

**THE MEASUREMENT OF DAMAGES
IN CARRIAGE OF GOODS BY SEA**

**- A COMPARATIVE STUDY OF ENGLISH AND CHINESE LAW WITH
A VIEW TO POSSIBLE REVISIONS OF THE CHINESE MARITIME CODE
AND OTHER LEGISLATION**

Submitted by Fan Wei, to the University of Exeter as a dissertation
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Abstract

Trade between Britain and China is rapidly expanding, and shipping law plays an important role in facilitating economic activity. This thesis provides an exemplification on the measure of damages in the carriage of goods by sea in both countries. It will help practitioners as well as scholars from both countries to understand the peculiar features and dynamics of the topic in the other's shipping laws.

The Chinese law of damages and shipping law are not as detailed or as well-structured as its English counterpart. Over the years, some articles in the Chinese Maritime Code (CMC) have been interpreted inconsistently, *e.g.*, art.55, and there is contradiction among different laws on the said topic, resulting in considerable confusion about the law. Bizarre and arguably unjust applications of legal rules continue to surface in claims for damages. A large number of contradictory decisions have been produced in Chinese shipping cases. Similar heads of damages are accepted or rejected in a process which at times seems alarmingly random. It is time to revisit the CMC and the law of damages and to urge their reform. England is a well-established centre of shipping litigation and arbitration in the world and its shipping laws are more influential on Chinese maritime courts than those of any other country. Several senior Chinese scholars suggest that English law is the model on which the reformed CMC should be based.

This thesis is written with a view to encouraging a revision of the defects in the CMC and to changing aspects of the current Chinese law of damages. It expounds on the English law part, provides a principled explanation for legal rules in cargo claims, reviews relevant Chinese law, makes comparisons between English and Chinese law at length, addresses the problems in Chinese shipping law and seeks a solution. It is hoped that this thesis can provide instructive recommendations to Chinese lawmakers and clarify the chaos inherent in interpreting the relevant law. In a few aspects, Chinese law seems fairer than the English position, which English scholars may find refreshing and enlightening. This thesis also proposes to increase the awareness of national decision-makers, especially the Chinese, of the international tenor of existing and proposed international maritime laws, as well as the concomitant duty to interpret and implement them as such.

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- Chinese Criminal Law (adopted at the Second meeting of the Fifth National People's Congress on July 1 1979 and amended by the Fifth meeting of the Eighth National People's Congress on 14 March 1997. English version available at <http://www.colaw.cn/findlaw/crime/criminallaw1.html>), art. 313
- Chinese Insurance Law (adopted at the 14th meeting of the Standing Committee of the Eighth National People's Congress on 30 June 1995 and amended at the 30th meeting of the Standing Committee of the 9th National People's Congress on 28th Oct 2002. English version see <http://www.qis.net/chinalaw/prclaw41.htm>), art.36, art.106 (2)
- Chinese Judge Law (adopted at the 22nd meeting of the Standing Committee of the ninth National People's Congress on 30 June 2001, and came into force as of 1 January 2002), art. 18
- Chinese Labour Law (adopted at the Eighth Meeting of the Eighth Standing Committee of National People's Congress on 5th Jul

- 1994, and was promulgated and entered into force as of 5th Jul 1994, by virtue of Order No. 28 of the President of the People's Republic of China)
- Chinese Maritime Code (adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress of the People's Republic of China on 7 November 1992 and entered into force as of July 1 1993, by virtue of Order No. 64 of the President of the People's Republic of China. English version see <http://www.qis.net/chinalaw/prclaw28.htm>), art.2, art. 42 (1) (2) (3), art.44, art.47, art.48, art.49, art.50, art 51 (1), art.51 (2), art 51 (3), art.54, art.55, art.56, art.57, art.58, art.59, art. 60, art.64, art.66, art.71, art.75, art.77, art. 87, art.88, art.115, art.166, art.169, art.171, art. 257, Chapter 11 art.204-220, art.277
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- Limitation of Liability for Maritime Claims concerning Vessels not exceeding 300 Tonnes and Vessels Engaged in Coastal Carriage and Coastal Operations (promulgated by the Ministry of Transport on 15 Nov.1993), art.3
- Maritime Special Procedure Code (adopted at the 13th Meeting of the Standing Committee of the Ninth National People's Congress on 25 December 1999, effective as from 1 July 2000.), art.250
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- Regulations of Contract for Waterway Cargo Transportation (promulgated by the State Council on 22 Aug 1987, and effective as of 1 Oct 1987), art.21
- Regulations on Carriage of Goods by Water (promulgated by the Ministry of Transport, came into effect on 1st Jan 2000)
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- Regulations on Prohibiting Agricultural Products and Other Materials that are Objects of Planned Purchase or Unified Purchase by the State to Enter the Free Market (promulgated by the State Council on 7th Aug 1957)
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- Regulations on the Foreign Exchange Regime of the People's Republic of China (promulgated by the State Council on 4 April 1996, revised on 14 January 1997), art.27
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Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of People's Courts for Violating Laws during Adjudication, promulgated by the Chinese Supreme Court and effective on Sept. 4, 1998, art.1, 2

Abbreviations

- 1976 Convention: 1976 Convention on Limitation of Liability for Maritime Claim
- B/L: Bills of lading
- CCL: Chinese Contract Law
- CCP: Chinese Communist Party
- cif: Cost, insurance and freight
- CIL: Chinese Insurance Law
- CLC: International Convention on Civil Liability for Oil Pollution Damage 1969
- CMC: Chinese Maritime Code
- CMI: Comité Maritime International
- CMR: Convention on the Contract for the International Carriage of Goods by Road
- COGSA: Carriage of Goods by Sea Act
- CSC: Chinese Supreme Court
- fob: Free on board
- GPCCL: General Principles of Chinese Civil Law
- HNS Convention: 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
- IMO: International maritime organization
- ISM Code: IMO's International Safety Management Code
- NOR: Notice of Readiness
- NYPE: New York produce exchange
- P&I: Protection and indemnity
- RCGW: Regulations on Carriage of Goods by Water
- RLLMC: Regulations on the Limitation of Liability for Maritime Claims concerning Vessels not exceeding 300 Tonnes and Vessels Engaged in Coastal Carriage and Coastal Operations
- SBFEA: State Bureau of Foreign Exchange Administration of China
- SDR: Special Drawing Rights
- SOLAS: International Convention for the Safety of Life at Sea
- Hague Rules: International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules) 1924
- Hamburg Rules: United Nations Convention on the Carriage of Goods by Sea
- Hague/Visby Rules: The Hague Rules amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments)
- UNCITRAL: United Nations Commission on International Trade Law
- UNCTAD: United Nations Conference on Trade and Development

Chapter 1 Introductory Issues

Comparative legal research is fascinating in the magnitude of its subject matter.¹ It is not just “a chance to satisfy idle curiosity,”² nor does it turn a blind eye to everything but surfaces. It not only distinguishes languages, terminology, institutions or structures from different legal systems, it also explores the local cultures historically evolved, philosophical ideas and their underlining connections.³ Law exists for people, therefore the habits of the people to whom laws are applicable must be familiar to those who write about law.⁴ Law is also an expression of culture experience,⁵ of an understanding exceeding that of a single generation.⁶ Hence the historical approach must be borne in mind in comparative legal research. In this way comparative study provides a bottomless supply of data which can be used to test philosophical, economic, and sociological theories about law and their influence on law.⁷ Chinese and English law are very different in their historical development, juristic style, ideologies and legal traditions. Therefore, it becomes necessary to introduce two legal systems and their historical development in brief as the starting point.⁸

¹ There are many arguments about the meaning of comparative law. Some regard it as a methodology: “it is a method, a way of looking at legal problems, legal institution and the entire legal systems” (Schlesinger, *Comparative Law Cases and Materials* (5th edn, 1988), p.1) and therefore not an independent academic discipline, while others hold the opposite view. Cf. Zweigert & Kotz, *An Introduction to Comparative Law* (3rd edn, 1998), p.3.

² Kamba, W.J. *Comparative Law: A Theoretical Framework*, (1974) 23 Int'l & Comp. L. Q. 485, 489.

³ As pointed out by Petre de Cruz, “...perhaps the litmus test of what is the heart and soul of a system, and its quintessential character, is not merely its language or terminology, its organisation, institutions or structure.” *Comparative Law in a Changing World* (2nd edn, 1999), p.29; cf. Valcke, C. *Comparative Law as Comparative Jurisprudence--The Comparability of Legal Systems*, (2004) 52 Am. J. Comp. L. 713, 715; Hill, J. *Comparative Law, Law Reform and Legal Theory*, (1989) 9 Oxf. J. Leg. Stud. 101, 111-13.

⁴ Keeton, *English Law the Judicial Contribution* (1974), p.1.

⁵ How do cultural factors effectively mould a legal system see Visser, D. *Cultural Forces in the Making of Mixed Legal Systems*, (2003) 78 Tul. L. Rev. 41; cf. Jackson, J.D. *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on Legal Processes and National Culture*, (1997) 5 Cardozo J. Int'l & Comp. L. 51, 52.

⁶ Grossfeld (Trans by Tony Weir), *The Strength and Weakness of Comparative Law* (1990), p. 44.

⁷ Curran, V.G. *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, (1998) 46 Am. J. Comp. L. 657, 661, 663, 666-67; Coombe, R. *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, (1995) 10 Am. U. J. Int'l L. & Pol'y 791.

⁸ As said “it will be impossible to succeed in the endeavour of challenging and re-

1.1 English legal history and legal system¹

The English common law system is rightly regarded as one of the major legal systems in the world, as well as one of the most influential.² It is the product of evolution over many years.³ The most distinguishing features of English law in the eyes of Chinese jurists would be its antiquity and continuity, case-centred and hence judge-centred, the comparatively slight influence of Roman law, and its professional excellence, where its commercial judges are all previous advocates with practical and hands-on experience of commercial law.

The majority of civil law countries (including the People's Republic of China) have codified legal systems, whereas the English court is subject to the doctrine of binding judicial precedents or *stare decisis*.⁴ This means that a decision of a higher court will be binding on a court lower than it; furthermore, in the absence of a code, those decisions represent the law itself, rather than (as in civil law jurisdictions) being merely evidence of the law. English judges are an indispensable part of the development of the common law, though nowadays common law principles are either supplemented or even replaced by legislation in many aspects. To interpret the statutes enacted by Parliament is another crucial role of English courts. Besides the courts, other law-making institutions in England include the British Parliament,⁵ central government and European institutions.

As for the hierarchy of the English civil and commercial justice

conceptualizing existing notions of foreign and domestic legal cultures unless we learn to respect and validate each other's perceptions about law and methodological approaches at home first." Demleitner, N.V. *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, (1998) 46 Am. J. Comp. L. 647, 654.

¹ Wales and Berwick-upon-Tweed are within the jurisdiction of the English courts (Wales and Berwick Act, 1746, s. 3), but not Northern Island, Scotland, the Channel Isles, or the Isle of Man. Jowitt's Dictionary of English Law (2nd edn, 1977), Vol. 1, p.700.

² Caenegem, *The Birth of the English Common Law* (1973), p.88.

³ Its outset can be traced back to 11th century. Cf. Wilson, B. *Cases and Materials on the English Legal System* (1973), p.1; Maitland, F.W. *History of English Law, Selected Historical Essays of F.W.Maitland* (Cambridge, 1957), p.97; Baker, J.H. *An Introduction to English Legal History* (4th edn, 2002), p.13.

⁴ Which "lies at the heart of the English legal system" as commented by Slapper & Kelly, *The English Legal System* (6th edn, 2003), p.68.

⁵ Which is currently the principal law-making body.

system, the County Court is at the base, and House of Lords is at the apex. The High Court handles cases arising at first instance and on appeal from county court¹ and some administrative tribunals. The Admiralty Court is part of the Queen's Bench Division of the High Court, dealing with the often esoteric issues of law relating to shipping. Appeals from decisions made by a judge in one of the three High Court Divisions will go to the Court of Appeal (Civil Division). If they satisfy certain conditions, a few appeals may leapfrog to the House of Lords directly.² The House of Lords, acting in its judicial capacity (as opposed to its legislative one), is the final court of appeal. They hear cases of general public importance concerning points of law.

1.2 Chinese legal history and legal system³

1.2.1 Confucianism, Legalism and law⁴

Confucianism was recognised as the spiritual and philosophical basis of the Chinese state for almost two thousand years.⁵ It has had an enduring and pervasive effect on the whole range of society, from personality, morality to practical politics. Such influence did not decline after China adopted codes on Romano-Germanic lines and opted for Marxism,⁶ nor did it significantly weaken when China partly abandoned the socialist economy. According to Confucianism, men are intrinsically good.⁷ People can and should behave in accordance with the concept of *Li*, a set of generally accepted social

¹ The County Court is inferior or lower court who deals with the largest number of civil cases. but in shipping the High Court is the only one that matters.

² S.12-15 of the Administration of Justice Act 1969.

³ Technically, it refers to the legal system of Mainland China.

⁴ More details on Confucianism, legalism and their viewpoints on law. Cf. Bodde & Morris, *Law in Imperial China* (1967), p.19-29; Chen, P.M. *Law and Justice the Legal System in China* (1973), p.26-55.

⁵ See Johnston, *Confucianism and Modern China* (1934), p.117; however, it should be noted that Legalism dominated during the Qin Dynasty (361BC-206BC). The theory of legalism is illustrated by Lord Shang (A theoretician of the Legalism), see *Book of Lord Shang* (338? BC), 24 of 29 Chapters remains.

⁶ Marxism contributes little to law anyway. As said, "Marx did not produce a large amount of legal theory and much of what he did produce sounded like either vulgar conspiracy theory or mechanistic determinism." Boyle, J. *The Politics of Reason: Critical Legal Theory and Local Social Thought*, (1985) 133 U. Pa. L. Rev. 685, 721-22.

⁷ Douglas, *Confucianism and Taoism*, p24-65, 154.

values or norms of good behaviour.¹ They believe only when people are governed by virtue and disciplined by rites will they learn what is shameful and behave in conformity with justice. Peaceful life in a society is ensured not by law but by Confucian morality. According to Confucianism, law can only curb social evils passively while virtues can eliminate the evil once for all.² The ruler was encouraged to govern the country by *Li*.³ Laws were traditionally used in Ancient China only to control the “barbarian” and the ancient Chinese codes are all penal codes.⁴ This worship of virtues and morality and distrust of laws were also followed by other schools of thought.⁵ Overall, law in imperial China was just the embodiment of the ethical norms of Confucianism and merely played a subordinate role to the *Li*.⁶ China has lived for twenty-five centuries on Confucian mysticism.⁷

It is worth mentioning that “legalism”⁸ is a competing school of thought that adopted the opposite stance to Confucianism. It emphasised the need to obey prescriptions of law rather than relying on the virtues of rulers.⁹ “They dare not treat the people contrary to the law, nor dare people transgress the law...”¹⁰ Their thoughts centring on rule of law approached modern concepts of rule of law.¹¹

¹ It can be translated into virtues, propriety or morality. See Wei-bin Zhang, *Confucianism and Modernization* (1999), p.204.

² “Lead through laws, discipline through punishments, and the people may be restrained, try to avoid the punishment, but having no sense of shame. Lead through virtues, discipline through the rites, and there will be a sense of shame and conscientious improvements.” Confucius, *The Analects of Confucius (Lunyu)*, BC 475 ?, Ch2 Verse 1; English translation see Confucius. *The Analects of Confucius*. (Translated by Arthur Waley, 1949); other translations of Confucian work see Confucius. *The Texts of Confucianism*. (2nd edn, translated by James Legge, 1899); Confucius. *The Analects of Confucius*. (1st edn, translated by Soothill, 1937); Confucius. *The Four Books* (Translated by James Legge, 1930).

³ “He who rules by means of his virtue is like the North Pole Star, around which all other stars revolve, in homage.” *The Analects of Confucius*, Ch2, Verse 3.

⁴ Ruskola, T. *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, (2000) 52 Stan. L. Rev. 1599, 1618.

⁵ E.g., Taoist also holds the same view. “The more laws and ordinances are promulgated, the more thieves and robbers there will be.” “Govern the people by regulations, keep order among them by chastisements, and they will flee from you.” Lao Tse (Lao Zi), *Tao Te Ching (Lao Zi)*, 600 BC?, Ch 57; cf. Lau, D.C. *Lao Tzu: Tao Te Ching* (1963).

⁶ Bodde and Morris, *Law in Imperial China* (1967), p.5.

⁷ David (ed.), *The Legal Systems of the World: Their Comparison and Unification, International Encyclopaedia of Comparative Law*. Vol.2, p.128.

⁸ “Fa jia” in Chinese, its literal translation is “legalism school”.

⁹ Chen, P.M. *Law and Justice the Legal System in China* (1973), p.34.

¹⁰ Lord Shang (A theoretician of the Legalism), *Book of Lord Shang*, as quoted by Kung-chuan Hsiao (translated by F.W.Mote), *A History of Chinese Political Thought* (1979), p.399.

¹¹ As said “on the whole, these theories (Legalism) express a concept of legislation and law very close to the western idea.” David and Brierley, *Major Legal Systems in the World*

It is such a pity indeed that Legalist philosophy only dominated during the Qin Dynasty (226 BC to 206 BC). Afterwards, Confucianism won the upper hand from the ensuing Han Dynasty (206 BC) all the way through to 1911.

1.2.2 Chinese legal history

The Chinese legal system is said to be the third earliest¹ and the longest continuing legal system in the world. In terms of the continuous history of more than 4000 years², “the other living systems of today are but children.”³ However, because of Confucianism no civil legal doctrine was ever developed and no doctrinal writer established a name for himself in the long history of China.⁴ The ancient Chinese codes are penal codes in form⁵, and there is no distinction between criminal law and civil law.⁶ Until the fall of the Manchu Dynasty in 1911 no radical change to the dim view of the law occurred in Chinese society. It was during the period from 1896 to 1936 that China started to modernise its legal system from scratch.⁷ Following the example of Japan the new codes were principally based on German and Swiss law⁸, which explains the civil law traits of contemporary Chinese law. Legal modernisation stalled from 1949 (the establishment of the P.R.C) to 1978 due to the

Today : An Introduction to the Comparative Study of Law (2nd edn, 1978), p.522. However, it should be borne in mind that the instance of legalism was motivated by no concern for human rights, but simply by realisation that human were evil and so it was essential to use harsh law for effectively control.

¹ The earliest legal system is the Egyptian legal system, beginning before B.C. 4000; the second is the Mesopotamian legal system, emerging from perhaps B.C. 4000 according to Wigmore, *A Panorama of the World's Legal Systems* (1936), p.11 and p.59.

² See Zhou Mi and Zong Lianwen, *Chinese Law and Oriental culture*, “Law in Motion” 1st World Law Conference Papers Part I, p.113.

³ Wigmore, *A Panorama of the World's Legal Systems* (1936), p. 141.

⁴ Liang Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, (1989) 3 J. Chinese L. 55, 91.

⁵ The earliest code is the Books of Punishment, which was inscribed in 536 B.C.

⁶ Wigmore, *A Panorama of the World's Legal Systems* (1936), p.152.

⁷ Henderson, D.F. *Japanese Influence on Communist Chinese Legal Language*, in *Contemporary Chinese Law: Research Problems and Perspectives* (Cohen ed.,1970), p.155-187.

⁸ As it is in Japanese law. Other views state that Japanese law is based on “largely German and French models”. Henderson, *Japanese Influence on Communist Chinese Legal Language*, in *Contemporary Chinese Law: Research Problems and Perspectives* (Cohen ed. 1970), p.173; See also Bernhardt & Huang, C.C. (eds.) *Civil Law in Qing and Republican China* (1994); Huang, C.C. *Civil Justice in China: Representation and Practice in the Qing* (1996).

Culture Revolution¹ and Maoism.² In the aftermath of the Culture Revolution, a splendid renewal of belief in the value of rule by law has since been popularised in the whole of China.³ “No organisation or individual shall enjoy privileges that transcend the Constitution and the law”.⁴ In line with “the largest revolution in the world history”⁵ to boost its economy,⁶ China is showing a growing commitment to the rule of law.⁷

1.2.3 Chinese courts

China is believed, arguably⁸, to belong to the socialist legal family.⁹ In terms of its judicial style and sources of law, it bears similarities with civil law countries.¹⁰ Legislation is the most important source of law. The decisions are only of persuasive power. The National People's Congress and its Standing Committee have the power to make and interpret laws.¹¹ The People's Courts are the judicial organs of the state.¹² Chinese courts are divided into a four-

¹ Details of which see Byung-joon Ahn, *Chinese Politics and the Cultural Revolution* (1976).

² Cohen, J.A. *The Chinese Communist Party and “Judicial Independence”: 1949-1959*, (1969) 82 Harv. L. Rev. 967.

³ E.g. The Third Plenary Session of the National People's Congress in December, 1978 issued a communique that “there must be laws for people to follow, those laws must be observed, the subservience must be strict and law-breakers must be dealt with.”; cf. Chen, A.H.Y. *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, (1999) 17 UCLA Pac. Basin L.J. 125.

⁴ Art.5 para 3 of the Chinese Constitution.

⁵ Schoppa, *The Columbia Guide to Modern Chinese History* (2000), preface IX.

⁶ Bear in mind that markets are often necessary for the legal change. See Zhiwu Chen, *Capital Markets and Legal Development: The China Case*, (2003) 14 China Economic Review 451, 471, where the author gave a vivid example to prove this view: i.e., each of the two major downturns of China's stock market led to a significant change in its relevant law.

⁷ E.g. in 1993, The Prime Minister Li Peng in his *Report on the Work of the Government* emphasised once again that “a clean and able government on the basis of the rule of law is a must.”; See also Gu Anliang, *A Commentary on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State, Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State* (Liu Hainian, et al., eds., 1996) 191, 196-197; Shen Zongling, *More on the Meaning of the Terms “Legal System” and “the Rule of Law”*, (1996) 10 Jurisprudence 4; Xie Pengcheng & Liu Cuixiao, *A Review of Research in Jurisprudence in 1996*, (1997) 1 Jurisprudence Studies 3, 4.

⁸ Western scholars unanimously treat China as a distinct legal system from the common law, civil law and socialist legal systems. See David and Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn, 1978), p.26 and Zweigert & Kotz, *An Introduction to Comparative Law* (3rd edn, 1998), p.72.

⁹ Chinese law is said by others a member of the socialist legal family, albeit with a touch of pre-revolutionary Chinese traditional law. Kim, C. *The Modern Chinese Legal System*, (1987) 61 Tul. L. Rev. 1413, 1449; Zhang Wenxian, *Jurisdiction* (1999), p.311.

¹⁰ Some scholars allege that China belongs to the continental law countries. Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.387.

¹¹ Art.62(3), art.67(3) and (4) of the Constitution of the PRC.

¹² Art.123 of the Constitution Law.

tiered hierarchy across 31 provinces starting with the County Court, moving up to the Intermediate Court and Maritime Court, both of which are at the second tier, then to the People's Higher Court (one in each province), the economic division of which hears appeals from the Maritime Court, and finally to the Chinese Supreme Court (CSC). There is an automatic right of appeal from judgments of the first and second instance in all cases apart from shipping cases, which are granted only one appeal.¹ The CSC decisions are periodically published.² Another role of the CSC is to interpret the law and publish its interpretations which are binding on all courts.³ Judges in lower courts can refer difficult problems on points of law to it for clarification; the decisions will be published and are binding as well.⁴

1.2.4 Obstacles to Chinese legal reform⁵

No doubt contemporary China is still in a state of transition, so it might be very helpful to point out its problems to show a bigger picture.

1. Bottleneck of political reform

With the passing of several more laws which appear to eradicate uncertainty and injustice, readers should keep in mind that China is still a socialist country which emphasises centralisation of state

¹ This is arguably because maritime court judges are hailed as an elite among the Chinese judiciary and can ensure the justice in shipping cases: indeed, it is noteworthy that over 99% of maritime court judges hold a law degree (332 out of 335 maritime judges) in comparison to the average of 41% (even including non-law degrees) in all courts. See Wang E'xiang (vice-president of the CSC), *Maritime Court Should Become the Windows of Foreign Cases Trial*, Talk in the Celebration of Establishment of Maritime Court for 20 years.

² The Supreme Court Bulletin is published every two months. Almost every judgment of commercial and maritime cases is published on their official website <http://www.ccmr.org.cn>

³ See art.33 of the Organic Law of the PRC.

⁴ However please note that there is still no system of binding precedent in China. See also 1.3 (2).

⁵ See generally Gu Peidong, *Several Questions relating to the Development of the Legal System in China*, [1996] Stud. on Legal Mod.197 (Legal Modernization Research Centre of Nanjing Normal University ed., 1996); Liu Zuoxiang & Xiao Zhoulun, *Jumping out of the "Periodic Cycle" by Relying on Democracy and the Rule of Law*, (1995) 2 Chinese Legal Sci.7; Li Youxing, *Research on the Problems and Solutions of Chinese Legal Modernization*, (1997) 2 Hangzhou J. Soc. Sci. 73. It should be noted that suggestions of political reform are still a taboo in Mainland China and none of articles published in mainland China bring up the topic even though Chinese legal reform will have to challenge socialist legal philosophy in its current form sooner or later.

power.¹ As Lubman states:

“In the absence of fundamental political reform that would validate the abandonment of the reigning ideology, Chinese law is likely to... remain an assortment of disparate institutions lacking some of the elements that Western ideals take as essential in a meaningful formal legal system such as hierarchy of sources of law, differentiation from other organs of state power, procedural regularity and control of discretion in decision-making, and adherence to professional values among the officials in the system.”² Today, some of the groundwork of reform has been laid, but current legal institutions are by no means beyond criticism. Therefore further potentially more fruitful reform in areas of democracy and politics is necessary.

2. Lack of legal professionals

The application of a range of enacted law will only be carried through when the number of courts, judges and lawyers is considerably increased and legal education expanded.³ During the Cultural Revolution the number of lawyers was reduced to almost

¹ China theoretically adheres to a one party regime, Marxism-Leninism and the Thoughts of Mao Zedong under the Constitution. See Chinese Constitution Law, preamble, para. 8 “Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people’s democratic centralisation and the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system, and ...” While China was experimenting with capitalist concepts of economic progress, Marxism-Leninism and Mao Zedong Thought were reaffirmed as the national ideology by the Sixth Plenary Session of the 12th Central Committee of the Communist Party of China on September 28, 1986.

² Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, (1991) 39 Am. J. Comp. L. 293; On the other hand, there are some scholars defending single-party rule as the system “in which the Party plays a leading role is in theory compatible with [the] rule of law-- albeit not a liberal democratic version of rule of law.” Peerenboom, R. *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, (2001) 19 Berkeley J. Int’l L. 161, 167; Wang Yaohua, *The Basic Characteristics of People’s Democratic Dictatorship and the Functions of the Political and Legal Establishments* (1991) 5 Chinese Jurisprudence 20; Zhao Changsheng, *Multiple Penetrating Examinations of the Interactive Relations between Law and Politics* (1991) 3 Jurisprudent Science 17; Chen Pixian, *Jurisprudence Studies Must Follow the Marxist Direction* (1991) 4 Chinese Jurisprudence 14. This view overlooks the simple fact that the party changes law, interprets law and is in many aspects superior to law. Cf. Cohen, J.A. *The Chinese Communist Party and “Judicial Independence”*: 1949-1959, (1969) 82 Harv. L. Rev. 967, 973.

³ Cf. Macdonald, R. *Legal Education in China* (1980) 6 Dal. L.J. 313; Bing Ho, *Chinese Legal Education* (1984) 8 Dal. L.J. 32 as quoted by David and Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn, 1978), p.532.

zero.¹ 80 percent of the judges who had served under the previous regime were eliminated, and 6500 new judges were named from the activists (most of them were blue-collar workers without any education).² After the legal reform, the number of lawyers climbed to 41,639 in 1991³ and rose to 114,503 by 2004.⁴ However there is still a shocking shortage of legal expertise and a lack of adequate legal training.⁵ The present generation of judges appear to have more of a party than a legal background.⁶ A large number of them are former military officers without a law degree.⁷ They are not qualified for the complexities of processing legal disputes under the rapidly changing laws in China. The growth of judicial capacity and the quality have lagged behind the actual demand for law implementation and compromised the effectiveness of the Chinese legal system.⁸

3. The influence of Confucianism on Chinese legal institutions

As a matter of historical fact, the development of legal systems has been powerfully influenced by morality.⁹ Critical morality necessarily becomes a persuasive source of law.¹⁰ Even though law fails to mirror moral rules or principles from time to time, when it is morally indefensible, it is always open to judges or legislators to argue that it should be interpreted, applied or amended in a way that

¹ Lawyers were in the forefront of those who were hunted down by the Revolutionary Guards. They were tortured, deported to work in distant fields, imprisoned or even killed. There were only 212 lawyers in the whole China in 1979. See *A 20 years' Retrospection of Chinese Lawyers' System*, China Website, available at <http://www.china.com.cn/baodao/china/htm/2001/2001-6/6-4.htm>

² See Shao-chuan Leng, *Justice in Communist China* (1967), p.127-137.

³ *Statistical Yearbook of China 1992* (China Statistical press,1992), p.803.

⁴ *Statistical Yearbook of China 2004* (China Statistical press, 2005), p.729.

⁵ See Laferla,A. *Lawyers are Coming from Peking to Gain First Hand Experience in English Law*, *The Independent* (December 10 1998).

⁶ Zander, M. *People's Efforts to Improve China's Legal Services*, *Guardian* (May 3 1985).

⁷ Only 41% of PRC judges had a degree (in law or anything else) in May 2004. See above; see also Zhiwu Chen, *Capital Markets and Legal Development: The China Case*, (2003) 14 *China Economic Review* 451, 454.

⁸ Gaunt,I. *The Legal Profession in the People's Republic of China*. *Law Society's Gazette* (24 August 1988).

⁹ "Law generally approves and reinforces what is generally accepted as good moral behaviour in the society in which it operates and disapproves and penalises what is regarded as bad moral behaviour..."Hart, *The Concept of Law* (2nd edn, 1994), p.268; cf. Goodhart, *English Law and the Moral Law* (1952).

¹⁰ "Morally iniquitous provisions may be valid as legal rules or principles." Hart, *The Concept of Law* (2nd edn, 1994), p.268.

is morally defensible.¹ The fact that law is always subject to Confucian rites only strengthens such effect.² There is always an inbuilt pressure within the Chinese legal system to render law morally defensible. The legal rules are needed to steer behavior in the direction that morality already points. Social ethics are emphasised and have been implanted into Chinese law whenever possible.³ *E.g.*, art. 7 of CCL reads “Legality in concluding or performing a contract: the parties shall abide by the relevant laws and administrative regulations, as well as observe social ethics, and may not disrupt social and economic order or harm the public interests.” The former Chinese president Jiang Zemin openly announced that “a country should be ruled by ‘De’ [morality or virtues]” and that “we will have a brighter future in the next five years if we combine the rule by morality and the rule by law”,⁴ which corresponds to the Confucian maxim “virtues, [are] fundamental basis of a country”.⁵ In the author’s view, the submission of the rule by De should be seen a regression in a reforming China which is shaking off its quintessential image of the rule of men,⁶ and is desperately calling for the rule of law.⁷ It raises the question of the negative effects of Confucianism.

Chinese people see it as an embarrassment that appealing to the

¹ Honoré, T. *The Necessary Connection between Law and Morality*, (2002) 22 Oxford J. Legal Stud. 489, 491; Shavell, S. *Law versus Morality as Regulators of Conduct*, (2002) 4 Am. L. & Econ. Rev. 227.

² A natural result of this influence is the “rule by man” in running a country. Xia Weidong, *Why the Rule-by-Virtue View of Confucianism Resulted in Rule by Man*, (2004) 4 Morality and Civilization 3, 16.

³ Ma Xiaohong, *The Rule of Rites and the Rule of Law*, in *Ruling the Country according to Law, Constructing a Socialist Rule-of-Law State* (Liu Hainian, et al., eds., 1996), p.367; Zhao Changsheng, *The Philosophical Reflections on the Legal System* (1991) 6 Jurisprudence 6, 8.

⁴ *The Chinese Communist Party Report*, presented by Jiang Zemin (Chinese president at that time) at the Sixteenth Meetings of Chinese Communist Party Members on 17 Nov. 2002.

⁵ See Zuo Qiuming?, *Zuo Zhuan (Or Zuo Shi Chun Qiu Zhuan)*, 403 B.C. ?, Chapter Xiang Gong Year 24.

⁶ Jenner, W.J.F. *The Tyranny of History: The Roots of China's Crisis* (1992).

