract, the statute of limitations of the insurer's subrogation right shall be equal to the period of the insured, and the period starts counting at the same time when the period for the insured starts.[52]

It is noted that the party who claims for the expiration shall take the responsibility to prove the starting date of the period, and the failure to prove that date may sometimes be unable to lead to the expiration.[53] Also, the expiration of the limitation will sometimes not be examined by the court if the legal relationship between the claimant and the defendant is in fact not established.[54]

2.2.3 Repeated Litigation

The defendant may sometimes challenge the filing of a case based on the repeated actions. In Chinese law, as long as the parties, the subject matter of action and claims of the action are identical, the court shall not institute the latter action or dismiss the action if instituted due to the repeated action.[55] However, even if the parties and the claims are identical, the actions

[51] Art 257 of the CMC.

[52] Official Reply of the Supreme People's Court on the Starting Date of the Statute of Limitations in Which the Insurer of a Marine Insurance Contract Exercises the Right of Subrogation to Claim for Compensation, Supreme People's Court, Interpretation No. 15 [2014] of the Supreme People's Court, 26 December 2014.
See also *PICC Property and Casualty Co., Ltd. (Beijing Branch) v Zhanjiang Port (Group) Co., Ltd. (First Branch) & Zhanjiang Port (Group) Co., Ltd.,* Guangzhou Maritime Court, (2018) Yue 72 Min Chu No.89.

[53] *Jiangmen International Container Terminal Co., Ltd. v Guangdong Gaoluhua TV Co., Ltd., Chen Changlong, Xiao Yongchao, Pearl River Container Transportation Center*, Guangzhou Maritime Court, (2002) Guang Hai Fa Chu No. 69 and also *Chiwan Container Terminal Co., Ltd.* (n 39).

[54] See *Cardolite Chemical (Zhuhai) Co., Ltd.,* (n 47) and *Shanghai Guandong International Container Terminal Co., Ltd. v Shanghai Youda Wood Industry Co., Ltd*., Shanghai Maritime Court, (2018) Hu 72 Min Chu No. 3141.

[55] Article 247 of the CPL, where, in the course of an action or after a judgment takes effect, a party institutes another action against matters for which an action has been instituted, and the another action meets the following conditions at the same time, it constitutes a repeated action:
(1) The parties to the latter action and those to the former action are the same.
(2) The subject matter of action in the latter action and that in the former action are the same.
(3) The claims in the latter action and those in the former action are the same or the claims in the latter action substantially deny the judgment in the former action.
Where a party institutes a repeated action, the people's court shall rule not to accept the action; if the repeated action has been accepted, the people's court shall rule to dismiss the action, unless otherwise as prescribed in laws and judicial interpretations.

would be different if one action claims in contract and one action claims in tort.[56] Besides, although the requirements for the repeated action are satisfied, there is a possibility that the action cannot be considered as the repeated action if the disputes in the former case were not substantially heard.[57]

Once the court confirms that it has the jurisdiction to hear the cases, the disputes are not repeated and are within the statute of limitations, the court will continue to consider the substantive disputes based on the appropriate applicable law. Under Chinese substantive law, it is noted that the CC entries into force later than the case collection. Therefore, in addition to the CC, the description of the cases within the substantial disputes will cite the relevant provisions of the Contract Law,[58] Tort Law,[59] Property Law[60] and other laws in the judgment, and also indicate the corresponding provisions in the CC. If the provisions of the CC are significantly different from the previous regulations, the rules in the CC will be discussed separately. In addition, during the terminal operation of the TOs, especially when they perform their warehousing obligations, the obligations they should fulfil are the same regardless of the carriage of goods by sea or carriage of goods by inland water. Therefore, there is no difference between the two carriages in determining TO's breach of contract or infringement. Thus, in the following discussions about the substantive issues, the disputes involving the TO in waterway cargo transportation may also be cited.

[56] *Shandong Laigang International Trade Co., Ltd., v Tianjin Port Fourth Port Co., Ltd.*, Tianjin High People's Court, (2019) Jin Min Final No. 77; *China Railway Materials General Import & Export Co. Ltd (China Railway Import & Export) v Fuzhou Songxia Terminal Co. Ltd (Songxia Terminal)*, Xiamen Maritime Court, (2017) Min 72 Min Chu No. 94; Fujian High People's Court, (2018) Min Min Zhong No. 457.
[57] See *Dalian Port Co., Ltd. v Shenyang Dongfang Iron and Steel Co., Ltd.*, Liaoning High People's Court, (2018) Liao Min Final. No 463.
[58] Contract Law of the People's Republic of China (CL), Order [1999] No.15 of the President of the People's Republic of China, 15 March 1999, invalidated by the CC.
[59] Tort Law of the People's Republic of China (TL), Decree No. 21 of the President of the People's Republic of China, 01 July 2010, invalidated by the CC.
[60] Property Law of the People's Republic of China (PL), Order No. 62 of the President of the People's Republic of China, 01 October 2007, invalidated by the CC.

Chapter 3 General Aspects about Terminal Operators and the Cargo Claims

3.1 Introduction

In general, to engage a TO's services, the consignee (or consignee's agent) or carrier (or carrier's agent) will conclude a TOC or a PWC/PSC with the TO. Under these contracts, the TO accepts obligations such as loading and discharging goods, safekeeping of the goods and delivering the goods against certain documents, including the ship's delivery order and the warehouse receipt. Failure to deliver against such legal documents will result in a breach of the contract, leading to a contractual or tort liability. Besides, during the operation, in addition to misdelivery, the goods may also be damaged or the quantity to be delivered is in shortage, leading to contractual liabilities. A contracting party may also choose to claim against the TO in tort if it is more appropriate for them, since the liability for misdelivery or cargo damage/shortage is a concurrence of contractual liability and tortious liability in Chinese law.[61] In addition, if TO's operation harms the legitimate property rights of a third party, the third party may claim against the TO in tort.

Even if the TO is required to bear a contractual liability or a tort liability, the first step is to confirm that the damages actually occur in TO's period of responsibility. Then, TO's actions violate the clauses in the TOC or PSC/PWC, or infringe the legitimate rights of others, thereby causing damages to the contracting party or a third party and should be liable for losses. Under such a circumstance, in order to exempt himself from liability, the TO may attempt to claim that even if there is a breach of contract or an infringement of the other's rights, its liability can be exempted due to certain statutory exemptions or some exemption clauses. Moreover, if a

[61] Provisions of the Supreme People's Court on Several Issues concerning the Application of Law during the Trial of Cases about Delivery of Goods without an Original Bill of Lading, Judicial Interpretation No. 1 [2009], hereinafter referred to as the Provisions. Article 3 of the Provisions, where a carrier causes any loss to the holder of an original bill of lading for delivery of goods without the original bill of lading, the holder of the original bill of lading may require the carrier to bear the liability for breach of contract or bear the tort liability.

TO is not entitled to be exempted, it may insist that it should limit its liability based on a statutory rule or a contractual agreement.

3.2 Defining the Terminal Operator

In China, the term "terminal operator" firstly existed in Rules for the Domestic Water Transport of Cargos (1995),[62] but was repealed by the enactment of the Rules for the Domestic Water Transport of Cargos (2000).[63] A similar definition of "terminal operator" was available in Ports Operation Rules, where it was described as a person who concludes an operation contract with the operating client.[64] Under the TOC, the client entrusts and pays operators for loading, unloading, transferring, warehousing, etc.[65] Nevertheless, the Ports Operation Rules was also repealed by the Ministry of Transport in 2016.[66] Thus, in current law, there lacks a definition of the TO in civil law fields.[67] Besides, none of the definitions mentioned above points out the scope, obligations and liabilities of the TO, and thus is somehow incomplete.

The lack of a clear definition may lead to difficulties in identifying a TO. In one case, the operating client entered into a TOC with a freight forwarder to unload and store the goods within the port area. One of the disputes in the case was whether the freight forwarder was a TO. The cargo owner believed that the freight forwarder could not be a TO, because a TO should be an actual owner or operator of a port, such as the port group or port company. However, both the courts of the first instance and second instance held that according to a regulation issued by the Ministry of Commerce,[68] an international freight forwarder sometimes

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[62] Art4 (6) of the Rules for the Domestic Water Transport of Cargos, Order No. 221 [1995] of the Ministry of Communications.
[63] Order No. 9 [2000] of the Ministry of Communications, August 28, 2000.
[64] Art 3 (2) of the Ports of Operation Rules.
[65] Art 3 (1) of the Ports of Operation Rules.
[66] Decision of the Ministry of Transport on Repealing 20 Transport Rules, Order No. 57 [2016] of the Ministry of Transport.
[67] There is a definition of TO in Provisions on the Administration of Port Operations, which is a term in the layer of the Administrative law and thus is beyond our topic. Art 3 (2) of the Provisions on the Administration of Port Operations (2019 Second Amendment), Order No. 36 [2019] of the Ministry of Transport. The term "port operator" refers to an organization or individual that has obtained the qualification for undertaking the operation of port.
[68] Article 2 of the Detailed Rules for the Implementation of the Regulations of the People's Republic of China on the Administration of the International Freight Forwarding Industry, Departmental Regulatory Documents, Instrumentalities of the State Council, All Ministries, Ministry of Commerce, No. 82 [2003] of the Notice of the Ministry of Commerce, January 1, 2004.

may act as an independent operator to engage in international freight forwarding operations; it can accept the entrustment of the consignee, consignor or its agent for importing and exporting goods, issuing transport documents, fulfilling the carriage contract and charging freight and service charges. This type of freight forwarder is actually a TO.[69] Thus, the freight forwarder in the former case was a TO. Accordingly, a definition that specifies the roles played by the TO and the relation with other possible contracting parties is important when identifying a TO.

3.3 The Legal Status of the Terminal Operator

When it comes to the legal status of the TO in China, the courts have adopted various approaches. Previously, a TO has been considered to be the servant of the carrier.[70] This approach is however outdated, because the tasks that the TO undertakes are nowadays more comprehensive and diversified, leading a TO to act more independently. Furthermore, the TO is regarded as an agent of the carrier,[71] which means that the TO acts on behalf of the carrier and within the authority granted to an agent under the laws of the agency. This approach, though, is also criticised, because when performing the services, the TO is in fact acting in its own name rather than the carrier's name.[72] The TO is also sometimes considered to be the actual carrier,[73] which is firstly being designed into the Hamburg Rules[74] and then absorbed by the CMC.[75] Although it is reasonable to assume the TO as an actual carrier when the transport of the goods from the place of receipt to the place of delivery is needed,[76] it is inappropriate to consider the TO as the actual carrier when it merely takes on the warehousing obligations rather

[69] *Shandong Yahe Agriculture Co., Ltd. v Qingdao Yihailong International Freight Forwarding Co., Ltd.*, Shandong High People's Court, (2017) Lu Min Final No. 1857.
[70] See *China Shenyang Mine Machine Import and Export (Group) Corp* (n 8) and also Zhu (n 8).
[71] See *Hebei President Shipping Co. Ltd (President Shipping)* (n 9); See also Palmer and DeGiulio (n 9).
[72] Si and Zhu (n 13).
[73] See *Haikou Port Container Terminal Co. Ltd.* (n 10).
[74] Article 1 (2) of the Hamburg Rules.
[75] Article 42 (2) of the CMC.
[76] See Michael F. Sturley, "Scope of coverage under the UNCITRAL Draft Instrument", *Journal of International Maritime Law* (2004) vol 10 (2), pp. 138-154, at p148.

than the transportation.[77] Moreover, in some situations, the TO can be considered as an independent contractor[78] who acts and is liable in its own name.[79]

Different courts in China have different considerations of the legal status of the TO; this brings uncertainties and difficulties to contracting parties in evaluating the liabilities of the TO and TO's lien rights, since the liability of the TO and its lien rights are to a large extent dependent upon the legal status of the TO according to the CMC. On the one hand, if the TO can be seen as the servant or agent of the carrier or the actual carrier, the carrier may be liable for damages caused by the TO within the scope of employment or agency, from which they are not entitled to exclude.[80] When both the carriers and the actual carriers are responsible for the damages, they share the joint and several liability.[81]After the compensation is awarded, a non-responsible party, or a party who is only partially liable, shall enjoy the right of recourse.[82] Furthermore, the provisions on the defence and limitation of liability available for the carriers are also available to their servants or agents or actual carriers when they are litigated against in both contract and tort.[83] As to the lien rights, when the TO is regarded as servant or agent of the carrier or the actual carrier, the lien rights of the TO shall be regulated by the CMC.[84] In cases where there is a lack of relevant regulations in the CMC, the rules in Chapter 19 of CC can apply.[85] On the other hand, if the TO is regarded as an independent contractor, only the provisions on exemption of liabilities in the CC,[86] such as *force majeure*, can be applied. Similarly, only the rules in Chapter 19 of CC can be applied for the lien rights.

[77] Si & Zhu (n 13) 8.
[78] See Law (n 11) 317.
[79] Zhu (n 8) 741; See also *Dalian Tariff-free Zone Wenda International Trade Co. Ltd* (n 12).
[80] Articles 54 and 60 of the CMC.
[81] Article 63 of the CMC.
[82] Article 65 of the CMC.
[83] Articles 58 and 61 of the CMC.
[84] Article 87 of the CMC.
[85] Chapter 19 of Title 4 of Book 2 of the CC, From Article 447 and 457 of the CC.
[86] Article 117 of the CL, Articles 26 to 31 of the TL and Articles 180, 590 and 1173 to 1175 of the CC.

3.4 Legal Frameworks Regulating the Cargo Claims

Legal rules that regulate the TO and its liabilities for cargo damage/shortage and misdelivery in contract or tort are scattered throughout various Chinese laws. In addition to the CC and the CMC mentioned above, the 'Provisions of the Supreme People's Court on Several Issues concerning the Application of Law during the Trial of Cases about Delivery of Goods without an Original Bill of Lading' (Provisions), and the 'Summary of the Second National Working Conference on Foreign-Related Commercial and Maritime Trials' (Summary 2005) are helpful to decide misdelivery claims.[87] In addition, since the CMC has been undergoing revision, new rules in the revised CMC draft for comments and revised CMC draft for review will also be discussed.

Within the CC, Book three Contracts deal with general contractual issues and the contractual issues for specific contracts contained in the "Nominate Contracts".[88] Both the "General Provisions" of the Book three Contracts [89] and Chapters 21 and 22 of the "Nominate Contracts" of the Book three Contracts govern the PWC/PSC. In contrast, the TOC, as an innominate contract,[90] is regulated by the "General Provisions" of the Book three Contracts, but may also have reference to relevant rules in "Nominate Contracts" of the CC or any other relevant law.[91] On the other hand, TO's misdelivery or the cargo damage/shortage, which infringes on others' legitimate rights towards the goods, shall undertake the tortious liability according to the CC.[92] In addition, the rules for loading, discharging, storage and delivery obligation and the liability for breach of such obligations are set down in Chapter 4 of the CMC;[93] the rules for the

[87] Summary of the Second National Working Conference on Foreign-Related Commercial and Maritime Trials, Fafa [2005] No. 26, promulgated by the Supreme People's Court on 26 December 2005, effective as of 26 December 2005, hereinafter referred to as Summary 2005.
[88] Refer to Title Two Nominate Contracts of the Book Three Contracts, Article 595 to 978 of the CC.
[89] Refer to Title One General Provisions of the Book Three Contracts, Article 463 to 594 of the CC.
[90] Refer to the contract which is not typical and thus not named in the CL and Title Two Nominate Contracts of the Book Three Contracts, CC.
[91] Article 467 of the CC, for a contract not expressly provided for in this Code or any other law, the General Provisions of this Book shall apply, and the provisions on the most similar contracts in this Book or any other law may apply mutatis mutandis.
[92] See Book Seven Tort Liability of the CC.
[93] Chapter 4 of the CMC, Contract of Carriage of Goods by Sea.

agent/servant of the carrier and the actual carrier are provided in the same chapter. For misdelivery, in the Provisions, apart from the delivery obligation, it also contains rules for compensation, and rules for exclusion and limitation of the liability in misdelivery claims.[94] Similar compensation rules, as well as limitation and exclusion rules, are provided in the Summary 2005,[95] in which the rule is explicitly confirmed that parties other than the carrier, including the TO, who release the goods without the original bills shall undertake the liability in tort when damages have occurred.[96]

3.5 Understanding of Misdelivery and Cargo Damage/Shortage

3.5.1 Misdelivery

In maritime practice, misdelivery normally occurs when the goods are delivered to a party other than the owner or other authorised holders of bills of lading.[97] Misdelivery includes situations, for instance, where a fraudster collects the goods and disappears with the goods, where a party has mistakenly taken delivery of the goods but can still be traced, or where a party who has a competing claim to the goods collects the goods. In those cases, the occurrence of misdelivery is mainly due to the carrier or the TO (if involved) who breaks the delivery obligation by delivering goods without the necessary documents.

Under sea carriage law, the carrier's delivery obligation is written into Article 71 of the CMC, where the carriers shall have the obligation to deliver the goods against the surrendering of the original bills. Any behaviour by a carrier who violates the law by delivering goods without presentation of the original bills of lading and thus damaging the rights of the holder of the bill, leads to misdelivery.[98] In actual practice, similar to the bills of lading, delivery orders also play

[94] See Articles 2 to 6 and 7 to 9 in the Provisions.
[95] See Articles 102, 107 and 110 of the Summary 2005.
[96] Article 101 of the Summary 2005.
[97] Misdelivery Law and Legal Definition, see https://definitions.uslegal.com/m/misdelivery/ (last accessed on 17 July 2020).
[98] Article 2 of the Provisions.

a vital role in delivery. A ship's delivery order is issued by the carrier at the destination to ensure that goods are delivered to the person identified in the document in return for the bill of lading.[99] Normally, when goods arrive at a port, the original bill of lading is presented by the consignee to the carrier in exchange for a ship's delivery order. Equipped with the delivery order, the consignee shall go through administrative procedures, such as customs clearance, and get the stamps from the customs. Finally, with all the procedures completed, the consignee can request delivery from the TO by presenting the delivery order. Prior to collection, it is the TO who shall take responsibility to have custody of the imported goods and to deliver the goods to the relevant consignees.[100] Thus, it is noted that the delivery obligation of the TO not only comes from the PWC/PSC or the TOC, but may also come from the administrative regulation. TO's breach of this delivery obligation can also lead to misdelivery.

In this thesis, misdelivery thus includes situations where the goods are delivered without either the original bills of lading or delivery orders. The following situations may be relevant: In situations where the original bills of lading are late, the carrier may be required to issue the delivery order with a letter of indemnity. For commercial reasons, the carrier may consent to this request and issue the delivery order for the consignee to do the customs clearance and collect goods from the TO.[101] The TO incurs no liability as long as the delivery order is issued by the carrier or is confirmed by the customs. By way of contrast, in some other cases, the bills of lading can be surrendered as expected, but TOs release goods before the arrival of the original bills or before the issuance of the delivery orders. Under this scenario, TOs must be liable for any consequences resulting from misdelivery[102] unless the TOs can retrieve delivery

[99] See The role of Delivery Orders in the shipping and delivery chain: https://www.cratexgroup.com/role-delivery-orders-shipping-delivery-chain/ (last accessed on 17 July 2020).
[100] Article 37 of Customs Law of the People's Republic of China (2017 Amendment), Standing Committee of the National People's Congress, 05 November 2017; and Article 12 of Ports Operation Rules.
[101] See *Hebei President Shipping Co. Ltd (President Shipping)* (n 9).
[102] See *Shenzhen Kaierde New Green Environmental Technology Co. Ltd v Shenzhen Anjunda International Freight Forwarder Co. Ltd*, Guangdong High People's Court, (2004) Yue Gao Fa Min Si Zhong No. 51.

orders and prevent the occurrence of damages.[103] In some extreme situations, the carrier or the shipping agency delivers the goods without the original bills, and the TO also releases the goods without the delivery orders. For example, in *China National Construction v Lianyungang Shipping Agency*[104] and *Lianyungang Shipping Agency v Lianyungang Port Authority*, the Lianyungang Shipping Agency delivered the goods without the original bills, and Lianyungang Port Authority released part of the goods before the issuance of the delivery order, and the remaining part was released against a forged delivery order. In the former case, Lianyungang Shipping Agency was forced to pay damages to the claimant because of the misdelivery; and in the latter case, Lianyungang Shipping Agency tried to obtain recourse from the TO after the compensation was awarded to the claimant. Normally, the TO needs to share the responsibility, but in this case, the liability of Lianyungang Port Authority, as the TO in this case, was exempted for two main reasons, which will be discussed elsewhere in this thesis.[105] Furthermore, in cases where the TO and the carrier share a common intention of releasing the goods without shipping documents, they will bear the joint and several liabilities.

