

Comments on the Revision of China's Maritime Code

LI Yingying^{[a],*}

^[a]Law lecturer of Shanghai Maritime University, Admiralty Law PHD of Dalian Maritime University law School, Visiting Scholar of Tulane University Law School. Shanghai, China.

*Corresponding author.

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Abstract

The China Maritime Code entered into force on July 1, 1993. Twenty-five years later, the first and substantial amendment was initiated in 2018. The proposed law adds two new chapters, the Domestic Carriage of Goods by Water and Liability for Compensation of Ship Pollution Damage. In addition, the proposed law has stipulations related to the title of the ship, especially ships under construction, and other issues to be consistent with new international conventions and the development of other related legislation. Every coin has two sides, and both praise and criticism of this amendment exist.

Key words: China maritime code; Title of ship; Domestic carriage of goods by water; Ship pollution damage; Actual carrier

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1. INTRODUCTION

On November 7, 2018, the Ministry of Transport of the People's Republic of China started the public consultation on most recent draft of maritime code. The proposed law may be presented to the National People's Congress for review in 2019. The China Maritime Code of the Peoples'

Republic of China became effective on June 1, 1993. It is never revised since the promulgation, although a lot of things have changed in the past twenty-five years. Maritime legislation in China is new (Yang, 2009), the revision of maritime legislation is even newer. The need for revision of the Maritime Code could be concluded as four aspects.

1.1 The Development and Explosion of the Shipping Industry and International Trade

Since the publication of the Maritime Code in 1992, China's shipping industry and international business and trade practice have made steady progress. The Chinese government has enacted several laws, decisions and legal interpretations related to maritime affairs, and many international conventions and rules have been revised or updated in the past 25 years.

The shipping industry is currently playing a much more important role in international business and trade, and it has become urgent for the Chinese government to determine how to regulate maritime transportation. According to the statistics of the Ministry of Transport, total import and export trade in China reached 27.79 trillion in 2017, which is 30.5 times of the level in 1992. Ninety percent of international trade requires maritime transportation, but the development of marine technology has led to an imbalance in the interests between shipper and carrier and the risks and responsibilities need to be redistributed. Multimodal transport is a new and vital form of maritime transportation in China, and China has formed a multi-nodal and full-coverage transport network through years of effort. The period of responsibility for the multimodal transport operator and the rules of the network system or uniform system should be reconsidered.

1.2 Changes and Achievements in International Legislation

International legislation has made great strides since the 1990s, but sluggish legislation in China is gradually becoming an outstanding problem. According to the

legislation history of the Maritime Code, the making of this code was informed and deeply influenced by international conventions and practice at that time. For example, the three most important conventions, the 1924 Hague Rules, the 1968 Hague-Visby Rules and the 1978 Hamburg Conventions, govern the carriage of goods by sea under bills of lading. They reflect the various rationales of international transport law in the development stages. The existing Maritime Code was also influenced by this legal regime. The reference documents that affect the development of the China Maritime Code are illustrated in the following chart.

Chapter of Old Maritime Code	Reference Documents
Chapter IV Contract of Carriage of Goods by Sea	1924 Hague Rules, 1968 Hague-Visby Rules and 1978 Hamburg Conventions
Chapter V Contract of Carriage of Passengers by Sea	1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea
Chapter VIII Collision of Ships	1910 International Convention for the Unification of Certain Rules of Law with Respect to Collision
Chapter IX Salvage at Sea	1989 International Convention on Salvage
Chapter X General Average	1974 The York Antwerp Rules
Chapter XI Limitation of Liability for Maritime Claims	1976 International Convention on the Limitation of Liability for Maritime Claims
Chapter XII Contract of Marine Insurance	1906 Marine Insurance Act

Meanwhile, many conventions and regulations related to maritime affairs have been created or modified in the past 30 years, as shown in the following chart.

Documents	Revision Year	Legislation Year
York Antwerp Rules	1994, 2004, 2016	1974
Athens Convention relating to the Carriage of Passengers and their Luggage by Sea	2002	1974
Convention on Limitation of Liability for Maritime Claims	1996	1976
International Convention On Liability And Compensation For Damage In Connection With The Carriage Of Hazardous And Noxious Substances By Sea		1996
International Convention on Arrest of Ships		1999
The safe operation of ships and for pollution prevention management rules		2000
International convention on Civil Liability Bunker Oil Pollution Damage		2001
International Ship and Port Facility Security		2002
Maritime Labor Convention		2006
Nairobi International Convention on the Removal of Wrecks		2007
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea		2008 ¹

Historically speaking, China has always recognized the need to conform to international norms to avoid disputes and to participate in international institutions to resolve those disputes that may occur (Nafziger and Ruan, 1987). The development of international legislation thus calls for the revision of China's internal legislation.