⁷ It is very sad to see many Chinese scholars support such a proposal. The proposal was hailed as a political legacy left by President Jiang Zemin. See Dou Yanguo, *Some Issues on “Ruling by Moral”*, (2004) 4 Morality and Civilization, 45, 67; Yu Ronggen, *Administering the Nation by Law and Administering the Nation by Morality* (2001) 4 Academic Exploration 16, 46; cf. Wu Xiaoping, *On the Relationship between “Administering a Nation by laws” and Administering a Nation by Morals*, (2004) 6 The Northern Forum 152; Lin Senquan, *The Unity of Administering the Nation by Law and Administering the Nation by Morality: the Necessity of Socialist Market Economy's Development*, (2001) 5 Academic Exploration 263.

courts is the most effective means for protecting private rights.¹ Mediation and conciliation in which legal principles are not binding, are still widely used,² including in shipping cases.³ It follows that it may be some time before Chinese citizens gain a true awareness of their strict legal rights. Traditional views still inhabit some academics and scholars. The award of damages, for example, is such that they should not reduce the author of some wrong, or his family, to a state of misery. Legal rules may be bent to balance between the rigid law and moral considerations.⁴ For example they might force the defendant to give up the global limitation in mediation when they come under fire by the media and victims yet it is not possible to break it legitimately.⁵

4. Corruption and the lack of judicial independence

Chinese judges are not as independent as they might be. They are arguably overly susceptible to pressure from local governments⁶

¹ This phenomenon is quickly changing. There has been a noticeable increase in the number of civil cases since 1993. For example, in 1995 more than 2.7 million cases were handled and concluded, increased almost 50 percent compared with 1990, See Carlos, W.H.Lo, *Legal Reform in the Quest for a Socialist Market Economy*, in *China in Transition Issues and Policies* (Teacher, D.C.B et al., eds., 1999), p.85.

² Article 6 of the 1982 Chinese Provisional Civil Procedure Act provides: "When trying civil cases, the People's Courts are required to stress the importance of mediation..." The mediation (either by court or by non-judicial mediators) is widely used in China. By 2005 the numbers of mediators had grown to around 8 million. (*Statistical Yearbook of China 2005* (2006), p.729 and 730). As far as the first trial of civil law cases is concerned, there were 1,876,871 cases receiving judicial decisions while 1,322,220 ended up with judicial mediation. See *Chinese Law Statistics Yearbook 2003* (2004), p.276. It mirrors the traditional idea that "an ideal man should make compromise of his own rights in order to re-establish the harmony". The philosophical origins of the conciliatory approach to dispute resolution in traditional China see Wong, B.K.Y. *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution*, (2000) 30 Hong Kong L.J. 304.

³ The typical example see *Yu Xiaohong v. Goodhill Navigation SA (Panama)*, Zhejiang Higher People's Court, 31 Nov 2001, (2001) ZJEZZ 96 discussed in Ch 7.

⁴ From the author's own experience, sometimes Chinese courts discuss and adjudicate cases with litigants around a dining table in mediation. This is very common in Chinese contexts while was commented "terrible idea" by western scholars. See Yablon, C.M. *Judicial Drag an Essay on Wigs, Robes and Legal Change*, [1995] Wis. L. Rev. 1129, 1153; how mediation is manipulated by Chinese court for their own benefits see *Yu Xiaohong v Goodhill Navigation SA (Panama)*, Zhejiang Higher People's Court, 31 Nov 2001, (2001) ZJEZZ 96. More details of the case see chapter 7.

⁵ *Cheng Fengying and Others v ICL Shipping (India) Co Ltd*, Tianjin Maritime Court, 14 Aug 2001, (2000) HSCZ 20-27. More details see chapter 7.

⁶ The newspaper Southern Weekend reported on a typical case in which local government interfered with the enforcement of a court decision. It had been tried four times by three courts yet still failed to be enforced. The decision became "a piece of blank paper", as commented by the newspaper. Shou Peipei, San Ji Fa Yuan and others, *Courts at Three Levels, Four Judgments, Eight Years of Litigation, a Piece of Blank Paper*, Southern Weekend (June 5 1998), p.6.

and the Party¹ who control courts' financial and personnel arrangements.² There is no institutional mechanism for the implementation of its constitution law.³ Due to institutional dysfunction, China lacks an effective anti-corruption mechanism.⁴ Corruption is said to have "penetrated deep into China's legal system."⁵ The general public distrusts the Chinese legal system and China has encountered immense problems concerning the authority of the law.⁶ Xiao Yang, the president of the CSC, in his speech to the Second Session of the Ninth People's Congress in March 1999 openly admitted that many Chinese see the judiciary as unfair and far from independent.⁷ In no way could justice be guaranteed without independence of judiciary.⁸

1.3 Comparison between two legal systems

After the brief overview of two legal systems and legal history, we can now identify some general similarities and differences between them. As a whole, the Chinese legal system in its present

¹ The Party's role in dealing with the judiciary is threefold. First, the Party conducts education programs to ensure its ideology and the maintenance of the party line by the judiciary. Second, the Party selects a number of able cadres to run the judicial organs. Third, the Party constantly supervises whether or not the judicial organs strictly execute the law. Thus, the Party becomes the guardian of the law. See Chen Wulin, *Independent Trials and Party Leadership*, Guangming Daily News, (Apr. 21 1975), p.3; Kim, C. *The Modern Chinese Legal System*, (1987) 61 Tul. L. Rev. 1413, 1423.

² Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 Am. J. Comp. L. 77, 115.

³ Ainsworth, J.E. *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, (1992) 43 Hastings L.J. 273, 278.

⁴ The Communist Party leadership is said to be the guardian of socialist legality, but Chinese political system does not have any superior power to monitor the leading party.

⁵ "It is unlikely that corruption will be wiped out quickly or completely" Sheehy, B. *Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes*, (2006) 26 Nw. J. Int'l L. & Bus. 225, 260; cf. Sonny S.H.Lo, *Public Maladministration and Bureaucratic Corruption*, in *China in Transition Issues and Policies* (Teacher, D.C.B et al., eds., 1999), p.54; Over the years 1997-2002 the Chinese Communist Party Inspection Department investigated 790,000 members which resulted in 780,000 officials being jailed, executed or subjected to internal party discipline. See *Crackdown on Corrupt Cadres Hailed as a Big Success*, South China Morning Post (October 15 2002); in 2004 China ranked 71 of out of 146 countries in a report produced by Transparency International, by no means an enviable spot. Transparency International, *Corruption Perceptions Index 2004* is available at: http://www.globalcorruptionreport.org/gcr2005/download/english/country_reports_a_j.pdf.

⁶ Xin Chunying, *What Kind of Judicial Power Does China Need?* (2003) 1 I.J.Con.L. 58, 78; see also the foresaid "blank paper" case.

⁷ *China's Judiciary Grapples with Perception Problem*, Channel News Asia (10 Mar. 2004).

⁸ Li Jingbing, *Judicial Independence is Conducive to the Construction of the Rule of Law*, (1996) 3 L. Sci. 15; Chen Jinzhao, *A Technical Choice in the Path of the Rule of Law*, (1996), L. Sci. 16; Zhou Hairong, *The Re-establishment of the Chinese Legal System: Achievements and Disappointments* (1991) 10 C.J.Q. 44, 46.

stage of development is still far from a logically formal and rational one in the western sense.¹ English jurists of course often complain that modern society has become too litigious and people are too willing to rush to court when something has gone wrong², while in a fascinating contrast the Chinese government and Chinese legal scholars are still making every effort to encourage people to do so.³ In 1999 there were more than 200 law schools and 100,000 lawyers in China,⁴ compared to England with 9,090 law graduates⁵ and 104,538 solicitors by July 31, 2000.⁶ In 1998, there were about 210,000 judges⁷ remaining tiny compared to the size of China's population of 1.2 billion people, while on 1st Apr. 2001 there were 28,735 part-time law magistrates in England, with a population of 50 million.⁸ Compared with a fairly mature English legal system China's legal system is still in its infancy to a large extent.

1. Source of law and binding precedent

In the conventional Chinese analysis, the detailed and theoretically self-contained codes are, as in the civil law tradition, the definitive source of law. Every answer is to be found in the code itself. There is no system of binding precedent in China and no court is legally required to follow any previous decision, not even a CSC decision.⁹ By contrast, the tradition of case law and empiricism make very poor soil for codification in England. Judges are seen as picking their way through dusty old volumes of law reports and loyally

¹ Chen, A.H.Y. *Rational Law, Economic Development and the Case of China*, (1999) 8 (1) *Social & Legal Studies* 97, 102; Some western scholars even denied that China has a legal system. See Keller, P. *Sources of Order in Chinese Law*, (1994) 42 *Am. J. Comp. L.* 711.

² Partington, *Introduction to the English Legal System* (2nd edn, 2000), p.194.

³ Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 *Am. J. Comp. L.* 77, 112.

⁴ Gewirtz, P. *The U.S.-China Rule of Law Initiative*, (2003) 11 *Wm. & Mary Bill RTS. J.* 603, 604.

⁵ Law society, *Annual Statistical Report 2000* (2001), Table 7.5, available at <http://www.lawsociety.org.uk/aboutlawsociety/whatwedo/researchandtrends/statisticalreport.law>

⁶ Smith, P.F. *The Modern English Legal System* (4th edn, 2002), p.146.

⁷ See *China Law Yearbook 1998* p. 155. For the ranking system of Chinese judges, see the *Judges Law*, art.18.

⁸ *Justicial Statistics 2000*, p.94.

⁹ Having said that, it must be said that in practice the lower court seldom contradicts with a Supreme Court decision even though they do not have to follow it. See 1.2.3.

following the precedents.¹ Chinese lawyers often find the traditional English law incomprehensible because of the lack of codes,² while English lawyers fully share this incomprehension mixed with aversion by describing it “the alien jungle of the code”.³

2. The courts

The Chinese court system has four tiers, compared with three tiers of England’s system. Chinese appellate courts routinely conduct an examination of both fact and law⁴ while English appellate courts do not generally interfere with the trial court’s view of the primary facts. Moreover, it is necessary to get permission to bring an appeal in England while Chinese litigants are free to bring the first and second appeals as of right. It is noteworthy the CSC resembles the House of Lords in that both of them are to resolve legal issues of public importance and to guide the development of law by making laws. The CSC habitually issues interpretations of statutes and rules, and hands down instructions to other inferior courts. The legitimacy is questionable constitutionally;⁵ but such a function seems rewarding in China due to the defective quality of much legislation, coupled with the inefficiency of the National People’s Congress when it comes to necessary legislation and the chaos in the interpretation of legislation that would otherwise ensue. Its decisions are generally followed even though there is no formal system of *stare decisis*.⁶

¹ Smith, P.F. *The Modern English Legal System* (4th edn, 2002), p.479.

² Nowadays this difference is not as dramatic as before because common law countries are making more legislations to supplement or replace common law principles.

³ Caenegem, *The Birth of the English Common Law* (1973), p.85.

⁴ According to the Chinese Civil Procedure Law, when trying an appeal case Chinese courts at all levels should examine both the fact and law. Any error will result in the reserve or remand of lower decisions. Article 151 of the Chinese Civil Procedure Law: “with respect to an appealed case, the people's court of second instance shall review both the relevant facts and the application of the law.”; article 153 of Chinese Civil Procedure Law: “When trying an appeal case, the people's court of second instance shall, in the light of the following situations, dispose of it accordingly:...(2) if the application of the law was incorrect in the original judgment, the said judgment shall be amended according to the law; (3) if in the original judgment the facts were incorrectly or not clearly ascertained and the evidence was insufficient, the people's court of second instance shall make a written order to reserve the said decision and remand it to the original people's court for retrial, or the people's court of second instance may amend the judgment after investigating and clarifying the facts; ...”

⁵ According to art.62(3), art.67(3),(4) of the Constitution of the PRC, the National People's Congress and its Standing Committee have the power to make and interpret laws. But no such power is granted to the Supreme Court by the Constitution.

⁶ Cf. 1.2.3.

3. Procedures¹

England shows a marked preference for adversarial procedure before judges with forensic experience. The judge's responsibilities are to be neutral as between the parties and he has no obligation to find the ultimate truth.² Chinese procedural law has the same foundation as that of Europe.³ The judge has primary responsibility for ascertaining the evidence and applying the correct legal principles. In concept, the judge is responsible for ascertaining the definite truth.

4. Conceptualism versus pragmatism

Chinese law is highly conceptual or formalist (some say too much so), whereas common law is pragmatic and concrete. English law prefers precedents as a basis for judgments, and moves empirically from case to case, from one reality to another.⁴ In China, by contrast, law is seen as a system, complete and intellectually coherent. It is composed of substantive rules, which logically precede the solutions. It is more conceptual, more scholastic and works more with definitions and distinctions. Chinese case-law moves more theoretically by deductive reasoning, basing judgments on abstract principles. Chinese judgments are written in a more formalistic style than common law judgments. They are indeed shorter than common law decisions, and can be easily framed into three parts: the facts, the grounds of the judgment and a syllogistic reasoning. The process of ratiocination is more obvious in a common law judgment than in the bleak arrested style of a Chinese one. Further, the brevity and simplicity of the judgment offer none of the opportunity for the individual views which are afforded by its discursive English

¹ See Kerameus, K.D. *A Civilian Lawyer Looks at Common Law Procedure*, (1987) 47 La. L. Rev. 493, 500.

² "You have two adversaries in every dispute--- someone asserting a right, someone denying it. Someone contending for one thing, someone contending against it." Sir Jack I.H. Jacob, *The Adversary System of Civil Litigation* (1983) City of London Law Review 17, 18.

³ Hazard, *Substance, Procedure and Practice in Comparative Law, Toward Comparative Law in the 21st Century* (1998), p.1094.

⁴ See Stychin and Mulcahy, *Legal Method: Text and Materials* (2nd edn, 2003), p.30.

counterpart.¹ Dissenting opinions are unknown, and even the existence of dissent is not revealed in China except in a few shipping cases.²

In short, it is through binding precedents that English law keeps its consistency and certainty, which are believed to be two of the hallmarks of a good decision-making process. In comparison, Chinese law endeavours to achieve the same goal by conceptual or formalist codification that controls the exercise of judicial discretion. However, very few laws can withstand the passage of time and changes in all circumstances. It seems that the English legal system does a better job of balancing the general benefits of consistency and certainty against the requirement of justice in individual cases in that the judges can manipulate to develop law in particular areas without waiting for the Parliament to enact legislation. In fact, Lord Wilberforce preferred better justice even at the cost of some uncertainty.³ Their experience should shed light on Chinese judicial professionals, as in China flexibility and justice are seen sacrificed for the sake of certainty.⁴

1.4 Maritime law and its history

1.4.1 Concept of maritime law

Maritime law is a branch of law that governs the legal relationships arising from the navigation and transportation of passengers and cargoes. Admiralty law is best known for its place at the English maritime tradition,⁵ while maritime law is more

¹ It is admitted that "Chinese judges are less creative than judges in common law countries." As commented by Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.95.

² *Guangdong Zhangjiang Food I&E Co Ltd v Cross Seas Shipping Corp, Croatia Line and Lucky Seaway Services Pte Ltd*, Guangzhou Maritime Court, 29 Dec 2000, (1998) GHFZZ 15. In respect of the joint and several liability of the third party, the court gave 2 to 1 decision dismissing the claims; cf. *Hainan Glory Honour Group Co. Ltd. v. Far Eastern Shipping Company*, Chinese Supreme Court, 3 Apr 2001, (2000) GHFSZ 186.

³ *The Despina R* [1979] AC 685, at p.698-699. "To say that this produces a measure of uncertainty may be true, but this is an uncertainty which arises in the nature of things from the variety of human experience".

⁴ See art.55 of the CMC, which will be dealt with in Ch 6.

⁵ The Court of Admiralty, a court of maritime jurisdiction was established in the reign of Edward III in about 1340. Then it became High Court of Admiralty, anciently styled the Court of the Lord High Admiral. It was transferred to Probate, Divorce and Admiralty

continental.¹ Nevertheless, the terms “admiralty” and “maritime” are effectively interchangeable.²

1.4.2 History

1.4.2.1 General history of maritime law

Maritime law is an ancient legal system apparently deriving from the customs of the early Phoenicians (900 B.C.), and later influenced by Rhodian Law,³ and the Laws of Oleron (the 12th century AD). Then it was shaped by medieval maritime codes⁴ used in northern and western Europe, including England.⁵ The remarkable feature in all those codes is the unity of their evolution as a distinctive and continuous body of maritime customs. In the 16th century, national maritime law was prospering individually with the codification of several national maritime codes.⁶ Contemporary maritime law is a mixture of ancient doctrines⁷ and new laws. Nowadays numerous international conventions are promoting the harmonisation of international maritime law.

1.4.2.2 History of English maritime law

English Maritime law, with its origin in the Mediterranean and European sea trade, more closely resembles the European civil law system than the English common law. In the latter part of the 14th

Division of the High Court by the Judicature Act 1873-75, and then transferred to the Admiralty Court, which is part of the Queen’s Bench Division by Administration of Justice Act 1970.

¹ Tetley, *International Maritime and Admiralty Law* (2002), p.xiv.

² See *Black’s Law Dictionary* (7th edn, 1999), p. 982.

³ The influence of Rhodian Law could be seen in the words of the Emperor Antoninus (138-161 A.D.) “I, indeed am Lord of the world, but the law is lord of the sea. Let it be judged by Rhodian Law, concerning nautical matters, so far as no one of our laws is opposed.” *Roman Digest; the Lex Rhodia*. As quoted by Tetley, *Maritime Law as a Mixed Legal System*, (1999) 23 Mar. Law. 317, 322.

⁴ Among the important medieval sea codes were the Laws of Wisby (a Baltic port), the Laws of Hansa Towns (a Germanic league) and the Laws of Oleron (a French island). These codes have been called the three arches upon which rests modern admiralty structure.

⁵ Tetley, *International Maritime and Admiralty Law* (2002), p.12.

⁶ Which includes Frederic II’s Maritime Code of 1561(Denmark), Maritime Code of Christian XI 1667 (Sweden), Louis XIV’s Marine Ordinance of 1681 (France), Marine Ordinance of Rotterdam 1721(Holland) and so on.

⁷ *E.g.* general average can be dated back to Rhodes; the rights and responsibilities of masters see the Laws of Oleron. *cf.* Tetley, *International Maritime and Admiralty Law*, p.29.

century when Admiralty Courts were set up, the courts followed civil law and procedures.¹ The lawyers and judges of the admiralty were trained in the Roman law tradition and made use of civil law in their arguments. Only after the jurisdiction of the Admiralty Court was restricted by the common law court by 1669-70 did the influence of the civil law in English maritime law start to decline.

1.4.2.3 History of Chinese maritime law

China was one of the earliest countries to master navigation.² But by the middle of the twentieth century the Chinese flag, oddly enough, had almost disappeared from the sea due to the “ban on sea trade” policy by the Ming Emperors dating from the 15th century.³ In the last two decades, however, China has emerged as one of the major maritime nations and has had to cope with increasing pressure from the trade. China has adopted more than 20 shipping related laws and regulations, including the Chinese Maritime Code (CMC) and the Maritime Special Procedure Code. The CMC is a revolutionary document, not only because of what it contains but because of the way it came into being.⁴ It is the “first Chinese law to draw on the legal experience of other countries and from international agreements.”⁵ It largely incorporates many international conventions or foreign laws.⁶

¹ As acknowledged by the Supreme Court of Canada. “There is no doubt that the development of English admiralty law, from which the Canadian maritime law in considerable measure derives, owes much to the civilian tradition. The common law in its early period was ill-equipped to deal with commercial and maritime matters.” *Q.N.S. Paper Co. v. Chartwell Shipping*, [1989] 2 S.C.R. 683 (The Supreme Court of Canada) *per* Laforest J. at p.695; “The principle adopted by the Admiralty Court has been that of the civil law.” *The Northumbria* (1869-72) L.R. 3 A. & E. 6, *per* Sir Robert Phillimore at p.10.

² Admiral Zheng He ventured to Southeast Asia, India, Persian Gulf and Arabia with a huge fleet between 1405 and 1433, which is earlier than Christopher Columbus’ sailing. There is even a theory alleging that it was actually Zheng He who discovered the America first. See Menzies, G. *1421 The Year China Discovered the World* (Bantam Press, 2004), but this view has been challenged by many opponents. See Levathes, L. *When China Ruled the Seas: The Treasure Fleet of the Dragon Throne, 1405-33* (Oxford University Press Inc, 1997).

³ Maritime law inevitably arises out of commerce on water. Thus it makes Prof. Tetley’s conclusion “China developed a sophisticated body of maritime law over the centuries” very doubtful. Tetley, *International Maritime and Admiralty Law*, p.28.

⁴ “It is noteworthy that the PRC has chosen to model its modern maritime law on principles emanating from the West.” . Tetley, *International Maritime and Admiralty Law*, p.29.

⁵ Michael Wood and Fang Guo Quing, *Understanding the New Chinese Maritime Code*, Lloyd’s List (12 April 1995).

⁶ *E.g.* Article 47 is, almost word for word, the same as Article 3(1) of the Hague Visby Rules.

1.5 Necessity of the research

1.5.1 Shipping law facilitates the trading between Britain and China

China is one of the biggest economic powerhouses in the world.¹ Trading between Britain and China is rapidly growing,² and likely to continue to grow.³ Shipping law is essential in reducing transaction costs and facilitating economic growth. Although two of the most influential shipping nations in the world, each shipping law more or less remains mysterious in the other's eyes. The thesis will bring English law into conversation with Chinese law in respect of damages in the carriage of goods by sea so that it helps practitioners as well as scholars to understand this topic better, which in turns reduces legal risks and transaction costs and helps to strengthen the trading.

1.5.2 Harmonisation and globalisation of maritime law

With the exception of a few dissonant voices,⁴ the harmonisation and unification of trans-national commercial law are strongly advocated, and with reason, by legal scholars.⁵ The necessity is especially urgently felt in maritime law. Maritime trade has an international character and the law needs to give all who engage in maritime trade a uniform understanding of their rights and

¹ China is one of the world's most rapidly growing economies, with GDP growth figures of around 9 percent *per annum* since the mid-nineties. As a conclusion of report conducted by the Foreign Affairs Committee (FAC) of the House of Commons, "we conclude that the growth of China's trade will continue to have an enormous impact on the world economy." See Foreign Affairs - Seventh Report (19 July 2006), available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmcaff/860/86002.htm>

² Trade and economic cooperation between China and Britain has experienced rapid development in recent years. In 2004, bilateral trade reached US\$19.7 billion, an increase of 37 percent over the previous year. *Britain, China Expected to Expand Trade Relations*, China Daily (9 November 2005).

³ "We conclude that the United Kingdom's market share in China is lagging behind its competitors, and that the Government must do more to support British business in China." Paragraph 68 in Foreign Affairs - Seventh Report, *supra*.

⁴ Boodman, M. *The Myth of Harmonisation of Laws* (1991) 39 Am J Comp L 699; Stephan, P.B. *The Futility of Unification and Harmonisation in International Commercial Law* (1999) 39 Virg J Int L 743.

⁵ Sturley, M.F. *Uniformity in the Law Governing the Carriage of Goods by Sea* (1995) 26 JMLC 553, 556-559; Clarke, M.A. *The Transport of Goods in Europe: Patterns and Problems of Uniform Law* [1999] LMCLQ 36, 39; Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* (2000) 31 VUWLR 355.

obligations, thereby reduces legal risks and transaction costs and increases the stability and predictability of processes and results.¹

Some uniformity of maritime law existed in ancient times.² It was resurrected in the nineteenth century and was boosted by several international organisations which primarily rely on the promulgation of international conventions. The Comité Maritime International (CMI)³ in particular has contributed to a large number of important international conventions or instruments.⁴ Nowadays, as far as private international law is concerned, there are four bodies most actively involved in the harmonisation of maritime law, viz. the Comité Maritime Internationale (CMI), the International Maritime Organisation (IMO) Legal Committee⁵, the United Nations Conference on Trade and Development (UNCTAD)⁶ and the United Nations Commission on International Trade Law (UNCITRAL)⁷. As a

¹ "The sea with its winds, storms and dangers doesn't change; it calls for a necessary uniformity of juridical regimes." Lilar,A. & Bosch,C. *International Maritime Committee: 1897-1972*, p.6 (quoting Mancini in his inaugural lecture at the University of Turin).As quoted by McCormack, H.M. *Uniformity of Maritime Law History and Perspective from the U.S. Point of View*, (1999) 73 Tul. L. Rev. 1481,1483.

² It was historically "found by practice to be suitable to the needs of a community which knows no national boundaries -- the international community of seafarers."Colombos, *The International Law of the Sea* (6th edn rev, 1967), p.29; Rhodian Sea Laws as the earliest maritime law were recognised in Mediterranean countries. Marseilles, Genoa, the Peloponnese, Venice, Constantinople and Aragon each had local variations engrafted upon it. See Radcliffe & Cross, *The English Legal System* (6th edn, 1977); Ashburner, *The Rhodian Sea-Law* (1909); other examples are the Rules of Oleron (1266) and the Rules of Visby (1505), each of which were accepted by many countries. See Tetley,W. *Maritime Law as a Mixed Legal System*, (1999) 23 Mar. Law. 317.

³ Its declared aim was "the unification of maritime law" See Lilar & Bosch, *Le Comite Maritime International 1897-1972*, p.2. As quoted by Griggs,P.J.S. *Uniformity of Maritime Law - An International Perspective*, (1999) 73 Tul. L. Rev. 1551,1545.

⁴ E.g. International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels (1910); Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea (1910); International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules) (1924); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1926); International Convention Relating to the Arrest of Sea-Going Ships (1952); International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships (1957); International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea (1961) etc.

⁵ IMO (previously IMCO, the International Maritime Consultative Organisation) consists of 149 member States, including almost every maritime nation in the world. Over 40 international conventions, 16 voluntary "codes" and over 500 recommendations have been developed under IMO's auspices. See Yost,M.J. *International Maritime Law & The U.S. Admiralty Lawyer: A Current Assessment*, (1995) 7 U.S.F. Mar. L.J. 313; Henry, C. *The Carriage of Dangerous Goods by Sea: The Role of the International Maritime Organization in International Legislation* (1985), p.49.

⁶ UNCTAD has been responsible for a number of Conventions in the shipping field such as Participation in Liner Shipping Conferences (1974), the Convention on Multi-Modal Transport of Goods (1980), Conditions of Registration of Ships (1986) and the Convention on Maritime Liens and Mortgages (1993).

⁷ The most important document, from the shipping law perspective, having been produced by UNCITRAL is the Model Law on International Commercial Arbitration and the United

result of fruitful international conventions introduced by these groups,¹ maritime law has been largely unified and becomes more predictable and uniform.² In this background, it is possible to compare the shipping laws of China and England where both are based on similar legal principles contained in international conventions.³

Nevertheless, harmonisation of law always runs the risk of misinterpreting legal phenomena. The comparison between Chinese and English shipping law clearly shows the challenge in front of maritime comparatists and will make them more aware of the cultural and legal diversity and the difficulty to eliminate it. This will prompt them to find a better solution during the trend of harmonising maritime law. The comparison will also urge Chinese lawmakers and judges to respect the pertinent international conventions.

1.5.3 Legal transplants in China

The Chinese feel a strong desire to achieve legal modernisation. Thanks to an embarrassingly blank legal history and lack of legal patriotism, there is no obstacle to the implantation of the western legal system.⁴ Only in this way could China jump to the legal plateaus

Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules) 1978, came into force on 1 November 1992.

¹ For a detailed discussion on all maritime conventions see Wiswall, F.L. *Uniformity in Maritime Law: The Domestic Impact of International Maritime Regulation*, (1983) 57 Tul. L. Rev. 1208.

² Paulsen, G.W. *An Historical Overview of the Development of Uniformity in International Maritime Law*, (1983) 57 Tul. L. Rev. 1065; Collins, D.M. *International Uniformity and the Carriage of Goods by Sea*, (1985) 60 Tul. L. Rev. 165; On the other hand, the promulgation of too many conventions arguably hinders the trend the harmonisation. Take an example of the carriage of goods by sea context, there are at least four conventions including the Hague Rules, the Hague Visby Rules, the Hamburg Rules and the CMI Instrument on Transport Law.

³ *E.g.*, the 1976 Convention on Limitation of Liability for Maritime Claims and the Hague/Visby Rules have the force of law by Sch.17-19, Schs 4 and 5 to the Merchant Shipping Act 1979 and s 1 (2) of COGSA 1971 respectively. Chinese law includes Hague/Visby Rules largely into its chapter 4 of CMC and the whole chapter 11 of CMC is based on the 1976 Convention.

⁴ As advocated by one scholar "the experience of the legal modernization that started in the West is a common heritage of all humankind." This view is particularly cherished in a transforming China under Communist ideology. See Gong Pixiang, *Legal Modernisation Does Not Equal Westernisation*, (1997) 1 Jurisprudence 6; see also Hao Tiechuan & Fu Dingsheng, *The Problems and Challenges of China's Legal Modernisation*, (1995) 7 Jurisprudence 2; Yan Cunsheng, *The Modernisation of Legal Ideas*, (1996) 2 Stud. on Legal Mod. 197 (Legal Modernization Research Centre of Nanjing Normal University ed.,

of developed countries rapidly and effectively without having to retrace by trial and error the linear course that other countries have followed.¹ The Chinese Insurance Law is a codification of internationally recognised insurance principles, many of which are English in origin, such as the doctrine of subrogation, insurable interest and the principle of utmost good faith.² The Contract Law brings English legal concepts such as offer, acceptance and frustration³ to Chinese soil for the very first time. The Chinese Arbitration Law copied English law to a large extent. In writing the Trust Law the government consulted British lawyers and the law consequently features the traditional English style even though China has a different legal culture and has no Court of Chancery.⁴ The Chinese Maritime Code draws on the legal experience of England and international conventions. This step has been continued in the drafting of the Chinese Securities law.⁵ Occasionally, common law legal principles were seen directly applied.⁶ Some cases were tried on western scholastic theory.⁷ All these have received some positive evaluation.

1996).

¹ Sun Xiaoxia, *The Rule of Law, Rationality and Cost*, (1997) 1 Legal Sys. & Soc. Dev. 1; Guo Daohui, *The Contemporary Spirit of Law* (1997), p.176; Guo Daohui, *Epochal Call for Law* (1998), p.34; Li Buyun, *Toward the Rule of Law* (1998), preface; Cai Dingjian, *Legal Evolution and the Transformation of the Chinese Legal System*, (1996) 5 Chinese Legal Sci. 3, 7.

² Zhu Zuoxian & Li Dong, *Should the Principle of Utmost Good Faith be Adopted in CMC? -- Theoretical Reconsideration on the Principle of Utmost Good Faith in the Marine Insurance Law* (2003) 14 Annual of China Maritime Law 4.

³ This innovation was pointed out a direct borrowing from common law, see Williams, *An Introduction to the General Principles and Formation of Contracts in the New Chinese Contract Law* (2001) 17 Journal of Contract Law 13, 14.

⁴ Harris, D. *Chinese Trust: Sweet or Sour*, [2004] Private Client Business 204, 204.

⁵ Michael Wood and Fang Guo Qing, *Understanding the new Chinese Maritime Code*, Lloyd's List (12 April 1995).

⁶ *In Sant'Andrea Novara S.P.A v Anhui I&E Shares Co Ltd and Jiangyin Xinnong Textile Co Ltd*, Hefei Intermediate People's Court, 27th Nov 2003, (2003) HMSCZ 01, the claimant denied that the third party was agent of the defendant, but the court rejected his argument on principle of estoppel, a common law concept that has never existed in Chinese law.

⁷ *Xiamen Yongchangrong Food Co Ltd v Xiamen Electricity Investment Development Group*, Fujian Higher People's Court, 20 Dec 2004, (2004) MMZZ 615. The court found Chinese legislation insufficient to protect shareholders. In the end, they referred to the western theory of Piercing the Corporate Veil and gave decision to shareholders.

1.5.4 The influence of China's accession to the World Trade Organization (WTO)¹

China became a member of the WTO on 11 December 2001. In terms of the effect it has on the laws, China has to honour its commitment to apply all laws, regulations and measures, passed at both central and local levels, in a uniform, impartial and reasonable manner.² The Chinese government has taken firm steps to combat judicial bribery, bolster judicial competence, and to make existing legislation and judicial interpretations more consistent with WTO rules so as to provide a stronger basis for judges to apply the law accurately, which has resulted in a number of amendments and repeals.³ The WTO accession has acted as a lever for legal reform by locking in reform and making it irrevocable. It could well have the effect of strengthening the rule of law and help China to its melting into the process of globalisation and legal harmonisation.⁴

1.5.5 Defects of the Chinese law of damages and the Chinese Maritime Code

The Chinese law of damages is not as detailed or well-structured as the English one. Measurement of damages is a natural result of interaction among different basic legal principles, such as remoteness, causation and mitigation. Each of these rules in Chinese law is more or less distinct from its English counterpart. For example, Chinese tort law has not officially adopted the mitigation and remoteness rules yet. Hence at present they are applicable to

¹ China was granted observer status in the GATT in November 1982 and became a member of the WTO in December 2001. For an official account of the chronology from the Chinese side, see Ministry of Foreign Affairs of the PRC, *Bilateral Agreement on China's Entry to the WTO between China and the United States* (17 Nov. 2000).