From the brief description, it is clear that the carrier's delivery shall be performed against the original bill of lading. Since the bill of lading is normally issued by the carrier or his agent, there is no difficulty in checking the authenticity of the bill. Thus, it may be questioned as to how the TO can check and distinguish the authenticity of the ship's delivery order. Prior to the judgment of *Lianyungang Shipping Agency v Lianyungang Port Authority*, [106] the question of whether or not a formal examination was sufficient was subject to much debating. In the *Lianyungang* case, the court believed that, due to the dual legal relationships[107] within TO's

[103] See *China Aviation Industry Supply and Marketing Corporation (China Aviation) v Sinotrans Guangdong Zhanjiang Storage and Transportation Company (Sinotrans Zhanjiang)*, Guangzhou Maritime Court, (2006) Guang Hai Fa Chu Zi No. 324.
[104] *China National Construction Import & Export Corporation (China National Construction) v China Lianyungang Ocean Shipping Agency Co. Ltd (Lianyungang Shipping Agency)*, Shanghai Maritime Court, (2002) Hu Hai Fa Shang Chu Zi No. 93.
[105] See Chapter 4, Para 2 and Chapter 5, Para 2.
[106] *China Lianyungang Shipping Agency v Lianyungang Port Authority*, Shanghai Maritime Court, (2004) Hu Hai Fa Shang Chu Zi No.25.
[107] A terminal operator's obligation to store, safekeep and deliver the goods are represented by two legal relationships, namely an entrust relationship between the carrier and the terminal operator, and an entrust relationship between the terminal operator and the customs authority.

obligations under international sea carriage, the examination rule imposed on TOs in inland water transport should not apply to TOs in sea carriage. Thus, under sea carriage, provided that the delivery order meets the formal requirements, such as being stamped by customs, there is no need for TOs to do a substantial check for its authenticity. This adjudication rule was also confirmed in *China Aviation v Sinotrans Zhanjiang*.[108] However, in *President Shipping v Zheneng Port*,[109] it was clearly stated in the declaration of the Zhoushan Port (where Zheneng Port locates in) that the TO could release the goods only when the delivery order was stamped by both the customs and the shipping agency, and after the identity of the consignee was checked. In this case, the TO released the goods without the stamp of the shipping agency, which was somehow defective in the procedure. Therefore, the Zheneng Port was supposed to be liable for the misdelivery due to the procedural failure. However, the court finally concluded that the TO should bear no liability since damages to the holder of the bill had no causal relationship with the defective procedure of the Zheneng Port. Therefore, it may be concluded that, if a local port has its regulations for checking delivery orders, the TO must obey. Otherwise, the court supports the industrial practice and recognises that the standard of checking the delivery order is formal checking; nevertheless, it is necessary for this standard to be further clarified and confirmed in law in the future.

3.5.2 Cargo Damage/Shortage

In general terms, the cargo may be considered damaged when received by the consignee in a condition worse than it was despatched by the consignor.[110] More precisely, according to the Dictionary of Communication, cargo damage is the decrease in quantity and the damage of quality that occurs during the transportation, loading, unloading, and storage of the goods.

[108] *China Aviation Industry Supply and Marketing Corporation* (n 103).
[109] *Hebei President Shipping Co. Ltd (President Shipping)* (n 9).
[110] The Essential Guide to Cargo Damage: Types, Reasons, Prevention & Handling. See https://shippingandfreightresource.com/wp-content/uploads/2017/10/The-Essential-Guide-to-Cargo-Damage.pdf.

Quantity loss includes the loss of goods caused by theft, loss, fire, explosion, shipwreck or other accidents, and the loss of goods that exceed the natural depletion due to volatilisation, spill and other reasons. Quality damage includes wet damage, breakage, deterioration, pollution, deformation, infection, etc.[111] Cargo difference is the excess or shortage that occurs during the transportation of the goods or the error in the freight work, including the discrepancy of the documentation against the actual cargo acceptance and excess or shortage in quantity or weight, caused by improper loading and discharging, short loading and discharging, mis-transfer, and incorrect handling of freight procedures.[112]

During the carriage of goods by sea, there are several reasons for cargo damage/shortage. Cargoes may have already been damaged before loading or have potential damaging factors before loading; the damages can happen due to undesirable loading site conditions, improper stowage on board, improper storage between loading and discharging, natural disasters, theft, and others.[113] In terms of the cargo damage/shortage that happen involving TOs, for example, the cargo damage/shortage may occur when the TO fails to equip proper spreader in the loading and discharging operation,[114] or when the TO improperly straps the goods before transportation within the port,[115] or when the TO fails to manage the goods properly during a storage period.[116]

3.6 TO's Period of Responsibility

In practice, the TO should take charge of the goods and perform the transport-related obligations before, during or after the carriage of goods in the port. Thus, under the TOC, a TO

[111] See Ma Guangwen, Wang Xizhi, *Dictionary of Communication*, Shanghai Jiaotong University Press.
[112] Ibid.
[113] Summarised from "The Essential Guide to Cargo Damage: Types, Reasons, Prevention & Handling." (n 110).
[114] See *Shenzhen Zhonghaitong Shipping Co., Ltd. v Shenzhen Haixing Port Development Co., Ltd.,* Guangzhou Maritime Court, (2011) Guang Hai Fa Chu Zi No. 488.
[115] See *Dubang Property Insurance Co., Ltd. (Tianjin Branch) v Tianjin Port International Logistics Development Co., Ltd*., Tianjin High People's Court, (2014) Jin Gao Min Si Final. No. 14.
[116] See *Qingdao Shixin International Freight Forwarding Co., Ltd. v Qingdao Qianwan West Port United Wharf Co., Ltd*, Shandong High People's Court, (2016) Lu Min Final No. 613.

may be liable for the damages when the damage to the goods happens under its control of the goods. To be precise, the TO may have two different time slots of the periods of liability based on whether it is the TO of a departure port or the destination port. Without otherwise agreed in the contract, the departure ports' TOs are only responsible for the losses that occur after the shippers' delivery of the goods to them and before loading; the TOs of the destination ports are liable for the losses that occur after discharging and before the collection of the goods by consignees. Even if the TO entrusts a part of the operation to a third party, it should still be held responsible for the entire terminal operation process without otherwise agreed.[117] However, if the contract expressly stipulates that the TO is only responsible for loading and discharging, then the TO is not liable for the damage that occurs in warehousing.[118] If the contract stipulates that the TO is only responsible for warehousing, then similarly, the damage in loading and discharging is out of TO's responsibility period.[119]

It is noted that if the recipient of the goods does not object to the quantity and quality of the goods at the time of receipt, the TO shall be deemed to have delivered the goods in accordance with the agreement, and the recipient shall not claim for cargo damages after the collection, unless the recipient of the goods provides proof to the contrary.[120] For example, in *Min'an Property Insurance Co., Ltd. (Shenzhen Branch) v Zhanjiang Port (Group) Co., Ltd. and China Shipping Terminal Development Co., Ltd.*,[121] the inspection of the damaged goods was carried out after the goods were out of the control of the TO, which failed to demonstrate that the goods were damaged during the custody of the TO. Thus, the TO was not liable for the damages.

[117] See *Meiya Property Insurance Co., Ltd v Qingdao Port (Group) Co., Ltd. (Dagang Branch) and Qingdao Port (Group) Co., Ltd,* Shandong High People's Court, (2014) Lu Min Si Final No. 192.
[118] See *China Shipping Development Co., Ltd. v Yingkou Port Group Co., Ltd.*, Supreme People's Court, (2015) Min Shen Zi No. 905.
[119] See *China Pacific Property Insurance Co., Ltd. (Qingdao Branch) v. Fubao Bohai Petrochemical (Tianjin) Warehousing Co., Ltd*., Tianjin Maritime Court, (2014) Jin Hai Fa Shang Chu Zi No. 418.
[120] Article 23 of the Port Operation Rules. Although the Rules have been repealed, this provision is still effective in practice. There is a case for the contrary: *China Continent Property Insurance Co., Ltd. (Hainan Branch)* (n 46).
[121] *Min'an Property Insurance Co., Ltd. (Shenzhen Branch) v Zhanjiang Port (Group) Co., Ltd. and China Shipping Terminal Development Co., Ltd.,* Guangzhou Maritime Court, (2014) Guang Hai Fa Chu Zi No. 1030.

In practice, disputes about the division of carrier's and TO's period of responsibility are also common. For containerised goods, the carrier's period of responsibility starts from the time when the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge,[122] including the period in port. Thus, the carrier's and TO's period responsibility period coincide. When the TO is litigated, it can invoke the carrier's limitation and exemption when it is considered as the agent or servant of the carrier, or the actual carrier. By contrast, the period of responsibility of the carrier for non-containerised goods is "tackle to tackle" only, [123] which means that the TO is responsible for the goods after the goods across the ships rail and the carrier is not liable for damages occurring in a port. Thus, the claimants may argue that, regardless of the legal status, the TO shall not be entitled to enjoy the exclusion and limitation of liability for the carrier when non-containerised goods suffer loss in a port. However, it is interesting to note that, in Chinese judicial practice, regardless of the rule about the carrier's responsibility period, the delivery obligation of the carrier is not discharged by passing the goods to the TO. The carrier may be responsible for the damages when being claimed against by the consignee.[124] Thus, it seems that as long as the TO is the servant or agent of the carrier, or the actual carrier, they can enjoy the carrier's exclusion and limitation of liability for the losses that occur in the port area.

3.7 Discussions

To deal with the lack of a definition, the revised CMC draft for review defines a TO as a party engaged in cargo management obligations within the port area. The TO shall properly and carefully receive, load, handle, stow, carry, keep, care for, discharge and deliver the goods carried.[125] However, this definition is more about the duty of the TO and far from the clarity.

[122]Article 46 of the CMC.
[123] Article 46 of the CMC.
[124] See *Daewoo International Corp v Shanghai COSCO Shipping Co. Ltd,* Guangzhou Maritime Court, (2011) Guang Hai Fa Chu Zi No. 646.
[125] Article 50 (6) and 56 of the revised CMC draft for review.

By contrast, at the international level, the definition of the TO in the OTT Convention contains the concept of the TO, the operation period, the roles played by the TO and the relations with other possible contracting parties. Despite not yet coming into force, the OTT Convention was established accordingly to deal with the issues involving the TO. In the OTT Convention and its Explanatory Note,[126] a transport terminal operator means a person who undertakes to take in charge goods involved in the international carriage to perform or to procure the performance of transport-related services, such as loading, unloading, storage, stowage, trimming, dunnaging or lashing, before, during or after the carriage of goods.[127] Their services may be contracted for by the consignor, the carrier or the consignee. Thus, to reduce the judicial disputes about the identification, the definitions of the TO can be clarified in the civil law field by referring to the OTT convention.

The revised CMC draft also attempts to solve the uncertainty about the legal status. In the revised CMC draft for comments, the TO who is employed by the carrier is regarded as an "actual carrier".[128] However, this rule is deleted in the revised CMC draft for review, where the legislation sets aside the legal status of the TO, but stipulates that the TO shall enjoy the same rights regardless of the operating clients.[129] The design of the revised CMC draft for review can alleviate the disputes about the legal status in practice to some extent. Nevertheless, it is somehow unreasonable to regulate the "independent contractor" under the carriage contract chapter, since most of the contractual relationships between the consignees and the TOs are based on the PWCs rather than the carriage contracts.

[126] This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes; it is not an official commentary on the Convention.
[127] Article 1 of OTT Convention.
[128] Article 4.2 of the revised CMC draft for comments.
[129] Article 74 of the revised CMC draft for review.

By contrast, in the Rotterdam Rules, the TO arguably falls within the idea of "maritime performing parties" (MPP).[130] Articles 4 and 19 of the RR entitle an MPP to enjoy the exclusion and limitation of liability for the carrier automatically.[131] However, the MPP in the RR does not include any TO who is entrusted by parties other than the carrier.[132] In terms of English law, the legal status of the TO and its right to exclusion and limitation of liability are also different. In Hague-Visby Rules (HVR), "a servant or agent of the carrier (such servant or agent not being an independent contractor)" has access to the defence and limitation of the carrier.[133] When the TO is recognised as an independent contractor,[134] it can invoke the carrier's limitation or exclusion of liability when the requirements for the agency device set in *Scruttons v Midland Silicones*[135] or the conditions in Contracts (Rights of Third Parties) Act 1999 are satisfied.[136] Thus, in the further revision, it is recommended that the Chinese law may add some rules about the legal status of the TO and distinguish between the TO employed by the carrier and by the consignee/consignor.

As to the period of responsibility, under English law, the carrier's period of responsibility is "tackle to tackle" only.[137] However, the contracting parties can reach further agreements about the care of cargo before loading and after discharge.[138] The English rules are similar to the rules in the current CMC. Nevertheless, as discussed above, during the Chinese judicial practice, Chinese courts may consider that the period of responsibility of the carrier was not

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[130] See Article 1 (7) of the RR, the MPP is described as parties who perform any of the carrier's obligations between the arrival of goods in a loading port and their departure from the port of discharge.
See also Michael F. Sturley, "The Rotterdam Rules and Maritime Performing Parties in the United States", *Journal of Transportation Law, Logistics & Policy*, (2012) vol. 79, pp. 13-40, at p.19.
[131] Ibid, 21.
[132] Article 1(6) of the RR.
[133] Article IV bis 2 of the HVR.
[134] See *Scruttons v Midland Silicones* [1962] AC 446.
[135] [1962] AC 446 at p.474. See also John F. Wilson, *Carriage of goods by sea* (7th edn, Pearson 2010) 150.
The agency relationship "might have been created on the facts of that case if four basic requirements were satisfied: 'first, the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for those provisions on his own behalf, is also contracting as agent for the stevedore that those provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.'."
[136] See Wilson (n 135) 153 note.199. S6(6) a of the Contracts (Rights of Third Parties) Act 1999, "a contract for the carriage of goods by sea is defined as a contract of carriage 'contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction'. The definition also covers analogous undertakings 'contained in a ship's delivery order or a corresponding electronic transaction'."
[137] Article I (e) of the HVR.
[138] See Wilson (n 135) 182.

necessarily ended after handing over to the TO in some cases. Thus, in the revised CMC draft for review, Article 54 stipulates that unless otherwise agreed by the contractual parties, the carrier's period of responsibility starts from the time when the carrier receives the goods for carriage and ends when the goods are delivered.[139] The rule of the period of responsibility in the revised CMC is similar to the "door to door" rules stipulated in the RR.[140] Under the revised CMC draft for review and the RR, the period of responsibility of the carrier somehow coincides with the period of responsibility of the TO. Thus, as discussed in Para 3.3, when the TO is considered as a servant or agent of the carrier, actual carrier or MPP, it can enjoy the carrier's limitation and exclusion of liability. It seems that the practice of the revised CMC draft, which is consistent with the current judicial practice and the provisions in the RR, is more reasonable.

3.8 Conclusion

Before discussing the contractual and tort liability for cargo claims in-depth, four general aspects of the TO are examined in this chapter. Firstly, according to TO's definition, no definition of the TO is specifically provided in current law. The rules in the revised CMC draft for review are also incomplete, which will bring disputes such as whether a particular service provider is a TO. In this regard, references may be given to the definition in the OTT Convention for a clear provision. Secondly, the legal status of the TO, which is closely connected to issues surrounding the limitation and exclusion of TO's liability, is to some extent unclear. Considering the TO as the actual carrier under the revised CMC draft for comments is not free of drawbacks. The practice of the revised CMC draft for review is also problematic. In its further revision, the legislators may consider the "MPP" in the RR and also adopt separate rules for the "independent contractor". Thirdly, as to the understanding of the misdelivery and cargo damage/shortage, the TO have the obligations to deliver against the bills of lading or the

[139] Article 54 of the revised CMC draft for review.
[140] Article 12 of the RR.

delivery orders. The failure to deliver against these documents will lead to the misdelivery of the TO. For the cargo damage/shortage, the TO shall undertake the liability for damages when the cargo is damaged, or the quantity of the cargo is reduced in its liability period. Lastly, a TO is liable for the cargo claims generally only when the damage to the goods happens during the period under its control. Furthermore, more certainties will be obtained if the period of responsibility of the carrier can be extended to "door to door", as the revised CMC draft for review does. Under such a circumstance, the disputes as to whether the TO can enjoy the carrier's limitation and exclusion of liability can be somehow alleviated.

Chapter 4 Determination of the Contractual Liability for Cargo Claims

4.1 Introduction

After analysing the general legal aspects of the TO and its cargo claims, this Chapter focuses on the contractual liability of the TOs in cargo claims, especially the determination of contractual liability. To engage in TO's services, a TOC or a PWC/PSC will be concluded between the TO and the carrier (carrier's agents) or the consignor/consignee (their agents). If the TO breaches the obligations to take care of the goods or deliver the goods, it should bear the contractual liability. According to the CC, to establish the contractual liability, in addition to proving the existence of a valid contract, the claimant shall also demonstrate that the defaulting party fails to perform the contractual obligation or the performance fails to satisfy the terms of the contract.[141]

4.2 The Conclusion of the Contract

When the TO is litigated against for its contractual liability, regardless of the type of contract, one defence that the TO may try to apply is to cast doubt on the formation of the contract. For example, in *Huaqing Company v Zhangjiagang Port*,[142] Huaqing and Zhangjiagang Port signed an entrustment agreement, where the port was entrusted to do the customs clearance and kept the goods for Huaqing company. The court held that, regardless of being named as "the entrustment agreement", a PWC was actually established due to the de facto performance between the parties, and a voucher for storage was issued by the port. In addition, in *Tangshan Port v Yang Pu Zhong Liang*,[143] even if a document named Shipping and Terminal Service Agreement was signed rather than the TOC, the TOC was still entered into, since the terminal

[141] Article 577 of the CC.

[142] *Qingdao Huaqing Import and Export Co. Ltd (Huaqing Company) v Zhangjiagang Port Affairs Group Co. Ltd (Zhangjiagang Port),* Wuhan Maritime Court, (2008) Wu Hai Fa Shang Zi No. 159; Hubei High People's Court, (2011) E Min Si Zhong Zi No. 47.

[143] *Tangshan Port International Container Terminal Co. Ltd v Yangpu Zhongliang Shipping Co. Ltd*, Tianjin Maritime Court, (2018) Jin 72 Min Chu No. 895.

operator agreed to provide the berthing service, loading and discharging service and storage service to the defendant, and the defendant agreed to pay for the services. Besides, even if there is no written form of the contract, the agreement to conclude the contract and the activity of the conclusion itself can be inferred from the performance of the contracting parties, such as the signing of the Minutes of meeting before the shipment, the Minutes of which indicates the agreement to form a contract between the TO and the contracting party.[144] Thus, except for the obvious agreements to conclude TOCs or PWCs/PSCs with TOs, the conclusion of these contracts can be inferred by the actual performance of the parties, regardless of the names or forms of the agreements.

To deny the contractual liability in claims for cargo damage/shortage, the TO may also attempt to question the conclusion of the contract. In terms of disputes about the de facto contract, as discussed, it shall be determined by the actual performance of both parties. Furthermore, the situations become more complicated where there is an agency relationship. For example, in *Hangzhou Maihao Trading Co., Ltd. v Shanghai International Port (Group) Co., Ltd.*,[145] although Shanghai Derun Shipping Co., Ltd. was entrusted by Maihao to conclude a TOC with Shanghai Port, the court held that a TOC was in fact established between Maihao and the Shanghai Port. The act of passing the goods to the port for shipment by Shanghai Derun and handing the goods over to the defendant was sufficient to prove that Maihao was the actual operation principal of the damaged goods. Moreover, in cases where the TOC or the PWC is concluded between the agent and the TO, the contract can be applied to the principal and the TO as long as the agent has disclosed the principal to the TO.[146]

[144] Tianjin Port Fifth Port Co. Ltd applied for the realization of security rights, Tianjin Maritime Court, (2015) Jin Hai Fa Te Zi No.1-1.
[145] *Hangzhou Maihao Trading Co., Ltd. (Maihao) v Shanghai International Port (Group) Co., Ltd.(Shanghai Port)*, Shanghai Maritime Court, (2011) Hu Hai Fa Shang Chu No.767.
[146] See *PICC Property and Casualty Co., Ltd. Beijing Branch v. Tianjin Port Fifth Port Co., Ltd. and Tianjin Development Zone Yuanxin International Freight Forwarding Co., Ltd.*, Tianjin Maritime Court, (2013) Jin Hai Fa Shang Chu No. 141.