1.3 The Maritime Silk Road Initiative

Maritime law is one of the most important tools for communication and cooperation among countries within the Maritime Silk Road initiative. International trade needs uniform rules adopted with worldwide consensus to address the legal risks and related costs of merchants. In a broad sense, all the conventions on the carriage of goods try to achieve international uniformity (Sturley, 2010). The use of computers and the Internet has become widespread, especially in business and commerce. To achieve paperless commerce, various electronic data interchange systems have been developed to facilitate the computer-to-computer transmission of standard business documents in a ready-to-process form (George, 1998). One of the most important documents in the shipping industry is the bill of lading, and the negotiability of the electronic bill of lading is very unique. To make electronic bills of lading legally enforceable, all participants must follow the same protocols and rules (Chen, 1999). Thus, there is an urgent need for China to revise Maritime Law and establish rules and regulations to help shipping trade among the above countries and to resolve new types of disputes and transnational cases.

1.4 Impact of Internal Legislation and the Revision of Related Laws and Regulations

The development of internal legislation in China calls for the coordination of different laws and rules. In the 1990s, there was only the General Principles of the Civil Law of P.R.C. and no specific rules for tort law, contract law or real rights law in China. All of these laws deeply affect the basic rights and interests of the parties involved in maritime disputes. Therefore, the legislative drafters of maritime law at that time had to learn from international conventions and practice, which are very different from China's domestic legislation and systems. In the past 20 years, contract law, tort law and real rights law have been promulgated one by one. Whether maritime law or other general laws should be applied to actual maritime disputes became a question for the courts. The core problems of this process are repeated provisions and unclear rules in both general law and maritime law. The legislative drafters of maritime law in 2018 thus face the question of how to balance the priority and relationship between general law and maritime law.

2. MOST RECENT REVISION OF THE CHINA MARITIME CODE

2.1 Major Amendments

The most recent draft version of the Maritime Law has 17 chapters, including some already-existing chapters,

such as General Provisions, Title of Ship, and material covering other contract and tort relations as they pertain to ships, and new chapters, such as the Domestic Contract of Carriage of Goods by Waterway and Compensation for Damage caused by Ship Pollution.

In the past, different legal regimes were applied to the carriage of goods by sea based on the specific conditions. For example, U.S. law contains two major pieces of legislation, the Carriage of Goods at Sea Act, which governs the foreign carriage of goods by sea, and the Harter Act, which has a limited domestic application to the carriage of goods by sea (Chen, 1999). Chapter IV, Contract of Carriage of Goods by Sea of the existing Maritime Code only regulates carriage by sea. According to Article 2 of the existing Maritime Code, the provisions concerning the contracts of carriage of goods by sea as contained in Chapter IV of this code shall not be applicable to the maritime transport of goods between ports of the People's Republic of China. Another legislative document, Regulations on Domestic Carriage of Goods by Water, regulates the maritime transport of goods between the ports of China and the carriage of goods by inland water. However, this document was abolished in 2017, meaning that there is currently no law or rules that could be applied to the maritime transport of goods between the ports of China or the carriage of goods by inland water. The most recent revision adds a new Chapter V, Domestic Carriage of Goods by Water to fill that gap.

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, in short the "*Rotterdam Rules*", was adopted by the UN General Assembly on 11 December 2008 in New York, USA, and opened for signature on 23 September 2009 in Rotterdam, the Netherlands (Hakan Haran, 2011). One of the major amendments of *the Rotterdam Rules* is the right of control of cargo, which is fully included in China's new Maritime Code.

The oil spill caused by the collision between Sanchi and Crystal in 2018 shocked the world, seriously polluted China's marine environment and damaged civilian property. However, there were no specific rules in the existing Maritime Code applicable to ship pollution. Legislative drafters took this golden opportunity to add a brand new Chapter XIII. Chapter XIII deals with compensation for damage caused by ship pollution, especially cargo oil pollution, bunker oil pollution and poisonous and harmful substances. The new Chapter XIII also stipulates rules about funding compensation for damage caused by ship pollution.

In addition, the most recent draft of the Maritime Code sets new rules about possessory lien, crews' rights and interests, electronic transport records and other procedural issues. This revision of the Maritime Code is called the "big project", as it is quite different from the revision of other laws. Both criticism and praise for these revisions exist.

2.2 Specific Modifications of Each Chapter

The legislators have made many changes in this revision, and they touch almost every chapter. The main changes are compared and illustrated in the following chart. For convenience, the existing Maritime Code is labelled as such, while the proposed law, which is open for public consultation, will be called the "latest draft".