² Article X of the GATT 1994 requires that all trade-related laws, regulations, and rulings be promptly published and administered in an "impartial and uniform" manner. See *General Agreement on Tariffs and Trade*, 30 Oct. 1947, art. X, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

³ *E.g.* China has reviewed over 2,500 pieces of WTO-related legislation. 830 pieces were repealed, 325 pieces were amended, and 118 new pieces of legislation were enacted. See Hung, V.M. *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, (2004) 52 Am. J. Comp. L. 77, 115.

⁴ Discussion of positive influence to law by this economic reform and globalisation see Jones, C.A.G. *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, (1994) 3 Soc. & Legal Stud. 195.

contract law only. The idea of mitigation appears only in somewhat rudimentary form, where the aggrieved party is not required by law to *minimise* the loss but only to prevent it from *increasing*. Remoteness features hardly at all in damages. As a result causation has to be pressed into service as the dominant means to limit damages even when remoteness or mitigation seems more appropriate. It is still ambiguous as to whether or not the law requires the aggrieved party to enter into the market; a market rule similar to English law has not been established in China, at least not as a general requirement. As a consequence, a large number of contradictory decisions have been produced in Chinese shipping cases. Similar heads of damages are accepted or rejected in a process which at times seems alarmingly random. The development of the shipping industry requires a developed legal framework to regulate and protect legal interests and resolve maritime disputes. The absence of a developed legal system and the consequential unpredictable nature of the decisions of maritime courts lead to criticism from litigants, which in turn are detrimental to the authority of law.

Although a revolutionary document, the Chinese Maritime Code is beset with several problems. Take the example of measurement of damages for cargo loss.¹ Under English law the rule is pretty settled: damages are measured by the value of the goods at the time when, and the place where, they should have been delivered. The CMC is less straightforward, to say the least. Art.55 says this: “loss of the goods shall be calculated on ... the value of the goods *at the time of shipment* plus insurance and freight.”(emphasis added) This article is oddly inconsistent with the solicitude generally shown in Chinese law for *restitutio in integrum*. The value at the port of destination includes a combination of cost, insurance, freight, customs duties, administrative expenses and a fair margin of profit. By rigidly limiting the value to the one *at the port of shipment*, Chinese shipping law effectively under-compensates him and unjustifiably

¹ Which will be discussed in detail below. See ch 6.

favours the carrier. Chinese law is also notoriously lacking in systematic statements of principle. When Ch 17 of the CCL (referring to the contract of carriage) applies, damages for cargo loss will be determined by the price at the port of discharging, which resembles English law yet is inconsistent with the CMC.

There are other problems in the CMC which will be elaborated on below. These include the defective definition of delay provided by art.50; a curious interpretation of art.55¹; disputes over the recoverability of economic loss arising from delay and cargo loss; problems in assessing damages for cargo damage; the disregarding of impecuniosity in mitigation; an arguably unreasonable deduction of new for old in mitigation; problems in the application of art.277 in converting SDR to other currencies; the question of the limitation of stevedores' liabilities; whether manager and operator should be included in global limitation in CMC; questions over the necessity for a parallel legal regime for internal carriage by sea or water; a peculiar application of art.59 and art.209 in breaking package and global limitation; the omission of carriage of hazardous and noxious substances by sea in global limitation; an inflexible and unfair view towards wastage loss; confusion over the award of interest; and so on.

All of this makes it, in the author's respectful suggestion, a serious necessity to amend the CMC.² A special committee has proposed to the NPC to revise it before 2010. So it is right time carrying out this comparative research. All exposition of English law on relevant principles will no doubt shed light on the Chinese law part.

¹ Art.55 reads: "Loss of the goods shall be calculated on the basis of the actual value of the goods so lost, while that for the damage to the goods shall be calculated on the basis of the difference between the values of the goods before and after the damage, or on the basis of the expenses for the repair. The actual value shall be the value of the goods *at the time of shipment* plus insurance and freight."

² See Si Yuzhuo & Hu Zhengliang, *Necessity, Principles to be Followed and Suggested Key Points of Revision of Chinese Maritime Code*, (2002) 13 Annual of China Maritime Law 1; Cao Jianming, the vice-president of the Supreme People's Court, emphasised that revision of the CMC was one of the most important jobs to be done in the near future. See Shao Zongwei, *China Aims at Regional Maritime Law Centre*, Asian Channel (23 November 2004).

1.6 Why English maritime law?

1. Sino-Britain legal exchange

The relationship between China and Britain is now “at its best”.¹ Trading between Britain and China is increasing daily. The dialogue and co-operation between the two countries’ judicial matters have continued to develop, *e.g.* the successful Practical Training Scheme,² Young Lawyers Training Scheme and Young Chinese Judges Training Scheme.³ From 1998 the British Council and the Chinese Ministry of Justice have been organising British Law Week---an annual series of seminars, workshops and the re-enactment of a mock trial. The mock trial in 2001 was broadcast on Chinese television, an unprecedented event. In 1997 China implemented radical revisions to its Criminal Procedure Law and criminal codes. English expert played an important role in advising the Chinese Government on these reforms, and reference was repeatedly made to British laws.⁴ The chairman of the British Council Lady Kennedy said the new law was “drawn very much from the common law”⁵. The same can be said of the Chinese Insurance Law and the Trust Law. English law firms are seen as enthusiastic in the Chinese market.⁶ All of above encourage the furtherance of the English legal influence in China.⁷

2. London, the centre of shipping litigation and arbitration in the world

¹ Said by Sir Christopher Hum, the British Ambassador to China. Hu Xuan, *Sino-British Rapport at Its Best*, China Daily (21 Jul 2003).

² It started in 1988. They have trained hundreds of Chinese lawyers, given them an understanding of English law and the English legal system, and provided an introduction to the practice of English law.

³ See Passmore, C. *Eastern Promise -- The 11-Year-Old-Exchange Scheme Operated by the China Law Council has been a Diplomatic and Commercial Success*, Law Society's Gazette (22 September 1999).

⁴ Kennedy, H. *China Bows to Legal Evolution*, the Times (10 November 1998).

⁵ Gibb, F. *How UK Lawyers are Aiding and Abetting China's Legal Revolution*, The Times (19 June 2001).

⁶ In 2006 there were 149 foreign firms in China, of which 22 are English. See *License Granted to Foreign Law Firms in 2006*, Minister of Justice Announcement No.57 (11 Sep 2006) available at http://www.legalinfo.gov.cn/moj/lsgzgzzds/2006-09/14/content_410752.htm

⁷ Helena Kennedy says “British lawyers and the UK Government are leading the People's Republic along the road to justice” Kennedy, H. *China Bows to Legal Evolution*, the Times (10 November 1998).

Britain is a historical shipping nation⁸ and as a consequence it has developed one of the most sophisticated maritime case law systems in the world. Of equal importance, is its gilt-edged international reputation for professional excellence. As a well-established arbitration and litigation centre for shipping disputes, its influence is global. Shipping law is a major invisible export of the city of London.⁹ It has primarily influenced the international consensus on the form and nature of many aspects of shipping law. It is quite natural and reasonable for the Chinese to look to English law for inspiration.

3. Significant influence of English shipping law to China

Chinese judges are more acquainted with English shipping law than with any other foreign laws. The Ningbo Maritime Court and the Shanghai Maritime Court send their judges to Britain periodically for training.¹⁰ Chinese maritime judges are unconventional and adventurous compared with others, more resembling to their English counterparts. This is arguably because they are hailed as an elite among the Chinese judiciary: indeed, it is noteworthy that over 99% of maritime court judges hold a law degree in comparison to the average of 41% (even including non-law degrees) in all courts. They are more willing to accommodate foreign judicial style. Particularly, it is well known that English shipping law is more persuasive than any others in Chinese maritime courts. Drawing on English case law, it was the maritime court that produced the first published dissenting opinion ever in China.¹¹ They

⁸ The size of the British flag merchant fleet in 1900 was estimated to be 52% of world shipping. See Howarth, D. *Sovereign of the Seas* (1974), p.322.

⁹ Its attraction to foreign parties is obviously reflected in court service statistics which shows that 52% of cases heard in Commercial Court involved the parties on both sides carrying on business outside England and Wales in 2003 compared with nearly 30 per cent of the cases involving no English litigants 10 years ago.

¹⁰ Wang E'xiang (vice president of the CSC), *Maritime Court Should Become the Windows of Foreign Cases Trial*, *supra*.

¹¹ *Guangdong Zhanjiang Food I&E Co Ltd v Cross Seas Shipping Corp, Croatia Line and Lucky Seaway Services Pte Ltd*, Guangzhou Maritime Court, 29 Dec 2000, (1998) GHFZZ 15. In respect of the joint and several liability of the third party, the court gave 2 to 1 decision dismissing the claims; another one appeared in *Hainan Glory Honour Group Co. Ltd. v Far Eastern Shipping Company*, Chinese Supreme Court, 3 Apr 2001, (2000) GHFSZ 186.

interpreted insurance law according to English authorities in *China Drawnwork Co., Ltd., Shanghai Imp. & Exp. Branch v. China Pacific Insurance Co., Ltd.*¹ In *Universal Chartering Inc. v Qinzhou Ocean Shipping Agent Co Ltd*,² the court dismissed a claim for unpaid rent for lack of consideration, an English legal term never been adopted by Chinese written law.³ Precedents are not an official source of law, but case law is more commonly cited and relied on by maritime courts than others,⁴ which is a typical brand of English law. In this background, many Chinese scholars suggest English law is the model on which CMC should be based.⁵

4. Other factors

After the handover of Hong Kong, a common law jurisdiction territory on its doorstep, Mainland China has shown more interest in drawing on the experience of the English legal system. Another crucial factor affecting the legal learning and implanting is the language.⁶ In China, most students in higher education learn English, and passing a national English exam is a prerequisite for the degree.⁷ The mastery of English in effect confined legal specialists into English law sources,⁸ which results in “anglicisation”⁹ taking place in

¹ Shanghai Maritime Court, 20 Mar 2001. The judge referred to English cases and authorities to interpret term “failure to pick up goods” in contract.

² Beihai Maritime Court, 28 Mar 2002, (2001) HSCZ 00

³ Cf. *Xu Xihang v Si Chuan Electricity Bureau*, Sichuan Chengdu Intermediate People’s Court, (2002) CMCZ 849, 11 Aug 200

⁴ *Xixia Hengxing Property Agency Co v Yuancheng Qingdao International Freight Co Ltd*, Shangdong Higher People’s Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=1406>, where the court relied on a Supreme Court decision; *Zim Israel Navigation Co Ltd v Sun Hing Shipping Co Ltd*, Guangdong Higher People’s Court, who took reference to Civil Judgment (2001) YCE2Z 284 by the same court; *Shenyang Mining Machinery (Group) Co. Ltd v Hyundai Merchant Marine Co Ltd and Wantong Logistics Ltd*, Dalian Maritime Court, 1st Feb 2002, the court relied on a decision made by Guangzhou Maritime Court.

⁵ See Fu Tingzhong, *Basic Principles and Approaches with Respect to the Amendment of the Maritime Code of the PRC*, (2006) 5 *Modern Law Science* 18,18; Si Yuzhuo & Hu Zhengliang, *Necessity, Principles to be Followed and Suggested Key Points of Revision of China Maritime Code*, (2002) 13 *Annual of China Maritime Law* 1,27.

⁶ See Grossfeld, B. (Trans by Weir, T.) *The Strength and Weakness of Comparative Law* (1990). The book explores the importance of language in comparative law.

⁷ *Requirements of English Teaching in Higher Education 2004*, promulgate by Ministry of Education of China.

⁸ Potter,P.B. *Legal Reform in China: Institutions, Culture, and Selected Adaptation* (2004) 29 *Law & Soc. Inquiry* 465, 482.

⁹ This is particularly true in the context of maritime law due to the reluctance of America to adopt international maritime laws (McCormack, H.M. *Uniformity of Maritime Law History and Perspective from the U.S. Point of View*, (1999) 73 *Tul. L. Rev.* 1481) and the renowned reputation of English shipping law, whereas “Americanisation” is more appropriate in many other areas of commercial law.

China's legal transactions. In a word, all these factors expand the influence of English shipping law and make this research more necessary and acceptable.

1.7 Contributions and aims of the research

This research will concentrate on the topic of damages in the carriage of goods by sea, which is important in both its theoretical and practical value. It will provide an exemplification on how damages law and its compensation regime work in both England and China. In this regard, it would be a good systematic thesis on the maritime law of damages as a coherent whole. Damages are of enormous practical importance: the litigant, after all, is primarily interested in the size of the cheque he will receive or have to write. As both countries are shipping nations and own large number of commercial fleets, it is expected that English litigants, lawyers and alike are more likely to encounter foreign Chinese shipping law than before,¹ and *vice versa*, along with heated economic relationship between the two. It is hoped that this thesis will prove of use to practitioners in both countries.

Due to a lack of transparency and no case reporting system in China, there has not been an empirical study of case law on the concerned subject. The collection and study of Chinese shipping cases can be seen as innovative in Chinese legal studies as this methodology has not been paid much attention by Chinese scholars. It is rarely seen in literature written in Chinese. Viewed in this light, nearly 300 Chinese shipping cases collected by the author will provide an insightful knowledge of Chinese shipping law to English readers. It also manifests to Chinese theorists that case study, even in a country without formal system of *stare decisis*, is as valuable in legal research as it is in common law countries.

¹ In a comment as to Chinese law market, Freshfields' chief executive Alan Peck puts it bluntly: "It's a huge market, an absolutely gigantic market, all the multinationals are involved there. If it's too big a market for our clients to ignore, it is too big a market for us to ignore." Allen, S. *Climbing the Wall*. Law Society's Gazette (17 August 2000).

Thirdly, this thesis will help readers from each country to understand the mysterious features and dynamics of each other's shipping law and legal culture. Comparison of their maritime laws and damages law will be made, in legal and sometimes cultural, philosophical or social aspects. It can be seen as a larger effort to bring English law into conversation with Chinese law. It is hoped the thesis will promote mutual understanding and legal exchange in a globalised world.

Fourthly, maritime law is more harmonised than any other legal areas due to the large number of international conventions applying to it. However, uniformity of law on paper will not necessarily guarantee the uniformity of law in action. Comparatists should always caution against being carried away by the improvements in maritime field. The comparison between China's maritime law and English one, on the one hand, clearly shows the challenge in front of maritime comparatists and will make comparatists more aware of cultural and legal diversity and the difficulty to eliminate it during the trend of law-harmonising;¹ on the other, it will recommend judiciaries, especially the Chinese one, to use meticulous care in their interpretation of the convention. This thesis can be seen as an attempt to increase the awareness of national decision-makers of the international tenor of existing and proposed international maritime law and the concomitant duty to interpret and implement them as such.²

Lastly and most importantly, the thesis is written with a view to encouraging a revision of the defects in the CMC and changing aspects of the current Chinese law of damages. As mentioned in the last section, numerous problems exist in this area. Thanks to the historical accumulation of knowledge developed by common law and the tireless exemplification provided by English cases, it seems there

¹ The relationship between diversity of law and culture see Friedman, L.M. *Some thoughts on the Rule of Law, Legal Culture, and Modernity in Comparative Perspective*, *Towards Comparative Law in the 21st Century*, (1998), p.1086-87.

² Collins, D.M. *International Uniformity and the Carriage of Goods by Sea*, (1985) 60 Tul. L. Rev. 165, 204.

is always an answer somewhere in English law for every doubt Chinese judiciaries and scholars have in mind. China can, in theory, profit from the mistakes of the English by taking what they want from them, and avoid some of the pitfalls. Only in this way could China improve its shipping law at low costs in a short time.

English law is recommended by many Chinese scholars to be the model on which the reformed CMC should be based.¹ This thesis will elaborate on the English law part, give detailed review on the relevant Chinese law, make comparisons between them at length, locate the problem and provide a solution by reference to English law. It is hoped this thesis will provide instructive recommendations for amending CMC and damages law in the carriage of goods by sea, and will clarify the chaotic interpretation in many aspects of damages law and maritime law. Occasionally, there might be a few circumstances where Chinese law seems fairer than the English position, which English scholars might as well find fresh and enlightening.

¹ Fu Tingzhong, *Basic Principles and Approaches with Respect to the Amendment of the Maritime Code of the PRC*, (2006) 5 *Modern Law Science* 18,18; Si Yuzhuo & Hu Zhengliang, *Necessity, Principles to be Followed and Suggested Key Points of Revision of China Maritime Code*, (2002) 13 *Annual of China Maritime Law* 1,27.

Chapter 2 Basic Definitions

Damages law holds a particular attraction for practitioners because in the eyes of their clients, the amount of money is of infinitely more importance than any abstract principles of liability in contract or tort. Particularly, shipping lawyers tend to grapple with this complex and sometimes elusive area more often because it is at the centre of many shipping claims.

2.1 Definition of damages and other terminologies

As far as English law is concerned, “damages” is defined as “the monetary reward made by a court or arbitrator in respect of a wrong committed against the claimant by the defendant, in order to compensate the claimant or otherwise vindicate his interest.”¹ The accepted Chinese definition does not differ in substance from the English one.² The gist of this definition could be summarised as “compensation”³, which means making things equivalent; satisfying or making amends.⁴ It is an amount to be paid which makes up for the loss that the client has sustained.⁵ Both English and Chinese law not surprisingly agree that there must be a wrong committed before damages can be recovered in an action.⁶ In English shipping law, the wrong usually takes the form of breach of contract, the liability under a bailment and tort. Cargo claims give rise to the majority of claims for damages in the carriage of goods by sea. Others take the form of claims for demurrage or detention⁷, claims for damage to the carrying vessel, claims for the contribution of general average and so

¹ Tettenborn, *The Law of Damages* (2003), p.3.

² See Peng Wanlin, *Civil Law Studies*, (2nd edn rev., China Policy and Law University Press, 1999), p.612; Zeng Shixiong, *Principles of the Law of Damages* (Policy and Law University Press, 2001), p.14; Wang Liming, *Liability for Breach of Contract* (2nd edn, 2003), p.494.

³ Compensation is not the equivalent of damages; “The expression ‘compensation’ is not ordinarily used as an equivalent for ‘damages’...Therefore that word would not... include damages at large.” *Dixon v Calcraft* [1982] 1 QB 458 *per* Lord Esher at 463, 464.

⁴ *Jowitt’s Dictionary of English Law* (1977), Vol. I, p.401.

⁵ *Great Western Rly Co v Helps* [1918] AC 141 *per* Lord Dunedin at 144,145.

⁶ See *Bourhill v. Young* [1943] A.C. 92.

⁷ Demurrage was treated as debt by Lord Denning in *The Maratha Envoy* [1977] QB 324 (C.A.) at 342E, which was rightly questioned by Brandon J. in the *Despina R* ([1978] QB 396, 407F). He said that liability for demurrage should be classified as a liability for liquidated damages rather than for debt.

on.

Debt accordingly falls outside the scope of the said definition since it is, in effect, a sum of money which the defendant has promised to pay. Examples include the freight under a voyage charterparty or the hire payable pursuant to a time charterparty. The definition of damages in *Black's Law Dictionary* is thus inaccurate. It states that "remuneration and other benefits received in return for services rendered; esp., salaries or wages"¹ which should be categorised as debt instead. Debt is treated by law differently in many aspects, *e.g.*, duty of mitigation and remoteness test only apply to damages but not debt.² This has not been clarified by Chinese law. Moreover debt is excluded from the global limitation,³ as it is in Chinese law.⁴

Generally speaking, the test by which the amount of the damages is ascertained is called the measure of damages.⁵ The measure of damages is such as will restore the aggrieved party to the same position he would have been in if he had not sustained the wrong. The assessment of damages is not an exact science;⁶ however because it depends on legal principles governing recoverability, such as remoteness, causation, mitigation *etc.* it should be fairly predictable. The process of measuring damages in England was neatly summarised in *The Sivand*.⁷ There Evans L.J said "the defendant is liable for what the law regards as the consequence of his wrongful act, identifying its consequences on a common sense

¹ *Black's Law Dictionary* (7th edn,1999), p. 393.

² A claim for costs or debts was held not governed by remoteness rule. See *the Eurasian Dream (No. 2)* [2002] 2 Lloyd's Rep. 692.

³ Art. 2 (2) of the 1976 Convention on Limitation of Liability of Owners of Seagoing Ships reads: "however, claims set out under paragraph 1 (d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable." In comparison damages are largely subject to the global limitation by art. 2 (1).

⁴ Art.207 of the CMC reads: "...However, with respect to the remuneration set out in subparagraph (4) for which the person liable pays as agreed upon in the contract, in relation to the obligation for payment, the person liable may not invoke the provisions on limitation of liability of this article."

⁵ See *Halsbury's Law of England* 12(1) (4th edn 1998), p.267 and *Jowitt's Dictionary of English Law* (1977), Vol. I, p.1166.

⁶ *The Heron II* [1969] 1 A.C. 350, *per* Lord Upjohn at 425.

⁷ [1998] 2 Lloyd's Rep. 97.

basis and distinguishing in particular between what has caused rather than provided the occasion for the plaintiff's loss, subject to reasonable foreseeability of the particular kind of loss, and subject also to loss which results from negligence of the plaintiff or those for whom he is responsible, in breach of duty to mitigate his loss..."¹ In contrast, the quantum of damages or quantification of damages means the assessment or calculation in terms of money without consideration of law.² The question of recoverability precedes the question of quantification. In Chinese law, however, this distinction is not so clear-cut: the word for the measure of damages (heng liang) encompasses both.

Damages in England are either liquidated or unliquidated. If the party agrees by contract that a particular sum will be payable or certain calculations will be adopted on the default of its terms, then it is liquidated damages. If the court has to quantify or assess the amount to be recovered, the damages are unliquidated. If the sum stipulated in a liquidated clause is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach,"³ it will be treated as a penalty and hence unenforceable.⁴ Charterparties, for example, invariably contain a demurrage clause providing that the charterer should pay an agreed rate when the vessel is detained in loading or discharging beyond agreed laytime. It is in nature a liquidated damages clause⁵ and thus subject to the penalty rule.⁶

¹ *Ibid.*, at p.105; reasonableness is arguably one of the independent legal principles in deciding damages. As Lord Lloyd put it in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 at 367B, "mitigation is not the only area in which the concept of reasonableness has an impact on the law of damages."

² *Halsbury's Law of England* 12(1) (4th edn 1998), p.266; *Essa v Laing Ltd* [2004] I.C.R. 746, per Rix L.J. "Question of the quantification of damages is not one of the conditions or pre-requisites for the finding of liability." *Jolley v London Borough Of Sutton* [1998] 1 Lloyd's Rep 433.

³ See *Dunlop Pneumatic Tyre Co Ltd v New Garage Co Ltd* [1915] AC 79 per Lord Dunedin at p.86.

⁴ It's now very difficult in practice to strike down a liquidated damages clause as penal. The modern restrictive approach to the jurisdiction appears in the (non-maritime) case of *Murray v Leisureplay* [2005] I.R.L.R. 946.

⁵ Cooke, *Voyage Charter* (3rd edn 2003), p.327; cf. *Union of India v Compania Naviera Aeolus SA* [1962] 2 Lloyd's Rep. 175, per Lord Huset at 191; *Naviera SA v Louis Dreyfus Corporation* [1978] 1 Lloyd's Rep 325, per Lord Diplock at 327; *The Lips* [1987] 2 Lloyd's Rep. 311, per Lord Brandon at p.315; *The Despina R* [1978] QB 396, per Brandon J. at 407F.

⁶ It will usually "be upheld unless grossly disproportionate to the value of the vessel".

However it has never been struck down by the English Court,¹ so the shipowner will most likely be bound to it even though his damages are greater and it appears likely that the charterer has delayed the vessel on purpose.²

Art.114 para.2 of CCL provides an opposite position regarding liquidated damages. "If the agreed damages [liquidated damages] for breach of contract are lower than the losses caused, any party may request the people's court or an arbitration tribunal to increase it; if it is excessively higher than the loss caused, any party may request ... to make an appropriate reduction." Correspondingly, liquidated damages can always be amended by the court in China (only if the litigant requests so). Such a rule admittedly disregards the freedom of contract to some extent. But it does in effect afford a more equitable solution compared with English one.³ On the other hand, considering the traditional law-making style and judiciary capacity, its appearance seems odd in China, where lawmakers are usually so conservative and prudential that they prefer rigid and formulated legal rules over fairer but too flexible ones.

Nominal damages will be given in England when the plaintiff establishes that his rights have been infringed, but cannot prove that he has sustained any actual damage from the infringement.⁴ Chinese law, by contrast, does not have this rule and will simply dismiss the claim on such occasions.⁵ Punitive damages or exemplary damages

Sturley, M.F. *Benedict on Admiralty*, Vol 2A, 18--1, par. 201.

¹ In *Gulf Azov Shipping Company Ltd and Others v Idisi and Others* [2001] EWCA Civ 505, the litigants had occasionally sidled up to the argument that demurrage clause was a penalty, but that was an inappropriate case for the court to decide on this point because demurrage clause wasn't relied on by the defendant.

² *Suisse Atlantique Societe d'Arment Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529.

³ There are some English scholars arguing that liquidated clauses should not be treated too harshly. "They should only be voided upon the finding of unconscionability." See Dimatteo, L.A. *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, (2001) 38 Am. Bus. L.J. 633; some argue that it serves important risk management functions and should not be struck down in all events. See Scott, R.E. *Embedded Options and the Case against Compensation in Contract Law*, (2004) 104 Colum. L. Rev. 1428; some criticised Common law's rejection of penalty clauses for its inefficiency. Hatzis, A.N. *Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law*, (2002) 22 Int'l Rev. L. & Econ. 381.

⁴ *The Mihalis Angelos* [1970] 2 Lloyd's Rep. 43; *The Marseilles and Epos* [2003] 1 Lloyd's Rep 503.

⁵ *China Minmetals Steel Co Ltd v Victory Castle Shipping Ltd*, Guangzhou Maritime Court, 84

are given in England to punish the defendant and vindicate the strength of the law.¹ They can be awarded in three categories of cases² and almost certainly cannot be given for breach of contract under English law.³ Is it possible to award them in shipping law then? Even though in principle there is no theoretical barrier in England,⁴ such an issue has never been considered in court.⁵ It is estimated that the English court might be reluctant in awarding punitive damages in the carriage of goods by sea. This is because shipowners can be punished by losing limitation for any reckless act or omission.⁶ Moreover, it is worth noting that art.IV 5 (a) of the Hague-Visby Rules provides “neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units...”(emphasis added),⁷ and this might well be held to preclude punitive damages. In China, punitive damages only exist in one case,

15 Dec 2003, (2003) GHFCZ 108, where court dismissed the case because the claimant failed to prove the value of damaged cargo; see also *Ever Eagle Co Ltd v COSCO Guangzhou*, Guangzhou Maritime Court, 20 June 1991.

¹ Gotanda, J.Y. *Punitive Damages: A Comparative Analysis*, (2004) 42 Colum. J. Transnat'l L. 391.

² These categories include (1) the oppressive, arbitrary or unconstitutional acts by government servants; (2) where the defendant's conduct has been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff, and (3) where expressly authorised by statute.

³ *Kenny v Preen* [1963] 1 Q.B. 499.

⁴ In America, punitive damages could be awarded under general maritime law but only in very limited circumstances. *E.g.* where a defendant is “guilty of gross negligence or actual malice or criminal indifference which is the equivalent of recklessness and wanton misconduct.” *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d. 855 at 861 (2nd cir. 1985); in *Armada Supply, Inc. v. S/T Agios Nikolas*, 639 F.Supp. 1161 (S.D.N.Y.1986), in addition to compensatory damages, the District Court awarded the plaintiff (cargo owner) \$250,000 as punitive damages for shortage, contamination and conversion of the cargo caused by gross negligence of the carrier and its agency; see also Leacock, S.J. *Liability for Punitive Damages under the American Carriage of Goods by Sea Act*, [1990] J.B.L.170, 172-175; *the “Sunset Limited”* 121 F.3d (11th Cir. 1997) 1421 at 1423; *Thyssen, Inc., v. S.S. Fortune Star*, 777 F.2d. 52 (2d. Cir. 1985); B.D.Wallace, *Riverboat Casinos and Admiralty and Maritime Law: Place your Bets*, 28 Tul. Mar. L.J. 315, at p.371.

⁵ English courts are more wary of punitive damages than American courts. A Law Commission Report states that awards of punitive damages have become unpredictable and uncontrollable. See The Law Commission Report 247, *Aggravated, Exemplary and Restitutionary Damages* (16 Dec. 1997), available at <http://www.lawcom.gov.uk/741.htm>; it was suggested by some that exemplary damages should be abolished as they are in serious tension with the nature of civil liability. See Beever, A. *The Structure of Aggravated and Exemplary Damages*, (2003) 23 OJLS 87,111.

⁶ Art. IV 4 (e) of the Hague-Visby Rules and Art 4 of the 1976 Convention on Limitation of Liability for Maritime Claims. See also 7.3.6 and 7.4.6.

⁷ *Cf.* the equivalent issue of interpreting US COGSA s. 1304(5) “in no event shall the carrier be liable for more than the amount of damage actually sustained” was considered in American case *Cosmos U.S.A., Inc. v. United States Lines, Inc.*, 1983 A.M.C. 1172 (N.D. Cal. 1980) and *Armada Supply, Inc. v. S/T Agios Nikolas*, 639 F.Supp. 1161 (S.D.N.Y.1986). Punitive damages were dismissed for the said article in the first case but upheld in the second case.

irrelevant to this thesis: namely, the Protection of Consumer Rights and Interests Law.¹ The expansion of its application is under discussion, but the dominant view is against punitive damages in contract law.²

2.2 Obligations, remedies and damages

It will not be appropriate in this thesis to spend a great deal of time discussing the topic of obligations and remedies, but some brief statement on the place of damages in the scheme of the law of obligations and law of remedies is needed in the interest of clarity. The origin of obligations as a category of law lies in Roman law.³ Its application is not culture-specific. Chinese scholars inherited, and still happily accept, this taxonomy.⁴ The modern English law of obligations arises from contract, tort, the law of trusts, the law of unjustified enrichment and so on.⁵ Tortious and contractual obligations are the two main types of obligations recognised in English law and the only two types explicitly stipulated in the General Principles of Chinese Civil Law (GPCCL). A remedy is the legal response to the breach of obligation. The plaintiff's remedial right is secondary because it is triggered by, and dependant on, the defendant's breach of a prior or primary obligation.⁶ It includes judicial remedies given by the court and self-help remedies available without appealing to court, such as termination of the contract. In England, the judicial remedies include damages, specific

¹ Art.49 reads "the businessman who commits fraud should compensate double amount of the loss the consumer has suffered." This act is deemed as morally indefensible and thus attracts heavy sanctions.

² "Punitive damages are beyond the compensatory purpose of the law of damages." Cui Jianyuan, *Principles of New Contract Law and Case Analyses* (1999), p.484; "punitive damages are unnecessary burdens to contractual parties. It might worsen their financial status and cause them bankrupt..." Wang Liming, *Liability for Breach of Contract*, (2nd edn, 2003), p.586,587; especially its necessity in general contract law is not strongly felt as it is in consumer law for the obvious reason that Chinese market is flooded with fake products.

³ Cooke and Oughton, *The Common Law of Obligations* (3rd edn 2000), p.5.

⁴ See the structure of General Principles of Civil Law. Chapter 6 Civil obligation includes four sections: Section 1 general principles; Section 2 civil obligations for breach of contract; Section 3 civil obligations for tort; Section 4 methods of bearing civil liability (*viz.*, remedies), under which art.134 provides ten forms of remedies including return of property, compensation for losses and so on.

⁵ Tettenborn, *An Introduction to the Law of Obligations* (1984), p.3.

⁶ Tilbury, *Remedies and the Classification of Obligations*, in *The law of obligations: Connections and Boundaries* (Robertson ed., 2004), p.15.

performance, injunctions, declarations and so on, while in China, ten forms of remedies are provided by art.134 of GPCCL.¹ Damages are one of the most important remedies available for the carriage by sea in both countries. Other remedies in English shipping law include arrest or alternative security, maritime liens, specific performance², declarations³, proprietary relief⁴ and so on. In comparison, fewer remedies are provided by Chinese shipping law, which limits itself to specific performance, maritime liens, injunctions and damages.