4.3 TO's Liability for Misdelivery under Contract Law

To establish a contractual liability for misdelivery, the prerequisite is the existence of a valid contract in which one party (the carrier or the TO) agrees to keep and deliver the goods for the other party (the holder of the bills of lading or holder of the delivery order). During the performance, if the party who has the obligation to deliver, cannot satisfy this obligation, this will lead to the loss of the holder's legitimate interests towards the goods.[147] In contrast, in cases where the TO re-obtains the original bills or delivery orders, the release of the goods actually serves the original purpose, and no damages occurred; no misdelivery remedies would then be claimed.[148] In commercial practice, to engage TO's services, the clients and the TOs will normally conclude PWCs/PSCs or TOCs. The below will analyse TO's liability for misdelivery under these two types of contract.

4.3.1 The Terminal Operation Contract

A TOC is an innominate contract under the CL and the CC. It is a contract under which the port operator performs operations such as loading, unloading, storing, and container vanning and devanning for goods that arrive at the port, and the client pays the operation fee for doing this.[149] The storage obligation is closely associated with the delivery obligation. Although the storage obligation is mentioned in the definition, whether each TOC includes this obligation must be interpreted on a case-by-case basis. For example, in *Zhejiang Wuchan v Songxia Terminal*,[150] the court of the first instance held that both parties under the TOC agreed to the obligation of "original loading and original discharging" and "handover and taking care" only; accordingly, the TO only had loading and discharging obligations. As a result, the obligations

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[147] Wang Jun, "Analysis of the latest judicial interpretation on delivery of goods without bills of lading", *Annual of China Maritime Law*, (2009) Vol.20 (1-2), pp32-40, at p.36 (in Chinese).
[148] See *China Aviation Industry Supply and Marketing Corporation* (n 103), and also *China Lianyungang Shipping Agency* (n 106).
[149] Article 3 (1) of Ports Operation Rules.
[150] *Zhejiang Wuchan International Trade Co. Ltd (Zhejiang Wuchan) v Fuzhou Songxia Terminal Co. Ltd (Songxia Terminal)*, Fujian High People's Court, (2016) Min Min Zhong No. 1430.

to store and keep goods were merely duties collateral to the loading and discharging, which could not establish a storage/warehousing contract between the parties. Since the Xinghai Company (the third party) was an operation entruster rather than a depositor for a warehousing contract, Songxia Terminal should thus be liable for releasing goods to Xinghai Company rather than the depositor. However, this decision was rejected by the court of the second instance, which held that the TO had the legal obligation to hand over the goods to the operation entrusters or to the receiver appointed by the entrusters. Songxia terminal, who delivered the goods based on the order of Xinghai Company, was acting legitimately and thus should not be liable. By way of contrast, in *Sinotrans Tanggu Branch v Lingang Port*,[151] it was clearly stated in the TOC between Lingang Port (TO) and Hangli Company (entruster) that the Lingang Port would only provide loading and discharging services in the port. Hangli Company should arrange other services, such as loading and discharging in the warehouse, and collection, and should take responsibility by himself for doing this. Sinotrans Tanggu Branch (the principal of Hangli Company) believed that Lingang port had the implied duty to take care of the goods based on the operation agreement. However, the court held that the operation agreement between Hangli Company and Lingang Port clearly stated the agreement to discharge only and excluded the storage obligation. Thus, Tanggu Branch, who claimed that the TO had the storage and delivery obligation, was declined by the court due to the lack of a legal and factual basis. Drawing a conclusion from the above two cases, it may be argued that the court considers that a TO under the TOC shall have the obligation to store and deliver the goods for the entrusters, even if this obligation is not clearly stated in the contract. Nevertheless, if a contract clearly excludes the storage obligation, then the party autonomy of the contracting parties must be respected.

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[151] *Sinotrans North China Co. Ltd, Tanggu Branch (Sinotrans Tanggu Branch) v Tianjin Lingang Port Affairs Group Co. Ltd (Lingang Port)*, Tianjin High People's Court, (2019) Jin Min Zhong No. 95.

4.3.2 The Port Warehousing Contract/Port Storage Contract

Misdelivery may also occur under a PWC/PSC where the TO agrees to perform the obligation of storage and delivery. Under a PWC/PSC, the TO, as the safekeeping party, keeps and stores the goods delivered by the depositor, and eventually returns them thereto.[152] It is noted that there is no substantial difference in judicial practice between TO's obligation to deliver the goods under a PWC or a PSC.[153] However, in cases where a warehousing contract is concluded, a warehouse receipt should be issued by the TO to the depositor.[154] The TO is liable if the goods are delivered to the party without either the warehouse receipt or the authorisation of the depositors within the warehousing period.[155] Nevertheless, under sea carriage, there always exists bills of lading or delivery orders, so, to collect the goods, both the delivery order/bill of lading and the warehouse receipt should be presented to the TO.[156] When the holder of the delivery order and the holder of the warehouse receipt is the same person, as long as the TO delivers the goods against one of the documents, no disputes will arise. However, if the TO delivers without either document, the TO must accordingly bear the liability for misdelivery.

The situation becomes more complicated in cases where the delivery order and the warehouse receipt belong to different parties. To be more precise, the TO concludes a PWC with one party and issues the warehouse receipt to the depositor; however, a third party other than the depositor may obtain the bills of lading or the delivery order according to transactions of the same consignment of goods. For example, if a former buyer fails to pay for the goods, the seller may re-sell the goods and order the carrier to issue a delivery order to a new buyer. However, the former buyer may still hold the warehouse receipt because of the previously concluded

[152] Article 365 and 381 of the CL, Article 888 and 904 of the CC.
[153] See *China Railway Materials General Import & Export Co. Ltd (China Railway Import & Export)* (n 56).
[154] Article 385 of the CL, Article 908 of the CC.
[155] Article 394 of the CL, Article 917 of the CC.
[156] See *Dalian Port Co. Ltd (Dalian Port) v China Railway Materials Harbin Co. Ltd (China Railway)*, Liaoning High People's Court, (2018) Liao Min Zhong No. 462.

warehousing contract. As a result, when both the delivery order and the warehouse receipt are valid, the TO faces a dilemma as to who the goods should be delivered to.

Before dealing with disputes over which party is entitled to the delivery, it is necessary to question the validity of a warehouse receipt. According to Article 386 of the CL, a warehouse receipt shall include basic information about the depositor, the information about the warehousing goods, the deposit place and period, and other relevant information.[157] Thus, in *Dalian Port v China Railway*, a warehousing proof issued by Dalian Port that listed the quantity and place of deposit of the imported mineral powder, as well as the name of the vessel, was in fact a warehouse receipt. By way of contrast, the warehouse invoice list that recorded the consignor and consignee was not a warehouse receipt.[158] Moreover, despite being named as a warehouse receipt, the document was not a warehouse receipt if the document clearly stated that it was a proof of warehouse only.[159]

If both documents are valid, the courts in some cases may have to consider the parties to whom the goods should be delivered. For example, in *Dalian Port v China Railway*, Shenyang Dongfang Company sold the imported goods from the original seller to China Railway, and recommended China Railway to conclude a PWC with Dalian Port. Dalian Port issued a warehouse receipt to China Railway after the execution of the warehousing contract. However, the original seller resold the goods to Sinochem International, because Shenyang Dongfang Company failed to pay for the goods. In this case, Sinochem International was the holder of the bill of lading and the delivery order, but China Railway was the holder of the warehouse receipt. Sinochem International requested the release of the goods but was declined by Dalian Port. Thus, Sinochem International claimed for the delivery of the deposit goods against the

[157] See also Article 909 of the CC.
[158] *Hengtian Venture Capital Co. Ltd v Qingdao Qianwan West Port United Terminal Co. Ltd*, Shandong High People's Court, (2019) Lu Min Final No.1745.
[159] *Tianjin Port Exchange Market Co. Ltd v Tianjin Branch of Beijing Zhongwuchu International Logistics Technology Co. Ltd, Tianjin* High People's Court, (2017) Jin Min Final No. 569.

Dalian Port in Court. In theory, in order to collect the goods, the consignee should provide both the delivery order and the warehouse receipt to the TO. However, the court held that Dalian Port should deliver goods to the holder of the delivery order, who was also the owner of the goods confirmed by another judgment according to the Chinese Property Law. A similar judgment was also made in *Guangzhou Jinbo Logistics Trading Group Co. Ltd v Dandong Port Group Co. Ltd*,[160] where the court held that the Dandong Port should deliver the goods to the holder of the bill of lading rather than the holder of the warehouse receipt; the court considered that the bill of lading (together with the associated delivery order) was the document of title and should be treated as superior to the warehouse receipt as a certificate of the creditor.

In conclusion, when both the delivery order and the warehouse receipt belong to different parties, the opinion of the court is that the goods shall be delivered against the presentation of the delivery order, rather than the warehousing receipt. Nevertheless, since both the delivery order and the warehouse receipt exist, if the TO delivers to the holder of the delivery order, it would take the risk of breaching the warehousing contract and losing the right to request warehousing fees. Accordingly, more certainty would be ensured if court practice and opinions could be written into a specific legal rule or rules.

4.4 TO's Liability for Cargo Damage/Shortage under Contract Law

To ascertain a contractual liability for cargo damage/shortage, there should be a valid contract between the TO and the clients in which the TO agrees to take the operation obligations, such as loading, unloading and taking care of the goods for the other party. During the contractual period, the TO fails to perform its obligations and its failure leads to the damages of the goods or the short in weight of the goods.

[160] *Guangzhou Jinbo Logistics Trading Group Co. Ltd v Dandong Port Group Co. Ltd*, Dalian Maritime Court, (2016) Liao 72 Min Chu No. 33.

4.4.1 Contractual Liability in Cargo Damage

For example, in a PSC, the TO, as the depositary, shall keep the deposited property with due care.[161] If the deposited property is damaged due to the depositary's improper keeping, the depositary shall undertake the contractual liability.[162] In port operation contract, according to the principle of good faith, the nature and purpose of the contract, and the usage of trade,[163] the operation clients have the obligation to declare the cargo information accurately and complete the cargo operation procedures even without clear agreements about the rights and obligations of the parties. By contrast, the TOs have the responsibility to equip suitable operation equipment in accordance with the nature and condition of the cargos, and to operate cautiously and safely.[164] Thus, in *Su Zufu v Guangzhou Port Authority Xiji Port Corporation and Guangzhou Port Authority*,[165] even without the explicit agreement, the two defendants should check the deadweight tonnage, and load the goods in accordance with the deadweight recorded on the ship inspection certificate without exceeding the deadweight tonnage. However, during the loading operation, the TO overloaded the vessel according to the requirements of the plaintiff. The court held that the TO and the plaintiff shall bear the corresponding liability for the damages, since the TO did not perform its obligation to load the goods in reasonable care and the plaintiff broke the contractual duty in providing a suitable vessel for loading.[166] Similarly, in *Qingdao Shixin International Freight Forwarding Co., Ltd. v Qingdao Qianwan West Port United Wharf Co., Ltd.*,[167] both parties breached the operation contract, and each party was correspondingly liable. Pursuant to the contract, Shixin (provider of depository) shall pack the pulp in accordance with national standards or in a manner sufficient to ensure the

[161] Article 892 of the CC.
[162] Article 897 of the CC. See also *China Arts and Crafts (Group) Corporation v Beihai Port Administration*, Beihai Beihai Port Co., Ltd., Guangxi High People's Court, (2005) Gui Min Si Final No. 20.
[163] Article 509 of the CC.
[164] See *Shenzhen Zhonghaitong Shipping Co., Ltd.* (n 114).
[165] *Su Zufu v Guangzhou Port Authority Xiji Port Corporation and Guangzhou Port Authority*, Guangzhou Maritime Court, (2002) Guang Hai Fa Chu Zi No. 451.
[166] Article 592 of the CC.
[167] *Qingdao Shixin International Freight Forwarding Co., Ltd.* (n 116).

quality of the goods. However, Shixin only simply wrapped the pulp with paper, which was not waterproof. Meanwhile, when performing the storage obligation, instead of communicating with Shixin about the improper packaging, the TO simply covered the pulp with a single layer of a brick-like item. Thus, the TO failed to fulfil the obligation of proper keeping as stipulated in the Contract Law.[168]

4.4.2 Contractual Liability in Cargo Shortage

Concerning the cargo shortage, the most often occurred disputes are about whether there is a shortage of the goods and the quantity of the shortage. These disputes are fiercer when there is an "original come, original transfer and original deliver" clause in the contract. Concluded from the judicial practice, neither does the existence of this clause imply that a shortage of goods is not impossible, nor does it exclude the right of the operation clients to claim compensation from the TO for the shortages.[169] Instead, based on the interpretation of the Ministry of Transportation, the theoretical interpretation and the usual practice of terminal operation, the weight stated in the TOC or other documents is only the figure declared by the operation clients rather than the figure that constitutes conclusive evidence of the weight. Thus, the TO is not obligated to deliver the cargo as recorded on the operation documents.[170] However, the TO should be liable when the clients can prove that the shortage of the cargo is caused by TO's fault. In current judicial practice, although some courts agree that a TO is liable when it is at fault,[171] there is however no decided case so far, where the clients can succeed in proving TO's faults in "original come, original transfer and original deliver" clause.

[168] See Article 374 of the CL and Article 897 of the CC.
[169] See *Shandong Yahe Agriculture Co., Ltd. (Shandong Yahe)* (n 69).
[170] See the judgment of *PICC Property and Casualty Co., Ltd. (Beijing Branch)* (n 146).
[171] See *PICC Property and Casualty Co., Ltd. (Beijing Branch) (PICC Beijing Branch)* (n 146) and also *Shandong Xinhai Technology Co., Ltd. (Xinhai Technology) v Guangzhou Port Co., Ltd., and Guangzhou Port Co., Ltd. Xingang Port Branch, (Guangzhou Port)*, Guangdong High People's Court, (2013) Yue Gao Fa Min Si Final No. 22.

As to the quantity of the shortage, it can be calculated based on the differences between the weight when the TO receives the goods and the weight when the TO delivers the goods. However, the quantity recorded on the shipping document is not definitely the accurate figure of the goods that the TO received,[172] especially in cases where an "original come, original transfer and original deliver" clause is included in the contract. For example, in *Xinhai Technology v Guangzhou Port*, due to the "original come, original transfer and original deliver" clause, the TO recorded the amount of quantity in the bills on the warehousing order without weighing the goods. However, when the clients collected their goods, the TO weighed the goods for calculating the operation fees, and there was a difference between the weighed figure and the recorded figure. Since the clients could not prove that the TO was at fault in storing the goods, the court held that there was no shortage in quantity. Moreover, even if the TO measures the weight of goods once receiving them and there is a difference between the inbound weight and outbound weight, such a difference does not necessarily mean that there must be a shortage. When calculating the shortage, loads of factors shall be considered, such as the errors between different measuring methods, natural losses during the storage, and reasonable losses during the operation. Thus, in *Shandong Yahe v Qingdao Yihailong*, even if there were 480 tons shortages between the inbound and outbound weights, the court held that the difference was reasonable and there was no shortage of the goods based on two reasons. Firstly, errors were normal when different measurement methods were used.[173] Secondly, due to the natural nature of the stored goods, a certain amount of loss was a natural phenomenon after a long period of storage. However, when the inbound and the outbound tolerance was exaggerated and unreasonable, this difference could be prima facie evidence of the shortage. Unless the TO could prove that it performed the obligations without fault, it should be liable for the shortages.

[172] See *Nanjing Huahai Shipping Co., Ltd. and Nanjing Haosheng Shipping Co., Ltd. v Benxi Beitai Iron and Steel Group Supply and Marketing Co., Ltd. and Yingkou Quantong Industrial Company,* Guangzhou Maritime Court, (2001) Guang Hai Fa Shan Zi No. 3; see also Article 33 of the Port Operation Rules.

[173] The quantity of inbound was measured by a draft survey, which itself is not error-free. By contrast, when the clients collected the goods, the goods were measured by a weighbridge, and the difference between the two data was normal.

This is the case in *PICC Beijing Branch v. Tianjin Port Fifth Port*, where the TO was held not responsible because it took regulatory measures, such as the designated route and the CCTV, to ensure that the operation process was entirely closed. In conclusion, when the TO is fulfilling its operational obligations, regardless of whether there is a special clause that the TO is only responsible for the original transfer, the TO should carefully perform its cargo management obligations, such as a real-time recording of the operation process and providing a suitable environment for warehousing, the TO may otherwise be liable for the shortage of goods.

For the liquid cargoes, concerning the question of whether a shortage exists when there are errors in different measurement methods, the Supreme People's Court expressed its opinion in a gazette case. In *PICC Property and Casualty Co., Ltd. (Beijing Branch) v Copper River Maritime Inc and Pan Cosmos Shipping & Enterprises Co., Ltd.*,[174] the court held that the specific facts and the evidentiary power between the evidence should be combined to determine whether there is a shortage. In the present case, since the cargo was measured in tank gauging at both the loading port and discharging port, tank gauging could be used as the final measurement. At the same time, the recorded weight in the bill of lading should be compared with the number recorded in the ullage report of discharging port and the dry cabin report, so as to confirm whether the fact of the shortage has occurred.[175] Based on this opinion, for the TOs, if the TOs agree with the weight measured when they received the goods, the shortages can be calculated based on the difference between the weight measured at the time of receiving and the weight measured at the time of delivery by the same method. However, if the TOs disagree with the figure measured at the time of receiving, it should provide other evidence to prove that the quantity inbound or the errors between inbound and outbound are reasonable.

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[174] Zhejiang High People's Court, Case No. unknown.

[175] Supreme People's Court, *Collection of Judicial Views of the Supreme People's Court (New Edition)* Commercial Volume V (2017.09), No. 1794, 3361.

4.5 Conclusion

First of all, in practice, the names and forms of the contracts are not the decisive factors in determining whether a TOC or PWC/PSC is concluded. It is the actual performance of the parties that should be taken into account. Secondly, in a port operation contract, without a specific agreement, a TO shall have an obligation to store and deliver the goods by default. In the PWC, even if a TO has signed a warehousing receipt to the depositor, to avoid misdelivery, the TO still has to deliver the goods to the holder of the bills of lading or delivery order. Thirdly, in the cases of cargo damage, a TO should perform the operation obligations actively and cautiously. Otherwise, it will be liable for breaking the contract based on its fault. In the cases of cargo shortage, arguments generally arise in determining whether there is a shortage and the quantity of the shortage. Accordingly, to decide whether there is a shortage, various factors should be considered, such as the differences in measurement methods, the storage period, ordinary wear and tear, etc. However, as long as a TO can prove that it is not at fault during the period of its responsibility, it is then not liable for the cargo shortage.

Since TO's misdelivery and breach of cargo management obligation may also lead to tortious liability, more discussions about the contractual liability for misdelivery and cargo damage/shortage will be conducted after analysing the tortious liability in Chapter 5.

Chapter 5 Determination of the Tortious Liability for Cargo Claims

5.1 Introduction

In addition to the contractual liability for cargo claims, the TO may also involve in a tortious claim and undertake tortious liability for cargo claims. For misdelivery, according to Article 101 of the Summary 2005, a consignee who takes delivery of the goods without original bills of lading, and parties other than the carrier (including the TO) who release the goods without original bills shall be liable in tort when damages occur. Both the holders of the bill of lading or delivery order and the carriers may sue the TOs in tortious claims. For example, in *China Railway Import & Export v. Songxia Terminal*,[176] China Railway, who was the holder of the bills, charged the Songxia Terminal directly for delivering to a third party without notifications and orders from him. In contrast, instead of suing the TO, the holder of the bill of lading or delivery order may also claim against carriers or their agencies for misdelivery. After compensation is awarded, if it is the fault of the TO, then the carrier can exercise the right of recourse against the TO. This is the case in *President Shipping v Zheneng Port*, where the carrier President Shipping claimed against the TO Zheneng Port after having compensated the titleholder.[177]

For the cargo damage/shortage, regardless of the existence of the contract, both the carriers and the holders of the bills of lading can claim the TO in tort law, since the liability for cargo damage/shortage is a concurrence of tort and contract liability. Thus, in theory, even if there is a TOC or a PWC/PSC between the TO and its clients, the clients can also claim against the TO in tort. However, this situation rarely happens in practice due to the heavy burden of proof in tort law. What's more, the TO may be litigated by the consignee in tort when the TOC is in

[176] *China Railway Materials General Import & Export Co. Ltd (China Railway Import & Export)* (n 56).
[177] See also in *Eastern Car Liner Ltd v Lianyungang Port Authority, China Lianyungang Shipping Agency and Lianyungang Huaxing Mechanized Engineering Co. Ltd*, Shanghai Maritime Court, (1999) Hu Hai Fa Shang Chu Zi No.134; and *China Lianyungang Shipping Agency* (n 106), where the carrier or his agency paid damages to the holder of the bills and then obtained the right of recourse against the port authorities and other relevant parties.

fact entered into between the carrier and the TO, but the damages happen during the terminal operation.[178] In cases where the carrier has compensated the consignee, he may also exercise his recourse rights towards the TO who is the ultimate tortfeasor in tort.[179]

5.2 Elements of the Tortious Claims

According to Article 1165 of the CC, one party who is at fault for infringing upon a civil right or interest of another party shall be subject to tort liability.[180] In general, to establish liability in tort, four conditions must be satisfied: the tortfeasors conduct illegal actions; these actions harm the rights of the owner and cause damages to the owners; there are causal relationships between the harms and the actions; and the conducts are deliberate rather than accidental.[181] The failure of the claimants to prove these conditions may lead to an unsuccessful litigation.[182] Thus, in *Sinoma Supply Chain Management Co. Ltd v Yangpu Huahong Shipping Co. Ltd* & *Baoshan Iron and Steel Co. Ltd*, the Baoshan Iron and Steel Co. Ltd (TO), together with two defendants, were not liable in tort for misdelivery because no evidence could prove the illegal actions of the defendants in delivery, and the defendants were thus not at fault. Also, in *China Lianyungang Shipping Agency v Lianyungang Port Authority*, the Lianyungang Port took no liability for misdelivery in tort because there was no causal relationship between its actions and the damages. Similar judgment can also be found in *President Shipping v Zheneng Port*, where the Zheneng Port was not liable because the losses of President Shipping were due to its own fault rather than TO's misdelivery; there was no causal relationship between the loss and TO's misdelivery. Furthermore, similar to the rule in contractual liability, the TO is not liable in tort

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[178] See *Fujian Huachuang Import and Export Co., Ltd., v Xiamen Container Terminal Group Co., Ltd.*, Fujian High People's Court, (2018) Min Min Zhong No. 426 and *Sumitomo Mitsui Marine and Fire Insurance (China) Co., Ltd. (Guangdong Branch) v Kawasaki Steamship (China) Co., Ltd. (Shenzhen Branch) and Kawasaki Steamship (China) Co., Ltd.*, Guangzhou Maritime Court, (2017) Yue 71 Min Chu No. 425.