Existing Maritime Code	Latest Draft	Key points for revision
Chapter I General Provisions	Chapter I General Provisions	Adds inland water to the application scope of the Maritime Code.
Chapter II Ships	Chapter II Title of Ship	1. Changes name of chapter; 2. Adds three new parts, Part 1--General Rule, Part 5--Possessory Lien, Part 6-Title of Ships under Construction.
Chapter III Crew	Chapter III Crew	1. Improves the relevant provisions of the crew's labour contract; 2. Specifies seafarers' right of repatriation; 3. Clarifies captain's duty, especially prevention of marine pollution.
Chapter IV Contract of Carriage of Goods by Sea	Chapter IV Contract of Carriage of Goods by Sea	1. Clarifies the subject of actual carrier; 2. Adds the definition of actual shipper; 3. Increases the unit liability limit of carrier; 4. Add new rules of right of control.
Chapter V Contract of Carriage of Passengers by Sea	Chapter V Domestic Contract of Carriage of Goods by water	1. States that carrier has duty to provide a seaworthy ship for the whole period of carriage; 2. Specifies carrier's exemptions 3. States that consignee is the party of contract of carriage and has the right to sue carrier for cargo damage, loss or delay.
Chapter VI Charter Parties	Chapter VI Contract of Carriage of Passengers by Sea	1. Includes regulations for the carriage of passengers by inland water; 2. Raises the liability of limitation of carrier; 3. Introduces new developments in international legislation.
Chapter VII Contract of Sea Towage	Chapter VII Charter Parties	Adds financial lease clauses to bareboat charter part.
Chapter VIII Collision of Ships	Chapter VIII Contract of Sea Towage	Makes the provision of this chapter also applicable to the inland water area.
Chapter IX Salvage at Sea	Chapter IX Collision of Ships	Amends expression in harmony with the tort legal system.
Chapter X General Average	Chapter X Salvage at Sea	1. Enlarges the scope of ship; 2. Sets new rules for salvors to receive remuneration for salvage in accordance with 1989 International Salvage Convention.
Chapter XI Limitation of Liability for Maritime Claims	Chapter XI General Average	Cancels general average charges in accordance with the York-Antwerp Rules 2016.

Existing Maritime Code	Latest Draft	Key points for revision
Chapter XII Contract of Marine Insurance	Chapter XII Limitation of Liability for Maritime Claims	1. Increases limitation of liability in accordance with the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims of 1976; 2. Abolishes the dual system stipulated in article 210, paragraph 2.
Chapter XIII Limitation of Time	Chapter XIII Liability for Compensation of Ship Pollution Damage	1. Adds a new chapter for ship pollution; 2. Sets rules for cargo oil, bunker oil and poisonous and harmful substance damage.
Chapter XIV Application of Law in Relation to Foreign related Matters	Chapter XIV Contract of Marine Insurance	1. Improves the rules on insured's obligation of disclosure; 2. Expands the provisions of this chapter to apply to compensation under mutual insurance.
Chapter XV Supplementary Provisions	Chapter XV Limitation of Time	1. Deletes the provisions of suspension and interruption of the limitation of time; 2. Revises rules about the limitation of time in different disputes, such as the contract of carriage of goods by sea, general average, towage contract and so on.
	Chapter XVI Application of Law in Relation to Foreign related Matters	States that if the port of loading or unloading is in China, Chapter IV will be compulsorily applied to the contract of carriage.
	Chapter XVII Supplementary Provisions	Makes no substantive changes.

3. CONCLUSIONS AND COMMENTS

3.1 A New Way and Applied Rules for Resolving Maritime Disputes

If this latest draft of the Maritime Code becomes effective in the near future, many maritime issues will be solved through a new route.

First, the total carriage of goods by sea and water will be regulated by the new Maritime Code. There will be no difference between domestic maritime transport and international maritime transport in terms of the applied law. "Ship" is defined as sea-going ships and other mobile units under the old Maritime Code, but this definition had been modified as mobile units in the sea and in navigable waters connected with the sea. This is further clarified by the new Maritime Code that those persons entrusted by carrier carry out cargo operations in the port area are seen as actual carriers. The new Maritime Code adds 'actual shipper' to resolve conflicts regarding shippers under FOB business (Wang, 2010). It is clearly stipulated that the vessel operators may be the subject of a limitation of

liability for maritime claims. Ship pollution caused by bunker oil, cargo oil or harmful and poisonous substance spills will be regulated by the new Maritime Code. The limitation of time stipulated in the General Provisions of Civil Law will be applied in maritime disputes.

If the latest draft of the Maritime Code becomes effective in the near future, the process for resolving maritime disputes will change in both its substantive and procedural aspects. This change will affect the rights and interests of most parties who participate in maritime commerce with China or the Chinese.