2.3 The objects of damages

Roughly speaking, the aim of awarding damages, in both English and Chinese law, is *restitutio in integrum*, i.e., to place the injured party into the same position he would have been in had the contract been duly performed;⁵ or in the same position he would have been in if the tort had not been committed.⁶ Many judgments reiterated classic authorities of this general principle.⁷ In *Monarch Steamship Co. Ltd v A/B Karlshamns Oljefabriker*⁸, the cargo was delivered to Glasgow short of destination. Thereby damages represented simply the cost of

¹ They are (1) cessation of infringements;(2) removal of obstacles;(3) elimination of dangers;(4) return of property;(5) restoration of original condition;(6) repair, reworking or replacement;(7) compensation for losses;(8) payment of liquidated damages;(9) elimination of ill effects and rehabilitation of reputation; and (10) extension of apology.

² In shipping law, it may be granted to enforce other acts but not to compel performance of a time charter. See Jackson. *Enforcement of Maritime Claims* (4th edn 2005), p.624.

³ *Messier Dowty Ltd. and Another v. Sabena S.A. and Others* [2000] 1 Lloyd's Rep. 428; *New Hampshire Insurance Co Ltd v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep. 539.

⁴ *The Ocean Enterprise* [1997] 1 Lloyd's Rep. 449.

⁵ "The rule in the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." *Robinson v. Harman* (1848) 1 Exch. 850 at 855, *per* Parke J.; see also *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railway Co. of London Ltd.* [1912] A.C. 673 (H.L.) at 688-689; *Johnson v. Agnew* [1980] A.C. 367 (H.L.) at 400; *Ruxley Electronics & Construction Ltd. v. Forsyth* [1996] A.C. 344 at 355 and 365-366 (H.L.); For a maritime decision, referring expressly to the *restitutio in integrum* principle, see *The Unique Mariner (No. 2)* [1979] 1 Lloyd's Rep. 37 at 54. Chinese literature see Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.205; Shi Shangkuan, *General Study on Civil Law* (1970),p.17; Zhang Ming'an, *Civil Obligations* (2002), p.112.

⁶ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 29 *per* Lord Blackburn.

⁷ Contract cases see *Birse Construction Ltd v Eastern Telegraph Company Ltd* [2004] EWHC 2512 (TCC); *Bank of Credit and Commerce International SA (in liquidation) v Ali and Others (No 2)* [2002] 3 All ER 750; *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97; *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 (H.L.) Tort cases see *Sowden v Lodge* [2005] 1 W.L.R. 2129; *Collins Stewart Ltd and Another v The Financial Times Ltd* [2005] E.M.L.R. 5; *Constantine v Total Fina Elf UK Ltd* [2003] EWHC 428 (Q.B.).

⁸ (1948-49) 82 Ll. L. Rep. 137.

transshipment from Glasgow to its right destination.¹ In addition to compensatory awards, damages would then encompass awards aimed at restitution, punishment, amelioration of non-pecuniary loss and so on, none of which is common in the context of carriage of goods by sea and therefore will not be addressed here.²

The compensatory object is so obvious that as a matter of fact it is universal to most legal systems. Art. 113 of the CCL is no exception. It states: “Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract...”

Article 117 of GPCCL similarly provides: “Anyone who encroaches on the property of the state or of a collective or other person shall return the property; failing that, he shall reimburse its estimated price. Anyone who damages the property of the state or of a collective or other person shall restore the property to its original condition or reimburse its estimated price. If the victim suffers other losses therefrom, the infringer shall compensate for those losses as well.”

However, this aim has not been strictly obeyed by all Chinese judges. Sometimes damages are assessed compromisingly so that the author of the wrong or his family will not be reduced to a state of misery.³ When making the Chinese State Compensation Law, instead

¹ Cf. In *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 (H.L.), it was held that compensatory principle is “overriding” in that the damages awarded should represent no more than the value of the contractual benefits of which the claimant had been deprived. *Per* Lord Birmham at p.382.

² For a thorough research of other aims of damages See Tettenborn, *The Law of Damages* (2003), p.15-21; McCamus, J.D. *Disgorgement for Breach of Contract - A Comparative Perspective*, (2003) 36 Loy. L.A. L. Rev. 943; Weinrib, E.J. *Punishment and Disgorgement as Contract Remedies*, (2003) 78 Chi.-Kent L. Rev. 55; Kull, A. *Restitution as a Remedy for Breach of Contract*, (1994) 67 S. Cal. L. Rev. 1465; Weinrib, E.J. *Restitutionary Damages as Corrective Justice*, (2000) 1 Theoretical Inquiries L. 1.

³ In *Sun's Family v Nine Juniors*, Zhenjiang Intermediate Court, 7th May 1997. Sun was beaten to death by nine junior gangsters. All received heavy sentences, several of them 15 years. The judge at civil trial believed justice had been served. Because the defendants all came from poor families, he held the nine defendants should compensate all together 1000 Yuan (66.67 GBP) to the claimant. This decision aroused vehement criticism in China. See Liu Dasheng, *Some Thoughts on the Compensation of 1000 Yuan for a Life*, The

of considering the true losses caused by the state power, law-makers worried that the damages would be too much of a burden on national coffers. The legislature only compensates direct losses.¹ Mental damages will not be considered whatsoever.² It is therefore advocated that the object of damages should be realised fully and uncompromisingly.

2.4 The interests that damages law exists to protect

2.4.1 English law

This topic is a matter of theory rather than practice but it helps to understand damages law. Roughly speaking, there are three theoretical interests damages law intends to protect: expectation, reliance and restitution interests.³ Expectation interests concern loss of a promised and expected benefit, such as the loss of anticipated profits,⁴ and is the core of the contractual claims.⁵ If the cargo is totally lost at sea due to the unseaworthiness of carrying vessel, the cargo owner's lost expectation includes the receiving of cargo at the destination as the immediate benefit of the promised performance and other consequential benefits to be derived from the arriving of the cargo such as the loss of resale profits or the loss of use.⁶ The courts are also willing to protect reliance interests by compensating

South Weekend (9th May 1997) p.9.

¹ See art.27 of the Chinese State Compensation Law.

² *Ma Dandan v Jingxian County Police Station*, Xianyang Intermediate Court, English case report is provided by Human Rights Research Center of Beking University Law School (<http://www.hrol.org/moot/info.php?id=14>), see also English news, *Victims of State Infringement Actions Deserve More*, China Daily (June 23, 2003). The plaintiff, a 19-year-old girl was illegally interrogated for 23 hours and then detained for 15 days on wrongly accusation of prostitution. She asked for compensation of 5 million Yuan (333,333GBPs) but was turned down by the Xianyang Intermediate Court and received a tiny compensation of 74.66 Yuan (4.98 GBP) because of the said article.

³ Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936) 46 Yale L.J. 52; Beatson, J. *Anson's Law of Contract* (28th edn 2002), p.576; *The Alecos M* [1990] 1 Lloyd's Rep. 82 at 84, where with respect to the sale of a vessel, it was held that "[i]n relation to recovery of damages the law recognises various interests, viz. expectation, reliance and restitution."; *The Black Falcon* [1991] 1 Lloyd's Rep 77, in awarding compensation for the breach of contract it was held "various interests may have to be considered, such as expectation, reliance and restitution. Here the relevant interest is the owners' expectation interest." *per* Steyn J. at p.81.

⁴ Lord Atkinson in *Sally Wertheim v. ChicoutimiPulp Co.* [1911] A.C. 301 at p. 307 (P.C.); *Robinson v. Harman* (1848) Exch. 848 at p. 855.

⁵ David, R. *International Encyclopaedia of Comparative Law* Vol, ch 16, p.27; Barnes, D.W. *The Net Expectation Interest in Contract Damages*, (1999) 48 Emory L.J. 1137, 1159.

⁶ Consequential loss is arguably a separate head: Tettenborn, A. *The Law of Damages*, p.394.

him for expenditure rendered sterile,¹ or opportunities lost as a result of breach of contract.² Suppose a vessel is unreasonably delayed and the claimant has to transship the cargo to another vessel to the destination; there is no doubt he can recover the expenses of transshipment.³ Reliance protection is often claimed because of the difficulty and uncertainty in proving the amount of the expectation interests,⁴ so that the claimant would at least have recouped his reliance losses.⁵ The aggrieved party can also recover the benefit he has conferred on the defaulting party which, in view of the defendant's failure to perform, it would be unfair to allow him to retain, as a protection of restitution interests. Repayment of freight on account of non-delivery is a typical example.

There is no obvious obstacle preventing the claimant from combining various types of claims in a single claim.⁶ The person suing for breach of contract is entitled to choose one or more among reliance, expectation and consequential damages,⁷ provided it is not in excess of his actual loss. However, reliance damages are not

¹ See *Sunley & Co Ltd v Cunard White Star Ltd* (1940) 66 Ll. L. Rep. 134, where the carriage of a tractor was delayed. The court found four possible heads of damage: (1) depreciation which was running on; (2) interest on the money invested which was being wasted; (3) some trivial amount of maintenance which was no doubt involved; and (4) some expenditure of wages which were thrown away." Clauson L.J. at p.138.

² *Anglia Television Ltd. v. Reed* [1972] 1 Q.B. 60.

³ *Monarch Steamship Co. Ltd v A/B Karlshamns Oljefabriker* (1948-49) 82 Ll. L. Rep. 137 (H.L.).

⁴ Tettenborn, *The Law of Damages*, p.400; McGregor, H. *McGregor on damages* (17th edn 2003), p.36; see also *Lloyd v Stanbury* [1971] WLR 1 535 where the claimant failed to prove the loss of bargain; *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, the loss of bargain was too uncertain and speculative.

⁵ Because of this reason, there is a view that the protection of reliance interest in contract is not a full-blown protection but is rather a means of protecting the expectation interest where there are problems of proof. See Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.65; in *Sunley & Co Ltd v Cunard White Star Ltd* (1940) 66 Ll. L. Rep. 134. The court held that the onus was on the plaintiffs as owners of a profit-earning chattel, to prove the pecuniary loss they had sustained. Because they failed to give evidence on that question, damages were awarded according to depreciation, interest on capital value, maintenance and wages; see also *Simpson v The London and North Western Railway Company* (1875-76) L.R. 1 Q.B.D. 274.

⁶ These interests may overlap. Expectation and reliance interests overlap with various restitutionary interests. See Beatson, J. *Anson's Law of Contract* (28th edn 2002), p.599; see also *Simpson v London & North Western Ry Co* (1875-76) L.R. 1 Q.B.D. 274, where a sample was delayed by the carrier. A sum for loss of time (reliance) and loss of profit (expectation) was held both available for the claimant.

⁷ In *Heimdal v Questier & Co* (1948-49) 82 Ll. L. Rep. 452, for the carrier's failure to carry part of the cargo, charterers were entitled to recover a proportionate part of the lump sum freight (restitution interests), loss of profits (expectation) and other disposing expenses (incidental damages). "He [plaintiffs] can either claim for loss of profits or for his wasted expenditure." *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60, per Lord Denning at p.63; see also *CCC Films (London) v Impact Quadrant Films* [1985] Q.B. 16, per Hutchison J. at p.32; *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 Q.B. 292.

available to claimants who try to escape an unprofitable contract.¹ This is because the court cannot “place him in a better financial position than if the contract had been properly performed”.² Occasionally certain types of loss can be recouped but seem by no means fully described by these categories, *e.g.* expenses incurred by a charterer in finding a substitute vessel after shipowners’ repudiation.³ On the other hand, these interests overlap.⁴ For these two reasons, the foregoing tripartite division⁵ of damages is still evolving and it has not been accepted by all courts and academics.⁶ Nevertheless, it represents a very convenient way to schematise damages law⁷ and the discussion here will make use of it.

2.4.2 Chinese law

2.4.2.1 A brief history

Before the enactment of GPCCL, there was no general principle of damages apart from a vague idea of *restitutio in integrum*. Chinese law was not satisfactory in the protection of aggrieved party. Damages were generally limited to direct loss.⁸ For example, it was

¹ *C & P Haulage v Middleton* [1983] 1 WLR 1461; *CCC Films (London) v Impact Quadrant Films* [1985] Q.B. 16.

² *C & P Haulage v Middleton*, *supra*, per Ackner L.J. at 1468

³ Expenses that the charterer incurred in disposing of the cargo left at port of loading were called “incidentals” in *Heimdal v Questier & Co*, *ibid*. The very similar head of damages is called “incidental damages” in the US, *e.g.* UCC section 2-715(1); Anderson, R.R. *Incidental and Consequential Damages*, (1987) 7 J.L. & Com. 327.

⁴ For example, expectation and reliance may overlap with various “restitutionary remedies” See *Anson’s Law of Contract*, p.599.

⁵ *Anson’s Law of Contract* only accepts two categories, *i.e.*, reliance and expectation interests. p.596-599.

⁶ It was said “the expectation, reliance and restitution interests underlying the traditional conceptualization of contract damages add only confusion to understanding the relevant rules.” Barnes, D.W. *The Anatomy of Contract Damages and Efficient Breach Theory* (1998) 6 S. Cal. Interdisc. L.J. 397; it is also said that it is unnecessary to choose between expectation and reliance damages, as they will be virtually equivalent in perfectly competitive markets. See Cooter, R. *Damages for Breach of Contract*, (1985) 73 Cal. L. Rev. 1432; reliance damages are said to be particularly unsatisfactory since in most torts the victim has not relied on the tortfeasor. Stapleton, J. *The Normal Expectancies Measure in Tort Damages* (1997) 113 L.Q.R. 257, 267.

⁷ As shown in many cases. See *Parsons Livestock Ltd v Uttley Ingham & Co Ltd* [1977] 2 Lloyd’s Rep. 522 (C.A.), where the court drew a distinction between loss of profit cases on the one hand and expenditure on the other; see also *The Alecos M* [1990] 1 Lloyd’s Rep. 82 at p. 84; *The Black Falcon* [1991] 1 Lloyd’s Rep 77 per Steyn J. at p.81.

⁸ See Tong Rou, *General Rules of Civil Law* (1982), p.24; direct loss is the loss of gain the claimant would have received if the contract had been duly performed. (Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.307) Any other financial losses suffered as a result of the breach are called indirect loss and generally irrecoverable. As said “indirect loss is accepted academically, but in judicial practice, the claims for indirect loss have not been fully supported. (Su Huixiang, *Modern Chinese Contract Law* (1992),

once said that particular damages were recoverable depending only on whether or not they were direct consequences of the defendant's wrongful act.¹ Sometimes the law did not even give full compensation for tangible physical loss, not to mention the protection of lost gain and other interests.² Lost gain was sometimes rejected only because of the difficulty in calculating it.³ In practice, liquidated damages in those standard form contracts were once the main form of remedies for breach of contract⁴ as most of the administrative regulations contain statutory provisions of liquidated damages as the default.⁵ Besides serving a quasi-compensatory function, liquidated damages were once seen as a form of guarantee for an obligation.⁶ The general aim of damages law, *restitutio in integrum* was gradually established only recently along with the promulgation of new laws.

2.4.2.2 Direct loss and indirect loss

The concept of loss is not elaborated on expressly in any PRC legislation,⁷ but there is nevertheless an academic tradition of classifying losses into three types: actual loss, direct loss and indirect loss.⁸ Actual loss is the physical damage to property. Direct

p.316).

¹ Tong Rou, *General Rules of Civil Law* (1982), p.24. This is very similar to the question posed by Lord Warrington in *Polemis v. Furness, Withy & Co* (1921) 8 Ll. L. Rep. 351, at 354. But this stance in English law has been overruled by the Privy Council in *The Wagon Mound* [1961] 1 Lloyd's Rep. 1.

² See Tong Rou, *General Rules of Civil Law* (1982), p.154.

³ Xu Kaishu, *Introduction to General Principles of Civil Law* (1988), p.222.

⁴ Wang Zuotang, *Civil Law Tutorial* (1983), p.248; in those years, commercial activities were not so diversified. Also the scarcity of lawyers in the P.R.C. and their unavailability in negotiating for and concluding contracts reinforce the use of standard form contracts, particularly in simple purchase and sales agreements.

⁵ The most frequently cited of these regulations is the Interim Regulations on the Basic Terms of Contracts for Ordering Industrial and Mineral Products, issued by the State Economic Commission on August 30, 1963. Article 34(2)9 of this regulation provides that a buyer shall compensate a seller by paying a fine of 5-80% of the contract price; other similar provisions see art. 17 of the Chinese Railway Law, art.8,9 of the Provisions on Economic Compensation for Breach and Repudiation of Contract of Employment, art.49 of the Protection of Consumer Rights and Interests Law.

⁶ Bai Youzhong & Li Zhugo, *Several Questions concerning Economic Contracts*, (1985) 18 Chinese Law and Government 17. In China, the performance of a contract may be constituted as part of the function of a planned economy. Therefore, the concluding of a contract is more than a meeting of minds of two contracting parties. Its binding effect was before greatly emphasised.

⁷ Art.112 of GPCCL reads "the party that breaches a contract shall be liable for the compensation equal to the losses consequently suffered by the other party." But it fails to define "loss".

⁸ See Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.307; Li Youyi, 92

loss is the loss of gain the claimant could have achieved if the contract had been duly performed.¹ Any other financial losses suffered as a result of the breach are called indirect losses. It is a striking feature of Chinese practice that Chinese courts are usually reluctant to accept indirect loss.² This classification of direct loss and indirect loss is unique and has no real equivalent in English law.³ It certainly has nothing in common with the Anglo-American distinction between reliance and expectation loss. When a cargo is lost, for example, the claimant generally claims the value of the goods as direct loss and the further profit which he may reasonably earn as indirect loss. But both are expectation losses. Today whether the existence of such categorisation is of any importance is very doubtful. There seems no difference of legal principle applicable to each group.⁴ In the name of *restitutio in integrum* both could be recoverable in principle. Therefore it is time to discard the category of direct loss and indirect loss.

2.4.2.3 Expectation, reliance and restitution loss: Chinese analogues

As mentioned above, the classification of losses into expectation, reliance and restitution losses has not been paid much attention by Chinese theorists and plays little if any part in court decisions. Even in the very limited discussion in textbooks, the approach is different from English law. Pre-contract expenses, for example, are summarily excluded from reliance damages because they are “not caused by the breach”.⁵ For the sake of comparison, this section will review

Civil Law Studies (1988), p.622.

¹ Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.308.

² As said “indirect loss is accepted academically, but in judicial practice, the claims for indirect loss have not been fully supported.” Su Huixiang, *Modern Chinese Contract Law* (1992), p.316.

³ The term “direct loss” under English law has different meanings and it corresponds to a loss that follows naturally from the breach within the first rule of *Hadley v Baxendale* (1854) 9 Ex. 341 and indirect loss falls within the second rule. See *BHP v. British Steel* [1999] 2 Lloyd’s Rep. 583 at p. 598, noting that “... the line between direct and indirect or consequential losses is drawn along the boundary between the first and second limbs of *Hadley v. Baxendale*”, and citing other U.K. decisions to that effect.

⁴ Remoteness, causation and other legal principles are displacing the “direct and indirect” rule and become the effective test under Chinese law. See the following chapters.

⁵ Wang Liming, *Liability for Breach of Contract* (2nd edn, 2003), p.529; Xu Bing, *The Law of Selling and Purchasing* (1991), p.324.

interests being protected by Chinese law and regroup them by the English method.

The principles which emerge from Chinese written law are that, generally, the expectation interests are protected; but in cases in which the aggrieved party puts an end to the contract, the restitution interests are protected; and in cases of invalidity of the transaction the reliance interest may be protected. The protection of the expectation interest has thus been declared by art.113 of the CCL as it would be under English law. A general protection of reliance loss is provided by art.97 of the CCL, which allows either reliance loss or expectation loss to be claimed upon the termination of contract.¹ Reliance interests are also dealt with by art.42 and 43 of the CCL. Here the reference is made to losses suffered by the claimant in reliance on the promise of the other party or validity of the contract. In cases of invalidity or cancellation of the contract, the restitution interests are officially protected.²

1. The first problem: Restitution and expectation loss in respect of termination

Art.56 of CCL reads “an invalid or cancelled contract is not legally binding *ab initio*...” This article proves to be problematic as it implies expectation interest will be ruled out upon termination. In some cases Chinese courts have indeed denied the shipowner’s claim for expectation interests upon invalidity of the contract for precisely this reason.³ Even when the contract is terminated by one party, such interests have also been rejected on various other grounds. In *Chengdu Textiles I&E Co Ltd v New Bright (HK) Ltd*,⁴ the buyer

¹ Art.97 of CCL reads: “Remedies in Case of Termination: upon termination of a contract, a performance which has not been rendered is discharged; if a performance has been rendered, a party may, in light of the degree of performance and the nature of the contract, require the other party to restore the subject matter to its original condition or otherwise remedy the situation, and is entitled to claim damages.”

² Art.58 of the CCL obliges each party to restore to the other any performance received in case of termination of the contract.

³ *Ningbo Qinning Shipping Agency Co Ltd v Tianjin Jinhang Freight Co*, Guangzhou Maritime Court, 12 Aug 2001; *Qinhuangdao Shanhaiguan Construction Materials Combined Store v Shekou Merchants Harbour Service Co Ltd*, Guangzhou Maritime Court, 9th Dec 1991.

⁴ Chengdu Intermediate People’s Court, 8th May, 2005, (2003) CMCZ 321.

terminated a contract of sale when the seller sent a defective cargo. The court rejected his claim for the loss of profit “because the evidence submitted has not been verified.” In *Toboluck International Ltd v Shandong Ruixing Chemical Industrial Group Co. Ltd*,¹ the court approved the cancellation² but denied the claims for the loss of profit again on grounds of lack of evidence.³ But lack of evidence seems as often as not just an expedient, because in *Hangzhou Sentai Pump Valve Whole Set Equipment v Jiase Technology*,⁴ when the plaintiff provided three sets of evidence proving its loss of expectation, the court still dismissed the case, this time on grounds of lack of causation.⁵ To summarise, expectation losses are less likely to recover in some courts when the aggrieved party puts an end to the contract.

One of the reasons for this is that the loss of expectation in case of termination is alleged to be “caused by his own decision to terminate”.⁶ However, this view has not been overtly admitted by any judicial decision and is completely wrong. If it is the defaulting party who breaches the contract in the first place, then why should the law place the innocent party at a disadvantage after he is compelled to terminate? Another explanation for this view is that “the termination of contract itself is a punishment to the defaulting party...so that expectation interests will not be necessary.”⁷ However, if a defaulting party deliberately breaches the contract for other profitable opportunities and expects to free its resources from the current contract, how can the termination of contract be a punishment? The

¹ Jinan Intermediate People’s Court, 18th Mar 2004, (2003) JMSCZ 199.

² Note: Such a cancellation does not necessarily require an approval from the court according to art.93 art.94 of the CCL. The aggravated party could terminate a contract upon satisfaction of certain condition..

³ See also *Huasheng Control Equipment v Shanxi Fuxintang Construction & Decoration Design Co Ltd*, Xi’an Intermediate People’s Court, 15th Jul 2004, (2004) XMSCZ 003, where the defendant delayed in decoration which postponed opening of the shop. No economic loss was awarded when the court held evidence of profits was insufficient and its recovery was against law. Only restitution interests were awarded.

⁴ Shanghai Huangpu District People’s Court, 23th Jan 2003, (2002) HMESC 197.

⁵ Cf. in another case, the court denied expectation losses without even providing any reasoning. See *Metals, Mineral & Building Material Development Co Ltd v Guangzhou Liji Commerce Co Ltd, Guangdong Hengrun Aluminium Co Ltd*, Guangzhou Intermediate People’s Court, 30th Mar 2006, (2005) SZFMSCZ 320.

⁶ Wang Liming, *Liability for Breach of Contract* (2nd edn, 2003), p.503.

⁷ *Ibid*, p.728.

restitution-only position is unfair because it benefits the defaulting party and punishes the innocent party. Most importantly, Chinese written law itself does not concur with this view. Art.97 itself clearly confirms that the other party is entitled to claim “further damages” besides expectation or reliance damages. Therefore, the above cited cases should not represent good law. In all, there is always a risk of protecting one interest while omitting the others at the same time in Chinese courts. Judges should keep from misusing reliance interests or overemphasising restitution damages upon termination of contract when citing art.56 and art.97 of the CCL. The expectation loss should not be excluded by courts on this occasion.

2. The second problem: can an award of reliance damages leave the claimant better-off?

There is a certain ambiguity as to whether or not an aggrieved party claiming reliance damages can be put into a position better than expected. Art.97 of the CCL allows either of them to be claimed for upon the termination of contract, but fails to answer the above question. At least one author¹, however, suggests that the choice is untrammelled. This view contrasts with English law position, where an award of reliance loss should not put the aggrieved party into a position demonstrably better than that in which he would have been if the contract had been performed. This problem has not been paid much attention by Chinese courts. With this in mind, any case of this nature must be closely examined and reference is suggested to be made to English law.

2.5 Legal philosophy, morality and law

2.5.1 Confucianism, ideology and Chinese law

2.5.1.1 Confucian influence

¹ “When these expenses exceed the gain which could be possibly made under the contract, reliance interest favors the plaintiff... so protection of reliance interest protect the plaintiff more satisfactorily.” Wang Liming, *Liability for Breach of Contract*, p.510; “there is no necessity to restrict the reliance interests according to expectation interest.” p.514.

As previously stated, the Chinese legal system has been powerfully influenced by Confucianism. In terms of contract law, Confucianism has supplied one of the most comprehensive attempts to give contract law a philosophical grounding.¹ The general idea of the world and the worship to Confucian virtues lead Chinese to scorn anyone who cannot keep their words. Trustworthiness has always been deemed as one of five basic virtues a man should have.² To keep a promise is regarded as indispensable to a man's integrity. "I know not what a man without trustworthiness may accomplish. Be it large or small, how could a carriage move without its yoke-bar?"³ Besides, any conduct guided by gain is despised by the Confucian. "Conduct guided by profit is the cause for much complaint."⁴ To break a promise for gains is beyond tolerance. Such a person is called little man or petty man, a term of disapproval in the modern Chinese language. "The mind of the superior man is conversant with righteousness; the mind of the petty man is conversant with gain."⁵ Trustworthiness is such a glorified virtue that there is no exception to its persistence whatsoever, neither in the name of pursuing fortune, nor in the period of deprivation.⁶

2.5.1.2 Ideological influence

Socialist ideology has also influenced the Chinese law for quite a while. In western societies the main purpose of contracts is to make

¹ It started from Han Dynasty. As remarked "the enforcement of agreements [in Han Dynasty] was conceptualised in terms of upholding the general moral obligations of truthfulness and of denying dishonest persons the benefits of holding ill-gotten gains." Scogin, H.T. *Between Heaven and Man: Contract and the State in Han Dynasty China*, (1990) 63 S. Cal. L. Rev. 1325, 1404.

² When Tsze-chang (A disciple of Confucius) asked Confucius about perfect virtue, Confucius said, "To be able to practice five things everywhere under heaven is perfect virtue." Asked to elaborate, Confucius said, "courtesy, tolerance, trustworthiness, quickness, and generosity. With courtesy, you will not be treated with disrespect. With tolerance there is support from people. With trustworthiness, people will repose trust in you. With quickness you will accomplish much. With generosity people can be employed willingly." Confucius, *The Analects of Confucius (Lunyu)*, BC 475 ?, Ch 17 Verse 6.

³ *Ibid.*, Ch2 Verse 22.

⁴ It can also be translated as "will be much murmured against", *ibid.*, Ch4 Verse 12.

⁵ *Ibid.*, Ch4 Verse 16.

⁶ "Riches and honors are what men desire. If they cannot be obtained in the proper way, they should not be held. Poverty and lowliness are what men hate. If they cannot be avoided in the proper way, they should not be abandoned. If a superior man abandons virtue, how is he to live up to his reputation? The superior man never acts contrary to virtue, not even for a meal's period, nor during hectic times, nor in destitution." *Ibid.*, Ch4 Verse 5.

a profit,¹ while in China during the 1970's the main goal was to satisfy state-run enterprises and fulfil the national plan.² The free market was literally non-existent at that time.³ The contract system existed only among the socialist enterprises in forms of planned contracts.⁴ Many contracts were specifically made pursuant to national, provincial, or local plans.⁵ Because any breach would likely affect the economic plan made by the state, "contractual discipline" was greatly advocated,⁶ so that defaulters must be penalised for failing to perform. This attitude still influences the modern Chinese law.

2.5.1.3 The design of Chinese law

It is taken by Chinese legal scholars as a given that promises are morally binding. Breach of contract, especially for gains, is despised. This loathing of the breach can be widely seen in authoritative textbooks. For example, a leading law textbook reads "The freedom to breach as recognised by the common law is against traditional Chinese morality, *i.e.* to keep promises... and thus is unacceptable to public opinion."⁷ The bitter enmity is deeply ingrained in Chinese legal scholars and judges, influences the best design of the law and alters the social value of use of the damages law. Under English law,

¹ Treitel, *International Encyclopaedia of Comparative Law* Vol 7, Contracts in General, Ch16 Remedies for Breach of Contract, p.179.

² "The conclusion of contracts is the basic form to guarantee the economic plans of both sides and to carry out economic accounting", Central Ministry of Trade, *Decision on the Conscientious Conclusion and Strict Execution of Contract* (3rd Oct 1950); this has also been repeatedly stressed by Chinese authors. See Gu Ming, *The Economic Contract Law is a Powerful Tool in Ensuring Implementation of the State Plan*, (1985) 18 Chinese Law and Government 50.

³ For example, see the Regulations on Prohibiting Agricultural Products and Other Materials that are Objects of Planned Purchase or Unified Purchase by the State to Enter the Free Market, promulgated by the state council (predecessor of the people's Congress) on 7th Aug 1957. It said "the entire production of the concerned products is bought by the state. When the farmers want to sell the small part left to them, it also has to be sold to the state. Sales on the market are strictly forbidden."

⁴ Xie Huashi, *The Contract Law of Modern China*, *International Encyclopaedia of Comparative Law*, Tunc, A. (ed.) vol. 7 Chapter 6, p.35, 39.

⁵ Macneil, R.W. *Contract in China: Law, Practice, and Dispute Resolution*, (1986) 38 Stan. L. Rev. 303, 318.

⁶ "The public as well as the private side (state-owned enterprises and private enterprises) must both strictly adhere to ordering contracts and purchase contracts... Disturbing contracts must be really forbidden." People's Daily (8th June 1960), editorial; see also Fang Shaoshen, *Damages for Breach of Contract* (1999), p.148, "it should be advocated to strictly perform the contract, maintain the seriousness of Contract ..."

⁷ Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.99.

the usual function of the judicial remedies is to relieve the plaintiff rather than to punish the defendant.¹ But in China, one of the functions of remedies is said to deter breach happening.² “[Remedies] should prevent the party from speculating and obtaining inappropriate gains through the breach.”³ In recent years a body of literature has appeared advocating the adoption of specific performance as the normal remedy for breach of contract,⁴ which finds its roots in the moral obligation of promises.⁵ In *Jiuyuan Industry and Commerce Trading Co Ltd v Jiacheng Economic Trading (Group) Co Ltd*,⁶ the defendant seller repudiated the contract of sale when the market price was rising dramatically. The claim for specific performance was supported by the court as “he has the ability to perform and cannot refuse so just because the market price is rising.” Chinese scholars are more interested in seeking for the best way to punish a defaulting party. The word *punish* appears in authoritative books of damages law more frequently than English ones. Take liquidated damages for example, besides serving a quasi-compensatory function, it was once seen as a form of security for an obligation.⁷ “If the party in default obtains gains, the court should *punish* it by awarding a certain amount of money as liquidated damages...”(emphasis added)⁸ Typically the breach of contract is regarded as so morally wrong that it deserves an apology. In *Qinzhou City Qinzhou Port Xinan Shipping Agency Co Ltd v Fuzhou Jinfan*

¹ Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.7.

² As noticed, “in China, it seems that the punitive aspect of damages is emphasised more than its compensatory effect.” See Leung, F.F. *The Contract Law of China - Some Characteristics*, (1987) J.B.L. Jan. 65, 71.

³ Wang Liming, *Liability for Breach of Contract* (2nd edn, 2003), p.466; “we should always emphasize the moral origin of Chinese contract law.” Fang Shaoshen, *Damages for Breach of Contract* (1999), p.151.

⁴ Peng Wanlin, *Civil Law Studies*, (2nd edn rev., China Policy and Law University Press, 1999), p.559; Guo Ruiming, *Civil Liabilities* (1991), p.102; Ma Qiang, *New Problems and Case Study of the Law of Obligation* (2002), p.253.

⁵ At the same time, there are some western scholars holding the same view. But their views are grounded on allegation that specific performance is more efficient compared with money damages. See Yorio, E. *In Defense of Money Damages for Breach of Contract*, (1982) 82 Colum. L. Rev. 1365; the literature claiming the opposite, *i.e.* specific performance is inefficient see, *e.g.*, Posner, R. *Economic Analysis of Law* (2nd edn 1977), p.88-90, 95-96; Kronman, *Specific Performance*, (1978) 45 U.Chi.L.Rev. 351.

⁶ As cited by Ma Qiang, *New Problems and Case Study of the Law of Obligation* (2002), p.252.