[179] See *NIPPONYUSENKABUSHIKIKAISHA v Quanzhou Port Group Co., Ltd.*, Xiamen Maritime Court, (2003) Xia Hai Fa Shang Chu No. 159.

[180] Article 1165 of the CC, one who is at fault for infringement upon a civil right or interest of another person, causing harm, shall be subject to the tort liability.

[181] See Jun (n 147) 36, see also *Sinoma Supply Chain Management Co. Ltd* (n 50).

[182] See *Fujian Huachuang Import and Export Co., Ltd* (n 178).

when the damages do not in fact occur.[183] The same conditions for tortious liability also apply to cargo damage/shortage cases. For example, in *Dubang Property Insurance Co., Ltd. (Tianjin Branch) v Tianjin Port International Logistics Development Co., Ltd.*,[184] although Dubang believed that the damages were caused by TO's speeding within the port, neither did Dubang prove the speeding action of the TO, nor did it establish the causal relationship between the damages and the TOs' speeding. Thus, the court held that the TO was not liable for the cargo damage. In practice, a TO may also be claimed against for liability for omission. To establish omission in tort law, except for the requirements for causal relationship and subjective fault, the tortfeasors must have the duty, either statutory, or contractually, or based upon previous performance, to exercise particular obligations, but fail to exercise them.[185] Thus, in *Shandong Laigang International Trade v Tianjin Port Fourth Port*, the defendant was not liable for misdelivery, since neither did it have any statutory obligation, nor did it have any obligation in contract or obligation arising from the previous course of dealing, to supervise or check the delivery after the issuance of the "black card" (a voucher for collection issued by the TO).

5.3 Joint and several liability of the TO

When a TO is a sole defendant, it will be liable in tort when the relevant elements for tortious liability, as discussed above, can be satisfied. Under some circumstances, the holder of the bills or delivery orders may sue the carrier, the TO and the other tortfeasors in one claim for joint and several liability.[186] Similarly, a carrier may exercise the right of recourse and sue the TO, the shipping agency and the other tortfeasors in one claim for joint and several liability.[187] In order to form a joint and several liability, as well as satisfying the conditions above, the

[183] See *China Aviation Industry Supply and Marketing Corporation* (n 103); See also *Cardolite Chemical (Zhuhai) Co., Ltd* (n 47).
[184] *Dubang Property Insurance Co., Ltd. (Tianjin Branch)* (n 115) and See also *Fujian Huachuang Import and Export Co., Ltd* (n 178).
[185] See *Shandong Laigang International Trade Co. Ltd* (n 56).
[186] See *Sinoma Supply Chain Management Co. Ltd* (n 50).
[187] See *Lilac Marine Corporation of Liberia & Korea Line Corporation v Guangdong Zhanjiang Shipping Agency Company & Sinotrans Guangdong Zhanjiang Storage and Transportation Company*, Guangzhou Maritime Court, (1999) Guang Hai Fa Zhan Zi Di No. 62.

tortfeasors must share common deliberations.[188] Although it is possible to hold the TO to be bound by joint and several liability with the carrier or other tortfeasors in theory, no successful court case in this regard has been reported so far. In *Qingdao Elison Import and Export Co. Ltd v Sinopec Shanghai Petrochemical Co. Ltd & Shanghai Huanxin Material Cooperation Company*,[189] Sinopec Shanghai (the TO) and Huanxin (the party who collected the goods) were claimed against for joint and several liability by the holder of the delivery order. However, the court held that the TO should undertake the whole liability alone for delivering without the delivery order, since there was no relationship between the damages and the collection by the Huanxin Company. In contrast, in *Sinotrans Tanggu Branch v Lingang Port*, the Lingang Port was not liable because it was not at fault. However, the Hangli Company and the Zhonghan Company had common intentions to order the delivery and thus must bear the joint and several liability according to the TL. In *Jiangsu New Era Shipbuilding Co., Ltd (New Era Shipping) v Shanghai Huichuang International Logistics Co., Ltd. (Huichuang)*,[190] New Era Shipbuilding claimed a joint and several liability towards five defendants, including the TO- Shanghai Port, about the damages to the carried ship. However, neither did the claimant prove each defendant's infringements, nor did he prove the parties' common deliberation. As to the liability of the TO, Shanghai Port should require the operation client to provide the certificate of the carried ship and other written materials required for the operation, rather than relying on fax or oral declaration to understand the technical parameters of the carried ship. Therefore, Shanghai Port had at least negligence in the occurrence of the accident, and it should also bear

[188] Article 1168 of the CC, where two or more persons jointly commit a tort, causing harm to another person, they shall be liable jointly and severally.
[189] *Qingdao Elison Import and Export Co. Ltd v Sinopec Shanghai Petrochemical Co. Ltd & Shanghai Huanxin Material Cooperation Company*, Shanghai No. 1 Intermediate People's Court, (2004) Hu Yi Zhong Min Si (Shang) Chu Zi No.93.
[190] Shanghai Maritime Court, (2010) Hu Hai Fa Shang Chu No.1105; Shanghai High People's Court, (2012) Hu Gao Min Si (Hai) Final. No. 77.

the corresponding tort liability. In most cases, due to the lack of common deliberation, the TO and the other tortfeasors would undertake proportional liability according to their faults.[191]

Several reasons can explain why the courts seldom support joint and several liability among the carrier, the TO and other parties. One principal reason is that the legal relationships between the claimants and the defendants are different. It happens that the claimant sues for contractual liability, but fails to confirm the existence of the contracts between him and all other parties; or the claimant claims for tort liability, but fails to demonstrate the infringements of his right by all the parties.[192] Normally, then, the court will set aside other defendants and decide that the carrier shall first bear the whole liability. If the carrier is not the ultimate tortfeasor, he is entitled to file a separate lawsuit for a recourse action.[193]

5.4 TO's Liability in Tort for Delivery against the Warehouse Receipt

In commercial practice, the TOs sometimes ignore the holders of bills of lading who have no contractual relationships with them and deliver the goods to the holders of the warehouse receipt who sign PWCs with them. For example, due to the foreign trade agency system,[194] the ultimate buyer must sometimes appoint a qualified agency to help them purchase the goods under the agency's name. Normally, the consignee recorded on the bill of lading is actually an agency. Nevertheless, the buyer often concludes a PWC with the TO directly. Disputes will then occur when the buyer collects the goods through the warehouse receipt but declines to pay

[191] See Article 1172 of the CC, where two or more persons commit torts respectively, causing the same harm, if the seriousness of liability of each tortfeasor can be determined, the tortfeasors shall assume corresponding liability respectively; or if the seriousness of liability of each tortfeasor is hard to be determined, the tortfeasors shall evenly assume the liability.
And see also *China Pacific Property Insurance Co., Ltd. (Yingkou Economic and Technological Development Zone Branch) v Dalian Longfeng Shipping Co., Ltd., Dalian Port Co., Ltd.*, Supreme People's Court, (2015) Min Shen Zi No. 2735.
[192] See Lixin He, Chaowei Fu, Nan Kang, Yue Chen and Ming Zhu, "Research on Practical Issues of Delivery of Goods Without Bills of Lading—Analysis of 135 Cases of Delivery of Goods without Bills of Lading", *Proceedings of the Chinese Lawyer's Maritime Law Seminar 2005* (2005) (in Chinese).
[193] See *China Lianyungang Shipping Agency* (n 106) and *Hebei President Shipping Co. Ltd (President Shipping)* (n 9).
[194] Article 12 of the Foreign Trade Law of the People's Republic of China (2016 Revision), a foreign business operator may accept the entrustment of other people and handle foreign trade businesses on their behalf within its scope of business.

the cargo price to the agency who has made the payment for the goods. In this situation, the holder of the bills may claim against the TO for misdelivery in tort.[195]

As discussed earlier, the TO is required to deliver the goods to the title owner, who is always the holder of the delivery order or bills of lading, rather than the holder of the warehouse receipt, in cases where the documents belong to different parties. Thus, if the goods are delivered by the TO to the holder of the warehouse receipt, the holder of the bills or delivery order may claim against the TO for misdelivery. Furthermore, as mentioned, under both the PWC and the TOC, the TO is presumed to have the obligations to store and deliver the goods. Therefore, even if there is no contractual relationship between the holder of the bills or delivery order and the TO, the holder of the bills or delivery order may claim that an implied contract should be inferred from the performance of the TO and himself, so that the TO has the obligation to store and deliver the goods for the holder of the bills. Under this circumstance, the holder of the bill or delivery order may have the opportunity to litigate against the TO for misdelivery either in tort law or contract law. In *China Railway Import & Export v Songxia Terminal*, Xinhai Company concluded a sale of goods contract with China Railway for buying the imported iron ore. Under the sale contract, it was agreed that, before the payment, the title of the goods was with China Railway. Besides this, Xinhai Company concluded a PWC with the Songxia Terminal. Upon request, Songxia Terminal released the goods to Xinhai Company based on the warehouse receipt, but Xinhai Company failed to pay the seller. The seller, China Railway, as the holder of the bill, sued the TO Songxia Terminal for misdelivery. During the litigation, China Railway believed that there was an implied TOC between them and the TO. Thus, based on Article 122 of the CL, they had the right to choose to claim either in contract law or tort

[195] Shaolin Xu and Bing Han, "Discussions on Port Operator's Obligations to Delivery against the Bills of Lading and the Judicial Application of the Unreal Joint and Several Liability", *Journal of Law Application*, (2006) vol. 7, pp.69-72, at p.70. (in Chinese).

law.[196] Since, in earlier litigation, the court had rejected China Railway's claim against the Songxia Terminal for contractual liability,[197] China Railway decided to claim for tortious liability in this case. However, the tortious claim was also declined by the court. The court believed that since there was no contractual relationship between the TO and China Railway, the TO had no obligation to store the goods for the China Railway. In contrast, the court held that TO's storage of the goods, which was based on the PWC, was a legal possession. TO's delivery to the depositor Xinhai Company was the obligation under the contract and was thus not at fault. Songxia Terminal had the duty to perform the delivery with due diligence. However, it could not, and had no obligation to, check the owner of the goods under each operation; the contractual agreement about the ownership between the buyer and the seller was thus beyond its checking obligation. Moreover, in this case, although the goods were collected by the Xinghai Company, the ownership of the goods was, however, still with China Railway and was not harmed by Songxia Terminal's delivery. Furthermore, the Supreme Court held that, in international commerce and shipping practice, the rights and obligations of the contracting parties in a sale of goods contract, carriage contract and warehousing contract were different. It was unfair and unreasonable for the seller to transfer the risks of non-payment in the sale of goods contract to the other parties under other contracts. Thus, the claimant's tortious claim against the TO was also declined by the court.[198] As a result, if there is no contractual relationship between the holder of the bills and the TO, the court is reluctant to decide that the TO shall undertake tortious liability for misdelivery in cases where the ownership of the goods

[196] Article 122 of the CL, where the breach of contract by one party infringes upon the other party's personal or property rights, the aggrieved party is entitled to choose to claim the assumption by the violating and infringing party of liabilities for breach of contract according to this Law, or to claim the assumption by the violating and infringing party of liabilities for infringement according to other laws.
See also Article 186 of the CC, where a party breaches a contract, causing damage to the other party's personal or property rights and interests, the aggrieved party shall be entitled to request the party to assume liability for breach of contract or assume tort liability.
[197] See *China Railway Materials General Import & Export Co. Ltd (China Railway Import & Export)* (n 56).
[198] Similar judgment can also be found in *Zhejiang Wuchan International Trade Co* (n 150) and *Ruiganglian Group Co. Ltd v Fuzhou Songxia Terminal Co. Ltd*, Xiamen Maritime Court, (2016) Min 72 Min Chu No. 321.

is not harmed and where there is another contract between the holder of the bills and the party who collects the goods.

5.5 Discussions about the Delivery Obligations in the Civil Law Fields

In practice, for cargo damage/shortage, in addition to the recourse from the carrier, only the party who delivers the goods in the loading port or the party who collects the goods in the discharge port may claim against the TO for compensation. The legal relationships between them are quite straightforward, and the courts only have to focus on the actions of the breach of the contract or the tortious acts. By contrast, when dealing with the delivery obligations, more issues should be analysed. As discussed earlier, several legal documents are presented during the port operation, including the bills of lading, delivery orders, and warehousing receipts, based on different legal relationships. When the legal documents belong to different parties, the TO may face such puzzles as to whom the goods should be delivered. Thus, the contractual and tortious liability arising from TO's delivery obligation will be discussed in this part.

5.5.1 Does a TO Have the Statutory Obligation to Deliver against a Delivery Order?

Although delivery orders are intensively used in practice, it is however not defined in current Chinese law. In addition, although a TO shall deliver against the presentation of the delivery order as a customary practice, this obligation is confirmed only in the Administrative Law;[199] as a result, whether a TO has the obligation to deliver against the delivery order in civil law has raised many debates. In cases where a TOC or a PWC/PSC is concluded, as mentioned earlier, judicial practice holds a presumption that the TO has the contractual obligation to store and deliver the goods. Besides, the delivery must be performed against the presentation of the

[199] See Article 17 and 20 of the Customs Law of the People's Republic of China (2017 Amendment), Standing Committee of the National People's Congress.

delivery order rather than the warehouse receipt. Compared to the contractual liability, the tort liability for misdelivery without the delivery order is not expressly provided in law; nevertheless, the subjective fault (i.e. the gross negligence of disregarding the duty of care through misdelivery), combined with the objective behaviour (i.e. the behaviour of releasing without the delivery order) results in damages to the holder of the delivery order; and the TO shall thus be liable in tort.[200]

According to the Carriage of Goods by Sea Act 1992 in the UK, a ship's delivery order means any document which is neither a bill of lading nor a sea waybill, "but contains an undertaking which (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person."[201] Accordingly, the delivery order not only records information about the goods, but is also a document against which the carrier guarantees to deliver the goods to the person identified in the document.

Even though a delivery order is a necessary document in TO's daily operation, its definition is still missing in Chinese law. Therefore, a definition similar to that in the English law might be considered by the Chinese legislature in the future. As to the obligation to deliver against the delivery order, if the revised CMC draft is approved, this rule will be confirmed by Article 101 of the draft for review where the TO shall deliver the goods against the transport documents issued by the carrier or carrier's agent.

[200] Xu and Han (n 195) 71.
[201] Section 1(4) of the Carriage of Goods Act 1992.

5.5.2 Is a TO Liable for Delivery against a Warehouse Receipt rather than a Delivery Order?

As mentioned, in cases where the holder of the delivery order and the holder of the warehouse receipt are different, upon request, the TO should deliver the goods to the title owner, who is always the holder of the bills or delivery order, rather than the holder of the warehouse receipt. Interestingly, for the tort cases mentioned above, the TOs who delivered the goods against the warehouse receipts were held not liable for delivery without the delivery orders. It seems that even if the TO delivered against the warehouse receipt, it may not bear the liability for misdelivery when there is no contractual relationship between it and the holder of the bill under the current law. However, in the aforementioned cases, despite the fact that the TOs had no contractual relationships with the holders of the bills or delivery orders, the judgment was actually made based on other reasons. For example, as in *China Railway Import & Export v Songxia Terminal*, the TO was not liable because the ownership of the goods was not harmed by the misdelivery; and the holder of the bill, who was also the seller of the goods in the sale of goods contract, could obtain compensation from the sale contract rather than the carriage contract.

Instead of suing the TO directly, the holder of the bills and the delivery orders may sometimes claim against the carrier for compensation based on the carriage contracts. After compensation, the carrier may exercise his right of recourse against the TO in tort when there is neither a contract between the carrier and the TO, nor a contract between the carrier and the party who collects the goods. The question would then arise, though, as to whether the carrier's recourse claim in tort would be supported by the court?[202] In current Chinese judicial practice, the answer seems to be no, since the courts believe that TOs have no obligation to store and deliver the goods without the contracts in such a case. If the carrier's claim against the TO is declined

[202] See the case mentioned in "Discussions on Port Operator's Obligations to Delivery against the Bills of Lading and the Judicial Application of the Unreal Joint and Several Liability" written by Shaolin Xu and Bing Han (in Chinese) (n 195).

solely due to lack of a contractual relationship, it sounds unfair for the carrier to be liable, while the TO who actually infringes the property rights of the holder of the bill does not have to bear any liabilities. To tackle this unfairness, it is perhaps feasible for the courts to refer to the 'unreal joint and several liability' principle. The "unreal joint and several liability" means that the obligee (victim) has the right to ask any one of his obligors to pay off all the debts or compensate for all losses, and this obligor's (infringer's) fulfilment leads to the expiration of the whole liability to the victim.[203] Under the unreal joint and several liability, within all the tortfeasors, it is the ultimate tortfeasor who shall undertake the tort liability for the victims. The tortfeasors who undertake the tort liability firstly, that is, other than the ultimate tortfeasor, can exercise the right of recourse. Thus, under the described circumstance, if the carrier undertakes the liability for misdelivery at first, he can exercise the right of recourse towards the TO for the whole liability. Unfortunately, except for where unreal joint and several liability can be identified in some legal provisions,[204] the principle itself is not specifically stated and defined in any law concerning civil matters in China.[205]

5.6 Conclusion

A TO should be liable in tort law if it subjectively conducts illegal actions and these actions lead to damages to the victims. Moreover, a TO may bear the joint and several liability if there are common intentions of all the tortfeasors, including the TO.

The fulfilment of a TO's delivery obligations is complex and therefore worth analysing. This chapter finds out the following: Firstly, the question as to whether the TO has the statutory obligation to deliver against the delivery order is not answered in the civil law field; it is thus necessary to confirm the delivery obligation as a statutory one like the revised CMC draft for

[203] See Xinbao Zhang, *Legislation of Tort Liability Law in China* (Springer 2018) 139, 259.
[204] For example, see Article 254 (1) of the CMC and Article 46 of the Insurance Law of the People's Republic of China.
[205] Zhang (n 203) 139.

review does. Secondly, a TO may be confused about how to fulfil the delivery obligation in cases when both the delivery order and the warehouse receipt exist. If the holder of the delivery order/bills concludes the TOC with the TO, and the holder of the warehouse receipt concludes a PWC with the TO, more protections in the law are necessary to provide that a successful delivery to the holder of the delivery order would exempt the TO from liability for breaching the warehousing contract. If there is no contractual relationship between the TO and the holder of the bills/delivery order, the TO is not liable for delivery against the warehouse receipt in current judicial practice. In this regard, when the TO is an ultimate tortfeasor, it has the opportunity to escape its liability in tort. Thus, more fairness would be achieved if the future law supports recourse action against the TO by the party who has paid the damages firstly, based on the unreal joint and several liability.