3.2 Comments on the Latest Draft for Public Consultation

There are several issues remaining in this draft that are being hotly debated. First, this draft has made a great number of changes, which is not in line with the general practice for amending laws, and was somewhat shaped under pressure from political parties. For example, this draft adds Chapter V, Domestic Carriage of Goods by Water, which is very different from provisions for the international carriage of goods by sea. Whether it is correct and necessary for China to add this chapter is controversial. The legislative drafter wants to allow the new Maritime Code to apply in all water areas and to all water-related disputes, which is impossible and unrealistic. The new Maritime Code is a compromise in this battle, rather than legislation that considered all concerned parties' rights.

Second, this draft has several mistakes, both content and form, which are very obvious. For example, there is no Chapter II in the catalogue, which could have been avoided by serious proofreading of the draft. As we all know, laws relating to the carriage of goods are the most essential and complex part of Maritime Code. Chapter IV addresses the International Carriage of Goods by Sea, Chapter V addresses the Domestic Carriage of Goods by Water and Chapter VI addresses the Carriage of Passenger by Sea. According to legislative drafters' illustration, they intend to enlarge the scope of the new Maritime Code to include inland water. The above chapters divide carriage into goods and passengers. This draft illustrates that the carriage of goods by sea is different from the carriage of goods by water by using distinct names and chapters. However, referring to the carriage of passengers, the draft only includes Chapter VI, which does not state whether carriage by sea in this chapter includes carriage by inland water. As practitioners, we all understand that the carriage of goods or passengers by sea is unique from carriage by inland water. The involvement of foreign elements, the movability and risks of ships in various water areas, the prevalence of single-ship companies, the involved parties, international conventions and practices, history and cultural differences are all points that need to be considered when deciding whether to combine the legal regime of carriage of goods or passengers by sea

and inland water. This is also the view held by opposing scholars.

Third, the legislative technique is not sufficiently scientific and reasonable. For example, there is no need to offer a new paragraph for ships under construction. The draft stipulates the existence of a carrier and an actual carrier and takes the person who accepts the carrier's entrustment to perform the cargo operation in the port area as the actual carrier. This draft also permits the person who accepts the shipper's entrustment to perform the cargo operation in the port area to enjoy the defences and limitation of liability of the carrier. This is very difficult to understand. As we all know, in the field of carriage, commercial interests can be divided as carrier interests and cargo interests (Hakan Haran, 2011). The above person is taking the order of the shipper to perform the cargo operation; if we let them stand in the place of the carrier, what is the relation between this person and the carrier who is performing other carriage processes?

Finally, the remaining issues in the old Maritime Code remain unresolved in the latest draft. For example, according to article 22 of the old Maritime Code, some types of maritime claims will be entitled to maritime liens: (1) payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts; (2) claims with respect to loss of life or personal injury occurring in the operation of the ship; (3) payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges; (4) payment claims for salvage payment; and (5) compensation claims for loss of or damage to property resulting from a tortious act in the course of the operation of the ship. Article 23 of the existing code stipulates that the maritime claims set out in paragraph 1 of Article 22 shall be satisfied in the order listed. According to Chapter XI, Limitation of Liability for Maritime Claims, shipowners and salvors may limit their liability for claims set out in this chapter. All maritime claims are divided into two categories: claims for the loss of life or personal injury and other claims. All claimants will be recovered from these two separate limitation funds. Where the fund for personal injury and death is insufficient for the payment of claims for loss of life or personal injury, the other fund for property damage and loss should pay the unpaid balance. All the claims of these two separate funds should rank rateably and be paid in the same order, regardless of the tort claim or breach of contract. Both the rules for maritime liens and limitation funds under the existing Maritime Code have their own order list for maritime claims. If a severe maritime accident occurs, it causes personal injury, cargo loss, salvage payment, crew wages and other claims, and these are quite common in reality. The promulgation of the existing Maritime Code

has made how to pay every claim a controversial issue in recent years. Some scholars hold that the order of the maritime lien should be applied in such claims, and other people claim that all claims should rank rateably and be paid in the same order according to the rules of limitation funds. The draft of the new code does not mention this issue, and divergences still exist.

It is universally acknowledged that the existing China Maritime Code needs to be revised to some extent. The draft of the new Maritime Code has made many changes to the existing Maritime Code, which is good for maritime practice. However, this draft revises most of the rules from the existing Maritime Code, which is unnecessary. Making law and revising law should actually be cautious experiments. The stability of social and legal regimes is the primary consideration for the shipping industry and businessmen. If there are more changes, it becomes much more difficult for this new code to become effective in the future. Further, even if it becomes effective, this code will cause more issues than it will solve. There is no doubt that the China Maritime Code is one of the most important documents under maritime legislation, but this does not mean that all possible maritime disputes and relations should be stipulated in this code. After all, the China Maritime Code provides the basic rules for international commerce and shipping but is not the basic ocean law for China. Maritime legislation is a sound legal system combined with various legal documents, not only the China Maritime Code but also other laws and regulations. Allowing them function together is the right way to revise the Maritime Code.

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