⁷ Bai Youzhong & Li Zhugo, *Several Questions Concerning Economic Contracts*, (1985) 18 Chinese Law and Government 17.

⁸ Wang Liming, *Liability for Breach of Contract*, (2nd edn 2003), p.531.

Shipping Co.,¹ after the shipowner's failure to carry, the plaintiff brought an action petitioning for an apology in the local media for his breach. As we will see, the development of the Chinese mitigation rule has been very stunted, at least when compared with the position in English law. The aggrieved party is not required by law to *minimise* the loss but only to prevent it from *increasing*. This rule clearly reflects a deliberate legal policy that the law would deter any breach and not lend any sympathy to the defaulting party because to ask an aggrieved party to minimise the loss for defaulter's interests is "morally indefensible". The Chinese legal system is not consistent in terms of its laws and result. Chinese judges have greater latitude to arbitrarily adjudicate cases. This encourages external moral influence on judicial decisions. Another example is that Chinese judges have great difficulty in balancing the limitation regime and innocent victims. This obsession in morality always leads to the arbitrary application of legal rules in particular cases and prompts the judges to loosening the standard to break limitation disregarding the written law.

2.5.2 English contract law and morality

In comparison, although the social utility of performance of contract is appreciated by English legal scholars from a functional perspective,² English law does not seem to concern itself with moral issues. This is not to suggest that moral considerations do not play a useful and beneficial role in English law,³ but English law is not as obsessive about moral issues as Chinese law is. Even though there are philosophical explanations based on individual liberty, or on ideals such as fidelity or truthfulness to justify that a contract should

¹ Beihai Maritime Court (the first trial), 28th May 2004, (2004) HSCZ 012.

² Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, (1980) 89 Yale. L.J. 1261.

³ Typical example is the deliberate wrongdoing. As Oliver Wendell Holmes observed "the very notion of deceit with its overtones of wickedness is drawn from the moral world." Holmes, *The Common Law* (Howe ed.), p. 106; in hearing a fraud case Lord Steyn took account of moral considerations and commented that "I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality." *Smith New Court Securities Ltd. v Scrimgeour Vickers* [1997] A.C. 254 (H.L.) at p. 280.

be binding in all events,¹ it is not as strongly felt and influential as Confucianism in Chinese society. English law is generally believed to have a broader approach of contract law compared with other countries.² Breach of contract will not be deterred on purpose provided the aggrieved party receives full compensation.

2.5.2.1 Economic analysis of law

One explanation³ for such an apparently ethically lax view is the economic analysis of law,⁴ which once provoked a vigorous controversy,⁵ but is now generally accepted as a respectable form of rational analysis of legal theories.⁶ Economic analysis of law borrows technical concepts from the discipline of economics and justifies any conduct which would increase social wealth or social welfare.⁷ It rejects the view of contract as promise, and replaces it with the idea that wealth maximisation provides a firmer basis for contract law.⁸ The aim of crafting legal rules is to maximise the achievement of a

¹ The attempts to explain contract law in terms of the moral obligation of promise. See Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981).

² See Harris and Tallon, *Contract Law Today: Anglo-French Comparisons* (1989), p.293.

³ Alternatively, to explain such a tolerant view on a rather conservative theory: English law has acted on the assumption where things have gone wrong it has usually been owing to some accident that creates impossibility, so that the law makes little provision for cases where they are dishonest or even malicious. Lawson, F.H. *Remedies of English Law* (2nd edn 1980) p.67.

⁴ See Posner, *Economic Analysis of Law* (6th edn 2003), p.118-126.

⁵ Kaplow, L. & Shavell, S. *The Conflict Between Notions of Fairness and the Pareto Principle*, (1999) 1 Am. L. & Econ. Rev. 63; Farber, D.A. *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, (1980) 66 Va. L. Rev. 1443, 1448-55; Macneil, I.R. *Efficient Breach of Contract: Circles in the Sky*, (1982) 68 Va. L. Rev. 947, 950- 53; Friedmann, D. *The Efficient Breach Fallacy*, (1989) 18 J. Legal Stud. 1, 6-7; Warkol, C.S. *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, (1998) 20 Cardozo L. Rev. 321.

⁶ The literature on this subject is vast, and a fair sampling is sufficient. See Smith, *Contract Theory* (2004), Harris, Campbell and Halson, *Remedies in Contract and Tort* (2nd edn 2002), Chs 4 and 11; Menetrez, F. *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, (2000) 47 UCLA L. Rev. 859; Barnes, D.W. *The Anatomy of Contract Damages and Efficient Breach Theory*, (1998) 6 S. Cal. Interdisc. L.J. 397; the current development of economic analysis of law attempts to extend the theory to procedure law. See Posner, R.A. *An Economic Approach to the Law of Evidence*, (1999) 51 Stan. L. Rev. 1477; scholars also have started to explore both the psychological and philosophical foundations of this theory. See Kaplow, L. & Shavell, S. *Fairness versus Welfare*, (2001) 114 Harv. L. Rev. 961.

⁷ Hoffman, D.A. *Can Law and Economics be Both Practical and Principled?* (2002) 53 Ala. L. Rev. 335.

⁸ See Posner, R. *Utilitarianism, Economics, and Legal Theory*, (1979) 8 J. Legal Stud. 103, at 103; cf. Posner, R. *Wealth Maximization Revisited*, (1985) 2 Notre Dame J.L. Ethics & Pub. Pol'y 85, 111, "the economic approach is less rejectable than ethical theories"; they look at law "as a bad man, who cares only for the material consequences." Holmes, O.W. *The Path of the Law*, (1987) 10 Harv. L. Rev. 459, 462; Hart, H.L.A. *Positivism and the Separation of Law and Morals*, (1958) 71 Harv. L. Rev. 593, where he defends the view that law and moral is separable.

particular result and to contribute most to efficiency.¹ Therefore the law defies the moral foundations of law² and suggests that common law legal rules are in fact efficient; and legal rules ought to be efficient.³ The economic analysis of law, though criticised by many people, offers sound explanations for several major contract doctrines, *e.g.* the preference for expectation damages to restitution or reliance interests, the opposition to punitive damages, and the justification for remoteness and mitigation *etc.*

2.5.2.2 The design of English contract law: efficient breach

The design of contract law is not to deter breach but to allow it if such is more economically efficient.⁴ Remedies, on this theory, form the legitimate way out of the contract,⁵ or even a way of inducing the parties to act efficiently. Efficient breach, which maximises individual wealth while simultaneously maximising the wealth of society,⁶ is encouraged. The promisee will receive expectation damages and the promisor can pocket the added profits from the breach as it accords with “Pareto criterion”,⁷ *i.e.* no-one is worse off but at least one of them is better-off. As we will see, remoteness and mitigation

¹ *I.e.* “someone can be made better off without making someone else worse off, *i.e.* maximize the production of efficient outcomes.” Kornhauser, L.A. *An Introduction to the Economic Analysis of Contract Remedies*, (1986) 57 U. Colo. L. Rev. 683, p.687.

² It is cautioned that any view seeing breach immoral is the product of an oversimple view of the moral sentiments. Shavell, S. *Is Breach of Contract Immoral?* The Harvard John M. Olin Discussion Paper Series: http://www.law.harvard.edu/programs/olin_center/

³ “Legal rules should be selected entirely with respect to their effects on the well-being of individuals in society.” Kaplow, L. & Shavell, S. *The Conflict Between Notions of Fairness and the Pareto Principle* (1999) 1 Am. L. & Econ. Rev. 96-7.

⁴ For the classical statement see Posner, *Economic Analysis of law* (1977), p.89,90. “The opportunity cost of completion to the breaching party is the profit he would make from a breach, and if it is greater than his profit from completion, then completion will involve a loss to him. If that loss is greater than the gain to the other party from completion, breach would be value-maximizing and should be encouraged. And because the victim of the breach is made whole for his loss, he is indifferent; hence encouraging breaches in these circumstances will not deter people from entering into contracts in the future.”

⁵ Remedies are seen as exit rules. Medina, B. *Renegotiation, “Efficient Breach” and Adjustment: The Choice of Remedy for Breach of Contract as a Choice of a Contract-Modification Theory*, *Comparative Remedies for Breach of Contract* (Cohen, ed.), p.57; Craswell, R. *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, (1988) 61 S. Cal. L. Rev. 629.

⁶ Barnes, D.W. *The Anatomy of Contract Damages and Efficient Breach Theory*, (1998) S. Cal. Interdisc. L.J. 397; Menetrez, F. *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, (2000) 47 UCLA L. Rev. 859.

⁷ “An allocation of resources is optimal only if no one may be made better off, in his own estimation, without simultaneously making someone else worse off, and a change in the allocation is optimal only if it makes at least one person better off and on one worse off.” This is called “Pareto criterion”. See Schwartz, A. *Re-examination of Non-substantive Unconscionability*, (1977) 63 Va.L.Rev.1053.

principles all lend support to this theory. Thus if a shipowner repudiates the contract, the cargo owner should enter into the market seeking a substitute. He will receive damages for the breach but specific performance will not generally be enforceable.

2.5.3 Some thoughts on both sides

2.5.3.1 Evaluation of English contract law

The idea “keeping promises is intrinsically good” is morally praiseworthy in English society, but English law is not designed to promote this value. Decision-makers in the legal context are not advised to give much independent weight to the notion of promise-keeping,¹ and indeed regard it as inconceivable that the law should try to embrace the whole of what society considers moral behaviour in the market place.² It is felt that the notion of morality is economically counterproductive and legal rules are needed to channel behaviour in a different, economically desirable direction.³ After all, “legal rules should be selected entirely with respect to their effects on the well-being of individuals in society.”⁴ This worship of wealth maximisation, not surprisingly, was criticised by many scholars as not being a demonstrably or a universally correct ethic.⁵ It is fairly achievable for these critics to give contract law a philosophical grounding; for example, the binding force of promises can be based on philosophical theories of individual liberty, or on ideals such as fidelity or truthfulness.⁶ However, in explaining whether a person has to remain faithful to his prior commitment in all events, none of these theories are powerful enough to justify an infinite enforceability of promises, as Chinese philosophical theory does. Viewed in this light, even the most vehement critics are

¹ Hoffman, D.A. *Can Law and Economics be Both Practical and Principled?* (2002) 53 Ala. L. Rev. 335.

² Borrie, G. *Law and Morality in the Market Place* [1987] J.B.L. Nov, 433.

³ See Posner, E. *Law, Economics, and Inefficient Norms*, (1996) 144 U. Pa. L. Rev. 1697.

⁴ Kaplow, L & Shavell, S *The Conflict Between Notions of Fairness and the Pareto Principle* (1999) 1 Am. L. & Econ. Rev. 96-7.

⁵ Dworkin, R.M. *Is Wealth a Value?* (1980) 9 J. Legal Stud. 191.

⁶ Fried, C. *Contract as Promise: A Theory of Contractual Obligation* (1981); Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), (1984) 97 Harv. L. Rev. 1223.

struggling to renounce this efficient breach idea effectively.

Nevertheless, law and morals intersect at many points, and it is not easy to separate the two.¹ Contracts are promises and thus must have some moral contents. Aware of this serious problem, *i.e.* lacking of obvious moral factor, many scholars attempt to justify their economic analysis by connecting common economic techniques to plausible moral principles, and elevating wealth maximisation to a principled ethical ground.² Even so, to ask a judge to look at a contract without any consideration for morality is intuitively wrong and dangerously deviates from the role of judge in the justice system that the public recognise. It seems incompatible for judges to respect the integrity, impartiality and fairness of the laws they have sworn to implement, while simultaneously recognising and glorifying efficient breach.³ In fact, few English judges have openly embraced this theory and they often write in terms of equity instead of economic terms. Also the glorification of economic rationale and removal of moral considerations signal a first retreat towards amorality of the law, which might lead to further drastically immoral behavior.

The second trouble of the economic theory is that it fails to take into account the practical inability of the theory.⁴ The theory is based on many assumptions. *E.g.* the innocent party can be fully compensated.⁵ Or can he? Sometimes he can only be compensated after pursuing costly litigation. This will cut down the full compensation he is entitled to; if the proof of loss is difficult,⁶ he

¹ D'Entreves, *Natural Law* (2nd edn 1952), at p. 116; *cf.* Hart, H.L.A. *Positivism and the Separation of Law and Morals*, (1958) 71 Harv. L. Rev. 593.

² Adler, M.D. & Posner, E.A. *Rethinking Cost-Benefit Analysis*, (1999) 109 Yale L.J. 165; Craswell, R. *Contract Law, Default Rules, and the Philosophy of Promising*, (1989) 88 Mich. L. Rev. 489; this view was criticised by Dworkin, D.M. *Is Wealth a Value?*, (1980) 9 J. Legal Stud. 191.

³ Just imagine the Shylock look-alike Themis (the Greek goddess of justice and law, representations of justice) with a calculator and a stack of money on each hand instead of her scale of justice and sword.

⁴ These critics include Farber, D.A. *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, (1980) 66 Va. L. Rev. 1443; Linzer, P. *Amorality of Contract Remedies: Efficiency, Equity, and the Second Restatement*, (1981) 81 Colum. L. Rev. 111.

⁵ As observed, there must be two ideals coexist in law so that the ideal of compensation is achievable. See Cooter, R. *Hand Rule Damages For Incompensable Losses* (2003) 40 San Diego L. Rev. 1097, 1100.

⁶ These cases include cases related to consumer surplus. See Harris, Ogus and Phillips,

might only recover less or even nominal damages¹; sometimes a breach causes him to lose a chance, but damages will never be assessed at the monetary value of the chance in the mathematical accuracy;² not to say, the time and energy wasted in the negotiation and the anger or anxiety caused by a breach will never be compensated in monetary terms. These practical concerns compromise the efficient breach theory.³ Therefore its function should not be exaggerated. The theory, for the time being, appears destined to remain an analytical exercise of legal theory rather than a judicially adopted fact.⁴ Even so, for the simple fact that it gives some damages law principles a rational reasoning, it could possibly coexist with theory of morality for some time.⁵

2.5.3.2 Evaluation of Chinese law

Chinese society's investment in imbuing moral rules is more substantial compared with western countries. In any such society there will always be an inbuilt pressure towards improving the law morally.⁶ Chinese Confucian society takes it as a given that promises are morally binding. This Confucianism provides a definite ground to bind a promisor's performance in all events. Thus Chinese law of remedies and law of damages are branded with such influence. Legal

Contract Remedies and the Consumer Surplus (1979) 95 LQR 581; or loss of profits for new business. See Smith, T.R. *Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases*, (1987) 55 A.L.R. 507.

¹ Typically see an American arbitration case *The Trade Yonder SMA Award No. 2435* (Arb. N.Y. 1987), in which the ship was falsely described as having "clear and unobstructed" holds, a misdescription that the charterer contended preventing it from fully using the ship as intended. However, he failed in his claims as he could not prove what earnings it had lost as a result of the breach.

² See *Chaplin v Hicks* [1911] 2 KB 786, where a candidate was rejected wrongly in beauty competition and lost a chance to win; *Professor Gruvel (Owners) v. The Barry Graving Dock and Engineering Company, Ltd.* (1926) 25 Ll. L. Rep. 434, where the claimant clearly lost future business opportunities.

³ The problem of incompensability also dogs tort law. See Ayal, A. *Can We Compensate for Incompensable Harms*, (2003) 40 San Diego L. Rev. 1123.

⁴ Aiken, J.H. *Striving to Teach Justice, Fairness, and Morality*, (1997) 4 Clinical L. Rev. 1, 49.

⁵ *E.g.*, in respect of expectation damages, it is required as such from moral obligation of the promisor so as to put the promisee in a position in which he would have been had the promisor fulfilled his promise. Fried, C. *Contract as Promise: A Theory of Contractual Obligation* (1981), p.17-21; but it can also be defended on economic grounds. See, Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, (1970) 24 Rutgers L.Rev. 273, 284-92.

⁶ Some lamented the traditional attitude of worshipping rites is changing the law. Du Wanhua, *The Dualistic Social Structure and Jurisprudential Reflections Thereon*, (1996) 1 Mod. L. Sci. 5; Chen Duanhong, *Confrontation: The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation*, (1995) 4 Peking U. L.J. 1.

rules such as causation, remoteness and mitigation rule are more or less modified accordingly to accommodate the general idea of morality and justice.

The problem with the Chinese position is, firstly, those philosophical ideas have seemingly little relevance to the law of remedies for breach and the conditions under which the promisor is excused to perform. The theory of efficient breach offers sound explanation for many Chinese contract law doctrines as well as under English law. Even though the morality is to win their theoretical arguments and is accepted by scholars, their victory has not been overwhelmingly reflected in courts. Because Chinese law recognises *restitutio in integrum*, damages are mainly assessed on the expectation interests of the aggrieved party rather than the gain of the defaulting party, it is practically possible that a defaulting party could be better off unpunished after a deliberate breach. Therefore the remedy for breach prescribed by Chinese law fails to prohibit moral wrongdoing. This will inevitably lead to the one better-off and no one worse-off scenario, which makes the breach of contract a harmless wrongdoing in practice and turns on a green light to efficient breach. In that sense, the moral element can be eliminated here.¹ If Chinese legal theory boasts of its moral fibre all the time yet in effect fails to implement it, the general public will soon realise its hypocrisy and begin to lose respect for the law.

The second problem is that law can sometimes be counter-productive in unduly hindering some trading activity, and law can bring with it an increase in bureaucracy.² A market economy expects optimal reallocation of resources. Therefore law should be more or less independent of morality. It is not sensible to contemplate the law taking over the whole area of conduct in the market place. A more realistic position can actually promote proper functioning of the

¹ This is a just a simplified assumption as it disregards the influence on judges. As a matter of fact it is very likely Chinese judges implement and interpret contract law in a moral way so that the defaulters incurs heavier liability than the law on paper requires.

² Borrie, G. *Law and Morality in the Market Place*, [1987] J.B.L. Nov, 433.

market mechanism. For example, Chinese law does not have a general principle requiring the aggrieved party to buy in the substitute. If the defaulting party's wrong is "morally indefensible", does it really help for law to lighten the effect of mitigation rule in order to deter it? Isn't it more efficient for the aggrieved party to mitigate so that he can still perform his subcontract? In the author's view, if there are excessive laws underpinning moral standards, there is a real danger that the law is followed more in the letter than in the spirit and the freedom of a market economy, seen as indispensable, is in danger of being suffocated.

2.5.4 Conclusion

This thesis does not address the concerns about which approach is preferable. Instead, the author only suggests that economic analysis is one way to shape contract law, which remains relevant even when a conventional approach to contract law is preferred by the Chinese. In both countries, some similar problems exist, *i.e.* how to strike a balance so that law can be both morally principled and feasible to apply in practice. Moreover, in what circumstances will the connection of law with morality be a necessary one? Both try to give the answer yet neither solves the problem impeccably. These questions will continue to occupy the attention of philosophers and legal scholars in both countries, as will be seen in the following chapters. This part intends to shed light on the powerful influence that the historically evolved morality imposes on the development of a legal system and illustrate how it ends up with today's diversity, which is anything but a coincidence. This comparative study clearly shows that such a historical and philosophical causal connection exists, though not easily traceable, and a seemingly slight difference between two countries could find its origin in philosophical ideas dominant in each society.¹ This will no doubt promote mutual

¹ It is said since human beings live in a world created by their culture, people from different cultures inhabit different worlds, to compare different legal systems is to compare different "world versions". Caterina, R. *Comparative Law and the Cognitive Revolution*, (2004) 78 Tul. L. Rev. 1501, 1502.

understanding.

2.6 Particular issues relating to the carriage by sea

The law relating to the carriage of goods by sea is often regarded as one of the most difficult subjects in the province of shipping law.¹ A contract for the carriage of goods usually takes the form of bills of lading, charterparties or sea waybills. The shipowner may employ his vessel in the liner trade, in which case the resulting contract of carriage will usually take the form of bills of lading/sea waybill. On the other hand, where the shipowner agrees to make available the entire or part of carrying capacity of his vessel for a particular voyage or for a specified period of time, it will take the form of charterparty. If it is chartered for a voyage, it is called a voyage charter, which contains some unique clauses, *e.g.*, clauses indicating the carrying capacity of the ship², laytime³, demurrage⁴ and so on. If the vessel is chartered for a specified period of time, then it is a time charterparty, in which the information of registered tonnage, class, speed capability, fuel consumption *etc.* will be described at length.⁵ There are also clauses concerning signing bills of lading⁶, off-hire⁷ and so on. The charterparty and the bill of lading contract are not mutually exclusive, since frequently the party chartering a vessel for a specific period of time may himself operate it as a general carrier or sublet it to a sub-charterer.⁸ Moreover, there are a number of hybrids besides the two most significant contractual forms, for example the trip charter on time basis, a charter concluded for a specific voyage and hire will be paid for the period of voyage.⁹ Another one is the consecutive voyage charter, a charter concluded

¹ Gaskell, Debattista and Swatton, *Shipping Law* (8th edn 1987), p.165.

² See Gencon 1976 Box 7 "Deadweight cargo carrying capacity in tons (abt.)"; Baltimore "Description of Vessel".

³ See Gencon 1976 cl. 6 "Laytime"; Baltimore "Laydays".

⁴ See Gencon 1976 cl. 7 "Demurrage"; Baltimore "Discharge terms".

⁵ See NYPE 93 "Description of vessel"; Baltimore first paragraph; Shelltime 4 1984 cl. 1 "Description and condition of vessel".

⁶ See NYPE 93 art 30 "Bills of lading"; Baltimore cl.9; Shelltime 4 1984 cl.13 "Bills of lading".

⁷ See NYPE 93 cl. 17 "Off hire"; Baltimore cl.11; Shelltime 4 1984 cl.21 "Off-hire".

⁸ See Asbatankvoy cl.25 "Sublet".

⁹ *E.g.*, *The Eugenia* [1964] 2 QB 226.

for several consecutive voyages.¹ Standard forms of charterparty are widely used. Many standard charterparties are often devised for particular interests.² In the context of bills of lading, considerable judicial effort continues to be devoted to package limitation and cargo valuation. Damage issues arising under charterparties and private contracts of affreightment focus on the calculation and recoverability of consequential damages and business losses.³ All of these points will be discussed further on in this thesis.

2.6.1 The concept of contract of affreightment (COA)

“Contract of affreightment” can have more than one meaning. It is used by English scholars⁴ and judges⁵ to refer to the contract of carriage of goods by sea, as contained in (say) the bill of lading or charterparty. But in *The Starsin*⁶ Lord Hobhouse made it clear that not all contracts for carriage were *contracts of affreightment*.⁷ The latter is recognised as a contract covering a specified, homogeneous cargo of large quantities through certain ports within long periods and several voyages.⁸ It may also be referred to as a freight contract or tonnage agreement.⁹ The Scandinavian Maritime Code 1994 contains specific provisions relating to it and names it quantity contract.¹⁰ To avoid confusion, the first meaning of COA should be avoided in the author’s opinion.

¹ *E.g.*, *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529.

² *E.g.* Time charter Shelltime is produced for oil tanker owner’s needs and voyage charter Baltimore is for the carriage of grain.

³ Vafidis, M.P. *Remedies for Breach of the Contract of Carriage*, (1991) 3 U.S.F. Mar. L.J. 77, 79.

⁴ “The contract of affreightment: the document evidencing the terms of carriage between a shipper and a carrier.” Clark, M.(ed.) *Glossary of Marine Insurance and Shipping Terms*, (2001) 14 U.S.F. Mar. L.J. 305, 339; Wilson, J.F. *Carriage of Goods by Sea* (6th edn 2008), p.3.

⁵ See *The Joanna V* [2003] 2 Lloyd's Rep 617 at p.625 “the contract of affreightment” was referred to a bill of lading contract; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd The Great Peace* [2002] 2 Lloyd's Rep 653, at p.666, “..contracts of affreightment evidenced by bills of lading...”

⁶ [2003] 1 Lloyd's Rep 571.

⁷ *Ibid.*, at 598.

⁸ Gorton and Ihre, *Contract of Affreightment* (1985), p.3; see also *Sacor Maritima SA v. Repsol Petroleo South Africa* [1998] 1 Lloyd's Rep. 518.

⁹ Aschehourg, *Introduction to Maritime Law the Scandinavian Perspective* (1998), p.460; Interoa 80 is the common standard form of COA. The detail see Bonnick, S. *Gram on Chartering Documents* (2nd edn 1988) Chapter 5.

¹⁰ S 302 14:42 to s 371 14:51.

2.6.2 The basis for claims for damages in the carriage of goods by sea

For damages arising from the carriage of goods the law involved is primarily contractual disputes under charterparties or bills of lading. But it could also be based in tort,¹ *e.g.*, negligence for want of due diligence on the part of shipowner,² conversion³ or bailment,⁴ particularly when the claimant is not the holder of the bill of lading.⁵ When the claimant has parallel claims against the carrier in tort and in contract, the suit in tort will be limited by the exceptions and limitations in contract.⁶ In *Pyrene Company Ltd v Scindia Steam Navigation Company Ltd*⁷ the liability of the shipowner for negligence was held to be limited by the terms under carriage contract which included definition clauses, obligations clauses and so on.⁸ The object of such a system is to ensure that a cargo-owner is no better off suing in tort than he would be if he sues in contract.⁹ This is also accepted by the Hague/Visby Rules.¹⁰ Chinese law also

¹ *Brandt & Co. and F. W. Vogel & Co. v. River Plate Steam Navigation Company, Ltd* (1923-24) 17 Ll. L. Rep. 142 at 145, *per* Scrutton L.J. "If he had property in the goods ... he could sue the shipowners in tort..."; *cf. Notara v. Henderson* (1872) L.R. 7 Q.B 225, *per* Willes J. at p.235.

² In *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, the plywood was stowed on deck and damaged by the rainwater. There was an express term of the contract of carriage that the plywood should be carried under deck and therefore the defendants were in breach of this agreement. Alternatively there is no question that the defendants were negligent in stowing the plywood on deck where it would be exposed to the weather; *cf. The Amstelslot* [1963] 2 Lloyd's Rep. 223, *per* Lord Devlin at p. 235; *Homburg Houtimport BV v Agrosin Private Ltd and Others; Raymond & Reid and Others v. King Line, Ltd* [1939] 64 Ll.L.Rep. 254; *Scruttons, Ltd v. Midland Silicones Ltd* [1961] 2 Lloyd's Rep 365 (H.L.).

³ *The Sagona* [1984] 1 Lloyd's Rep 194, *per* Staughton J. at 350; *United Africa Co., Ltd v. Saka Owoade* [1954] 2 Lloyd's Rep 607; *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266; *Batut v. Hartley* (1872) L.R. 7 Q.B.594; *Hiort v. Bott* (1874) L.R.9 Ex.86.

⁴ Baughen, *Shipping law* (3rd edn 2004).p.47.

⁵ *The Irene's Success* [1981] 2 Lloyd's Rep. 635; Tettenborn, A.M. *The Carrier and the Non-Ownning Consignee - An Inconsequential Immunity*, [1987] J.B.L.12; another historical reason was he did not have any right of suit by virtue of s. 1 of the Bills of Lading Act, 1855. But now the problematic act has been repealed by the COGSA 1992. See *The Aliakmon* [1986] 2 Lloyd's Rep. 1; Bassindale, J. *Title to Sue under Bills of Lading: The Carriage of Goods by Sea Act 1992*, (1992) 7(10) J.I.B.L.414.

⁶ See *Lister v. Romford Ice and Cold Storage Co. Ltd.*, [1956] 2 Lloyd's Rep. 505 at 522 and 587 *per* Lord Radcliffe; *The Captain Gregos* [1990] 1 Lloyd's Rep. 310; *Tai Hing v Liu Chong Hing Bank* [1986] A.C 80; *Clement Shaw & Co Ltd v. Joseph C. Mount & Co* [1982] Ll L Rep 995; *Air and Skin Trading Co. Ltd v. Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443; *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402; *Nelson Line v. Nelson* [1908] A.C. 16.

⁷ [1954] 1 Lloyd's Rep. 321.

⁸ See also *The Captain Gregos* [1990] 1 Lloyd's Rep. 310; *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*, (1923) 17 Ll.L.Rep. 142.

⁹ Boyd, S.C. *Scrutton on Charterparties and Bills of Lading* (20th edn 1996), p. 458.

¹⁰ Art. IV *bis* 1. "The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort." Art. IV *bis* 2. "If such an

includes a similar article into the CMC.¹ In many shipping cases the recovery of the claimant does not differ whether he submitted the cases in contract or in tort,² although it seems impossible to eliminate all the differences.³ In China, a suit can be brought on either contract or tort grounds.⁴ But bailment, negligence and conversion are not Chinese legal language and they are all called tort. Further, in China delivery without bill of lading is now generally treated as a breach of carriage contract rather than tort.⁵ Litigants should be reminded that the time bar is now one year instead of two years.⁶

2.6.3 Unique features of damages in the carriage of goods by sea⁷

Damages law is a large topic. No doubt all those general principles of damages law are applicable in shipping cases. However, shipping law has its own distinct features which make damages thereof worth an independent topic. The particular features of damages in the carriage of goods by sea are as follows:

1. Disputes are often more complicated.

Shipping law has earned a reputation for fiendish complexity.⁸

action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.”

¹ Art.58 of the CMC provides: “The defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier ...whether the claimant is a party to the contract or whether the action is founded in contract or in tort.”

² See *Dampskibsselskabet AF 1912 A/S v Motis Exports Ltd* [2000] 1 Lloyd's Rep. 211; *Center Optical (Hong Kong) Ltd v Jardine Transport Services (China) Ltd*[2001] 2 Lloyd's Rep. 678 (CFI (HK)); *The Antwerpen* [1994] 1 Lloyd's Rep. 213 (CA (NSW)).

³ Transshipment costs incurred as a result of the shipowner's breach were not recoverable in tort, but could be recovered in contract. *The Gudermes* [1991] 1 Lloyd's Rep. 456 Hirst J. (obiter).

⁴ See CMC art.71.

⁵ Si Yuzhuo, *A Review on the Controversy about Character of Right in Rem of Bill of Lading from the Aspect of Delivery of Cargo without Bills of Lading*, (2005) 16 Annual of China Maritime Law 1.

⁶ Delivery without bills of lading was regarded as tort. *Xi'an Yusheng International Trading Co Ltd v Guangzhou Huasheng Freight Co Ltd*, *Guangzhou Maritime Court*, (2001) GHFCZ 1, time bar was 2 years; *Zhejiang Tuhsu Import and Export Co v International Freightbridge (China) Group*, The Supreme Court, (1997) JTZ 1, it was held such a claim should be based in contract and therefore 1 year time bar applied.

⁷ See generally Rue, T.S. *The Uniqueness of Admiralty and Maritime Law*, (2005) 79 Tul. L. Rev. 1127. The article lists the peculiarities of maritime law from the perspective of American law, but it applies to all other countries.

⁸ Typically see an American case *Biehl & Co. v Apollonia Holding, Inc.*, 693 F. Supp. 457

The businessman in shipping circles runs the multiplicity of risks to which goods travelling at sea are exposed. There is the complicated process of loading and discharging the vessel, carrying the cargo, signing bills of lading, sub-letting the vessel, *etc.* which give rise to numerous legal problems related to the allocation of risk, limitations and exceptions that hardly met with in land transport.¹ It appeals to academics as well for its intricacy. Many countries including China provide specialised shipping law to cope with unique shipping cases.²

2. Mandatory application of conventions or national legislation.

Maritime law has a history of harmonisation.³ There are many international conventions on shipping matters. The Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the CMI Draft Instrument on Transport Law⁴ are the mostly dealt with in the carriage of goods.⁵ In England, the COGSA 1971 provides that the Hague/Visby Rules shall have the force of law.⁶ China isn't a signatory of any of these conventions. However it has copied many provisions from the Hague/Visby Rules. Neither the UK nor China became a party to the Hamburg Rules, nor is it thought that they have any present intention of doing so given their leading position in shipping.⁷ However, China has incorporated some provisions of the

(E.D. La. 1988) where the time charterer failed to pay hire, the shipper failed to pay freight, a shipowner changed the discharge terms in the bills of lading, the discharging stevedore was not paid and the shipper fraudulently altered the bills of lading. The question was who caused the ship's delay?

¹ Other procedural issues on the jurisdiction, applicable law, arrest of the vessel and so on are equally as complicated and important as the substantive law.

² *E.g.*, the time bar for cargo claims against the carrier is one year according to art. 257 of CMC while art. 135 of General Principles of the Civil Law provides two years for the protection of other civil rights.

³ Manca, P. *International Maritime Law*, vol.1 (1970), p.11.