Chapter 6 The Remedies for Cargo Claims and the Derogation of Liability

6.1 Introduction

Once the contractual or the tortious liability is ascertained, the remedies for the cargo claims should be decided. When a TO has to compensate for the loss, it may sometimes argue that it can apply the statutory exclusions of the liability, such as the *force majeure* in the CC and carrier's exclusion of the fault of the consignor or consignee in the CMC. Even if the liability cannot be exempted, the TO may also raise the claim that it can use the limitation of liability rules in the CMC. In addition to the statutory exclusion and limitation, the TO may also argue that it can apply the agreements in the carriage contract, TOC or PWC/PSC to exempt from or limit its liability. However, whether a TO can apply the carrier's exclusion or limitation rules, and whether a contractual exclusion or limitation clause is valid are still problematic. In this Chapter, the remedies for the cargo claims and the possibility for a TO to be exempted from or limit its liability will be discussed.

6.2 The Remedies for Cargo Claims

In terms of the contractual remedies for breach, according to Article 577 of the CC, a TO who fails to perform its obligations shall continue to perform its obligations, take remedial measures, or compensate for losses. Based on this rule, to claim for compensation for losses, a claimant shall prove that, due to TO's behaviour, he actually has difficulty in performing the contractual duty and taking remedial measures, and therefore suffers the loss. As a result, for example, in cases where misdelivery incidents occur, and the claimant still has the opportunity to collect the goods, but declines to collect, he would not be entitled to claim for compensation.[206] Furthermore, when the defaulting party continues to perform the obligation or adopts some

[206] See *Daewoo International Corp* (n 124).

remedial measures, the defaulting party shall compensate the other party if the other party still suffers losses.[207] For example, in *Maihao v Shanghai Port*, the court held that even if Shanghai Port had taken some remedial measures to repair the goods, it still had to bear the differences between the original purchase price of the goods and the estimated price of the damaged goods. As to calculating the loss, the general rule in the CC is that the amount of compensation shall be equal to losses caused by the breach of contract, including the foreseeable interests.[208] Besides this, in a cargo transport contract, the amount of compensation shall be calculated on the basis of the prevailing market price at the destination when the cargoes are ought to be delivered. However, when other laws or regulations have different rules for calculation, the other rules shall prevail.[209] Thus, for the cargo claims, according to Article 55 of the CMC and Article 6 of the Provisions, the amount of compensation for the loss is calculated on the actual value, which is the value of goods at the time of shipment plus freight and insurance premiums.

In terms of the remedies for liability in tort, according to Article 179 and 1167 of the CC, the available methods of assuming tort liabilities for cargo claims shall include cessation of infringement, elimination of danger, restitution of property, restoration to the original condition and compensation for losses.[210] For misdelivery, if the collected goods can be returned, the tortfeasors shall return the goods and compensate for the remaining losses. If the goods cannot be returned, the tortfeasors shall compensate for all the losses. For cargo damage, the tortfeasors shall cease the infringement, eliminate the danger, repair and restore the goods to the original conditions and also pay the compensation. For cargo shortage, the tortfeasors may make restitution to the original amount or compensate for the loss. It is noted that the principle

[207] Article 583 of the CC.
[208] Article 584 of the CC.
[209] Article 833 of the CC, where the parties agree on the amount of damages in case of damage to or loss of the cargoes, the damages payable is the agreed amount; if the amount of damages is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 510 of this Code, it shall be calculated on the basis of the prevailing market price at the destination when the cargoes are or ought to be delivered. Where a law or administrative regulation provides otherwise for the measures for the calculation of damages and of the ceiling of the amount of damages, these provisions shall be applied.
[210] See also Article 179 and 1167 of the CC.

for compensation for the tort liability is to remedy the loss.[211] Therefore, in a case where the victim had already got adequate compensation from the freight forwarder through amicable negotiation, he could not litigate against the TO in tort for compensation.[212] Moreover, in a remedy for property losses, the tortfeasor is only liable for the damages directly caused by the tortfeasors. As a result, in *New Era Shipping v Huichuang*, the court declined the plaintiff's claim for compensation for the transportation fees and insurance premiums for newly purchased mainframes, since these fees did not fall into the category of direct damages stipulated by the tort law.[213] As to the amount of the losses to the property, it is calculated as per market price at the time of occurrence of the loss, or calculated otherwise.[214] If there are several delivery times, the problem of how to set a standard market price may occur. For continuous infringements, the court may consider the market price when the infringement is terminated and other relevant factors to calculate the amount.[215] It is noted that the rule governing the amount of compensation for misdelivery in tort liability in the Summary 2005 is the actual losses, which is based on the actual value of the goods.[216] However, in practice, the amount of compensation in tort liability is based on the market value of the goods in the Tort Law (CC), rather than according to the provisions in the Summary 2005.

Moreover, if a claimant claims for a period of bank deposit interest based on the amount of compensation, the court may support that claim.[217] In addition, in a very recent case, the court also supported a claim for the actual loss of the advance payment, which was held to be consistent with the principle of indemnity.[218] However, it seems that in Chinese law, regardless

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[211] See Huiwen Shen, "The Interpretation of the Remedy Clause of Tort Liability Law", *Journal of Southwest University of Political Science & Law* (2014) vol 16 (5).

[212] See *Sumitomo Mitsui Marine and Fire Insurance (China) Co., Ltd. (Guangdong Branch)* (n 178).

[213] See *Jiangsu New Era Shipbuilding Co., Ltd (New Era Shipping)* (n 190).

[214] Article 1184 of the CC, and see *Sinotrans North China Co. Ltd Tanggu Branch (Sinotrans Tanggu Branch)* (n 146), and also *Qingdao Elison Import and Export Co. Ltd.* (n 189).

[215] See *China Railway Materials General Import & Export Co. Ltd (China Railway Import & Export)* (n 56).

[216] Article 109 of the Summary 2005.

[217] See *Dalian Port Co. Ltd (Dalian Port)* (n 156); *Cangzhou Qiancheng Steel Pipe Co. Ltd and Yetai International Freight Forwarder Co. Ltd Tianjin Branch v Yabolai International Freight Forwarder (Shanghai) Co. Ltd and COSCO Container Transport Co. Ltd*, Tianjin Maritime Court, (2014) Jin Hai Fa Shang Chu Zi No.81.

[218] *Bank of China Co. Ltd Rizhao Lanshan Branch v Tianjin Southwest Shipping Co. Ltd*, Ningbo Maritime Court, (2017) Zhe 72 Min Chu No.1601; Zhejiang High People's Court, (2018) Zhe Min Zhong No.624.

of the nature of the claim, the amount of compensation for most misdelivery claims is somehow linked to the actual value of the goods (i.e. CIF price) as settled in the CMC and the Provisions as a special rule, rather than based on the general rule in the CL and the CC.[219]

6.3 Exclusion and Limitation of the Liability in Cargo Claims

As discussed earlier, the issues relating to TO's exclusion and limitation of liability are closely associated with the legal status of the TO. If the TO is regarded as an "independent contractor", only the statutory exclusion for liability in the CC, i.e. *force majeure*, is available to the TO. Where the TO is regarded as the servant or agent of the carrier or the actual carrier, under the CMC, the exclusion and limitation for the carrier can also apply to the TO. According to Articles 58 and 61 of the CMC, the exclusion and limitation rules based on the carriage contracts are also available to the tort claims; in addition, the exclusion and limitation rules for the carrier are also available for the servant or agent of the carrier or the actual carrier in tort claims.[220] Except for the statutory exclusion and limitation, for contractual liability, there is also a possibility that the contractual parties may insert special agreements for the limitation or exclusion of the liability. Both the statutory exclusion and limitation, and the contractual exclusion and limitation will be analysed below.

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[219] Article 55 of the CMC and Article 6 of the Provisions.
See Wang Wei, "*Laws and Practices for Delivery of Goods without an Original Bill of Lading*" (Law Press: China 2010), pp. 289 (in Chinese). See also *Beijing Fuyanghang Trading Co. Ltd v Haimao International Transportation Co. Ltd*, Xiamen Maritime Court, (2003) Xia Hai Fa Shang Chu Zi No. 14.

[220] Article 58 of the CMC, the defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort. The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his action was within the scope of his employment or agency.
Article 61 of the CMC, the provisions with respect to the responsibility of the carrier contained in this Chapter shall be applicable to the actual carrier. Where an action is brought against the servant or agent of the actual carrier, the provisions contained in paragraph 2 of Article 58 and paragraph 2 of Article 59 of this Law shall apply.

6.3.1 Statutory Exclusion and Limitation of Liability in Cargo Claims

6.3.1.1 Statutory Exclusion of Liability in Misdelivery

First of all, the carrier or the TO will not be blamed for misdelivery if it can prove that delivery is acknowledged by the holder of bills of lading.[221] This is because it is the holder of the bills who has the right to demand that the carrier deliver the goods against the bills of lading. If the holder clearly states that he abandons this right, there is no rationale for him to require the carrier to obey the presentation rule again. This estoppel rule is similar to promissory estoppel in common law countries.[222] Besides, if the TO acts as the agent or servant of the carrier, it is not liable for misdelivery if the release is confirmed by the carrier.[223] Secondly, the carrier or the TO can be exempted in cases where the customs take over the goods stored in port and sell them when no one claims for the goods within the statutory time limit. Besides this, the carrier or the TO is also not liable when the courts rule to auction the goods retained by a carrier or a TO according to the applicable law.[224] Thirdly, if no one collects the goods in the discharging port, the carrier or the TO can also deliver goods according to the order of the shipper without being blamed for misdelivery.[225] Moreover, for a straight bill of lading, the carrier or the TO is not liable for delivery without bills at the request of the consignor,[226] since prior to delivery, the right to control belongs to the consignor under the straight bill of lading.

A defence based on the rules of the destination port is the most frequently invoked but the most debatable one in practice. As settled in both the Summary 2005 and the Provisions, the carrier and the TO bear no liability in cases where the discharging port has mandatory legal provisions

[221] Article 110 (1) of the Summary 2005.
See *Lilac Marine Corporation of Liberia* (n 187).
[222] See Law (n 11) 234. Equitable estoppel: A rule of evidence or a rule of law that prevents a person from denying the truth of a statement he has made or from denying the existence of facts that he has alleged to exist.
[223] Article 106 of the Summary 2005.
[224] Article 8 of the Provisions. See *Guangzhou Haide International Freight Forwarder Co. Ltd v Fujian Yingdahua Industry and Trade Co. Ltd*, Guangdong High People's Court, (2017) Yue Min Zhong No. 387, and also *A.P. Moller-Maersk (A/S) v Zhejiang Longda Stainless Steel Co. Ltd*, Supreme People's Court, (2017) Zui Gao Fa Min Zai No.412.
[225] Article 110 (3) of the Summary 2005.
[226] Article 9 of the Provisions, see also *Hanzhou Company v Weifang Yaxiang International Trade Co. Ltd*, Shandong High People's Court, (2016) Lu Min Zhong No. 1352.

that the imported goods must be delivered to local customs or port authorities.[227] However, whether this exception can be approved by the court shall be analysed on a case-by-case basis. Most of the existing reported cases fail to apply this defence because the carriers or the TOs fail to prove the following: Firstly, they lose the right to control the goods upon having handed them to the authority; and secondly, the local law allows delivery without bills of lading or delivery orders.[228] However, in *Baililande Rubber v MSC Shipping*,[229] according to the rule of Brazil port, the goods that had arrived in port should be delivered to the Brazil customs. The goods in this case were in fact handed to the port authority, so the court held that the carrier was not liable for misdelivery. Accordingly, one may conclude that the courts usually consider two conditions before deciding whether the exemption of the liability based on the foreign rules in the destination port is allowed: First, the carrier or the TO must prove the existence of the rules at the discharging port that goods must be delivered to the port authorities; and secondly, the goods have been delivered to the local authorities and thus the carriers have lost control of the goods.

6.3.1.2 Statutory Exemptions of Liability in Cargo Damage/Shortage

As mentioned above, if the TO is considered as the "independent contractor", only the exemptions in the CC can be applied. Thus, under a TOC, when the TO performs the transport obligation, it can be exempted from the liability when the damages or the shortages are caused by *force majeure*,[230] the intrinsic characteristics of the cargoes or reasonable depletion,[231] or the fault of the consignor or consignee.[232] When a PWC/PSC is concluded between the TO and

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[227] Article 7 of the Provisions, the same defence exists in Article 110 (2) of the Summary 2005.

[228] See *Shenzhen Kaierde New Green Environmental Technology Co. Ltd* (n 102); *Hin-pro International Logistics Limited v Compania Sud Ameicana De Vapore S.A.*, Shanghai High People's Court, (2016) Hu Min Zhong No.25; *Shenzhen Air Asia International Freight Forwarder Co. Ltd v Shanghai Fujia Furniture Co. Ltd*, Supreme People's Court, (2016) Zui Gao Fa Min Shen No. 3238.

[229] *Wenzhou Baililande Rubber Tire Co. Ltd v MSC Mediterranean Shipping Company S.A.*, Zhejiang High People's Court, (2017) Zhe Min Zhong No. 864.

[230] See *China Pacific Property and Casualty Insurance Co., Ltd. (Ningbo Branch) v Haikou Nanqing Container Liner Co., Ltd. (Shanghai Branch)*, Shanghai Maritime Court, (2013) Hu Hai Fa Shang Chu Zi No. 1072.

[231] See *Shandong Yahe v Qingdao Yihailong* (n 69).

[232] See Article 832 of the CC.

the consignee/consignor, or when the TO fulfils a storage obligation under a TOC, it is not liable if the loss is caused by *force majeure*,[233] natural nature of the goods and packing, or passes the expiration date for storage.[234] In addition to the exemptions stipulated in the CC, if the TO acts as an agent or a servant of the carrier, or an actual carrier, the exemption in the CMC is also available for him. These exemptions include, but are not limited to *force majeure* and perils, dangers and accidents of the sea or other navigable waters, act of the shipper, owner of the goods or their agents, nature or inherent vice of the goods and inadequacy of packing.[235]

Among all the exclusions of the liability, the *force majeure* is the one that is most disputable in practice. According to Article 180 of the CC, "a *force majeure* means any objective circumstance that is unforeseeable, inevitable, and insurmountable," including the natural disaster, the act of the government and social anomalies.[236] Besides, without otherwise provided by the statutory, the party can be exempted from the liability in part or in whole when the loss is caused by the *force majeure*.[237] Concluded from the above provisions, to exempt from the liability based on *force majeure*, four conditions should be satisfied:

Firstly, the objective phenomena should be unforeseeable, including the situations where the phenomena cannot be foreseen at all, and cannot be accurately foreseen. In practice, most of the discussions about foreseeability are focused on whether the phenomena can be accurately anticipated, especially in cases involving a natural disaster. In today's society, most natural disasters can be predicted in advance. However, the forecast is just a trend that cannot accurately and timely predict the exact time, place, duration, scope of their occurrence, and degree of influence.[238] Most of the natural disaster is still considered as unforeseeable. For

[233] See Article 180 and 590 of the CC.
[234] See Article 917 of the CC.
[235] See Article 51 of the CMC.
[236] It is noted that due to the outbreak of the COVID-19, there are a lot of discussions about force majeure and the COVID-19. The SPC has published three adjudicative guidelines about the civil disputes involving the COVID-19. These issues deserve further discussions. However, since the case collection period of this study was ended on 31 March 2020, and according to the cases collected in this study, disputes relating to *force majeure* are mainly about natural disasters.
[237] Article 590 of the CC.
[238] See *China Pacific Property Insurance Co., Ltd. (Ningbo Branch)* (n 230).

example, a flood is an objective situation that can be foreseen to a certain extent but cannot be accurately foreseen. In *Pacific Property (Ningbo) v Haikou Nanqing*, the port authority changed the forecasting of peak stage from time to time, and the actual peak stage was different from any of the forecasts. For typhoons, humans may predict in advance to a certain extent based on existing technical means, but they cannot accurately and timely predict the exact time, location, duration, and scope of their occurrence. In *PICC (Quanzhou) v Haikou Port*,[239] although the expected maximum tide height could be calculated by the "Tide Table" and the maximum increase in storm surge predicted by the National Ocean Forecasting Station, this figure was just an approximate value rather than the factual value. Besides, seawater irrigation, which was the most direct reason for the loss, was not reflected in the forecast. Concluded from the cases collected, it seems that when the actual situations are worse than the forecast, or the natural disaster is the strongest for decades,[240] these situations should be unforeseeable. Furthermore, it should be noted that foreseeability is not constant. Instead, the standard of foreseeability is based on the current level of technology and ordinary people's knowledge, and it will change with technology development.[241]

Secondly, the objective phenomena should be inevitable, which means although the parties have tried their best to take reasonable care, they still cannot prevent the occurrence of the event.[242] For example, in *Pacific Property (Ningbo) v Haikou Nanqing*, although the TO received the warning of the flood, it could not avoid the flooding of the container yard platform since no measures could be taken to prevent a flood which was more than 4 meters above the shoreline of the terminal. In addition, in cases where the disaster is the worst in decades or

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[239] *People's Property Insurance Company of China (Quanzhou Branch) v Haikou Port Container Terminal Co., Ltd.*, Supreme People's Court, (2017) Zui Gao Fa Shen No. 3253.
[240] See *China Pacific Property Insurance Co., Ltd. (Zhuhai Branch) (Pacific Property (Zhuhai)) v. Haikou Port Container Terminal Co., Ltd.*, Hainan High People's Court, (2017) Qiong Min Final No.72 and also *Guangdong Aokete New Material Technology Co., Ltd. v Guangdong Sinotrans International Freight Forwarding Co., Ltd. and Jinxing Shipping Co., Ltd.*, Guangzhou Maritime Court, (2018) Yue 72 Min Chu No. 261.
[241] See *People's Property Insurance Company of China (Quanzhou Branch)* (n 239).
[242] See *China Pacific Property Insurance Co., Ltd. (Zhuhai Branch) (Pacific Property (Zhuhai))* (n 240) and *China Pacific Property Insurance Co., Ltd. (Ningbo Branch) (Pacific Property (Ningbo))* (n 230).

history, or is beyond TO's estimates or the port's carrying capacity when designed, it is evident that the damage caused by such an objective phenomenon is inevitable.[243]

Thirdly, the objective phenomena should be insurmountable, which means the ability of the parties is not sufficient to overcome the objective facts (the natural and social forces) which affect the performance of the contract or lead to the occurrence of torts. For example, in *Pacific Property (Zhuhai)) v. Haikou Port Container Terminal Co., Ltd*, although Haikou Container took different measures in advance and after the typhoon incident to reduce losses, when facing the super typhoon's enormous destructive power, manpower could not resist. Thus, in this case, the cargo losses could not be avoided. Concluded from the above-mentioned cases about the *force majeure*, the objective phenomenon should be considered insurmountable when the TO actively performs its duty with reasonable care, takes reasonable measures to prevent the disaster, reduces losses after the incident, and treats the objective phenomenon in line with the common practice of the TO, but the damages of the phenomenon still cannot be avoided.

Fourthly, there should be a causal relationship between the cargo losses and the *force majeure*. In Article 590 of the CC, the party shall be exempted from liability in part or in whole based on the impact of force majeure. Thus, if a TO intends to allege a whole exemption, it should prove that the damages are caused entirely by *force majeure* without its fault.[244] For example, in *PICC (Quanzhou Branch) v Haikou Port Container Terminal Co., Ltd.*, the TO was not liable for the loss, because the TO had done its duty of proper keeping and the typhoon "seagull" was the only cause of cargo losses.[245]

Although there are several criteria for ascertaining the *force majeure*, a case-by-case analysis is required to determine whether an event constitutes a *force majeure*. Take the typhoon as an

[243] See *China Pacific Property Insurance Co., Ltd. (Zhuhai Branch) (Pacific Property (Zhuhai))* (n 240), *People's Property Insurance Company of China (Quanzhou Branch)* (n 239) and *Guangdong Aokete New Material Technology Co., Ltd*. (n 240).
[244] See *China Pacific Property Insurance Co., Ltd. (Ningbo Branch) (Pacific Property (Ningbo))* (n 230).
[245] See also, in *Guangdong Aokete New Material Technology Co., Ltd.* (n 240), the TO was not liable for the cargo losses since he had done all the customary measures for a TO to prevent the effect of a typhoon, but the cargoes were still damaged by the disaster.

example. In *Min'an Property Insurance Co., Ltd. (Shenzhen Branch) v Zhanjiang Port (Group) Co., Ltd. and China Shipping Terminal Development Co., Ltd.*,[246] the damages for the cargo were caused by the typhoon. However, the TO cannot use the *force majeure* exemption, because it failed to prove that active measures were taken to prevent the typhoon and emergency measures were taken after the terminal was flooded. In practice, there are many other cases in which typhoons do not constitute force majeure.[247] Therefore, whether an event constitutes a *force majeure* should be judged in conjunction with the facts of the case and the criteria for deciding it. In addition, even if similar incidental events have occurred before, it is still difficult to prove that the subsequent events are predictable. In *PICC (Quanzhou Branch) v Haikou Port Container Terminal Co., Ltd.*, for example, the court denied the view that after "Rammasun", Haikou Container should have a more accurate view of such enormous typhoons (the "seagull" in this case) and the consequences of such typhoons.