⁴ The CMI Final Draft Instrument on Issues of Transport Law dated December 10, 2001 available at www.comitemaritime.org/singapore2/singafter/issues/cmraft.pdf

⁵ For more detailed history of these conventions see Diamond, *The Hague-Visby Rules*, [1978] L.M.C.L.Q.225; Carver *on Bills of Lading* (2005), p.446; O'Hare, C.W. *Cargo Dispute Resolution and the Hamburg Rules*, (1980) 29 I.C.L.Q. 2. 219; Yancey, B.W. *The Carriage of Goods: Hague, COGSA, Visby and Hamburg*, (1983) 57 Tul. L. Rev. 1238; Chandler, *A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules*, (1984) 15 J. Mar. L. & Com. 233.

⁶ Art.1(2).

⁷ Lee, E.S. *The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules*, (2002) 15 Transnat'l Law. 241, the author suspects whether the benefits of the Hamburg Rules is worth changing the whole system.

Hamburg Rules into its CMC.¹ In both countries, the carriage contract must contain terms no less favourable to the cargo interests than those laid down in the law.²

3. Exemptions of the carrier from liability for negligence

An important rule, which sets shipping apart from all other branches of industry and commerce is that according to art. Art. IV rule 2 of the Hague-Visby Rules,³ a shipowner is entitled to relieve his liability for the loss or damage caused by his negligence.⁴ China has an equivalent article,⁵ with a semantic but not substantial difference.⁶ Its uniqueness lies in the fact that no equivalent is to be found in any other transport conventions.⁷ Its justification is historical.⁸ Not surprisingly, it is strongly criticised by cargo interests⁹ and as a result the successor Hamburg Rules abolished exemptions of navigational or management error but still kept the fire exemption and package limitation as a compromise.

¹ For example provisions on the delay of delivery. See art. 50 of the CMC.

² Art. III rule 8 of the Hague and Hague Visby Rules provides “any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect”; art.23 (1) of the Hamburg Rules provides “any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage of goods by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this convention.”; art.44 of the CMC “any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this Chapter shall be null and void...”

³ “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; Fire, unless caused by the actual fault or privity of the carrier...”

⁴ *Gosse Miller Ltd v Canadian Gout Merchant Marine Ltd* [1929] A.C. 223.

⁵ Art.51 (1) of the CMC “The carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier’s responsibilities arising or resulting from any of the following causes: (1) Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship; (2) Fire, unless caused by the actual fault of the carrier; ...”

⁶ It slightly differs from the former in two aspects: First it deleted “nor the ship” from the subject. This is because action *in rem* is not accepted in Chinese law. Although according to art. 250 of the Maritime Special Procedure Law, application to arrest the ship will be allowed when the defendant is unknown to the arresting party, the action is theoretically brought against the owners rather than the offending vessel. Secondly, it replaced the “Act, neglect, or default” and “fault or privity” with a single word “fault”. But this is generally not of substantial importance.

⁷ Wilson, J.F. *Carriage of Goods by Sea* (6th edn 2008),p.198.

⁸ Its origin appeared in the (United States) Harter Act 1893, Sec 3.

⁹ Zhao Yuelin & Hu Zhengliang, *A Study on Whether the Nautical Fault Exemption Should be Eliminated in CMC*, [2003] Journal of Dalian Maritime University (Social Science Edition) no.1 2; Yu Jinbing, *A Discussion on Carrier's Navigation Fault under Maritime Law*, (2004) 10 Shipping Management 12.

4. Package limitation and global limitation

Even when the liability is beyond any doubt, damages may still be restricted by the package and global limitation. If the carrier is responsible for the loss of or damage to the goods, the maximum amount which the carrier is bound to pay, if the Hague/Visby Rules apply, is 666.7 SDR *per* package or unit or two SDR *per* kilo in gross weight carried.¹ This is exactly the same in China.² Further, the damages may also be restricted by gross limitation. A shipowner can limit his liability according to the size of his ship. English law has applied the 1976 Convention on Limitation of Liability of Owners of Seagoing Ships. As usual China didn't ratify it but has absorbed most provisions of the 1976 Convention into its CMC.³

¹ Art. IV 5 (a) of the Hague-Visby Rules.

² Art. 56 of the CMC.

³ Art.204-220 (Chapter 11) of the CMC.

Chapter 3 Causation

3.1 Introduction

In so far as a legal system allows compensatory aims to be achieved, some limitations must be placed on the recoverability of loss to avoid too great a burden upon defendants. The defining and refining of these limits by the courts over the years have produced the most difficult and hence some of the most interesting problems in the whole field of damages.¹ Although it is safe to say that various legal systems are unanimous in the commonly held objects of damages, namely *restitutio in integrum*, the techniques they use are different. Prof. Treitel lists six such principal techniques including fault, foreseeability, causation, judicial discretion, mitigation and certainty,² while Prof. Burrows summarises five which are remoteness rule, intervening cause, mitigation, contributory negligence and impecuniosity.³ In addition, procedural reasons also play an important role in Chinese law. Overall causation is one of the important methods used to control recoverability and measurement of damages.

Since all of above function to prevent damages from becoming entirely open-ended and unpredictable, it is not at all surprising that the same result may often be reached by different routes – that is, by applying any one of them.⁴ Again, as often as not the distinction between intervening cause and remoteness is not clearly drawn,⁵ since both principles are essentially concerned with the same aim.⁶

¹ *McGregor on Damages*, p.75.

² Treitel, *Remedies for Breach of Contract* (1988), p.143.

³ Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.36.

⁴ “The three questions, duty, causation and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same problem...” *Roe v Minister of Health* [1954] 2 Q.B. 66 (C.A.), *per* Denning L.J. at 85; *cf.* *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), Hart J. said though he was “doing the best I can to keep afloat in the murky pool of mitigation, causation and remoteness ... It seems to me that, whether one expresses the matter in terms of mitigation of damage or causation” the reasonable answer should be the same.

⁵ For example McGregor takes the view that the problem of causation falls essentially within the issue of remoteness. See *McGregor on Damages*, p.98.

⁶ “The circumlocution whether posed in terms of foreseeability, duty, proximate cause, remoteness and mitigation is for practical reasons.” *Compania Financiera “Soleada” SA v*

Judges sometimes rule out a claim without clarifying whether it is “too remote” or “not proximate”, or basing on both.¹ Take, for example, the facts of one English case² where a shipowners' failure to obey the charterer's instructions caused the charterers grievous loss, but only because of a bizarre and little-known local custom in the oil trade. The dismissal of the charterers' claim for this loss could equally well be based on either causation or remoteness, since the local custom was the cause of the damage and this local custom was not reasonably foreseeable to the parties. Sometimes cases with insufficient causal link are decided on other principles, such as *volenti non fit injuria* or failure to mitigate.³ In this thesis it has been considered helpful to differentiate these terms,⁴ as each has a different focus of attention and the principles applied to each are not the same.⁵

A causal nexus provokes complicated philosophical discussion.⁶ But the legal and philosophical notions of causation should be distinguished in that the law is not primarily concerned with explanation but rather with fixing the limits of responsibility.⁷ If a tanker explodes at sea, both oxygen and oil are the cause of the accident in the scientific sense but they will not be treated as the legal cause in courts. Lastly the reader should be reminded that causation is a topic that straddles both liability and damages and that these two are difficult to separate;⁸ in this chapter its separation

Hamoor Tanker Corporation [1981] 1 WLR 274 at 284F *per* Templeman L.J. “It is all a question of expediency... of fair judgment, always keeping in mind the fact that we endeavour to make a rule in each case that will be practical and in keeping with the general understanding of mankind.” *Palsgraf v. Long Island R. Co.* 248 N.Y. 339 at 354 (N.Y. 1928) *per* Andrews J. (dissenting); see also *the Liesbosch* (1933) 45 Ll. L. Rep. 123.

¹ *The Eurys* [1998] 1 Lloyd's Rep. 351 (C.A.).

² *The Eurys*, *ibid.*

³ Tettenborn, *The Law of Damages*, p.166.

⁴ “Theorists, who are concerned to understand rather than to manipulate the principles of legal responsibility, must keep them separate” Hart and Honore, *Causation in the Law* (2nd edn 1995), p.132.

⁵ Remoteness is not regarded as a test of causation but as an additional requirement to it in English law. See Tettenborn, *The Law of Damages*, p.127-152; causation issues arise before the assessment of damages and remoteness issues. See *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.* [1987] 1 W.L.R. 916, 924-925.

⁶ To find a thorough discussion of philosophical analyses of causal concepts, see *Causation in the Law*, p.2-3, 9-22.

⁷ *Ibid.*, p.432.

⁸ “Often the relationship of duty and legal cause is something akin to a seesaw”, see Stapleton, J. *Legal Cause: Cause-In-Fact and the Scope of Liability for Consequence*, 54 Vand. L. Rev. 941; *cf.* Wright, R.W. *Causation, Responsibility, Risk, Probability, Naked*

is considered not necessary.

3.2 Definition of causation, English-style

The legal notion of causation at common law is rather simple compared to the one which takes effect in China. In order to establish a right to damages the claimant must show that as a matter of fact the breach of contract or a certain tortious conduct is a dominant cause of the harm and that they play a necessary part in the chain of events bringing about the loss.¹ The event which merely gives the opportunity for the loss does not count.

In deciding whether or not the alleged causal nexus by the claimant is legally recognised, the verbal formula referring to causal connection varies. "Real cause"², "material cause"³, "effective cause"⁴ and "dominant cause"⁵ are all used and their respective meanings are seldom differentiated and of no real substance. "Proximate cause"⁶ is commonly seen in common law⁷ and also appears in statutes⁸. It must be a material contributory cause for the concerned loss. It is irrelevant with sequence. The event which is closest to any particular point of time may be excluded because it might be some earlier event that leads inevitably to a fatal result.⁹

Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, (1988)73 Iowa L. Rev. 1001,1011. For Chinese literature see Wei Zhenying, *Causation as a Condition for Establishing Civil Liability* (1987) 3 Beking University Journal (Social Science) 224.

¹ See *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd.* [1992] 1 A.C. 233; in the face of modern industrial damage, the orthodox view is furthered by some scholars holding that the liability will establish and damages will be eligible whenever the wrongdoing increases the risk of harm occurring, whether or not it eventually does. See Schroeder, C.H. *Corrective Justice and Liability for Increasing Risks*, (1990) 37 UCLA L. Rev. 439. This view is practicable for at best a small subclass of cases, such as long-latency toxic torts, but has problems explaining other cases. See Simons, K.W. *Corrective Justice and Liability for Risk-Creation: A Comment*, (1990) 38 UCLA L. Rev. 113, 114.

² See *Munro, Brice & Co v F W Marten-Munro, Brice & Co v The Crown*, [1920] 2 Ll.L.Rep. 2.

³ See an American case *The Irish Spruce* [1976] 1 Lloyd's Rep 63.

⁴ *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255.

⁵ *The Christel Vinnen* (1924) 19 Ll. L. Rep. 272 (C.A.).

⁶ Which might also be related to the remoteness rule sometimes.

⁷ *Causation in the Law*, p.86.

⁸ The Marine Insurance Act 1900, section 55(1).

⁹ In *the Clan Matheson* 34 Ll.L.Rep. 1, although the collision was closer in time than the earlier breakdown of the steering gear, the House of Lords held the latter was the legal cause.

The burden of proof of causation is *prima facie* on the claimant,¹ which is not overly easy sometimes, because in one sense everything is connected and thus causation establishes, in another nothing. In the bewilderingly complex or freakish combination of circumstances which often confront the courts, particularly in shipping cases,² a great degree of discretion is imposed on English judges while only few rules are generalised, one of which is the “but for” test.³

3.3 The “but for” test

The “but for” test is the *prima facie* test of causation.⁴ The claimant must establish that but for the tortious act or breach of contract the concerned loss would not have occurred.⁵ The “but for” test is mainly useful in eliminating possible causes from further consideration.⁶ For example in the carriage of dangerous cargo, if the shipowner negligently damages the cargo, *e.g.* breaks the drum during discharging, the “but for” test shows the damage is not caused by its dangerous nature, but the shipowner’s negligence.⁷ If a given loss is wholly the product of some pre-existing conditions affecting the claimant, the “but for” test helps to spot it. So the carrier was not liable for damage to the vessel caused by a collision if the same would had happened anyway in heavy weather it encountered later.⁸

Nevertheless, the “but for” test could lead to injustice if misused.⁹ For example, it cannot be used to solve the problem where

¹ Hay, B.L. *Allocating the Burden of Proof*, (1997) 72 Ind. L.J. 651.

² Typically see an American case *Biehl & Co. v. Apollonia Holding, Inc.*, 693 F. Supp. 457 (E.D. La. 1988) where the time charterer failed to pay hire, the shipper failed to pay freight, a shipowner changed the discharge terms in the bills of lading, the discharging stevedore was not paid and the shipper fraudulently altered the bills of lading. The question was, who caused the ship’s delay?

³ There is an argument in American literature that Necessary Element of a Sufficient Set (NESS) test is the only plausible definition of causation. See Wright, R.W. *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, (1988) 73 Iowa L. Rev. 1001, 1018.

⁴ Tettenborn, *The Law of Damages*, 152.

⁵ For example, in *CV Scheepvaartonderneming Flintermar v Sea Malta Company Ltd* [2005] EWCA Civ 17, Rix L.J. established the causation by saying “but for the inexplicable act the Chief Officer... would not have suffered any injury”.

⁶ Harris, R. *Remedies in Contract & Tort* (2nd edn 2002), p.298.

⁷ *Cf. The Mahia* [1955] 1 Lloyd’s Rep. 264 Sup Ct (Que).

⁸ *The Carslogie* [1951] 2 Lloyd’s Rep 441 (H.L.).

⁹ See Hazelwood and Tettenborn, *Marsden on Collisions at Sea* (13th edn Sweet&Maxwell 118

each of two or more causes could on its own have produced the harmful result, because its application to each event would produce the result that neither is a cause of the loss, which offends common sense.¹ For example, the “but for” test cannot be a good argument if the vessel ships two dangerous cargoes that simultaneously explode due to a collision but each is capable of destroying the whole vessel. Secondly, even assuming the loss would not have happened but for the defendant’s breach or conduct, certain intervening circumstances will break the chain of causation and thus prevent the defendant being liable for the loss. In this sense, a departure from the “but for” test serves to extend the scope of a defendant’s liability.² Thirdly, the “but for” test is very speculative and could confuse the real question.³ For example, in *The Estrella*,⁴ the plaintiff’s vessel wrongly proceeded south in a northbound traffic lane. It came into collision with the defendant’s ship. Apparently without the plaintiff’s fault in navigation, the collision would not happen. However the court held that navigating in the wrong direction itself was not a cause of the collision. The true cause was the failure to maintain course and speed by both.

3.4 Competing causes

A carrier’s obligations include a warranty of seaworthiness, care of the cargo and reasonable dispatch.⁵ If the court finds a causal connection between the loss or damage and unseaworthiness,⁶ lack

2003), p.508; typical example of applying conventional principles of but for test which brings injustice see *Chester v Afshar* [2005] 1 A.C. 134 (H.L.), where “but for” test was discarded. In that case, a surgeon was held liable for his failure to warn his patient of the small risk of an operation even though whether he had notified her or not, he did not have any negligence during the operation and did not increase the risk.

¹ Wright, R.W. *Causation in Tort Law*, (1985) 73 Cal. L. Rev. 1735 at 1775.

² McGregor, H. *McGregor on Damages* (17th edn 2003), p.100.

³ As Leon Green put it, referring to the but-for test, “tests of this character have the same vice as any ‘if,’ or any analogy. They take the eye off the ball.” Green, L. *The Causal Relation Issue in Negligence Law* (1962) 60 Mich. L. Rev. 543, 556.

⁴ [1977] 1 Lloyd’s Rep. 525.

⁵ See art. III rule 1, rule 2 and rule 4 (4) of the COGSA 71 and the Hague/Visby Rules.

⁶ *The Muncaster Castle* [1961] 1 Lloyd’s Rep. 57 (H.L.); *The Kamsar Voyager* [2002] 2 Lloyd’s Rep. 57 (H.L.); *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*, [1973] 2 Lloyd’s Rep. 469, (Sup Ct (Can)).

of care of cargo¹ or unreasonable deviation,² then the carrier will be liable for it. On the other hand the carrier is entitled to exemptions.³ He will not be responsible if the loss is caused by, *inter alia*, negligence of his servant in the navigation or in the management of the ship⁴ and fire.⁵ Unfortunately the loss occurred in the carriage of goods is usually brought about by a series of events; for example, a combination of breach of the carrier's obligations and excepted perils.⁶ In deciding which one of them is legally recognised, the "but for" test has to be disregarded and the law will employ its empirical or common-sense view of causation in order to select the one or more proximate causes.

1. Interruption of the chain of causation

The doctrine of *novus actus interveniens* may equally apply in order to deny the recovery. A claimant cannot succeed in his claim if a both unforeseeable and quite unreasonable intervening event is so much more responsible for the loss than his wrong that the original wrong has to be disregarded, even though the defendant's wrong is sufficient in its own right to bring about the loss. The intervening event has just "wipe(d) the slate clean as regards the defendant."⁷ In *The Carslogie*⁸, the claimant's vessel was damaged in a collision with the defendants' ship. The vessel then suffered heavy-weather damage on the way to dockyard. The collision repairs were executed at the same time with heavy-weather damage. The court then held that the heavy weather broke the chain of causation. Suppose in the carriage of dangerous cargo, the shipper breaches his duty by

¹ *The Starsin* [2003] 1 Lloyd's Rep. 571 (H.L.); *The Aliakmon* [1986] 2 Lloyd's Rep. 1; *The Washington* [1976] 2 Lloyd's Rep. 45.

² *Glynn v Margetson & Co* [1893] A.C. 351 (H.L.); *Foscolo Mango & Co Ltd and H C Vivian & Co Ltd v Stag Line Ltd* (1931) 41 Ll. L. Rep. 165 (H.L.).

³ Art. IV rule 2 of the COGSA 71, the Hague/Visby Rules.

⁴ *President of India v West Coast Steamship Company* [1964] 2 Lloyd's Rep 443.

⁵ *The Apostolis* [1997] 2 Lloyd's Rep. 241.

⁶ In *Ceylon v Chandris* [1965] 2 Lloyd's Rep. 204 the damage of cargo was caused (a) partly by the negligence of the shipowner and his breach of contract; (b) partly by the entry of sea water; (c) partly to negligence or misbehaviour of stevedores employed by the charterers; (d) partly due to detention of the vessel over permitted lay time for which the charterers were liable, and (e) partly to causes for which neither party was liable

⁷ Tettenborn, *The Law of Damages*, p.161.

⁸ [1951] 2 Lloyd's Rep. 441 (H.L.).

loading undisclosed dangerous cargo, then one member of the crew also breaches his duty by smoking in the bunker which causes its explosion. If it is highly likely that such an act will lead to a disaster even without the concerned cargo, *e.g.* there are other ignitable cargos in the bunker, then the shipowner will be liable. On the contrary, if the shipowner can prove that the smoking itself will not bring out such a result without this dangerous cargo on board, then the latter is really causative.

2. Continuation of the chain of causation

On the other hand, if another event is likely to happen or will not affect the result whatsoever once the breach of contract or tortious conduct has occurred, the chain of causation will not be broken. In *A/B Karlshamns Oljefabriker and Another v Monarch Steamship Company Ltd*¹, due to the unseaworthiness of the vessel a voyage was prolonged until the outbreak of war and was then ordered to another port. It was held the outbreak of war was not out of anticipation in that circumstance and therefore orders by government did not break the chain of causation. In *Heskell v Continental Express, Ltd*², the first defendant failed to ship the cargo and the second defendant negligently issued bills of lading for it. The plaintiff claimed damages from both. Since the claimant would still incur the loss even without the mistake to issue bills of lading, the second defendant's mistake was not cause of the loss.

3.5 Common sense

English courts have treated the determination of proximate cause in a broad way, ignoring strict expressions or formulae. The approach is a robust pragmatic one, in the end turning to "common sense" to philosophical niceties.³ The common sense approach is not

¹ (1948-49) 82 Ll. L. Rep. 137.

² (1949-50) 83 Ll. L. Rep. 438.

³ As reviewed by Lord Greene, "the legal theory of causation has, in the course of years, had a remarkable history, but the point at the moment at which it appears to have come to rest is that which lay it down that this type of question of causation is really a matter for the ordinary common sense and intelligence of the ordinary man..." *Athel Line Ltd v Liverpool and London War Risks Insurance Association Ltd* (1946) 79 Ll. L. Rep. 18, at 21.

a matter of inexplicable or arbitrary assertions. A detailed intellectual analysis is not required. It is the facts of each case that matter.¹ Common-sense standard refers to the judgment by the man in the street or ordinary business man rather than the scientist or the metaphysician.² For instance in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport*³, to decide whether the proximate cause of the stranding of vessel was a warlike operation the court asked what the ordinary man conversant with marine insurance business would determine was the predominant cause. This choice might have something to do with the jury system, because “a jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation...”⁴ The choice of the proximate cause can be made by English courts in a way without laying down any definite line of construction and it therefore marks a watershed between Chinese and English law.

3.6 Causation: the Chinese position

Truly the overall picture of causation is of a highly discretionary and unpredictable branch of law, which is probably a factor that has discouraged common law writers from generalising causal theory in this sphere.⁵ In comparison, Chinese jurists have not hesitated to apply to the law philosophical doctrines of considerable complexity.⁶

¹ See *the Kamsar Voyager* [2002] 2 Lloyd's Rep. 57 (H.L.); *Galoo Ltd. v. Bright Graham Murray* [1994] 1 W.L.R. 1360.

² See *Leyland Shipping Co v Norwich Fire Insurance Co*, 1918 AC 350 (H.L.) *per* Lord Dunedin at 363.

³ (1942) 73 Ll. L. Rep. 1, *per* Lord Macmillan at 6.

⁴ *Grant v Sun Shipping Co Ltd and Others* (1947-48) 81 Ll. L. Rep. 383 (H.L.) *per* Lord Du Parcq at 392.

⁵ The distrust of abstract theories by English jurists was shown in *The Wagon Mound* [1961] 1 Lloyd's Rep 1 (P.C.), Viscount Simonds said at p.8 “the courts were feeling their way to a coherent body of doctrine, and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.”; one author went further to suggest that Anglo-American writers have made piecemeal contributions to the study of causation compared to continental jurists. *Causation in the Law*, p.432.

⁶ There is an immense literature in many languages on theories of causation invented by continental jurists and the basic theories of causation are at least five in number according to Andre Tunc (ed.), *International Encyclopaedia of Comparative Law*, Ch 7, p.33 and Lawson, F.H. and Markesinis, B.S. *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (1982), p.118. For Chinese literature see Wang Yang, *Theories of Causation in Tort Law*, *Civil Law and Commercial Law Reviews* vol 11 (Law Press, Liang Huixing ed.) p.487; Wang Liming, *Exploration of Causation in Civil Law*, *Civil Law and Commercial Law Reviews* vol 1 (Law Press, Liang Huixing ed.) p.749.

They are always actively pursuing a concise formula or an explicit theory to guide judges.¹

3.6.1 Historical view of causation in China

Chinese law is influenced by Marxist philosophy, which – perhaps surprisingly to an English observer – may have practical effects in the field of causation.² Marxist philosophy holds that causality is not an *a priori* category of thought but an objective connection existing regardless of consciousness.³ As a result of this ideological position, Chinese law at one time adopted a theory known as the “necessary consequence theory”, under which a “cause” in law must be objectively necessary to the consequence. “There must be an inner and necessary connection between an illegal act and its consequence.”⁴ “The accused will not be liable without a necessary and logical connection between the wrong and the damage.”⁵ However, this legal rule is too strict, as it is seldom possible to say with certainty that anything but certain immediate events will necessarily occur.⁶ This theory was replaced by a more practical theory in 1989.⁷ But even today Chinese courts are occasionally seen applying the obsolete rule. In *Guangzhou Dengdai Shipping Co. v. Guangzhou Salvage Bureau*,⁸ the defendant charterer refused to return the vessel to the claimant shipowner. The claimant sent a tugboat in an attempt to tow back the chartered vessel. However the claim for the costs of tugboat was refused by the court guided by this theory. “These [expenses] are not expenses *necessarily* arising from

¹ Markesinis once said, “if causation did not exist as a subject it would have to be invented so that German lawyers would have something to exercise their minds.” Such a statement applies equally to Chinese jurists. See *A Comparative Introduction to the German Law of Torts* (2nd edn 1990), p.95.

² Jiang Yi, *Causation in Tort*, (2006) 6 Contemporary Legal Science 45, 50.

³ Marx, *Selected Karl Marx Classical Works* (Trans. People’s Press, 1972), p.552; Andre Tunc (ed.), *International Encyclopaedia of Comparative Law*, ch 7, p.28.

⁴ Tong Rou, *General Rules of the Civil Law* (1982), p.308.

⁵ Civil Law Research Group of China Politics and Law School, *Basic Issues on the Chinese Civil Law* (1958), p.334. This is the first text book on civil law after the establishment of P.R.C.

⁶ Andre Tunc (ed.), *International Encyclopaedia of Comparative Law*, Ch 7, p.39.

⁷ Liang Huixing, *An Analysis and Explanation to Case Zhang Lianqi, Zhang Guoli v Zhang Xuezhe*, *Jurisprudence Studies* (Liang Huixing ed. 1989 No.4); Liang Huixing, *A Study of Theory, Case and Legislation of Civil Law* (1993), p.279.

⁸ Guangzhou Maritime Court 25 Aug 2004, (2004) GHFCZ 96.

the breach.” (emphasis added) The consequential injustice is quite obvious as it makes certain claims extremely difficult to prove.¹

3.6.2 The modern Chinese view of causation and the comparison with England

In modern Chinese legal theory, a defendant should be liable for losses caused by his default. Chinese scholars view causation as two questions,² cause in fact and cause in law (or adequate cause).³ The existence of cause in fact is to be judged objectively through the ordinary knowledge,⁴ imperfect though this may be. Although it bears some similarity with the common sense approach, a phrase like “common sense” is deemed unauthoritative and has never appeared in Chinese judgments. The “but for” formula is widely used in deciding cause in fact and it does not differ from English law. So, for example, in *Gu Shaohua, Zhu Duodi v. Shenzhen Lixin Co*,⁵ the 2-year-old daughter of claimants fell into a pond and was drowned. To determine causation, the court held “but for the failure of the

¹ In *Fang Shubang and Fang Yanya v Fang Xiaoping and Others*, Guangdong Dongguan Intermediate People’s Court, cited by Li Qi, *Analysis of Tort Law Cases* (2005), p.1, the son of claimants was swimming in a reservoir with all other children (the guardians of whom are defendants). When Fang Guangwei drowned and disappeared in the water, the other five children did not ask for help for fear of blame even though there were policemen and reservoir guards nearby on duty. His body were found in reservoir 5 hours later. The court held that “there is no *necessary causal link* between the failure of children to ask for help and the death of the Fang Guangwei. Even if the defendants had reported the accident, it might not have necessarily saved his life.” Therefore the claims were dismissed. The case clearly shows the injustice caused by the said theory. On a balance of probabilities, the silence of other children had materially eliminated the only chance of his survival, and significantly increased the likelihood of his death. How can Chinese court reject such a common sense conclusion simply because the claimant could not prove so in a scientifically accurate way?

² It should be noted that this analysis remains as a theory and has not been much reflected in courts. This is because the question of fact or law is not as significant as in common law countries, *e.g.* to determine whether a point could be retried. According to art.151 of the Chinese Civil Procedure Law, when trying an appeal case Chinese courts at all levels should examine both the fact and law. Any error will result in the reserve or remand of lower decisions; compare: *Flint v Lovell* [1935] 1 K.B. 354 (C.A.) *per* Greer L.J. at 360 “In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

³ “The first question is, as a matter of fact is the conduct of the defendant or the event for which he should be responsible a cause of the harm? And the second, is this factual cause recognised as the cause in law which he should be liable for?” Jiang Ping, *Civil Law* (2001), p.759; see also Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.550; Zeng Shixiong, *Principles of the Law of Damages* (2001), p.104.

⁴ Wang Jiafu, *Creditor’s Rights in Civil Law* (1991), p.477.

⁵ *Gu Shaohua, Zhu Duodi v. Shenzhen Lixin Co*, Guangdong Province Shenzhen Intermediate Court, cited in *Analysis of Tort Law Cases* (2005), Li Qi, p.11.

defendant to guard against the pond, the little child would not have died”¹ and therefore gave decision for the claimant.

In respect of causation in law, a claim will often be denied if the court cannot find “sufficiently strong or close causal link” between the default and the loss or injury.² The replacing of the wording “necessary connection” with “sufficiently strong or close causal connection” is significant in that the above unwelcome “consequence theory” has been supplanted by the “adequate theory”,³ which means a wrongdoer will be liable if his act increases the objective probability of consequence by a significant amount.⁴ This is comparatively easier to establish. The adequate causation theory was first adopted in *Zhang Lianqi, Zhang Guoli v Zhang Xuezheng*,⁵ where the son of claimants died in an accident when constructing a building. The court held that bad working conditions had increased the likelihood of accident and therefore gave judgment to claimants. The plaintiffs could not have won the case had the court stuck to the “consequence theory”. To determine whether or not it increases the risk of the loss, the court will apply the standard of a reasonable man at the time of the default, who is assumed to have knowledge of all the generalisations available to mankind as well as any additional knowledge of which the wrongdoer himself actually knows.⁶ It is just common sense in another name. A few dissents show concern about the uncertainty it might lead to.⁷ However in the author’s opinion, if

¹ *Ibid.*, p.14.

² Zhang Ming’an, *Civil Obligations* (2002), p.105; cf. *Yu Ying, Yu Dingzhang and Gu Huilian v Wuhan City Hongshan Luo Jiashan Post Office and Wuhan Post Office*, Wuhan Higher People’s Court, 25 Jul 2005, (2004) EMSZZ 19. The claimant’s parents sent important documents to their daughter in Japan so that she could apply for two universities. The parcel never arrived and she missed the deadline. There was only 5.5% and 3.3% percentage of successful applicants for each university. Chinese courts refused causal nexus between the delay of letter and her loss of chance as there was a insufficient causal link.

³ The adequacy theory is said to start in Germany, and then has spread widely. Its introduction into Mainland China came from Taiwan, the law of which was influenced by Japan and Germany greatly. See Chen Congfu, *Causation in Tort Law*, Legal Science Thesis of Taiwan University (Issue 2, vol.29); Shi Shangkuan, *A General Research on the Law of Obligation* (1978),p.163-165.

⁴ Shi Shangkuang, *Law of Obligation* (2000), p.172.

⁵ Chinese Supreme Court, published in Supreme Court Communiqué (Issue 1, 1989).

⁶ Zhang Ming’an, *Civil Obligations* (2002), p.105; Li Qi, *Analysis of Tort Law Cases* (2005), p.16.

⁷ “It gives judges too much discretion and is the culprit of uncertainty.” Liu Shiguo, *A Contemporary Study on Law of Damages for Tortious Act* (1998), p.66.

we evaluate the trend of legal thoughts on causation, it is the nature of causation that calls for the flexibility. This area of law could not be improved significantly simply by drafting more precise language. The courts are not therefore in a position to expound and develop a comprehensive system of interpretations of various legal theories or norms on causation. The notion of adequate theory is no doubt an appropriate method to approach questions of causation in China and is thus recommendable.

3.6.3 Certain problems in the Chinese approach to causation

A number of problems arise in connection with the Chinese approach to causation. Firstly, causation was once the principal method to limit liability in Chinese law. Recovery was usually denied on the ground that the causal link between losses and defaults was too weak without resorting to other principles. But until recently the remoteness rule and mitigation rule, although they are in fact two of the most important techniques to limit damages, have not yet been officially accepted by Chinese tort law and are applicable to contract law only.¹ As a result causation has had to be pressed into service as the dominant means to limit damages. This outcome can be unfortunate, since Chinese courts are equipped with insufficient legal principles and have to deal with the question of damages with the incompetent causation rule even though other legal principles may be more appropriate.² This fact makes it possible for a Chinese court to ask whether a defaulted carrier who delayed the cargo *caused* the liquidated damages which the owner has to pay under the sub-contract with the third party. The liquidated damages indeed arose out of the consequence of the delay in the sense that the cargo owner would not have incurred it but for the delay. Purely based on this footing, it should be recovered in the sense that causation has been established. But by blatantly denying its recoverability, the

¹ This topic will be addressed in the following chapters.

² Zhang Peilin, *Problems of Causation in Civil Compensation* [1996] Policy and Law Forum No.2, p.27.

Chinese courts have to reject a causal link which clearly exists, which makes their ratiocination somewhat arbitrary and sophistic.¹

The law can only acquire authority through its convincing reasoning, fairness, and correctness. Failing to provide convincing explanations, judgments can seem arbitrary and capricious in the litigants' eyes. Such arbitrary application of law sends a message to the people that the law is so flexible and changeable that commonsense can be altered in favour of the judges' views. The authority of law will gradually diminish in the minds of people if this problem cannot be changed. Even though traditionally it is not a primary concern to produce a detailed and self-explanatory judicial decision, however judicial decisions are not mechanical applications of general rules, and there must be inherent logic between the outcome and interpretation of the facts of the case. The fact that Chinese decisions often contain the obscure text suggests that it seriously falls short of the requirements of transparency and fairness. This should be acknowledged and corrected.