6.3.1.3 Statutory Limitation of Liability in Cargo Claims

There is no statutory limitation of liability rules in the CC; however, the parties may agree on their own contractual limitation, the rules of which will be discussed later. By contrast, in the CMC, unless the loss was resulted from an act or omission of the carrier or resulted from the intent or gross negligence of the agent or servant of the carrier, or the actual carrier, they should have the right to limit their liability for the loss based on the limits of liability rules set down in Article 56 of the CMC:[248] without otherwise agreed, the liability for the losses "shall be limited to an amount equivalent to 666.67 Units of account per package or other shipping unit, or 2 Units of Account per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher." Thus, in theory, when the TO is regarded as the agent or servant of

[246] *Min'an Property Insurance Co., Ltd. (Shenzhen Branch)* (n121).
[247] See *Zhanjiang Xinwei Crafts Co., Ltd. v Maersk Logistics (China) Co., Ltd. (Guangzhou Branch), Zhanjiang Port Zhonghai Container Terminal Co., Ltd.*, Guangzhou Maritime Court, (2003) Guang Hai Fa Chu Zi No. 485.
[248] Article 58, 59 and 61 of the CMC.

the carrier, or the actual carrier, it should be entitled to the carrier's limitation of liability stipulated in the CMC without fault or gross negligence to the loss. In practice, in *Yantai Binglun Co., Ltd. v Yantai Universal Terminal Co., Ltd*.,[249] although the court of the first instance believed that the TO was an actual carrier and the court of the second instance believed that the TO was an agent of the carrier, they both believed that the TO should have the ability to enjoy the carrier's statutory liability in the CMC.[250] Nevertheless, in this case, the TO failed to use the carrier's limitation of liability because the damages were caused by TO's gross negligence. Therefore, it seems that when the TOs act as the agents or servants of the carriers, or the actual carriers, the carriers' limitation of liability stipulated in the CMC can be applied to them in practice.

When it comes to misdelivery, however, a carrier who delivers goods without bills of lading will lose his right to enjoy the limitation rule under the CMC.[251]Accordingly, when a TO acts as an agent or servant of the carrier, or an actual carrier, it will similarly be deprived of its right to enjoy the limitation of liability rules.

6.3.2 Special Agreements about Exclusion and Limitation of Liability in Contract

According to Article 44 of the CMC, any stipulation in the carriage contract or bills of lading that derogates from the provisions in Chapter 4 shall be null and void. Accordingly, carriers who try to insert clauses that exempt them from liabilities in cargo claims or set a lower limit of liability in carriage contracts are deemed to be "null and void" and "of no legal effect" under Chinese law.[252] The TOC and the PWC do not fall within the scope of a carriage contract.

[249] *Yantai Binglun Co., Ltd. v Yantai Universal Terminal Co., Ltd*., Shandong High People's Court, (2010) Lu Min Si Final No. 87.
[250] See also *People's Insurance Company of China (PICC) (Wuxi Branch) v Panalpina International Transport Agency (China) Co., Ltd.*, Shanghai High People's Court, (2012) Hu Gao Min Si (Hai) Final No. 94; Supreme People's Court, (2014) Min Shen Zi No. 1188.
[251] Article 4 of the Provision; see also in Article 102 of the Summary 2005.
[252] Article 44 of the CMC.

Therefore, the question may arise as to whether an exemption clause or a limitation of liability clause for cargo claims could be inserted in the TOC or the PWC.

Chinese law recognises party autonomy. Without violating any mandatory provision, it may be possible for the TOs and the other parties who engage TOs in their services to agree on contractual terms to meet their expectations.[253] Nevertheless, in China, the contractual agreement is restricted by Articles 148 to 154 and 506 of the CC. The agreement to the exemption of liability will be null and void in situations where malicious collusion is conducted to damage the interests of a third party, and where an illegitimate purpose is concealed under the guise of legitimate acts or where property damages to the other party are caused by deliberate intent or gross negligence.[254] In addition, the TOC and the PWC are often concluded in standard forms and thus have to follow the rules regulating the standard form contracts under the CC.[255] For example, the providing party must define the rights and obligations following the principle of fairness, inform the other party of the exclusions or restrictions of its liabilities, and explain the standard terms upon request.[256] Any term that exempts the providing party from its liabilities, increases the liabilities of the other party, and deprives the material rights of the other party shall thus be invalid.[257] When disputes arise, the contractual terms should be interpreted with common understandings and be constructed unfavourably to the party who provides the standard form.[258] These rules will apply to situations where the TO designs its own contracts and concludes contracts with the clients.

Therefore, it would be reasonable to assume that the position of the Chinese court is that the agreed contractual exemption clause for misdelivery, which is obviously unfair to the other

[253] See Article 5 of the CC, the parties to civil legal relations shall conduct civil activities under the principle of free will, and create, modify, or terminate civil legal relations according to their own wills.
[254] See Article 148 to 154 and 506 of the CC.
[255] See Article 496 to 498 of the CC.
[256] See Article 496 of the CC.
[257] See Article 497 of the CC.
[258] See Article 498 of the CC.

party, is invalid. However, for the cargo damage/shortage, there are successful cases where the party agrees in the contract that the TO is not liable for the damages caused by the natural disaster that happened in port. For example, in *China Continent Property Insurance Co., Ltd. (Hainan Branch) v Sinotrans Guangdong Zhanjiang Company and Zhanjiang Port International Container Terminal Co., Ltd.*,[259] two defendants Sinotrans Zhanjiang and the Zhanjiang Port Terminals, concluded a TOC which contained an exemption clause for natural disasters. The effect of the exemption clause was confirmed by the court based on two reasons. First of all, the TOC was entered into through amicable negotiation, and thus was not taken as being based upon a standard form. Secondly, in response to the typhoon, the TO reinforced the stockpiled cargos before the arrival of the typhoon, but the increase in water caused by the typhoon exceeded the design level of the pier. The damage to the cargo was caused by actual seawater immersion without TO's intent or gross negligence is inevitable and insurmountable. Thus, the exemption was outside of the regulatory scope of Article 53 of the CL[260] and was valid. In another case, the contract for exemption from typhoon and rainstorms was also found to be valid, because the available evidence did not prove malicious collusion between the two defendants and the defendants had not committed gross negligence in the damage.[261] As to the exemption from natural disaster, it is no more than detailed agreements about the statutory exemption from the *force majeure*. However, since there are no successful cases of exemption through contractual terms other than those relating to natural disasters, one may assume that the contractual exemption of liability for cargo damage/shortage is in general difficult to be valid in court.

[259] *China Continent Property Insurance Co., Ltd. (Hainan Branch)* (n 46).
[260] Article 506 of the CC.
[261] See *PICC Property and Casualty Co., Ltd. (Beijing Branch)* (n 52).

In contrast, a limitation clause is usually treated with more leniency than exclusion clauses.[262] Thus, in theory, as long as a limitation for cargo damage/shortage lower than the provisions in the CMC or a limitation clause for misdelivery is agreed with fairness and justice, the party autonomy should be respected by the court. However, in cases where the contract is concluded between the consignee and the TO, it is likely that the consignee may choose to bypass the TO and claim compensation from the carrier, who does not have the right to limit its liability for misdelivery and have a lower limit than the rules stipulated in the CMC. In this situation, the limitation clause between the TO and the consignee is just an empty shell.

6.4 Discussions

6.4.1 The Amount of Compensation

According to judicial practice, the amount of compensation for the damages is based on the CIF price of the misdelivered goods. However, this is usually unfair to the consignee, particularly when the market price has largely increased. By contrast, another method for calculating compensation, which is based upon the market value of the goods, is adopted by English Courts[263] and provided in the RR.[264] The English law also specifically mentions several elements that can be considered in deciding the market value when no market price is available, including the cost price and expenses of transit, the reasonable profits of the importer, and also the price at which the consignee resells the goods.[265] Thus, compensation based on the market value, which brings into play more specific elements for calculating, is more reasonable than the compensation based on the CIF price.

[262] Anders Møllmann, *Delivery of Goods under Bills of Lading* (Routledge 2017) 77, and also Paul Todd, "Excluding and Limiting Liability for Misdelivery", *The Journal of Business Law*, (2010) issue 3, pp.243-266, at p. 263.
[263] Sale of Goods Act 1979, s. 51.
[264] Article 22 of the RR.
[265] See Wilson (n 135) 359.

Under the general provisions of the CC, the amount of compensation shall be equal to the amount of loss caused by the breach and also the receivable interests after the performance of the contract.[266] Accordingly, apart from the CIF price (amount of loss), the general rule supports a claim for receivable interests, which may consider the market value of the goods when the goods are intended to be resold. At the same time, the compensation rule in the tort law,[267] and the compensation rule of a cargo transport contract under the CC[268] are also based on the market value of the goods.

Very recently, in Article 4.16 of the revised CMC draft for comments and Article 63 of the draft for review, the compensation rule has been revised to refer to the market value. This may help to solve the issues caused by the calculation method based upon the CIF price of the mis-delivered goods. Article 4.16 also clarifies that in cases where there is no market price of the goods, the rule for calculation is based on the common price of similar goods of similar quality.[269] However, there is no further clarification of the meanings of "similar goods" and "similar quality" in Article 4.16, which will cause controversies. Instead of adding further clarification, the draft for review directly deletes the rules about similar goods and quality. Article 63 of the draft for review stipulates that without an accessible market price, the actual value of the goods and the compensation shall be calculated by the CIF price, the method of which is a compromise between certainty and fairness.

6.4.2 Statutory Exclusion and Limitation of Liability for a TO in Cargo Claims

As mentioned, when a TO acts as an independent contractor in the TOC or PWC/PSC, only the statutory exclusions of liability under the CC can be employed by the TO, such as the *force majeure* and the natural depletion. Thus, the exclusion for misdelivery is nearly impossible

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[266] Article 584 of the CC.
[267] Article 1184 of the CC.
[268] Article 833 of the CC.
[269] Article 4.16 of the revised CMC draft.

under the CL, because TO's misdelivery rarely occurs due to *force majeure*. Besides, the CC contains no statutory limitation of liability rules. However, there is no need for the legislation to lay down further statutory exclusion and limitation in such contracts, since the contracting parties have the freedom to reach their own agreements about the exclusion and limitation by contractual terms.

When the TO acts as an agent or servant of the carrier, or an actual carrier, the exemption and limitation for the carrier can also be applied by the TO. For misdelivery, under a sea carriage contract, it is a statutory law in China that the goods must be delivered upon the presentation of the original bills of lading, and thus a carrier who breaches this obligation shall be liable without the specific exclusion rules set in law.[270] In addition, according to the Provisions, the carrier is not entitled to apply the limitation rules set in the CMC for a misdelivery case. Accordingly, as discussed earlier, if the TO is identified as the servant or agent of the carrier, or the actual carrier, it is bound by the same exclusion and limitation rules.

Under English law, the obligation to deliver the goods against the presentation of the bill of lading is one of the key provisions of the bill of lading and is confirmed by case law.[271] Delivery without production of an original bill of lading has long been regarded by the courts as a serious breach of the carriage contract, and thus the court is reluctant to allow carriers to exclude and limit the liability for misdelivery.[272] By way of contrast, in the RR, although the presentation of the transport document is still a basic principle for delivery,[273] a so-called "extraordinary way" of delivery, which means delivery where no transport document is presented,[274] is possible. However, this "extraordinary way" of delivery is largely criticised in practice for

[270] Article 71 of the CMC.
[271] See *Sze Hai Tong v Rambler Cycle* [1959] AC 576.
[272] Todd (n 262) 243.
[273] Article 46 (1) ab of the RR.
[274] Møllmann (n 262) 124.

creating more conflicts than solutions.[275] Furthermore, the extent to which this "extraordinary way" of applying it to an MPP is still unknown. Besides, the rule in the RR for the carrier to identify the rightful holder for delivery without a transport document in a way is in conflict with the formal checking obligation of the TO in Chinese law. In conclusion, without adequate proof and practice, it is not wise at the current stage for Chinese law to allow the carrier and the terminal operator to release goods without transport documents.

When it comes to the statutory limitation of liability for misdelivery, compared to Chinese law, where the liability for misdelivery is an unlimited one, the limitation of liability set down in Article 59 of the RR also includes limitation of the carrier's liability for delivery without a transport document.[276] The carrier is able to limit his liability for misdelivery unless the claimant can prove that the loss was attributable to a personal act or omission of the carrier done with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.[277] There is no doubt that the limitation of liability in Article 59 of the RR applies to an MMP as well. However, it seems that the Chinese law should not entitle the TO to limit its liability for misdelivery in statutory law, since, unlike other cargo damage claims, misdelivery is likely to occur due to an act or omission of the party with the intent to cause such damage, or recklessly and with the knowledge that such loss in delivery would probably result.[278]

For cargo damage/shortage, the statutory exclusions of liability for the carrier under a carriage of goods contract are stipulated in the CMC. As noted above, some of the exclusions are also related to TO's operations, and thus can be invoked by the TO. These exclusions, such as the act of God (*force majeure* and perils in the CMC), inherent defect (vice) of the goods and

[275] Caslav Pejovic, "Article 47(2) of the Rotterdam Rules: Solution of Old Problems or a New Confusion?", *Poredbeno Pomorsko Pravo* (2013) vol 167, pp. 81-103, at p. 87.
[276] Møllmann (n 262)148.
[277] Article 61 (1) of the RR.
[278] Article 59 of the CMC.

inadequacy of packing, are also in line with the international conventions.[279] Therefore, there is no need to modify the statutory exemptions for the TO for cargo damage and shortage. In terms of the statutory limitation, the rules in the CMC modelled from the HVR.[280] Although the provisions on limits of liability are different in the HVR, the Hamburg Rules[281] and the RR,[282] most of the mainstream maritime trading countries still adopt the same limitation stipulated in the HVR.[283] In addition, in the investigation of the revision of the CMC, there are few demands for raising the liability limit at the practical level. Therefore, considering the social situations in China, from the present point of view, the limits of liability in the CMC need not be modified.[284]

6.4.3 Contractual Terms and the Derogation Issue

Although it is not suitable to have statutory exclusion and limitation of liability for misdelivery in both the carriage contract and the TOC or PWC/PSC, it is questionable whether contractual agreements on exemption and limitation of liability for misdelivery in these contracts should be allowed in the future. For cargo damage/shortage, in addition to the current statutory exemption and limitation of liability, whether contractual agreements on exemption and limitation for liability should be allowed is also worthy of discussion. Under current law, there is a possibility that contractual agreements regarding liabilities in TOCs or PWCs/PSCs are valid, as long as the agreements satisfy the requirements of the CC.[285] However, when it comes to the carriage contract, any derogation of a contractual term that assumes the lessor liabilities and obligations for the carriers and the TOs, but assumes greater rights for the carriers and the

[279] See Article 4 (2) of the HVR and Article 17 of the RR.
[280] See Article 4 (5)(a).
[281] See Article 6 (1)(a) of the Hamburg Rules and Article 59 (1) of the RR.
[282] See Article 59 (1) of the RR.
[283] Such as United Kingdom, German and Japan.
[284] Zhengliang Hu, "Amendments to the "Chinese Maritime Code" should Proceed from Country's Reality, see https://www.ship.sh/news_detail.php?nid=36728.
[285] See Article 148 to 154 and 506 of the CC, and Article 496 to 498 of the CC.

TOs, is barred by the CMC.[286] The following will discuss the contractual agreements in both the carriage contract and the TOC or PWC/PSC.

6.4.3.1 Contractual Limitation and Exclusion in TOC and PWC

Under English law, any terms exempting or limiting liability will be governed by the provision of the Unfair Contract Terms Act (UCTA) 1977, which subjects the terms to a test of reasonableness.[287] In terms of the contractual agreement, the standard is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.[288] In cases where the liability is in respect of the right to transfer ownership or give possession, it cannot be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of the reasonableness test settled in the schedule of the UCTA.[289] Thus, in *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority*,[290] the exception clause and the limitation clause between the TO and the consignee were held valid, since they had relatively equal bargaining positions. Besides this, at the time of its conclusion, it was reasonable for the TO to stipulate some exceptions.[291]

As mentioned earlier, in current Chinese legislation, as long as the agreement concludes with an amicable negotiation and passes the 'fair and reasonable test, it shall be deemed valid. However, compared to the English rules, as well as the rules about the standard forms and the

[286] Article 44 of the CMC.
[287] Simon Baughen, 'Chapter 15 Terminal Operators and Liability for Cargo Claims under English Law' in Baris Soyer and Andrew Tettenborn (ed), *Carriage of Goods by Sea, Land and Air: Uni-Modal and Multi-Modal Transport in the 21st Century* (Informa Law 2013), pp. 267-285, at p. 271.
[288] See s11 (1) of the UCTA.
[289] See s7 (4) and Schedule 2 of the UCTA.
The matters to which regard should be paid in particular for the purposes of sections 6(1A), 7(1A) and (4), 20 and 21 are any of the following which appear to be relevant:
(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.
[290] [1988] 2 Lloyd's Rep. 164.
[291] Baughen (n 287).

invalidity of the clauses set out in the CC, more detailed rules about exclusion and limitation clauses should be drafted. When considering more detailed rules, reference can be made to the reasonableness test of the UCTA under English law. For example, special agreements over liabilities and compensations between the TO and the carrier are more likely to be held valid because they have equal bargaining positions. However, special agreements about the liabilities and compensations between the TO and the consignee would be null and void if the TO and the consignee have different financial abilities and bargaining powers.

In particular, the TO sometimes may agree on a *force majeure* clause with the clients under a TOC or PWC. However, under the existing Chinese law, *force majeure* is a statutory exclusion, and there is no specific provision for the *force majeure* clauses in the relevant contract law rules. Therefore, there is a debate in practice as to the validity of the *force majeure* clause. The first view is that *force majeure* should be a statutory rule. A *force majeure* clause agreed upon in the contract is indeed an exemption clause.[292] If the parties expressly agree in a *force majeure* clause on the scope of the *force majeure*, the legal consequences and the conditions for its application, the court will directly apply the clause agreed upon in the contract regardless of the elements of the *force majeure* on the condition that the agreement is valid under the CC.[293] The second view is that a *force majeure* clause is a supplement to the statutory principle of the *force majeure*. The contracting parties may list some matters constituting a *force majeure*. When applying this term, the court is likely to judge further on such factors as the elements of *force majeure* and the fault of the parties.[294] This opinion is similar to the English view of the "act of God". Instead of setting the *force majeure* as a statutory rule, under English law, the *force majeure* or the "act of God" is a contractual clause. As summarised in *Nugent v Smith*,[295]

[292] Chang He, "Analysis of the Focal Issues in the Force Majeure in China", *Legal System and Society*, Legal System and Society Press 2014 vol 3 283.
[293] Lixin Han, Xiangling Hong, "Legal Analysis of Typhoon Immunity in Maritime Transportation", *World Shipping*, Dalian Maritime University Press (2020) vol 10 41 43.
[294] Ibid.
[295] (1876) 1 CPD 423 at p444.

the carrier could only rely on the "act of God" when the damage was caused by natural causes without human intervention and the damage could not have been foreseen and could not be prevented by reasonable steps.[296] In a recent case, the court held that even if an event was listed as a *force majeure* clause, whether the party can be exempted shall depend on the interpretation of the clause, the specific factual circumstance and also the linkage between the damage and the parties' performance.[297] In fact, these two views are both reasonable and have been reflected in practice.[298]

6.4.3.2 Contractual Limitation and Exclusion in Carriage Contract

On the other hand, in terms of derogation in the carriage contract for misdelivery, in the English law, despite the traditional view that misdelivery is a serious breach of the carriage contract and thus the exemption and limitation by contract terms should be declined, nowadays the English courts hold that as long as the exemption or limitation clause is "sufficiently tightly drafted, and unambiguously covers the event that has occurred", courts shall at least in principle respect the party autonomy.[299] This sounds as if certain agreements would be obeyed provided that the necessary requirements are satisfied. As for the cargo damage/shortage, the principle is that the contractual agreement shall not be derogated from the limits set in Hague-Visby rules.[300] However, as mentioned, the existing English law has a tendency to lose the limitation and exclusion of liability for mis-delivery. This tendency may imply that the liability for cargo damage/shortage can be excluded or limited to a lower limit since cargo damage/shortage is a less severe breach of contract than the mis-delivery.

[296] Wilson (n 135) 264.
[297] See *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.
[298] See *China Continent Property Insurance Co., Ltd. (Hainan Branch)* (n 46) and *PICC Property and Casualty Co., Ltd. Beijing Branch* (n 52).
[299] Todd (n 262) 261.
[300] Article III (8) of the HVR.