As to the above issue, take the facts of the English case *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*². There the plaintiffs were unable to complete their contract with a third party due to shipowners' failure to deliver a cargo. It was held on causation at first instance that the dates of delivery did not exactly coincide with those in their contract with the third party and therefore the buying-in was not *caused* by shipowners' default (which resembles the Chinese position).³ This view was reversed by the House of Lords. It was held causation inquiry in such a case was confusing and unnecessary. The question was plainly regarded as a question of remoteness there,⁴ an approach that could well be adopted by

¹ Cf. in *The Baleares* [1993] 1 Lloyd's Rep. 215 (C.A.) for a shipowner's delay in sending the vessel the court held "they must have realized that it was not unlikely that the charterers would have made forward sales at fixed prices and that they were likely to suffer loss from delay causing an increase in price." p227, 234 *per* Neill, L.J.

² [1905] A.C. 515.

³ (1904) 6 F. 486. the First Division of the Court of Session, Lord Kinnear's opinion resembles the Chinese one. He said "the one loss had nothing to do with the other [breach]."

⁴ See Chapter 4.

Chinese judges. In the comparable Chinese case of *Fafeng City Baiju County Dongqiao Kangfang v Baiju Electricity Management Station and Sheyang Road Carriage Co.*¹, the defendant's truck knocked down an electricity pole which caused a stoppage of electricity in a large area. A factory owner claimed for the loss of production against the defendant. The court dealt with the question purely on causation and had great difficulty in rejecting such unreasonable claims while providing convincing judgments. By contrast, these claims can be easily dismissed as being "too remote", the *ratio decidendi* of which is far more convincing in this aspect.

Secondly, a pure causation approach is highly discretionary, and this is a feature which many Chinese judges are not used to because of the short history of legal system building and hence lack of experience and tradition. When Chinese judges have excessive discretionary powers, it will inevitably increase the potential for mistakes or even abuse. In *Li Shantong v Li Xu and others*², an unleashed dog barked at and chased the claimant to the centre of road, he was then knocked over by an overloading truck. He sued the careless driver and the dog owner. The court held the driver had 30% responsibility, dog owner had 20% and he himself had to bear 50% liability for damages even without any fault at all. In *Huang Aiping v Li Qiang*,³ the defendant parked his car at the side of the road without permission. When the claimant's mother in her 60's was walking nearby, she suddenly lost the balance, fell down to the still car and knocked her head over the car. She lost consciousness for some time before she was found, and later died at the hospital. The judge held the defendant was responsible for 50% liability.⁴ Apparently, the judges wrongly established the causal link as the illegal parking was not the cause of the death. These cases highlight

¹ The Supreme Court (ed.), *Essentials of Chinese Judiciary Cases Civil Law Cases Volume* (1998), p. 273.

² Chaozhuo Intermediate People's Court, cited in Li Qi, *Analysis of Tort Law Cases* (2005), p.38.

³ Taizhou City Yuxian County People's Court, 17 Oct 2006. It is said that the defendant has appealed against this decision, but the result of the appeal has not been published.

⁴ The decision was based on art.56 para 2 of the Chinese Road Traffic Safety Law which reads "anyone who temporarily parks vehicles at the side of the road shall not obstruct pedestrians and other vehicles."

the indeterminacy and uncertainty in the application of legal rules and principles in causation. The outcome of litigation in the courts is in fact highly unpredictable when the court relies on causation improperly. Judicial decisions are not just mechanical applications of general rules that dictate outcomes by deductive logic. Conversely, much depends on judges' subjective perception and interpretation of the facts of the case and on judges' own value judgment, moral and political viewpoints, or even personal bias and prejudice. It raises the alarm that doctrines of causation are always open-ended enough to allow judges to exercise discretion in a subjective and personal way. It cannot be overcome by providing more precise legal rules, and in fact causation rules are incapable of being more precise. This phenomenon should be closely watched by appeal court and legal scholars. Causation alone should not be over-emphasised when measuring damages. This point will be reiterated in the following chapters.

3.7 The burden of proof of causation in sea carriage cases

The establishment of causation is based on the evidence afforded by parties. In English law it is the parties in suit who must provide evidence, while in China the court also has the duty to investigate and collect evidence if necessary.¹ Even so, owing to its heavy workload and the unstated influence of English shipping law, Chinese maritime courts are reluctant to do so.² It is suggested by Prof. Tetley that both the cargo claimant and the carrier are obliged to prove all the facts available to them.³ This view only adds confusion

¹ Art.64 of the Chinese Civil Procedure Law "It is the duty of litigants to an action to provide evidence in support of his allegations. If, for objective reasons, a party and his agent *ad litem* are unable to collect the evidence by themselves or if the people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it..."

² In *PICC Xiamen v Lombardo Marine Limited*, Shanghai Maritime Court, 22 Mar 2004, (2003) HHFSCZ 94, the claimant did not submit any evidence about their cargo value. As a result, the court dismissed the claims even though the breach of carrier had been confirmed. See also *China Minmetals Steel Com Ltd v Victory Castle Shipping Ltd*, Guangzhou Maritime Court, 15 Dec 2003, (2003) GHFCZ 108. But reader should keep in mind that it is unlikely for other Chinese courts to follow as Chinese maritime courts tend to be English-alike and unconventional.

³ Tetley, W. *The Cause of the Loss or Damage, Etudes de Droit Maritime à l'aube du XXIe siècle - Mélanges offerts à Pierre Bonassies*, (Editions Moreux 2001), p.370.

to the whole picture. A more useful summary of the incidence of the burden of proof in cargo claims was provided by Lloyd J.¹, which will be cited word for word:

“The cargo-owner can raise a *prima facie* case against the shipowner by showing that cargo which had been shipped in good order and condition was damaged on arrival. The shipowner can meet that *prima facie* case by relying on an exception, for example, perils at sea...The cargo-owner can then seek to displace the exception by proving that the vessel was unseaworthy at commencement of the voyage and that the unseaworthiness was the cause of the loss. The burden in relation to seaworthiness does not shift. Naturally, the Court can draw inferences...But if at the end of the day, having heard all the evidence and drawn all the proper inferences, the Court is left on the razor's edge, the cargo-owner fails on unseaworthiness and the shipowners are left with their defence of perils of the sea. If, on the other hand, the Court comes down in favour of the cargo-owners on unseaworthiness, the shipowners can still escape by proving that the relevant unseaworthiness was not due to any want of due diligence on their part or on the part of their servants or agents.”²

Chinese law is pretty much the same.³ When the goods arrive in a damaged condition, although it does not in itself constitute a breach of the obligation, it is the *prima facie* evidence that the carrier has breached their obligation, *e.g.*, failure in care of cargo.⁴

¹ *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336; see also Ezeoke, C. *Allocating Onus of Proof in Sea Cargo Claims: The Contest of Conflicting Principles* [2001] LMCLQ, p.272-273; Tetley, W. *Marine Cargo Claims* (4th edn 2008), Ch 6 The Burden and Order of Proof in Marine Cargo Claims, available at www.mcgill.ca/maritimelaw/mcc4th/

² *Ibid.* at p.339; *cf.* *The Apostolis* [1997] 2 Lloyd's Rep. 241; Ezeoke, C. *Allocating Onus of Proof in Sea Cargo Claims: The Contest of Conflicting Principles* [2001] LMCLQ, p.272,273; Richardson, J. *The Hague and Hague-Visby Rule* (4th edn LLP 1998), p.32.

³ *Cf. PICC Zhejiang Branch v NSCSA National Shipping Corp and CMA CGM SA*, Shanghai Maritime Court, 24 Dec 2001, (2001) HHFSCZ 286; Liu Xu, *Proof of Burden when the Shipowner Raises Exemptions Defence* (1999) 10 Chinese Maritime Law Annual 358; Liu Shoujie, *Proof of Burden in Marine Cargo Claims*, Maritime Law Studies (Guo Yu ed.), No.3, p.169.

⁴ “The cargo owner is not expected to know what happened on the voyage, and, if he shows that the goods arrived in a damaged condition and there is no evidence from the shipowner showing that the goods were duly cared for on the voyage, the Court may well infer that the goods were not properly cared for on the voyage.” *Albacora SRL v Westcott & Laurance Line Ltd*, [1966] 2 Lloyd's Rep. 53 (H.L.) *per* Lord Pearson at 63; But there

In the Chinese case *Zhejiang Grand I & E Co Ltd v Malaysia International Shipping Corporation Sdn Bhd*,¹ a change in the purity of a cargo of alcohol was held a *prima facie* evidence of insufficient care by the carrier. But the carrier can still exempt himself by exception clauses, the burden of proving causation being on him due to one of the excluded clauses.²

The matter may of course become more complex. Cargo interests, for example, may want to submit a claim of unseaworthiness so as to prevent the shipowner from relying on the exceptions. The burden of proof rests on them in this case.³ If the unseaworthiness has been established the shipowner will be prevented from relying on the exception⁴ unless he can prove no causal nexus lies between them⁵ or it is caused by a latent defect which they could not have detected with due diligence⁶. But it would be very difficult to prove as the relevant information is usually not available to cargo interests. Nevertheless the courts are ready to draw inferences where appropriate.⁷ For example, a court may be ready to treat the presence of seawater in the hold as a *prima facie* evidence of unseaworthiness.⁸ If the vessel's bearing breaks down within a few hours of the vessel's departure in a calm sea, then

might be exceptions. See Chinese case *Radiant Shipping Limited v China Metals Products Trading Corp.* Shandong Higher People's Court, 14 May 2003, (2002) LMSZZ 24, where the cargo was waste iron and the shipowner did not have the knowledge to recognise its normal apparent condition. This prevented his liability for the failure to mark the bill of lading.

¹ Ningbo Maritime Court, 13 Aug 2002, (2002) YHSCZ 23.

² *China Ocean Shipping Agent Co Ltd Beihai v Beihai Ocean Carriage Co*, Guangxi Higher People's Court, 14 Mar, 2005, (2005) GMSZZ 2; cf. *The Tasman Discoverer* [2004] 2 Lloyd's Rep. 647 (P.C.), per Lord Bingham par.6.

³ *The Farrandoc* [1967] 1 Lloyd's Rep. 232; *Paterson Zochonis & Co Ltd v Elder Dempster & Co Ltd* (1924) 18 Ll. L. Rep. 319; Chinese law see the CMC article 51 para. 3.

⁴ *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265; *The Popi M* [1985] 2 Lloyd's Rep. 1.

⁵ *The Torepo* [2002] 2 Lloyd's Rep 535.

⁶ *The Antigoni* [1991] 1 Lloyd's Rep. 209; but it is usually difficult to prove. See *Parsons Corp v CV Scheepvaartonderneming Happy Ranger* [2006] 1 Lloyd's Rep. 649, where the shipowner failed to prove it when unseaworthiness was found in a brand new vessel on maiden voyage.

⁷ Generally see *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32 (H.L.); *Barker v Corus UK Ltd* [2006] 2 A.C. 572 (H.L.). In both cases causation was established even though the claimant actually failed to prove it (or it is impossible to prove it) in a scientific sense.

⁸ See Chinese case *China Pacific Property Insurance Co Ltd Haina v Quanzhou Jincheng Shipping Co and Others*, Shanghai Maritime Court, 25 Jul 2003, (2003) HHFSCZ 146; *China Ocean Shipping Agent Co Ltd Beihai v Beihai Ocean Carriage Co*, Guangxi Higher People's Court, 14 Mar 2005, (2005) GMSZZ 2.

although impossible to identify the precise cause, the court can presume it is caused by unseaworthiness.¹ In *Application for Setting up Limitation Fund by Samsun Shipping Corp*,² the vessel lost her stabilisation quickly and sank due to a wide swerve to avoid a collision. The shipper argued that the only possible reason was that the vessel had insecure stabilisation at the beginning of the voyage. But the shipowners refused to provide the crucial evidence of the stowage plan and the manifest. The court nevertheless drew an inference and supported the shipper's view even though no direct evidence was provided.

3.8 Contributory negligence and the carriage of goods by sea³

There is also the possibility that the loss has been caused partly by the defendant's fault and partly by the claimant's own negligence. In this case, the claimant's negligence is contributory but not *novus actus interveniens*.

3.8.1 Contributory negligence: English law

At common law the claimant will be wholly denied the right to recover damages if his fault is regarded as *novus actus interveniens*, which breaks the chain of causation.⁴ But the apportionment was out of account as to contributory negligence. The claimant would recover his losses in full⁵ with his contribution to the loss being totally disregarded, or the opposite. This was changed by the Law Reform

¹ *The Fjord Wind* [1999] 1 Lloyd's Rep.307; English cases see *Phillips & Co (Smithfield) Ltd v Clan Line Steamers Ltd* (1943) 76 Ll. L. Rep. 58; *The Saudi Prince (No. 2)* [1986] 1 Lloyd's Rep. 347; Chinese case *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365.

² Guangdong Higher People's Maritime Court, 12 June 1999.

³ As we will see, this topic does not completely accord with causation and arguably deserves a separated discussion. But the all or nothing basis and the superiority of unseaworthiness are all closely related to contributory negligence and causation. For this reason the author placed it here for a better understanding of the two rules.

⁴ *Compania Naviera Maropan S.A. v Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68, per Devlin J. at 78; *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.* [1907] A.C. 272, per Lord Halsbury L.C at 278; *Quinn v Burch Bros (Builders) Ltd.* [1966] 2 Q.B. 370; *Lambert v Lewis* [1982] A.C. 225 (H.L.).

⁵ See Hazelwood and Tettenborn, *Marsden on Collisions at Sea* (13th edn 2003), p.519; In *the Fogo* [1967] 2 Lloyd's Rep. 208, no division of loss was available as the claimant's fault was assumed to be either a *novus actus interveniens* so that it absolved the defendant altogether or the converse where the defendant compensated in full, nothing in between; *Heskell v Continental Express, Ltd.*(1949-50) 83 Ll. L. Rep. 438; *The Guildford* [1956] 2 Lloyd's Rep. 74; *The Metagama* (1927-28) 29 Ll. L. Rep. 253 (H.L.).

(Contributory Negligence) Act 1945, by which damages are reduced in proportion to the degree of his responsibility for the loss.¹ To establish contributory negligence, the claimant must have been at fault or negligent towards himself and the negligence must have exposed him to the particular risk of the type of damage suffered.² This negligence is of legal significance only if it is causally connected with the harm.³ The usual “but for” test helps to decide this, *i.e.*, it will amount to contributory negligence if the harm would not have occurred without the plaintiff’s negligence. The Act makes apportionment turn on the extent or share of responsibility of the parties.⁴ The courts will consider both the causal potency and the comparative blameworthiness of the parties’ conduct.⁵ In this sense, contributory negligence is similar to *novus actus interveniens* and the duty of mitigation as causal potency plays a very preponderant role in all of them. As to the burden of proof, the claimant must prove the defendant is at fault while the defendant in turn alleges fault in the claimant amounting to contributory negligence or *novus actus interveniens*.⁶

The Law Reform (Contributory Negligence) Act 1945 only applies to tort unless the breach of contract gives rise to a duty of care in

¹ S 1(1) “where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...”; *cf. The Calliope* [1970] 1 Lloyd’s Rep. 84, *per* Brandon, J. at 101; *The Kazimah* [1967] 2 Lloyd’s Rep. 163; *The Magnolia* [1955] 1 Lloyd’s Rep. 417, 429 (personal injury case).

² Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.129.

³ Hart and Honoré, *Causation in the Law*, (2nd edn 1985), p.207.

⁴ See s1(1) of the Law Reform (Contributory Negligence) Act 1945 “...the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...”; however, contributory negligence does not apply to intentional torts, such as deceit. See *Standard Chartered Bank v Pakistan National Shipping Corporation and Others (No. 2)* [2003] 1 Lloyd’s Rep. 227 (H.L.).

⁵ “Whilst causation was the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, the amount of the reduction was such an amount as might be found by the court to be ‘just and equitable’ having regard to the plaintiff’s ‘share in the responsibility’ for the damage. That involved a consideration not only of the causative potency of a particular factor, but also of its blameworthiness.” *Davies v Swan Motor Co.* [1949] 2 K.B. 291 (C.A.), *per* Denning L.J. at 326; *cf. The Miraflora* [1966] 1 Lloyd’s Rep. 97 (C.A.); *Fitzgerald v Lane* [1989] A.C. 328 (H.L.); some authors also suggest that the responsibility depends on the actor’s degree of departure from the standard of care of the reasonable man. Payne, D. *Reduction of Damages for Contributory Negligence*, (1955) 18 M.L.Rev. 344, 354.

⁶ *The Metagama* (1927-28) 29 Ll. L. Rep. 253 (H.L.), *per* Lord Haldane at 257-258; *The Guildford* [1956] 2 Lloyd’s Rep. 74.

tort independent of the existence of the contract.¹ It will not apply to any other contractual claims even if the claim is framed under tort. So contributory negligence does not apply to breaches of a strict contractual duty;² or cases in which a duty of care imposed by the contract does not also give rise to liability in tort;³ or not be co-extensive with the one in tort.⁴ For this reason, generally there is no apportionment of damages in the carriage of goods by sea. This “all or nothing” position will be discussed in more detail in the next section. Suffice to say here that the court will have to decide which of the two breaches is the proximate cause of the loss and then attach the totality of that loss to that breach.⁵ Where the shipowner’s breach is a breach of his warranty of seaworthiness, it is highly likely that he will be held responsible for the entire loss provided his breach is an effective cause of loss, even though it may not be the dominant cause.⁶

The reasoning behind this arrangement is that the apportionment might unduly undermine the certainty in the English law of contract, where the simplicity of damage claims for the breach of contract would be replaced by complex disputes as to comparative blameworthiness.⁷ This approach, however, is not entirely satisfactory. It is not fair that the blameworthy claimant can be better off, especially where there is clear blameworthiness on both sides. Also, the English position is not very logical as it leads to the “all or nothing” injustice. “If the claimant’s unreasonable conduct can sometimes result in its recovering no damages it must be

¹ S 4 of the Act, “‘fault’ means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence”; see also *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852 (H.L.); *UCB Bank Plc v Hephherd Winstanley & Pugh* [1999] Lloyd’s Rep PN 963 (C.A.).

² *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 (C.A.); *Den Danske Bank A/S v Skipton Building Society* [1998] 1 E.G.L.R. 140.

³ *Rafalac Ltd v Eade* [1999] 1 Lloyd’s Rep. 506; *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852 (H.L.), at p.866.

⁴ *Contributory Negligence as Defense in Contract*, Law Com 219 (1993) parts 3,4; *The Good Luck* [1988] 1 Lloyd’s Rep. 514.

⁵ *Heskell v Continental Express, Ltd.*, (1949-50) 83 Ll. L. Rep. 438.

⁶ *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance*(1940) 67 Ll. L. Rep. 253 (H.L.) per Lord Wright at 259,260; *The The Kapitan Sakharov* [2000] 2 Lloyd’s Rep. 255.

⁷ *Contributory Negligence as Defense in Contract*, Law Com 219 (1993) paras 3.39-3.40,4.6.

sensible for there to be a mid-position where its negligence results in a mere reduction of damages.”¹ Its possible reform, which intends to extend it to contractual claims, has been under discussion.²

3.8.2 Mutual fault: Chinese law

Chinese law recognises the principle of apportioning damages to the degree of the aggrieved party’s fault.³ In *Wei Zhenren, Li Wenxiu and Others v Beihai Hengtong Shipping Group Co Ltd*,⁴ the vessel sailed through a seawater culture farm negligently and caused damage. The plaintiff however had not been granted any permission for that farm and he failed to notify any authority about its position. It was consequently unmarked in the published navigation chart.⁵ The court held the claimant should be liable for 60% of the loss. Chinese scholars have developed various notions which serve the same purpose, such as contributory fault (negligence),⁶ mutual fault,⁷ fault of the victim,⁸ fault of debtor⁹, and set-off of the fault.¹⁰ The author will use mutual fault in this thesis.¹¹ It is said that this principle arises from the *bona fide* principle of civil law,¹² or a

¹ Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.141.

² “[it] is unjustified in principle and little value in practice.” Palmer and Davies, *Contributory Negligence and Breach of Contract: English and Australian Attitudes Compared* (1980) 29 ICLQ 415, 416; “such injustice could be avoided by revising the Act to make it clear that it applies to actions for breach of contract.” Taylor, A.S. *Contributory Negligence as a Defence to Actions for Breach of Contract*, (1986) 49 MLR 102, 108; see also Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.143.

³ “If the loss is due to the act or fault of the victim the liability of the defendant may be extinguished if the act of the victim can be said to be the sole cause of the loss; or attenuated if both parties’ faults have contributed to the loss.” Shi Shangkuan, *A General Research on the Law of Obligation* (1990), p.292.

⁴ Beihai Maritime Court, 15 Dec 2004, (2004) HSCZ 012.

⁵ Cf. *He Rong v Shanghai United Plumbing Fittings Co., Ltd*, as cited by Selected Cases of People’s Courts (1992), p.50; *Dong Jingchun v Siping Specialised Vessels Trading Co Ltd*, Jilin Higher People’s Court, as cited by Selected Cases of People’s Courts (1996, no.4), p.58.

⁶ Zhang Ming’an, *Contract Law* (2003), p.284; Cui Jianyuan, *Contract Law* (3rd edn 2003), p.268.

⁷ Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.409; Wang Liming, *Liability for Breach of Contract*, (2nd edn 2003), p.552.

⁸ Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.425.

⁹ Fang Shaoshen, *Damages for Breach of Contract* (1999), p.177; Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.145.

¹⁰ Fang Shaoshen, *Damages for Breach of Contract* (1999), p.199; Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.341; Zhang Ming’an, *Civil Obligations* (2002), p.111.

¹¹ There seems little practical significance to differentiate between them and the author will spare the attempt. Suffice to point out here that to call it set-off of the fault might be a misnomer. Mutual fault cannot be offset. It is the damages compensable to each other that is the subject of set-off.

¹² Zhang Ming’an, *Civil Obligations* (2002), p.111; Zeng Shixiong, *Principles of the Law of*

general idea of social justice.¹ Chinese courts apply objective criteria and judge the plaintiff's foreseeability of harmful consequences in its own context.² He is deemed at fault if there is a failure on his part to take reasonable steps to safeguard his own interests.³ There must be a causal nexus between the loss and fault.⁴ The burden of proof to show contributory negligence is on the defendant.⁵ All these are very similar to English law.

However, there is one remaining problem in Chinese law. This is that there is no general provision in the civil code expressing the doctrine as a whole. There are merely specific instances of it. It is mostly clearly stated in art. 131 of the GPCCL, "if a victim is also at fault for causing the damage, the civil liability of the injuring party should be reduced." This article is positioned in Section 3 Civil Liability for Infringement of Rights (*i.e.* tort law) of Chapter 6 Civil Liability. Presumably it only applies to tort law. Other relevant articles are all for tort law.⁶ Arguably its relevant provisions on contract law are expressed in art. 113 in Section 2 Civil Liability for

Damages (2001), p.218; Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.443.

¹ See Liu Shiguo, *A Contemporary Study on Damages for Tortious Act* (1998), p.113. "He should only be responsible for his own fault, but not the other's fault as it is against general idea of social justice."

² See *Lv Nan v Hong Guang Machinery Co Ltd*, as cited by *Analysis of Civil Cases* (Long Yifei ed. 2000), p.137, the defendant does not have any warning of a transformer placed over a tree. The underage plaintiff went into the factory, climbed to the tree and was shocked by high-voltage electricity. The court held considering the plaintiff's age and other factors, there was no negligence on his part; *cf.* Liu Shiguo, *A Contemporary Study on Law of Damages for Tortious Act* (1998), p.79; Wang Jiafu, *Chinese Civil Law- Civil Law Obligation*, p.461.

³ In *Lin Qiliang v Zhangzhou Trading Co-operative*, as cited by *Selected Cases of People's Courts* (1996, no.3), p.101, when the lift broke down, the plaintiff forced the door open. He slipped through the gap and fell down the tunnel. The court held he is negligent in exposing himself to the danger and deducted 20% damages; *cf.* in *Yang Xinyu v Tianjin No.48 Middle School*, as cited by *Selected Cases of People's Courts* (1993, no.2), p.89. The plaintiff jumped from the window when admonished by his teacher. The court reduced the damages for his own fault. There are notably two extreme views which haven't been accepted by Chinese courts. One school of view holds that it must be morally blameworthy. He Xiaoyuan, *Study of Compensation for Damage* (1982), p.49; Cui Jianyuan, *Contract Law* (3rd edn 2003), p.269; Han Shiyuan, *supra*, p.353; Shi Shangkuan, *supra*, p.294. Another view says that the fault should be an illegal act. Wang Jiafu, *Chinese Civil Law- Civil Law Obligation*, p.461; Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.426.

⁴ Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.420.

⁵ Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.353.

⁶ Art.169 of the CMC reads "If the colliding ships are all in fault, each ship shall be liable in proportion to the extent of its fault; if the respective faults are equal in proportion or it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships shall be apportioned equally"; others see art.76 of Chinese Road Traffic Safety Law and art.115 of CMC.

Breach of Contract of GPCCL, reading: “If both parties breach the contract, each party shall bear its respective civil liability”; and art.120 of CCL, which reads: “In case of bilateral breach, the parties shall assume their respective liabilities accordingly.” But in the author’s opinion, it seems unlikely that these legislations on contract, on its wording, intend to deal with the concerned doctrine. Mutual breach and mutual fault are not the same thing. Actually the third and fourth draft of CCL contained a specific mutual fault article.¹ But during the heated debate on the question of whether contract law is based on strict liability or liability for wrongs, the drafters drew a veil over it in order to compromise between two schools of view.² As a result, this article was changed to what is now art.120 in its fifth (final) draft,³ and the stance on mutual fault in CCL becomes ambiguous.

Nevertheless there is a large amount of literature emphasising that the principle does apply equally to contractual default⁴ as a general rule of civil law.⁵ This liberal construction can be seen as an attempt by these scholars to justify mutual fault in contract law, which they see as a trite law regardless of the gap in legislature. This has also been accepted by the Chinese courts. In *Liu Yulan v Chinese Industrial and Commercial Bank Yuci Branch*,⁶ the plaintiff lost her certificate of deposit and her identity card. She did not report it until three months had passed. Her money was withdrawn by an impostor

¹ Which reads “If the aggravated party is at fault in events giving rise to or enlarging the loss, the liability of the party in breach should be attenuated or extinguished.”

² Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.373.

³ Both the cautious drafting and its liberal construction have been criticised by Cui Jianyuan, *Contract Law* (3rd edn 2003).

⁴ “As to the set-off of fault, our Contract law theorists have always been accepting it.” Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.343; “there is no problem to apply it [mutual fault] to either contract or tort law.” Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.443; Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.291; Zhang Ming’an, *Civil Obligations* (2002), p.111. Only one writer points out that the said article is not really about mutual fault, nevertheless he himself still agrees that the mutual fault should be applicable to contract law. See Fang Shaoshen, *Damages for Breach of Contract* (1999), p.199.

⁵ See Liu Shiguo, *A Contemporary Study on Damages for Tortious Act* (1998), p.115; Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.244; Fang Shaoshen, *Damages for Breach of Contract* (1999), p.201; Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.554; Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.293; Cheng Hao, *Set-off of Fault in Tort Law*, [2005] *Tsinghua Law Journal* no.6 18, 18.

⁶ The Supreme Court, (1990) Reply MTZ 25.

with her card. The court held that the bank was negligent in failing to check the picture on the card while the plaintiff was also negligent in her indifference to the likely consequence. Therefore the claimant had to bear 30% loss.¹ Likewise, there is no problem to apportion damages in the carriage of goods by sea.² This is a significant difference between the two countries. Since it has been unanimously accepted that mutual fault is applicable to contractual default, it is time Chinese written law openly confirm it.

In order to apportion damages, art.131 of GPCCL refer to “fault” of the victim but does not expressly state how to conduct the apportionment. Art.169 of the CMC suggests the proportion of apportionment should be decided by *the extent of its fault*.³ Many scholars accordingly suggest comparative culpability as the criterion.⁴ This was accepted in *Dingbian Plastic Manufactory v Industrial and Commercial Bank Xianyang Branch*.⁵ The defendant bank released the payment without checking the fraudster’s identity and was found grossly negligent. The plaintiff was found slightly negligent in that his order to the bank was ambiguous. In the end the plaintiff was responsible for the loss of interest while the defendant was responsible for all the rest major loss in proportion to the degree of his fault. But this is not the only standard. Another view holds that the potency of causation is more important.⁶ Therefore a more

¹ *Dong Jingchun v Siping Specialised Vessels Trading Co Ltd*, Jilin Higher People’s Court, as cited by Selected Cases of People’s Courts (1996, no.4), p.58.

² See the next section.

³ Art.169 of the CMC reads “If the colliding ships are all in fault, each ship shall be liable *in proportion to the extent of its fault*; if the respective faults are equal in proportion or it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships shall be apportioned equally.”; see also art.2 of the Interpretation concerning to Several Issues in Application of Law on Compensations for Damage and Injury to Person, reading “if the victim deliberately or negligently brings about or increases the damage ... the liability for compensation should be lessened or exempted. Nevertheless, if the damage is caused by deliberate or gross negligence of the injuring party and the victim is only found slightly negligent, the liability of compensation shall not be lessened.” The said deliberate, gross negligence and slight negligence no doubt all denote the degree of fault.

⁴ This position is supported by Wang Liming, *Liability for Breach of Contract*, (2nd edn 2003), p.83, 84; Liu Shiguo, *A Contemporary Study on Law of Damages for Tortious Act* (1998), p.117; Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.299.

⁵ Shanxi Higher People’s Court, 30 Mar 1991.

⁶ Zhang Xinbao, *Chinese Tort Law* (1998), p.421; Zeng Shixiong, *Principles of the Law of Damages* (2001), p.233; Zhang Ming’an, *Contract Law* (2003), p.285; In *Liu Yulan v Chinese Industrial and Commercial Bank Yuci Branch*, The Supreme Court, (1990) Reply MTZ 25, both parties were found in “gross negligence”. The court then asked how far the loss was preponderantly *caused* by one or the other of the parties. Because the negligence

popular view holds that the court should take into consideration both the degree of fault and potency of causation.¹ This is very similar to English law. Some judicial decisions lend support to this view. In *Guangzhou ETDZ construction I&E Trading Co v Sun Hing Shipping Co Ltd and its Guangzhou Branch*,² the carrier defendant provided rusted and broken containers which were evident by their appearance. This was accepted by the plaintiff shipper. The contained cargo was damaged for this reason. The court held “both were at fault and caused the accident... the defendant was the major reason of it ... the plaintiff has certain degree of fault as well”, then apportioned 20% liability to the plaintiff.³

3.8.3 Apportionment of damages in contractual default⁴

This is one (rare) area where Chinese and English law are completely different. As said under English law, causation is an all-or-nothing idea in contractual default which stands out as an inflexible rule against apportionment.⁵ A defendant will be liable in full if he causes the claimant’s loss to any extent at all. The possibility of holding him liable to a reduced extent, in proportion to the degree to which the plaintiff and other extraneous factors (such as natural force) contribute to the loss, has not generally been

of the defendant bank directly caused the loss, he was held 70% liable for the loss.

¹ Shi Shangkuan, *A General Research on the Law of Obligation* (1990), p.297; Cui Jianyuan, *A Study of Liability of Contract* (1992), p.217; Cui Jianyuan, *Contract Law* (3rd edn 2003), p.271.

² Guangdong Higher People’s Court, 28th Oct 1997.

³ Cf. *Nanjing Jianghai Shipping (Group) Co Ltd v Dalian Ocean Shipping Co Ltd*, as cited by Selected Cases of People’s Courts (1992), p.144, the vessels collided due to mutual fault. The court held the collision “was *predominantly caused* by the defendant... the plaintiff has certain *fault* as well” and mediated the case accordingly.

⁴ This section should be distinguished from the question to permit claimants to recover from a defendant who contributed to the risk of causing the claimant’s harm without proving that the defendant actually caused the harm. For such a discussion see *Barker v Corus UK Ltd* [2006] 2 A.C. 572 (H.L.); *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32; Fischer, D.A. *Proportional Liability: Statistical Evidence and the Probability Paradox*, (1993) 46 Vand. L. Rev. 1201; Makdisi, J. *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability*, (1989) 67 N.C. L. Rev. 1063; Porat, A. *Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen, and Fairchild*, (2003) 23 Oxford Journal Of Legal Studies 667; Owen, R.F. *Causation and Apportionment*, (2000) 150 New Law Journal, 1116.