In the RR, a carrier can assume "greater or lesser rights, obligations and liabilities" in a "volume contract"[301] than those provided elsewhere in the Convention.[302] This assumption of lesser liability should sometimes include lesser liability in all the cargo claims. Strict requirements are nevertheless established to test the effectiveness of the derogation of the liability in these cases. First, such an agreement on liability derogation should be specifically stated in the contract and should not be incorporated by reference from another document. Secondly, instead of being a contract of adhesion, the contract needs to be negotiated individually between the carrier and the shipper. It appears that a contract form submitted to the shipper with a few blank spaces relating to quantities, number and period of shipments, and freights rates, but with all other terms already in print, is not enough to avoid it being a contract of adhesion.[303] Moreover, the derogation would apply between the consignee and the carrier only if he was adequately informed and gave his express consent.[304] However, disputes may arise in the construction of "specified quantity" and "prominent statement" in the rule. In addition, the RR is silent as to the question of whether the derogation can be applied between an MPP and the consignee or between an MPP and the shipper. The favourable answer is that in a situation where lesser obligations and liabilities are concluded, the MPP will enjoy this benefit automatically.[305] If the MPP is not entitled to incite the derogation, there is a high possibility that the claimant will sue the MPP directly in order to avoid the derogation contained in the carriage contract. Thus, a well-drafted derogation section could be in vain. Moreover, the MPP is protected by Himalaya clauses under current practice, which would generally entitle the MPP to enjoy all protections under the carriage contract. In a volume contract, the MPP seeks almost the same protection as it would seek in a traditional Himalaya clause. Therefore,

[301] Article 1 (2) of the RR. "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
[302] Sturley (n 130) 23.
[303] Berlingieri, Francesco, "Freedom of Contract under the Rotterdam Rules", *Uniform Law Review*, (2009) vol. 14 (4), pp. 831-846, at p. 840
[304] Article 80 of the RR.
[305] Sturley (n 130) 27.

as long as the carrier continues to include the Himalaya clause, which is currently common practice, the MPP shall be entitled to the derogation.[306]

Despite the fact that both the English law and the RR fail to provide concrete rules for contractual limitation and exclusion, it is suggested that the Chinese regulation should leave room for the parties of the carriage contract to have special agreements on exemption and limitation of liability when extremely strict conditions are satisfied. This is because the principle of party autonomy is confirmed by the CC,[307] and party autonomy should be respected by the court. However, much more analysis is needed of the requirements for derogation and the interpretation of this contractual clause. At the very least, the rules of derogation in volume contracts in the RR are worthy of being examined. If the agreement in the carriage contract is valid, the TO can also have the right to invoke this agreement under certain circumstances. Otherwise, the claimant may be likely to seek remedies from the TO, who is not entitled to the derogation.

6.5 Conclusion

The discussions about the remedies for cargo claims and limitation of liability in this Chapter show that: Firstly, the current method of calculating the compensation amount, which is based on the CIF price of the mis-delivered goods, is to some extent rigid and unreasonable, whereas the compensation rule in the revised CMC draft, which considers the market value of the goods, is fairer and more reasonable. Secondly, for the statutory exclusion of liability, no further rules are needed. Then, for the statutory limitation of liability, it is not appropriate to entitle a TO to limit its liability in misdelivery. For cargo damage/shortage, there is no need to revise the limit of liability rules in the current CMC as well. Thirdly, the current law is silent as to whether the

[306] Ibid.
[307] See Article 5 of the CC.

contractual agreements on exemption and limitation of liability should be allowed. It is recommended that Chinese law should perhaps leave room for the contracting parties to have special agreements on these matters when certain conditions are strictly satisfied. In addition, a number of other issues should also be further clarified by legislation, including, for example, the standards for checking the delivery order, the methods to ascertain the cargo shortage, and the rules about the *force majeure* clause.

Chapter 7 Disputes other than Cargo Claims

7.1 Introduction

As discussed in Chapter 2, disputes arose in non-payment and lien right, and personal injury are the second and third most controversial issues, accounting for 27% and 7% of the total cases collected. During a terminal operation, personal injury incidents may happen due to the improper operation procedure, and a TO may thus face claims for personal injury compensation. When a TO provides services, it is entitled to charge the relevant fees. In cases where the operating clients refuse to pay for the relevant fees, the TO may take different measures to secure its legitimate rights and get the payment, including seizing the containers stored in port, freezing the deposits or seizing other properties that the defendant may have, and obtaining mortgages against the cargoes stored in the port. Among all the property preservation measures, the most frequently used and most debatable one is the lien right. Within this Chapter, the relevant issues about personal injury, and non-payment and lien right will be discussed.

7.2 Terminal Operation and the Personal Injury

In practice, safety is always a priority of the terminal operation due to the special and high risks of the terminal operation industry. Accordingly, the rules about work safety stipulated by several regulations are stringent. In general, a TO must "strengthen the management on safe production, set up and improve the rules and systems on liabilities for safe production, improve the conditions for safe production, take effective measures to guarantee safe production, so as to ensure safe production" according to the Production Safety Law and other relevant laws and regulations.[308] For example, the operator should set conspicuous safety signs and instructions

[308] Law of the People's Republic of China on Ports (2018 Amendment), Standing Committee of the National People's Congress, 12-29-2018 Article 32 The business operator of port must, in accordance with the Production Safety Law of the People's Republic of China and other relevant laws and regulations as well as the relevant working rules of the administrative department of communications under the State Council on port safety, strengthen the management on safe production, set up and improve the rules and systems on liabilities for safe production, improve the conditions for safe production, take effective measures to guarantee safe production, so as to ensure the safe production.

around facilities and equipment with greater risk factors even during non-business hours;[309] the operator must maintain and test the safety equipment to ensure normal functionality in routine;[310] and the TO shall also provide safety education and training courses to ensure that the workers have adequate safety knowledge and safety operating skills.[311] The failure to perform safety control obligations may result in a TO's breach of the contract or tort. In cases where the legal relationships are clear, a TO would take proportional liability or joint and several liability based on the fault of tortfeasors.[312] It is noted that the "letter of accident responsibility confirmation", as an administrative document, shall be treated as a reference rather than the standard of ascertaining the responsibility.[313]

In addition to the situations where the legal relationships are clear, there are also two types of circumstances where the legal relationships are less direct and thus the division of liability is difficult to determine. Firstly, a TO may sublease the terminal to a third party and accidents occur during the operation of the sub-lessor. In most cases, the TO has to undertake the liability based on the degree of its fault, since the TO has the obligations to supervise the work safety, strengthen management on work safety, improve the conditions on work safety, etc. all the time.[314] In addition, in a sublease, the TO must check the Port Business Permit of the sublessor;

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[309] Work Safety Law of the People's Republic of China (2014 Amendment), Standing Committee of the National People's Congress, Order No. 13 of the President, 12-01-2014, hereinafter referred as Work Safety Law.
See Article 32 of Work Safety Law, business entities shall set conspicuous safety signs on business premises and relevant facilities and equipment with greater risk factors.
See *Peng & Yang v Chongqing Ruizhan Logistics Co., Ltd.,* Mengla Basic People's Court, (2014) La Min Yi Chu Zi No.29.
[310] Art 33 (2) of Work Safety Law, business entities must conduct routine repair and maintenance and regular testing of their safety equipment to ensure its normal operation. Records of repair, maintenance, and testing shall be properly made and signed by the relevant personnel.
See *Duan Guangming, Ni Youxia, Duan Guanggen v Chongqing Shipping Construction and Development Co., Ltd. (Foeryan Branch)*, Hubei High People's Court, (2014) E Min Si Final No. 00165.
[311] Article 25 of Work Safety Law, business entities shall provide their employees with work safety education and training to ensure that their employees have necessary work safety knowledge, are familiar with the relevant work safety policies and rules and safe operating procedures, possess the safe operating skills for their respective posts, know the emergency response measures for accidents, and are informed of their rights and obligations in work safety. Employees failing the work safety education and training shall not take their posts. A business entity using seconded workers shall include seconded workers in its own employees for unified management, and provide seconded workers with education and training on safe operating procedures and safe operating skills for the relevant posts. The supplier of seconded workers shall provide necessary work safety education and training for them.
See *Gao Shilin v Zhangjiagang Free Trade Port Area Port Co., Ltd., Zhangjiagang Huasheng Loading and Unloading Service Co., Ltd.*, Hubei High People's Court, (2015) E Min Si Final No. 00134.
[312] See *Duan Guangming* (n 310) and *Peng & Yang* (n 309).
[313] See *Duan Guangming* (n 310) and *Gao Shilin* (n 311).
[314] Provisions on the Administration of Port Operations (2019 Second Amendment), Instrumentalities of the State Council, All Ministries, Ministry of Transport, Order No. 36 [2019] of the Ministry of Transport. Article 24 (1), a port operator or a port tally business operator shall, in accordance with the relevant laws and regulations as well as the provisions of the Ministry of Transport on work safety of ports, strengthen

the failure to perform this obligation may lead to the joint and several liability together with the direct tortfeasor.[315] By contrast, if a TO has checked the Permit of the sublessor, no matter whether the sublessor is the ultimate operator or not, the TO shall only undertake a small proportion of liability for the negligence in safety supervision.[316] Secondly, there is also a possibility that the TO may sub-contract some of the tasks, such as loading or storage, to a third party; and the employee of the third party is then dispatched to perform the sub-contracted obligations. When such an employee gets injured in the port, he or she may also claim losses against the TO. This was the case in *Guo Houcai v Nanjing Port (Group) Co., Ltd. Fourth Port Company*,[317] where Guo (a third-party's employee) suffered a work injury in a port during his dispatching. After being compensated by the employment injury insurance, Guo also claimed the tort compensation against the TO. The court held that even Guo had been compensated by the insurer, he could also raise a tortious claim against the TO who had not fulfil the safety control obligation for the personal injury compensation, such as the disability level compensation and mental damage compensation. However, as for the loss of property, such as medical fee, transportation fee and appraisal fee, Guo shall be compensated only once. Moreover, it is crucial for a TO to pay attention to the agreed scope of work for the dispatched worker. If the worker is required to perform services beyond the designated scope, especially the work that needs special skill and qualification, the TO rather than the employer of the worker shall undertake most of the liability when any injury occurs.[318]

management on work safety, improve the conditions on work safety, establish and improve its responsibility system for work safety and other rules and regulations, and strengthen the implementation thereof to ensure work safety.
See *Liu Simao v Jiaonan Dawan Port Co., Ltd*., Qingdao Maritime Court, (2001) Qing Hai Fa Hai Shi Chu Zi No. 2 and also *Jiang Yongxiang v Ningbo Shipping Group Co., Ltd. and Shi Meiliang*, Ningbo Maritime Court, (2013) Chong Hai Fa Shi Chu Zi No. 84.

[315] Article 6 of Provisions on the Administration of Port Operations,whoever intends to undertake the business operations of a port shall apply for obtaining the Port Business Permit.
See *Wang Yunpeng v Taizhou Wanlunda Shipping Co., Ltd., Liu Jian, Tianjin Pacific Shipping Co., Ltd., Tianjin High People's Court*, (2010) Jin Gao Min Si Final No. 0064.

[316] See *Jiang Yongxiang* (n 314).

[317] *Guo Houcai v Nanjing Port (Group) Co., Ltd. Fourth Port Company*, Nanjing Intermediate People's Court, (2015) Ning Min Final No. 4300.

[318] *Gao Shilin* (n 311).

7.3 Failure of the Payment and the Lien Right

Within a TOC or PWC/PSC, the operation clients have to pay for TO's services. However, in judicial practice, the contracting party may fail to make the payment due to various reasons and thus breach the contract. In this situation, a TO may claim for the payment and apply for the lien rights.

7.3.1 Cases where the Clients Fail to Pay the Fee

To establish a contractual liability for fee payment, a TO must prove the existence of a valid contract under which a TO agrees to carry out the operation work and the clients meanwhile agree to pay for the services; the clients then however fail to pay for the service and thus the TO suffers the loss.

To start with, one may question whether or not the TOC or the PWC/PSC is in fact concluded, especially in cases where no written form is signed between the parties. In *Shenzhen Chiwan Petroleum Base Co., Ltd. v Huirong (HK) Shipping Limited.*,[319] despite no port storage agreement was signed between the parties, the ship in fact berthed at the port, and Huirong Shipping paid the operation fee directly to the TO. Thus, the TOC was de facto established by the performance of the parties.[320] Meanwhile, in some other cases, even if the TOC was expired, a TO nevertheless performed the primary obligation of the contract without the clients' objections. Whereas, the client refused to pay the operation fees due to the expiration of the contract. This is the case in *Shanghai Mingdong Container Terminal Co., Ltd. v Hanjin Shipping Co., Ltd.*,[321] where the court held that since TO's performance of the obligation was accepted by Hanjin Shipping, although the original contract was expired, a new contract was

[319] See *Shenzhen Chiwan Petroleum Base Co., Ltd.* (n 39).
[320] See also in PSC, *East Wuzhu Muqinqi Yitai Cargo Transportation Agency Co., Ltd. v Tianjin Gangxin Container Logistics Co., Ltd.*, Tianjin High People's Court, (2011) Jin Gao Min Final No.3.
[321] See *Shanghai Mingdong Container Terminal Co., Ltd.* (n 35).

in fact established and Hanjin should pay for the services.[322] Furthermore, complications could arise when the contracting parties choose to conclude the contract online. For example, in *Shandong Wantong Group Dongying Port and Navigation Co., Ltd. v Yingkou Guohua Petrochemical Co., Ltd.*, (*Wantong case*),[323] Dongying Port sent the loading and discharging agreement via the email, which was considered as "making an offer". However, instead of replying to the email, Yingkou Guohua then called the Dongying port and requested the discharge. The court held that the offer was not accepted without replying to the email, thus the late fee payment clause in the contract was invalid. Nevertheless, the Yingkou Guohua still had to pay the discharging fee due to the factual performance.

Moreover, under the circumstance that the contract is concluded, the defendant may argue that he is not the right defendant, especially when there is an agency relationship. In *Tianjin Port 5th Port Co., Ltd. v Beijing China Storage International Logistics Technology Co., Ltd (Tianjin Branch) and Tianjin Jiwu Harbour Metal Minerals Market Management Co., Ltd.*,[324] Tianjin Branch argued that it was not the party of the operation contract, since it entrusted Tiansheng Company (freight forwarder) to do the terminal operation. It was Tiansheng Company who was the contracting party in the TOC. However, Tianjin Branch participated in the negotiation meeting together with Tiansheng Company and submitted the stamped delivery order to the TO. The evidence was sufficient to prove that the claimant knew the existence of the agency relationship between Tianjin Branch and Tiansheng Company. Thus, according to the contract law, the TOC could directly bind between the Tianjin Branch and the TO.[325] In addition, there

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[322] See Article 7 of the Contract Law, also *Shenzhen Chiwan Container Terminal Co., Ltd.* (n 39); *Shenzhen Magang Warehouse Co., Ltd. v Hanjin Shipping Co. Ltd*, Guangzhou Maritime Court, (2017) Yue 72 Min Chu No. 223.

[323] See *Shandong Wantong Group Dongying Port and Navigation Co., Ltd. v Yingkou Guohua Petrochemical Co., Ltd.*, (Wantong case), Qingdao Maritime Court, (2015) Qing Hai Fa Hai Shang Chu No. 1783.

[324] *Tianjin Port Fifth Port Co., Ltd. v Beijing Zhongwuchu International Logistics Technology Co., Ltd. Tianjin Branch, Beijing Zhongwuchu International Logistics Technology Co., Ltd., and Tianjin Jiwu Gangwan Metal Minerals Market Management Co., Ltd.*, Tianjin Maritime Court, (2015) Jin Hai Fa Shang Chu No. 387.

[325] Article 402 of the CL (Article 925 of the CC), where the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party. See also *Shanghai Mingdong Container Terminal Co., Ltd.* (n 35).

is also a possibility that the contract is signed by the employee of a company, but the company argues that the signing is the personal choice of the employee, thus declining to perform the contract. However, as long as the contract contains the company's official stamp, it is sufficient to perceive that the employee represents the company and behaves on behalf of the company. The failure of proving an employee's personal behaviour by the employer shall lead to an adverse effect and the company itself should take on the liability.[326] Furthermore, it is also difficult to ascertain the contracting party or the responsible party when there is a dispute as to whether the behaviour of the original contracting party is a debt assignment or a substitute performance. If it is a debt assignment, the obligor needs to seek permission from the obligee and the obligor is no longer the contracting party.[327] However, if it is a substitute performance, the obligor is still the contracting party. When a third party fails to fulfil the obligation properly, the obligor has to undertake the liability for breaking the contract.[328] For example, in *Tianjin Port China Coal Huaneng Coal Terminal Co., Ltd. v Zhejiang Wuchan Metals Group Co., Ltd.*, (*Huaneng v Wuchan*),[329] the court held that the agreement which all the operation fees shall be paid by Dechang (third party) in the contract between Wuchan and Dechang was in fact a substitute performance; and thus in cases where Dechang failed to pay the operation fee, Wuchan company shall undertake the liability and pay the operation fee.

The amount of payment is another problem that needs to be accessed by the court when a contract is in breach. According to the CC, firstly, after a contract becomes enforceable, the parties may agree upon supplementary terms through consultation if there are disputes about the price or remuneration; if a supplementary agreement cannot be reached, such terms shall

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[326] See *Chizhou Longchang Heshun Building Materials Co., Ltd., v Chizhou Yuanhang Niutoushan Port Co., Ltd.*, Chizhou High People's Court, (2017) Wan 17 Min Final No. 406.

[327] Article 84 of the CL (Article 551 of the CC), where the obligor delegates its obligations under a contract in whole or in part to a third party, such delegation shall be subject to the consent of the obligee.

[328] Article 65 (Article 523 of the CC), where the parties agree that a third party performs the obligations to the obligee, and the third party fails to perform the obligations or the performance is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.

[329] *Tianjin Port China Coal Huaneng Coal Terminal Co., Ltd., v Zhejiang Wuchan Metal Group Co., Ltd.*, Tinajin High People's Court, (2017) Jin Min Final No. 530.

be determined in accordance with the relevant provisions of the contract or the transaction practices.[330] In practice, sometimes both the terms of the contract and the transaction practices should be considered together. For example, in *Huaneng v Wuchan*, only a package charge and the storage fees were expressly stipulated in the contract. Nevertheless, Wuchan had to pay the weighing fee and other necessary fees for the performance of terminal operation services even without an agreement, since these fees were factual costs and the contracting parties should have known the fees as a business practice.[331] Moreover, in cases where there was a new de facto TOC between the contract parties and no price agreement was established in the new contract, the fee rate in the former contract may still be valid if the contracting party pre-paid some of the operation fees based on the former rate and promised to a further payment.[332] If having considered the relevant provisions of the contract or the transaction practice, it is still unable to ascertain the amount of payment due, the prevailing market price at the place of performance at the time the contract was concluded,[333] the government guided-price or the public billing standard[334] can be applied.[335]

In addition to the price for the services, the contracting parties may also agree on a late payment fee clause in a contract. It is the party that claims for the late fee payment who has to prove that the clause is valid. In the aforementioned *Wantong case*, the offer sent by the claimant contained the late fee payment clause; however, the claimant failed to prove the validity of the clause since the contract was not concluded. Besides, the claimant needs to ascertain the exact starting date for calculating the late payment fee. For example, in *Jiangmen International Container Terminal Co., Ltd. v Guangdong Gaoluhua Television Co., Ltd.*,[336] the parties

[330] Article 510 of the CC, where, after the contract becomes effective, there is no agreement in the contract between the parties on such contents as quality, price or remuneration, or place of performance etc., or such agreement is ambiguous, the parties may agree upon supplementary terms through consultation; if a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or the transaction practices.
[331] *Tianjin Port China Coal Huaneng Coal Terminal Co., Ltd*. (n 329).
[332] *Shenzhen Chiwan Petroleum Base Co., Ltd.* (n 39).
[333] *Xuzhou Feida Port v Jiangsu Golden Port Energy Co., Ltd.*, Suzhou High People's Court, (2017) Su Min Shen No. 3489.
[334] See Tianjin Port Fifth Port Co. Ltd applied for the realization of security rights (n 144) and *Tianjin Port Exchange Market Co., Ltd.* (n 159).
[335] Article 511 of the CC.
[336] *Jiangmen International Container Terminal Co., Ltd.* (n 53).

agreed to commence a late fee if the operation fee was not given after 15 days of the issuance of the monthly statement. Nevertheless, the claim for the late payment was declined by the court since the TO failed to prove the issuance date of the monthly statement. By contrast, the claims for a late fee with an exact starting date in *Chiwan Container Terminal Co., Ltd. v Hanjin Shipping Co., Ltd.*[337] was supported by the court. The contracting parties agreed that the late fee payment would be started calculating after 30 days of the receipt of invoices. The invoices were presumed to be received after 7 days of the issuance. Furthermore, in terms of the rate of the late fee, before 2016, a rate of 5 ‰ due payment per day based on a government regulation was supported by courts.[338] However, in a later case, the 5 ‰ rates per day for late payment was considered too high and was objected to by the court. Instead, a 20% rate per year was deemed reasonable and was approved by the court.[339] In addition, the plaintiffs' demands for the interests of the unpaid fee are usually supported by the courts. Concluded from the cases mentioned above, the courts may support the same interests as the bank deposit rate or the loan interest rate and set the starting date of calculation as the date of filing the lawsuit or the trial date as the starting date of calculation.

7.3.2 TO's Lien Rights

If the defendants fail to pay the operation fees, the TOs may take different measures to ensure that they can secure their legitimate rights and get the payment. For example, the TO may apply for property preservation. The preservation can be proposed before instituting the litigation in court, such as seizing the containers which are stored in the port.[340] A TO may also apply for the property preservation to freeze the deposits or seize other properties that the defendant may

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[337] See *Shenzhen Chiwan Container Terminal Co., Ltd.* (n 39).
[338] Article 6 of Port charges rules of the Ministry of Communications of the People's Republic of China (foreign trade part), Ministry of Communications, 12 Jun 1997, which was repealed by The Decision of the Ministry of Transport on the Abolition of 2 Transportation Regulations, Ministry of Communications, 01 March 2016, and see *Zhanjiang Port China Shipping Container Terminal Co., Ltd. v Hong Kong Donggang Freight Service Co., Ltd.*, Guangzhou Maritime Court, (2002) Guang Hai Fa Chu Zi No. 12.
[339] *Tangshan Port International Container Terminal Co. Ltd* (n 143).
[340] See *Shenzhen Magang Warehouse Co., Ltd.* (n 322).

have,[341] or freeze the shares which the defendant may hold in litigation.[342] In addition, the TO may sometimes directly apply for obtaining mortgages against the cargoes stored in a port and take the priority of compensation.[343] Among all the measures, it is most common for a TO to enforce the lien rights in order to secure its right of being paid. As a result of the recent enactment of the CC, according to the research within the Alpha Database, no case has been reported so far where relevant rules under the CC are applied to decide on the issue. Consequently, the following part of this Chapter, relating to TO's liens in practice, will be discussed based on the previous legislation. Besides, any possible impacts of the following implementation of the CC on the previous case scenario will also be analysed.

In Chinese Law, the lien right refers to the act that the creditor occupies the debtor's movable property in accordance with the arrangements of the contract and if the debtor fails to pay the debts before the agreed time, the creditor would have the right to take lien of the debtor's movable property and convert it into money, or auction or sell off the property, and use the proceeds to be paid off preferentially.[344]

As mentioned above, the rules about TO's lien rights are related to the legal status of the TO. The independent contractor can only invoke the general rules about the lien rights in the CC (previously in the Contract Law and Property Law). In addition to the general rules in the CC, if the TO is regarded as a servant or agent of the carrier or the actual carrier, the TO shall also share the carriers' lien rights in the CMC. Besides, if the TO provides the storage or warehousing services, it can have the lien rights in the PWC/PSC based on the CC.[345] The TO may also have lien rights when it provides transport services, but the clients fail to pay him.[346]

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[341] See *Shanghai Mingdong Container Terminal Co., Ltd.* (n 35).
[342] See *Shenzhen Chiwan Container Terminal Co., Ltd* (n 39).
[343] See *Rizhao Lanshan Wansheng Port Industry Co., Ltd. v Shandong Pangu Energy Co., Ltd. and Shandong Wanbao Trading Co., Ltd.*, Qingdao Maritime Court, (2017) Lu 72 Min Chu No. 971.
[344] Article 447 of the CC,
[345] Article 903 of the CC.
[346] Article 836 of the CC.

However, the current law is silent on the lien rights of the TOs in TOCs where no transport service is provided. In current judicial practice, whether the TO shall have a lien right is determined by the Property Law (CC) in most judicial practice.

According to the CC and the Property Law, the lien rights will be granted as long as the obligor fails to pay the amount due; the obligor's movable properties are legally occupied by the obligee; and the movable properties that are taken as lien fall into a same legal relationship with the obligee's rights, except for the lien between enterprises.[347] Notably, providing the lien right is either prohibited by other legislation or is ruled out by the contractual agreement, it will not be supported by the court.[348] To exercise the lien rights, the performance period, i.e. the time for the obligee to fulfil the obligation, shall be agreed upon by the parties. Without an explicit agreement, the period shall be no less than 60 days, except for fresh goods, perishable goods or those movable properties that are not easily preserved.[349]

In practice, there are several disputes about the conditions for TOs' lien rights. First of all, literally speaking, in a "lien between enterprises", there is no requirement of the "same legal relationship"; thus, a legal occupation of any movable property is enough. For example, in *Dalian Port Co., Ltd. v Shenyang Dongfang Iron and Steel Co., Ltd.*[350], when the operation payment is due, even though the occupied iron was not in the same legal relationship with the matured debts, the lien rights against the iron was supported by the court because it is a "lien between enterprises". Indeed, lessened strictness of requirements for lien rights between

[347] Article 230 of the PL (Article 447 of the CC), in case an obligor (debtor) fails to pay its due debts, the obligee (creditor) may take the lien of the obligor's movable properties he has lawfully possessed, and be entitled to seek preferred payments from these movable properties. Article 231 of the PL (Article 448 of the CC), the movable properties taken as lien by the obligee shall fall into a same legal relationship with the obligee's rights, except for the lien between the enterprises.

[348] See *Tianjin Port Exchange Market Co., Ltd.* (n 159). Article 232 of the PL, no lien may be taken if any law prohibits to do so or the parties concerned stipulate not to do so.

[349] Article 236 of the PL (Article 453 of the CC), a lienor shall stipulate the term for fulfilling the obligee's rights with the obligor after the property is taken as lien; and in case there is no such stipulation or such stipulations are unclear, the lienor shall give two months or more to the obligor for him (it) to fulfill the obligee's rights, except for fresh goods, perishable goods or those movable properties that are not easy to be kept. In case the obligor fails to fulfill the obligee's rights within the time limit, the lienor may, by concluding an agreement with the obligor, convert the property under lien into money, or seek preferred payments from the money incurred from the auction or sell-off the property under lien. See also *Longkou Bingang Liquid Chemical Terminal Co., Ltd. v Shandong Daxin Chemical Co., Ltd.*, Qingdao Maritime Court, (2019) Lu 72 Min Chu No. 553.

[350] *Dalian Port Co., Ltd.* (n 57).

enterprises is helpful in facilitating transactions and protecting the legitimate interests of creditors. On the other hand, without further restrictions on the 'lien between enterprises', adverse consequences may appear. For example, in *Zhejiang Jindun v Nanjing Chongding*,[351] the lien right was upheld by the court. Jindun owed some debt to Chongding in a contract for the sale of goods. Chongding later borrowed a car from Jindun and refused to return the car, claiming a lien right towards the car based on the former sale of goods contract. Through this case, it is not difficult to find that the enterprise lien rights are likely to be abused and the integrative relationship between enterprises can be harmed. It is hoped that with the implementation of the CC and its judicial interpretation in this regard, this concern will be alleviated. According to Article 62 of the 'Interpretation of the Supreme People's Court of the Application of the Relevant Guarantee System of the Civil Code of the People's Republic of China' (Interpretation of the Application of the Relevant Guarantee System of the CC),[352] in an enterprise lien, if the debtor requests that "the creditor makes restitution of the property under a lien on the grounds that the claim is not incurred by the enterprise operating as a going concern," the court shall uphold the request. Thus, if the aforementioned scenario in *Zhejiang Jindun v Nanjing Chongding* occurred after the enactment of the CC, the lien rights upon the car may not be granted.

Secondly, to establish the lien rights, the occupied movable must be the movable of the debtor. There are two different understandings of the "movable of the debtor". Some believe that the debtor must have the title of the property under lien, while others believe that the debtor's legal occupation of the property under lien is adequate. The first opinion is outdated. In cases involving a TO, many courts hold the view that the TO does not have to ascertain whether the obligor is the owner of the lien properties when it provides the transport service, since

[351] *Zhejiang Jindun Chain Manufacturing Co., Ltd. v Nanjing Chongding Material Trade Co., Ltd.*, Nanjing High People's Court, (2017) Su 01 Min Final No.9181.
[352] Supreme People's Court, No. 28 [2020] of the Supreme People's Court, 01 January 2021.

according to the Contract Law, the carrier shall be entitled to a lien on the relevant carried cargoes when the consignor or consignee fails to pay the freight, storage fees and other carriage expenses.[353] This is the case in *Haikou Port Container Terminal Co., Ltd. v Guangxi Xinminhang Shipping Co., Ltd.*,[354] where the cargoes were contained in the container, and the TO was considered as the actual carrier. When the client failed to pay for the services, the TO shall have the maritime lien provided in the Contract Law and the Maritime Law.[355] In the same case, the court held that the TO would also be entitled to the lien right also based on the rule of storage contract, where the depository was entitled to a lien on the legally occupied deposit.[356] This point was also mentioned in *Jinzhou Port Co., Ltd. v Tianjin Wuzhou International Container Terminal Co., Ltd.*,[357] where the court believed that whether the depositor had ownership towards the deposit did not affect the lien rights of the depository. It is noted that in this case, the TO concluded a TOC rather than a storage contract with the contracting parties. Before the invalidation of the Ports Operation Rules in 2016, the TO shall have the lien rights when the operation entruster fails to pay the fee settled in the TOC.[358] However, this case happened after the repeal of the Ports Operation Rules; thus whether the TO could have the right to take the lien should be determined by the most similar law. In this case, the rule of the storage contract in Contract Law would be applied. Article 380 of the Contract Law, which is related to the storage contract, pays more attention to the fact that the properties are possessed by the depository through the storage contract or the warehousing contract.[359] In a former case, the court held that no matter in the semantic interpretation,

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[353] Article 315 of the CL (Article 836 of the CC), where the consignor or consignee fails to pay the freight, storage fees and other carriage expenses, the carrier is entitled to lien on the relevant carried cargoes, except as otherwise agreed upon by the parties.
[354] *Haikou Port Container Terminal Co., Ltd.* (n 10).
[355] Art 315 of the CL (Article 836 of the CC) and Article 87 of the CMC, if the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods.
[356] Article 380 of the CL (Article 903 of the CC), where the depositor fails to pay the storage fee and other expenses, the depository is entitled to lien on the deposit, unless as otherwise agreed upon by the parties. Article 395 of the CL (Article 918 of the CC) matters not provided for in this Chapter shall be governed by the relevant provision on storage contracts.
[357] *Jinzhou Port Co., Ltd. v Tianjin Wuzhou International Container Terminal Co., Ltd.*, Tianjin Maritime Court, (2018) Jin 72 Min Chu No. 940, see also *Tianjin Wuzhou International Container Terminal Co., Ltd. v Yangpu Zhongliang Shipping Co. Ltd*, Tianjin Maritime Court, (2018) Jin 72 Min Chu No. 710.
[358] Article 40 of the Port Operation Rules.
[359] Article 903 of the CC.

systematic interpretation or teleological interpretation, the depository can perform the lien rights as long as the "deposit" is occupied through the contracts. There is no need for the depositor to confirm the deposits' ownership. Furthermore, compared to Article 230 of the Property Law, which is the general rule about the lien rights, Article 380 of the Contract Law is a special law and thus shall have the priority in the application.[360]

However, the occupation of the property must be performed in good faith to fulfil the requirement of lien rights, which means that a TO shall not enforce this right when it knows that the property does not belong to the contracting party or the contracting party is in fact an ex right disposition.[361] Similarly, the lien right cannot be established when the property is possessed by force.[362] What's more, disputes about the lien rights may also occur even if the lien right is upheld by the court. Occasionally, the TO may have to face the dissent action of a third party who believes that the lien right is not applicable. In general, the court may review the case based on the same criteria mentioned above when the dissent action is reasonable.[363]

In the CC and the revised CMC draft, several new rules relating to TO's lien rights are established. For the enterprise lien, in addition to the aforementioned rule about "as a going concern", if the creditor holds a lien on the property of a third party, and the third-party requests that the creditor makes restitution of the property under lien, the court shall uphold the request.[364] By contrast, if the creditor has a lien in and lawful possession of the movable of a third party by reason of the same legal relationship, and the third party requests restitution on the grounds that the property under lien is not the property of the debtor, the court shall reject the request.[365] Furthermore, in the revised CMC draft for review, legislation about TO's lien

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[360] *Tianjin Wuzhou International Container Terminal Co., Ltd*. (n 357).
[361] *Tianjin Port Exchange Market Co., Ltd.* (n 159) and *Dalian Port Co., Ltd.* (n 57).
[362] *Dalian Port Co., Ltd. v Dalian Guanglida Freight Forwarding Service Station*, Dalian Maritime Court, (2019) Liao 72 Min Chu No. 527.
[363] See Tianjin Port Fifth Port Co. Ltd applied for the realization of security rights (n 144) and *Tianjin Port Exchange Market Co., Ltd.* (n 159).
[364] Article 62 (2) (3) of Interpretation of the Supreme People's Court of the Application of the Relevant Guarantee System of the Civil Code of the People's Republic of China, Supreme People's Court, No. 28 [2020] of the Supreme People's Court, 01 Jan 2021.
[365] Article 62 (1) of Interpretation of the Supreme People's Court of the Application of the Relevant Guarantee System of the Civil Code of the People's Republic of China.

rights is settled. If this draft can be approved, the TO shall have a lien right towards the movable of the clients as long as the clients fail to pay the relevant fees in full, including the terminal operation expense, the necessary costs paid by the TO for the goods and other expenses that should be paid to the TO. In this situation, there is no need for TO to seek help from the contract law or property law to exercise the lien rights like the TO did in *Jinzhou Port Co., Ltd. v Tianjin Wuzhou International Container Terminal Co., Ltd*.

7.4 Conclusion

In practice, a TO may also face claims for compensations for personal injury. Therefore, the TO should put much more emphasis on safe operation. In addition to training employees and qualifying workers with special types of work, the TO should also take various safety protection measures and design conspicuous warning signs to avoid injury to people who enter the port area. If the TO subleases the terminal to a third party, it must confirm whether the lessee is qualified to operate the port. Otherwise, the TO will be in a disadvantaged place and take the adverse consequences in a personal injury claim.

Moreover, sometimes the TO will face the situations of not being paid. The person who has the duty to pay the service may claim that the TOC or the PWC is not established, or that he is not a suitable defendant. However, in general, as long as the TO performs the obligations according to the contract, and the service was accepted by the other party, the contract will be deemed as having been established. Regarding the question of a suitable defendant, if there is an agency relationship and the TO knows the relationship, then both the agent and the principal can be the appropriate defendants. For the amount of remuneration, if the two parties can reach a further agreement, the amount shall be decided by the agreement. Otherwise, the amount can be determined by referring to the relevant terms of the contract and trading practices. As a last resort, the amount of which can be determined by market prices or government-guided prices.

As for the lien right, when the payment is due, and the debtor refuses to perform the related debt, the TO can take a lien on the movable property legally possessed by him. According to the relevant provisions of the CC, under an enterprise lien, when there are continuous transactions between the TO and its debtor, and the lien property is continuously related to the operation, the lien property does not need to be in the same legal relationship with the creditor's rights. In addition, the lien goods may not be owned by the debtor, but this lien should be premised on possession in good faith. In the existing laws, when the TO does not provide storage or transportation services, it is difficult to find the corresponding basis for the relevant lien in the CC. However, if the revised CMC draft for review can be approved, the lien of the TO should be provided for by the CMC without referring to other general rules.

Chapter 8 Conclusions

A TO plays a vital and indispensable role in the carriage of goods by sea, adopting legal rules for regulating the activities of the TO is thus important and necessary. However, as shown in this thesis, the current rules are found scattered throughout several laws, regulations, judicial interpretations and adjudicative guidelines; they are also fragmented and vague in many aspects.

The relevant findings of this thesis mainly include the following three aspects: *Firstly*, this thesis presents the current legal framework for regulating TOs in China. Furthermore, after collecting and analysing the judicial cases in the last ten years (2010-2020), the three most evident categories of substantial legal disputes and difficulties are identified and discussed. They are: (1) cargo claims; (2) personal injury and (3) non-payment and lien rights.

Secondly, this thesis is dedicated to discussing the legal issues relating to cargo claims, including misdelivery and cargo damage/shortage. Based on the in-depth analysis, the identified legal problems for cargo claims are mainly focused on the following seven aspects: (1) the term “terminal operator” is not defined in any law, and its legal status is to some extent confusing; (2) the “ship’s delivery order”, which is widely used in commercial practice, is not defined; in addition, TO’s obligation to deliver against the delivery order is questionable; (3) different opinions exist as to whether a TO shall be liable for misdelivery against the warehouse receipt; (4) the method to calculate the amount of the cargo shortage is not ascertained by the legislation; (5) the current method used for calculating the amount of compensation for the damage, which is based on the CIF price of the goods, is to some extent rigid and unreasonable; (6) other than by using the defences in current law, the CMC leaves no room for the TO and the carrier to apply for exemption and limitation of their liability for cargo claims, which, though, has raised intense debates; and (7) the current law is silent as to whether a special

contractual agreement on exemption and limitation of liability can be allowed. These legal issues have been analysed and explained in the corresponding chapters of this thesis.

In order to deal with these issues, the revised CMC draft stipulated some rules to deal with TO's cargo claims: (1) the definition and obligations of the TO are added; (2) the TO has the statutory obligation to deliver the goods against the transport documents (such as the bills of lading and delivery orders); (3) the amount of compensation is calculated through the market value rather than the CIF price. However, when there is no available market value of the goods, the CIF price will be referred to; and (4) the TO, regardless of its legal status and its client, shall enjoy the carrier's exclusion and limitation of liability.

However, even if with these amendments, some of the legal issues involving the TO cannot be completely solved. Here are some suggestions to improve the rules about the TO: (1) the definition of the TO can be further improved by modelling for the OTT Convention, where the concept of the TO, the operation period of the TO, the roles played by the TO and the legal relationship between the TO and other parties are regulated; (2) the legal status of the TO shall be improved by referring to the RR, in which the TO employed by the carrier is regarded as the MMP. Besides, the TO employed by the party other than the carrier shall be regarded as the independent contractor; (3) for delivery obligation, even if the proposed legislation confirms that the TO shall deliver the goods against the transport document rather than the warehouse receipt, in some tort cases, the TO is still likely to be not liable for delivery against the warehouse receipt. In these circumstances, the unreal joint and several liability shall be invoked to reach fairness; (4) for the exclusion and limitation of liability, there is no need to reform the rules about statutory derogation in TOC/PSC/PWC. For statutory derogation in carriage contract, although there is a different practice in the RR, it is still not wise to revise the current legislation. In terms of the contractual derogation in TOC/PSC/PWC, the party autonomy should be respected. However, more detailed rules about unfair contract terms

should be established. For the contractual derogation in carriage contract, the Chinese law shall at least leave room for the conclusion of special agreements, as there is a tendency to support such agreements.

Thirdly, this thesis also examines the personal injury compensation disputes that the TO may face during its operation. The ascertainment of a TO's liability for personal injury largely depends on its attitudes towards and its compliance with the work safety regulations. Moreover, the TO may fail to collect the operation fees from the clients; the lien right of the TO is thus also discussed.

Throughout the thesis, in addition to referring to all relevant Chinese laws and international conventions, the relevant provisions in the CC and the revised CMC draft are particularly used for the evaluation of certain legal issues. Meanwhile, whether these rules are adequate and whether further changes are necessary are also questioned and evaluated.

Nevertheless, there are limitations of this study. Firstly, this study only collected cases of the past ten years, i.e., 2010-2020. More cases will be collected and studied in the future. Secondly, although the influence of the CC and the revised CMC draft on TO's rights and obligations has been discussed in this thesis, the discussions are merely based on theoretical analysis due to the lack of relevant judicial practice. Moreover, while applying some new legislations such as a new maritime code in the future, it is expected that some new legal issues may emerge. As a result, the study of some relevant issues will be updated in due course. Secondly, when carrying out the comparative study, except the international conventions, only English law is applied for comparison. This kind of comparative study may consider insufficient, and the law of some other jurisdictions may be studied in our future research.

The future study on the TO may be extended to the topics including the *force majeure* and the TO, the rationality of the rules for TO's lien rights, and the influence of e-commerce on TO's

rights and obligations. In particular, the issues about the *force majeure* deserve analysis due to the outbreak of the COVID-19. The impact of the outbreak of the pandemic on the TO and its operation cannot be underestimated. Moreover, the rules regulating other third parties to the sea carriage contract, such as the actual carriers and the freight forwarders, are also worth studying.

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