⁵ The well-known exception is where the breach of contract would give rise to a duty of care in tort independent of the existence of the contract. There is however another exception where the apportionment has been accepted as anomalous and it is probably not applicable to maritime situations, namely *Barker v Corus* [2006] 2 A.C. 572 (H.L.) where the damages for exposing employers to asbestos dust were divided according to the relative degree of contribution to the chance of the disease.

considered.¹ This is particularly so in the carriage of goods by sea, where breaches of contractual duties of care do not usually correspond to tortious liabilities. In *AB Marintrans v Comet Shipping Co Ltd*,² the charterer claimed damages from the shipowners for bad stowage of cargo. The charterer had also contributed to the damage by their own negligence as his surveyor gave approval of the stowage to the master who challenged its safety. However it was held that the 1945 Act did not apply in that situation. The court chose the proximate cause of the loss,³ (i.e. the shipowner's breach) and then attached the totality of that loss to it. The charterer recovered in full against the shipowner notwithstanding the fact that he himself had been negligent and did partly cause the damage. In *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance*,⁴ the vessel leant to starboard at the beginning of the voyage, which was subsequently increased by the act of the carrier adding more bunker coal. It finally heeled over and beached. There were two causes of this accident; one was the unseaworthiness for which the carrier was liable, and the other was the negligence of adding bunker for which he was not according to exception clause. The court held that the carrier was fully liable.⁵

Apportionment was attempted in *The Christel Vinnen*⁶ where the cargo was damaged by water which entered through a rivet hole in the port bilge amidships. Hill J. at the first trial held that half the total damage was caused by an inflow of water due to unseaworthiness, and half by inflow of water due to negligence, an excepted peril, and he gave judgment for 50 per cent of the

¹ Tettenborn, *The Law of Damages*, p.173. "It is not open to the court to award damages based on the amount that would have been recovered had causation not been in issue, less a discount to reflect the probability that the loss was not caused by the defendant's wrong."

² [1985] 1 Lloyd's Rep. 568; cf. *Ceylon v Chandris* [1965] 2 Lloyd's Rep. 204.

³ It was not clear how the court chose the proximate cause. But considering the fact it was recognised by arbitrators that the loading and stowing the cargo was a joint operation and that 60 percent of the blame for the incorrect stowing attached to the master and 40 percent to the charterers, maybe any contribution over 50 percent would be treated as a proximate cause.

⁴ (1940) 67 Ll. L. Rep. 253 (H.L.).

⁵ Cf. *Ceylon v Chandris* [1965] 2 Lloyd's Rep. 204.

⁶ (1924) 19 Ll. L. Rep. 272 (C.A.); the same attempt was made by arbitrators in *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 Lloyd's Rep. 568.

claimants' proved damage. Unfortunately it was reversed by the Court of Appeal, which held (notwithstanding an exception of negligence) that the shipowners were responsible for the whole of the damage, not merely for such proportion.¹ In *Heskell v Continental Express, Ltd.*,² Devlin J. expressly stated that "whatever the true rule of causation may be, I am satisfied that if a breach of contract is one of two causes, both co-operating and both of equal efficacy...it is sufficient to carry judgment for damages."³

There is no doubt that a defendant should be liable only for the part of the harm he contributes. So is there any justification for this inconsistent rule? Apart from the merit of the simplicity defence,⁴ there is much literature defending so from the perspective of causation. Prof. Honore tries to justify the rule on several scholastic theories. He says the position best fits the equivalence theory of causation, *i.e.* every condition in the absence of which the harm would not have occurred in the way it did occur is the cause of the harm.⁵ It certainly explains the logical establishment of the defendant's liability, but fails to justify the full compensation position, as by the very application of the same theory, contribution of extraneous factors or plaintiffs should also be recognised and qualified as a legal cause.⁶ Similarly, other theories he resorts to all fail to rationalise the all-or-nothing compensation.⁷ Prof. Treitel comments that it is based on the policy that the need to protect defendants is more acutely felt in countries denying such a rule,⁸ which he subsequently shows not a logical one. It is also said in one view that in cases on causation the sole issue being considered is

¹ [2000] 2 Lloyd's Rep. 15.

² (1949-50) 83 Ll. L. Rep. 438.

³ *Ibid.*, per Devlin J. at 458.

⁴ See the previous section.

⁵ Honore, A.M. *International Encyclopaedia of Comparative Law* vol 6 Ch 7 Causation and Remoteness of Damage, Tunc, A. (ed.), p.36.

⁶ Not to say the theory itself is more popular in criminal law. It has fallen out favour for civil law for its fatal defects of introducing excessive liability. *Ibid.*, p.14 fn 135.

⁷ On the explanatory theories, what is meant is that the other cause is by itself a sufficient explanation of the harm, and on the probability theories that the other factor renders the harm sufficiently probable, whereas the tortfeasor does not. On insurance theory, it represents an attempt to ensure that the injured party receives compensation. All can establish the liability but fail to justify a stubborn non-apportionment position. See *ibid.*, p.36-49 and p.90.

⁸ Treitel, G.H. *Remedies for Breach of Contract: A Comparative Account* (1988), at p.173.

whether or not the defendant is liable: the plaintiff's culpability is immaterial.¹ This does not seem like a sound reason for departing from the general causation rule, other than *ipse dixit*.²

The advocates of this approach might overlook a persuading reasoning from the perspective of burden of proof. Under English law if a certain type of loss or damage is divisible, each of which is respectively caused by different factors, then only the particular type of damages caused by the breach is recoverable, while others caused by the plaintiff or the act of god will not.³ So the defendant will be liable for the whole harm unless he can prove the proportion that is caused by others.⁴ This view concurs with the Hamburg Rules.⁵ Nevertheless, isn't it fairer to bear 50% liability rather than 100% on that occasion? Especially given the fact that it is beyond doubt that both have indeed caused the loss, it is not convincing to select one in preference to others simply because the proof is unavailable. The proposed Carriage of Goods by Sea Act 1999 (US)⁶ and the CMI Final Draft Instrument on Issues of Transport Law⁷ adopts a half-half

¹ McGregor, H. *McGregor on Damages* (17th edn 2003), at p.102; *cf.*, *Heskell v Continental Express*, *supra*, per Devlin J at 452.

² In another words, "because I say so".

³ See Hart, H.L.A. and Honore, T. *Causation in the Law* (2nd edn 1995) p.225; *Ocean Steamship Company Ltd v Liverpool & London War Risks Insurance Association Ltd* (1947-48) 81 Ll. L. Rep. 1 (H.L.); *the Isla Fernandina* [2000] 2 Lloyd's Rep. 15; *The Europa* [1908] p 84; *Tulloch v Town Line (London) Ltd* (1923) 14 Ll. L. Rep. 122.

⁴ Tetley, W. *The Cause of the Loss or Damage, Etudes de Droit Maritime à l'aube du XXI^e siècle - Mélanges offerts à Pierre Bonassies*, (Editions Moreux 2001), p. 357-371, 360; *The Torenia* [1983] 2 Lloyd's Rep. 210 at 218, where Hobhouse J. stated: "Where the facts disclose that the loss was caused by the concurrent causative effects of an excepted and a non-excepted peril, the carrier remains liable. He only escapes liability to the extent that he can prove that the loss or damage was caused by the excepted peril alone"; *Gosse Miller Ltd. v. Canadian Government Merchant Marine Ltd.* (1928), 32 Ll. L. Rep. 91 per Viscount Sumner at 98; *Wayne Tank & Pump v. Employers' Liability*, [1973] 2 Lloyd's Rep. 237 per Lord Denning at 240; *cf. Chrysler Corp. v. Todorovich*, (1978) 580 P.2d 1123 (Supreme Court of Wyoming); There is however, a distinguishing English case *Ceylon v Chandris* [1965] 2 Lloyd's Rep. 204 where Mocatta, J. at 216 in his obiter remarked that after the claimant was found breach of contract which contributed the loss, onus was on the claimant to prove the extent of damages caused by his breach, otherwise he can only recover nominal damages.

⁵ See art.5 (7), a provision similar to the said effect.

⁶ See Sec. 9. E(2) Insufficient Evidence. "If there is no evidence upon which the trier of fact in an action for loss or damage can base a determination of the extent to which the loss or damage is attributable under paragraph (1), and a carrier or ship is found liable for an undetermined portion of such loss or damage, then the aggregate liability of all the carriers and ships is one-half of the loss or damage."

⁷ See 6.1.4.

[If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]

[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is

approach and provides that the carrier will be liable for no more than 50% of the damages in the event when there is no evidence available to apportion damages. This is commendable.

The merit of the English position is its simplicity, as courts and lawyers do not need to do their best to assign a part of liability on the basis of a pure guess. But why could the defendant not be held partly liable for the damage¹ whilst English law does hold the defendant liable to a reduced extent in tort law when the loss is partly caused by the act of the claimant himself.² Not to say, where each of several defendants causes only part of the total damage, contribution between wrongdoers is allowed.³ Some judges have advocated the apportionment,⁴ but apart from *Barker v Corus*⁵ these attempts have been unsuccessful.

In comparison, the Chinese position is more flexible here and arguably better simply for that reason. Under English law, liability for breach of contract is strict, *i.e.* it arises quite irrespective of fault. It might be thought difficult to apply comparative blameworthiness, since the defendant is not blameworthy at all.⁶ As a result English

not liable and in part by an event for which the carrier is liable, then the carrier is
(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable. If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

¹ *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] Q.B. 405 is wrongly said to be a case of causal apportionment in assessing damages in Harris, R. *Remedies in Contract & Tort* (2nd edn 2002). The causation issue in that case is simple and settled. But the starting date of the duty of care is not consistent with the whole period during which the claimant was deafened. The apportion of damages in that case reflected a deduction of the period during which no duty of care had been imposed on the defendant to protect his employees. But it is not a case of apportionment concerned in this section.

² See Law Reform (Contributory Negligence) Act 1945.

³ Fleming, *The Law of Torts* (9th edn 1998), p.201.

⁴ In *The Eurasian Dream*, [2002] 1 Lloyd's Rep. 719, Cresswell J. did suggest such an approach in its obiter: "what if a fire is not caused by unseaworthiness in that its origin is unrelated to unseaworthiness, but it spreads in a way that it would not have done because the vessel is unseaworthy? ... in such circumstances, the carrier is [only] liable for the loss or damage caused or aggravated by the unseaworthiness..." *Ibid.*, at 737.

⁵ [2006] 2 A.C. 572 (H.L.) where the damages for exposing employers to asbestos dust were divided according to the relative degree of contribution to the chance of the disease.

⁶ "It calls for 'fault' on both sides, and so is unsuitable for non-negligent breaches of contract." Newman, P.L. *The Law Reform Act 1945 and Breaches of Contract*, (1990) 53 MLR 201, 201. Even though Ogus thinks that one can still talk in terms of comparative blameworthiness by asking how far short of the standard imposed by law did the conduct of each party fail. Ogus, *The Law of Damages* (1973), p.105.

courts only have the choice of allowing the claim in full or of dismissing it altogether. Under Chinese law, whether contract law is subject to strict liability or not is debatable.¹ Many authorities stick to fault liability even though the new CCL seems favour the other.² It is alleged that to make everyone responsible for his own fault “contains strong moral values and can purify the moral standard of society”.³ This explains why the introduction of strict liability into Chinese contract law is objected to by so many renowned scholars. A by-product of this view is that it has the merit of removing the all-or-nothing injustice. It is practically feasible in Chinese contract law to split up the aggregate of the loss and attribute identifiable parts to the defendant.⁴ In *Guangzhou ETDZ construction I&E Trading Co v Sun Hing Shipping Co Ltd and its Guangzhou Branch*⁵ mentioned above, the court held both were at fault and damaged the cargo, then apportioned 20% liability to the plaintiff.⁶

It is suggested that the union of law and mathematics “would be more dangerous than fruitful”⁷ and that the mathematical division of damages is arbitrary in some sense. But it is not more or less arbitrary than the division in contributory negligence cases in tort law⁸ or the apportioning between two or more persons who is held liable jointly and severally for their respective shares of

¹ Strict liability was suggested by one renowned scholar. See Liang Huixing, *From Liability for Wrongs to Strict Liability*, *Civil Law and Commercial Law Studies* (Liang Huixing ed.), no.8; Liang Huixing, *Drafting the Chinese Contract Law*, *Civil Law and Commercial Law Studies* (Liang Huixing ed.), no.9.

² “Liability for wrongs should be one of the basic principles for contract law” Tong Rou, *The Task of Chinese Civil Law in the New Era*, *Tong Rou Works*, p. 24; Cui Jianyuan, *Strict Liability or Liability for Wrongs?* *Civil Law and Commercial Law Studies* (Liang Huixing ed. 1999), no.11, p.197; Wang Liming, *Liability for Breach of Contract*, (2nd edn 2003), p.195-197; Wang Jiafu, *Creditor’s Rights in Civil Law* (1991), p.240; Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.92-101.

³ Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.83, 84.

⁴ Yan Xiaoli, *Exploration of Causation in Tort Law --- How to Determine Causation when the External Factor Intervene*, [2002] *Modern Law Study* No.12, 52; Huang Li, *Civil Law Obligations: General Principles* (2002), p.116.

⁵ *Supra*.

⁶ *Cf. Nanjing Jianghai Shipping (Group) Co Ltd v Dalian Ocean Shipping Co Ltd*, as cited by *Selected Cases of People’s Courts* (1992), p.144, the vessels collided due to mutual fault. The court held the collision “was predominantly caused by the defendant... the plaintiff has certain fault as well” and mediated the case accordingly.

⁷ Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, (1971) 84 *Harv. L. Rev.* 1329.

⁸ See Payne, D. *Reduction of Damages for Contributory Negligence*, (1955) 18 *Mod.L.Rev.* 344, 337.

responsibility.¹ Therefore, the principle of apportionment is recommended and it “may well provide a more satisfactory solution in cases of this kind than the all or nothing rule generally adopted in common law countries.”² The Chinese approach seems more equitable here. But there is ambiguity in Chinese law when there is no evidence available to apportion damages. Here the recommendation of the author is that the defaulting party should be liable for no more than 50% of the damages by reference to the proposed Carriage of Goods by Sea Act 1999 (US) and the CMI Final Draft Instrument¹ on Issues of Transport Law mentioned above.

3.9 Causation issues in obligations and exceptions in the carriage of goods by sea

It will appear from what has been said above that the causation issue is elastic and that each case must be judged in light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to some commonplace tests. It could frequently be harder than it might be thought to show that the loss was actually caused by the breach. In shipping law very similar causal problems have occupied the courts for centuries, and yet still keep coming back. One large group of cases concerning causation arises from certain obligations of shipowners that may, if at least partially cause of loss, “trump” what would otherwise be excepted perils in the context of cargo claims. These obligations are the duty to provide a seaworthy ship, to take care of the cargo and not to deviate.

3.9.1 Unseaworthiness

The duty of seaworthiness is stipulated by art III rule 1 of the Hague/Visby Rules.³ Its Chinese equivalent is slightly differently-

¹ See McCoid, *Negligence Actions Against Multiple Defendants*, (1955) 7 Stan. L. Rev. 480; Daly, W.B. *Contribution and Indemnity*, (1994) 68 Tul. L. Rev. 502.

² Treitel, G.H. *Remedies for Breach of Contract: A Comparative Account* (1988), p.172.

³ “The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) Make the ship seaworthy; (b) Properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.” The

worded,¹ but the effect is the same. In summary, the ship must be fit in design, structure, condition, and equipment to encounter the ordinary perils of the voyage.² In both countries if the court finds the vessel to be unseaworthy and it is linked to the loss or damage, then the carrier will be liable. In *The Muncaster Castle*³, for example, the vessel was unseaworthy in that shipowners failed to ensure nuts were tightened which subsequently let water in and damaged the cargo: a causal nexus was held established.⁴ On the other hand claims for damages will be dismissed if a defendant's breach does not cause the casualty. The burden of proof is on him. In *The Yamatogawa*⁵, even if the shipowner had exercised due diligence, a thorough inspection would not find a design defect in the gear which caused the accident. Thus the carrier was held not liable for damages.⁶

Hague/Visby Rules do not apply to charterparties, but a duty of seaworthiness is still implied, in both English and Chinese law.

¹ See art.47 of the CMC, *supra*.

² Colinvaux, *R. Carver Carriage by Sea* (13th edn 1982), p.114.

³ [1961] 1 Lloyd's Rep. 57 (H.L.).

⁴ Other English examples where the unseaworthiness was found a proximate cause of the damage include: *The Kamsar Voyager* [2002] 2 Lloyd's Rep. 57 (H.L.) where a serious defect piston let the vessel idle on the sea and caused a large sum of GA expenses; *Standard Oil Co of New York v Clan Line Steamers Ltd* (1923) 16 Ll. L. Rep. 367 (H.L.) where the failure to keep sufficient margin of stability of the vessel caused its capsizing and total loss of cargo; *The Good Friend* [1984] 2 Lloyd's Rep. 586 where substantial residues from previous carriage; *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd* [1973] 2 Lloyd's Rep. 469, (Sup Ct (Can)), the cargo fell overboard from the barge because of inadequately secured equipment. Similar Chinese cases include: *Zhuzhou Tuhsu Tea Import and Export Co. and others v. Weifang International Shipping Corp.* Guangdong Higher People's Court, where the vessel's hull was rusted and leaked water during voyage; *Ming An Insurance Co (HK) Ltd v. Eversall Shipping Ltd (St. Vincent) and Yingkou Shipping Co*, Guangdong Higher People's Court. *Qinhuangdao Jinhai Oils & Foodstuffs Industrial Co Ltd v Qinhuangdao Yudonghang Shipping Co Ltd*, *supra*, in both cases the vessel sank during a storm which was normally expected in the voyage; *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*, Guangdong Higher People's Court, the engine broke down and caused delay and damage to cargo.

⁵ *The Yamatogawa* [1990] 2 Lloyd's Rep. 39; *The Europa* [1908] P. 84; *J&E Kish v Charles Taylor & Sons & Co* [1912] A.C. 604.

⁶ In *the Torepo* [2002] 2 Lloyd's Rep 535, two pilots brought discrepant Chilean charts with them for the passage of a strait, but this fact of unseaworthiness (the discrepancy between the charts) was not of itself the cause of the casualty. A failure to arrange adequate rest and the deflection of pilot's attention was the proximate cause. Therefore the defendants were not liable. Similarly, in a Chinese case *Guangdong Cereals, Oils & Foodstuffs Corp v Nanjing Lianyung Corp*, Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91, the unseaworthiness of vessel made necessary a second carriage during which the claimant incurred loss of shortage of cargo and also paid demurrage. Such a claim was denied as they had no causal connection with the carrier's breach.

3.9.2 Care of cargo

The second obligation is the duty to take care of the cargo. Art III rule 2 of the Hague/Visby Rules states: "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Its Chinese equivalent is almost the same except it deleted "subject to the provisions of Article..."¹ If causation is established between the negligence and the loss, then the carrier will be liable despite the contribution of an excepted peril. In *The Starsin*² causation was established because the cargo was negligently stowed and as a result it deteriorated during the voyage.³ On the other hand, if the cargo cannot stand the normal hazard of the sea and is damaged, then the true cause is the inherent vice of the cargo, for which the carrier is not responsible.⁴ Chinese law is of the same view apart from the all or nothing basis.⁵

¹ Art.48 of the CMC.

² [2003] 1 Lloyd's Rep. 571 (H.L.); *The Aliakmon* [1986] 2 Lloyd's Rep. 1; *the Washington* [1976] 2 Lloyd's Rep. 45.

³ Other cases of causation issue in care of cargo include: *The Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep. 1; *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606; *The Chanda* [1989] 2 Lloyd's Rep. 494 (in all three cases the cargo was carried on deck without permission of cargo owners and was damaged); *The Canadian Highlander* (1927-28) 29 Ll. L. Rep. 190; *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* (1928) 32 Ll. L. Rep. 91 (cargo was exposed to rain); *Hourani v T.& J.Harrison* 28 Ll.L.Rep. 120, *Morris v C W Martin & Sons Ltd* [1965] 2 Lloyd's Rep. 63, *Heyn and Others v Ocean Steamship Company Ltd* (1927) 27 Ll. L. Rep. 334 (goods were stolen); *The Wear Breeze* [1967] 2 Lloyd's Rep. 315 where the crew failed to fumigate the ship properly; *Rowson v Atlantic Transport Co* [1903] 2 K.B. 666, *Foreman & Ellams Ltd v Federal Steam Navigation Co Ltd* (1928) 30 Ll. L. Rep. 52 where the crew had error using refrigerating machinery and cargos were rotten.

⁴ *E.g.*, in *Mayban General Insurance Bhd v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep. 609 the cargo could not stand force 8 winds on voyage by all means. Then the proximate cause is the inherent vice rather than the negligence of the shipowner; *cf. The Jordan II* [2005] 1 Lloyd's Rep. 57.

⁵ The establishment of causation between the negligence of the carrier and cargo loss or damage include: *Zhejiang Grand I & E Co Ltd v Malaysia International Shipping Corporation Berhad*, Ningbo Maritime Court, June 18 2003, (2002) YHSCZ 23 (the failure to clean holds caused subsequent contamination of the cargo); *Zhanjiang Sugar Development Co and Shanghai Sugar Tobacco & Wine Corp. v. Yingkou Shipping Corp. and Others*, Guangdong Higher People's Court (cargo damaged by rain); *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365 (bad stowage damaged machinery during voyage); *PICC Beijing Branch v Mitsui OSK Lines Ltd, Shanghai Maritime Court*, 21 Apr 2004, (2004) HHFSCZ 162 (failure to ventilate and mildew damage of cargo); *PICC Zhejiang Branch v NSCSA National Shipping Corp and CMA CGM SA*, Shanghai Maritime Court, 24 Dec 2001, (2001) HHFSCZ 286 (the bad lashing and the damage of cargo during storm); *Ming An Insurance Co (HK) Ltd v Eversall Shipping Ltd (St. Vincent) and Yingkou Shipping Co*, Guangdong Higher People's Court (mixture of steel and erosive chemicals in the same hold); *Fujian Tingyi Food Co Ltd v COSCO Container Lines Co Ltd*, Guangzhou Maritime Court, (2003) GHFCZ No. 171 (the negligence in discharging the cargo).

3.9.3 Non-deviation

The duty not to deviate is expressly provided by legislation in Chinese law (unlike English law): under the CMC, art.49 “the carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route...” The Hague/Visby Rules do not impose it in so many words, but nevertheless its existence is clearly assumed in art IV rule 4.¹ In either case the rule is the same: the shipowner will be liable for the loss of or damage to the cargo, in so far as deviation is the cause of a loss.² On the other hand, the cargo owner seems to benefit from a presumption of causation here, in that damage occurring during deviation is regarded as having been caused by it unless it is shown that such damage would certainly have happened even without such a deviation.³ Chinese law holds the same position.⁴

3.9.4 Exceptions

The Hague/Visby Rules grant the shipowner a large number of exceptions under Art. IV rule 2. All but two of these (Art. IV rule 2 (a) and (b)) are trite law, covering situations which involve no fault on

¹ “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.” Example of reasonable deviation see *The Al Taha* [1990] 2 Lloyd's Rep. 117. “Deviation” from the outer harbour where bunkering usually took place, to the inner harbour for repairs was held reasonable; cf. *Reardon Smith Line Ltd v Black Sea & Baltic General Insurance Company Ltd*, (1939) 64 Ll. L. Rep. 229 (H.L.).

² In *Drew Brown Ltd v the Orient Trader* [1973] 2 Lloyd's Rep. 174, (Sup Ct (Can)), there had been an unreasonable deviation, but the carrier was not liable as the loss was caused by the fire and was not causally connected with the deviation.

³ *Foscolo Mango & Co Ltd and H C Vivian & Co Ltd v Stag Line Ltd* (1931) 41 Ll. L. Rep. 165 (H.L.) (The vessel altered its course to land engineers and wrecked afterwards. The court held there was a causal connection between the two, although it was arguable that navigation accident could happen anywhere even without deviation); A more obvious example is *Glynn and Others Appellants v Margetson & Co and Others Respondents* [1893] A.C. 351 (H.L.) where cargo was rotten during prolonged voyage.

⁴ In *Zhanjiang Sugar Development Co and Shanghai Sugar Tobacco & Wine Corp v Yingkou Shipping Corp and Others*, Guangdong Higher People's Court, the carrier was liable for damage to a cargo of sugar deteriorated during a prolonged journey. It was regarded as a result of the deviation.

the part of the carrier anyway.¹ Some of them overlap each other² and therefore could be combined, as they are in CMC which only provides 12 immunities but without any substantial difference from English law.³ Art. IV rule 2 (a) and (b)⁴, by contrast, are unique and do not exist in other international or national legal regimes as they exonerate the carrier even when he is at fault. They refer to

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.⁵ and

(b) Fire, unless caused by the actual fault or privity of the carrier.⁶

¹ See art. 4 (2) "...(c) Perils, dangers and accidents of the sea or other navigable waters.
(d) Act of God.
(e) Act of war.
(f) Act of public enemies.
(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
(h) Quarantine restrictions.
(i) Act or omission of the shipper or owner of the goods, his agent or representative.
(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
(k) Riots and civil commotions.
(l) Saving or attempting to save life or property at sea.
(m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
(n) Insufficiency of packing.
(o) Insufficiency or inadequacy of marks.
(p) Latent defects not discoverable by due diligence.
(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier."

² See *the Ocean Liberty* [1953] 1 Lloyd's Rep 38 (United States Court of Appeals for the Fourth Circuit), the carrier could actually rely on both fire exception and inherent vice exception.

³ For example the CMC art 51 (3) "Force majeure, act of god and perils, dangers and accidents of the sea or other navigable waters" actually merges Article 4 (2) (c) and 4 (2) (d) of the Hague/Visby Rules; but the shortening of this article in the CMC does cause ambiguity, e.g., wastage exception under Chinese law is not as clear as art.4(2)(m), which will be discussed later.

⁴ Equivalent to art 51 (1) and (2) of the CMC.

⁵ *The Portland Trader* [1964] 2 Lloyd's Rep 443, the vessel grounded on reef and the shipowner succeed in defence of negligence in manning vessel; in Chinese case *China Ocean Shipping Agent Co Ltd Beihai v Beihai Ocean Carriage Co* Guangxi Higher People's Court, 14 Mar, 2005, (2005) GMSZZ, the collision was caused by negligence in navigation; White, R. *The Human Factor in Unseaworthiness Claims* (1992) 5 LMCLQ 221.

⁶ If the vessel catches fire and cargos weres subsequently damaged, whether directly consumed in fire, damaged by smoke or damped by water in fire fighting, the true cause is still fire. *The Apostolis* [1997] 2 Lloyd's Rep. 241; Chinese cases see *PICC Property and Casualty Com Ltd Shanghai v Shanghai Interunited Ltd and Ensign Freight (China) Ltd*, Shanghai Maritime Court, 18 Apr 2004, (2003) HHFSCZ 485; *China Ping'an Insurance Hangzhou v Hanjin Shipping Co Ltd and Hanjin Shipping (China) Co Ltd*, Shanghai Maritime Court, 25 Jun 2004, (2003) HHFSCZ 462; Tetley, W. *Responsibility for Fire in the Carriage of Goods by Sea*, [2002] ETL 1-35; the fire defence was suggested to be eliminated as an outdated defence. See Hicks, J.K. *What Should We Do with the Fire Defence, Late in the Evening?* (2005) 83 Tex. L. Rev. 1225.

Thus if the causation can be established between the above and the damage, the shipowner can be exempted.

3.9.5 Multiple causes in cargo damage or loss and the all or nothing basis

Unfortunately causation inquiry is complicated in shipping cases. Seldom is unseaworthiness or any other discrete factor the sole cause of a marine casualty.¹ The concerned loss could be caused by several breaches of obligations,² and excepted perils³ or a combination of all.⁴

Under English law, if there is only one operating legal cause of the loss, it may be possible to distinguish the sole cause and *novus actus interveniens* and to discard other disguising possible reasons as irrelevant because their connection is too tenuous.⁵ In *Dunn v. Bucknall Bros*,⁶ a shipowner and his agent carried the goods of enemies on board. The vessel was then arrested and caused great delay. It was the shipowners' reckless conduct not the restraint of princes that was the proximate cause. In *The Eurasian Dream*,⁷ the fire would not have broken out if the master and crew had been properly instructed and trained. Thus the proximate cause of loss was unseaworthiness rather than fire.⁸ When the court found that but for the defaults in compass, error in navigation would have been avoided;⁹ or but for the instability of vessel, the vessel would not have been lost in a storm,¹⁰ then the proximate cause was

¹ As remarked by Lord Wright that "unseaworthiness...can never be the sole cause of the loss..." in *Smith Hogg & Co. v. Black Sea and Baltic General Insurance Co.*, (1940) 67 Ll.L.Rep. 253 at p. 259.

² *E.g.*, by unseaworthiness and deviation. See *The Thordoc* (1937) 58 Ll. L. Rep. 33 (P.C.).

³ *E.g.* by fire and inherent vice. *The Ocean Liberty* [1953] 1 Lloyd's Rep 38 (United States Court of Appeals for the Fourth Circuit).

⁴ *The Christel Vinnen* (1924) 19 Ll. L. Rep. 272 (C.A.); *Ceylon v Chandris* [1965] 2 Lloyd's Rep. 204.

⁵ So is called "a troika in resolving cargo claims." Tetley, W. *Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules* [2001] ETL 9, 34.

⁶ [1902] 2 K.B. 614 (C.A.).

⁷ [2002] 1 Lloyd's Rep. 719.

⁸ *Cf. Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105 (P.C. (Can)).

⁹ *The Thordoc* (1937) 58 Ll. L. Rep. 33 (P.C.).

¹⁰ *Standard Oil Co of New York v Clan Line Steamers Ltd* (1923) 16 Ll. L. Rep. 367 (H.L.); *Charles Goodfellow Lumber Sales Ltd. v. Verreault, Hovington and Verreault Navigation Inc.*, [1971] 1 Lloyd's Rep. 185, Sup Ct (Can).

unseaworthiness.¹

A further point can also arise in this connection. If the cargo owner has been put in an awkward position by the breach of shipowner, his reasonable reaction will not be regarded as *novus actus interveniens* and will not break the chain of causation, even though it might be seen unwise in hindsight. In *Vinmar International Ltd and Another v Theresa Navigation SA*², the defendant owners failed in their duty to clean the tanks. The cargo owner accepted the continuing loading of the cargo in the hope that the contamination would lessen. The causative factor was the shipowner's breach but not cargo owner's fault.³ On the other hand, if the claimant acts unreasonably, it will break the chain of causation. In *The Marseilles and Epos*⁴ shipowners' agents delivered a cargo without bills of lading, an obvious breach of contract. However, as a result of an error the shipowner wrongly settled the claim with the cargo owner's underwriters for a great deal more than it was worth. The court held that the defendant's breach of contract did not cause the settlement loss. This does not differ from the Chinese position.⁵

Opposite to the above, if it is indeed both the defendant and the claimant/excepted factor that contribute to the loss, English law is different. If their respective impacts are separable, *e.g.* some of cargo damage is caused by unseaworthiness and others by exceptions; the shipowner is only liable for the former part.⁶ But if

¹ In *Raymond & Reid and Others v King Line Ltd*, (1939) 64 Ll. L. Rep. 254 though experienced bad weather, the real cause of cargo damage was over-stowage of cargo. In *Canada Rice Mills Ltd v Union Marine & General Insurance Company Ltd* (1940) 67 Ll. L. Rep. 549 (P.C.); *cf. Foreman & Ellams Ltd v Federal Steam Navigation Co Ltd* (1928) 30 Ll. L. Rep. 52; *Foscolo Mango & Co Ltd and H C Vivian & Co Ltd v Stag Line Ltd*, (1931) 41 Ll. L. Rep. 165 (H.L.)), the cargo was damaged by overheat because ventilators were closed during bad weather. Thus it was not caused by perils of sea but by the negligence in looking after cargo.

² [2001] 2 Lloyd's Rep. 1.

³ The court held it did not break the chain of causation as the decision "could reasonably be anticipated to be made consequent upon creation by the owners of the dilemma with which the claimant were confronted ... the decisions ... not sufficiently aberrant as wholly to supplant the unfitness of the vessel as the effective cause of the contamination..." *Ibid.*, *per Tomlinson, J.* at p.15.

⁴ [2003] 1 Lloyd's Rep. 503.

⁵ See *Jinshi Trading Co v Lianyungang Shipping Co Ltd*, Tianjin Maritime Court, 18th Apr 2005, (2005) JHFSCZ 37; *Shandong Animai By-Products I/E Corp v Hong Kong Yong He Shipping Co and Others*, Qingdao Maritime Court, 6th Apr 1999.

⁶ In *The Isla Fernandina* [2000] 2 Lloyd's Rep. 15, a cargo of bananas was damaged. Some

such a separation becomes impossible in reality, which is common in the carriage of goods by sea, English law adopts a simple all or nothing method, by which the English court will have to decide which of the two or more factors is the proximate cause of the loss and then attach the totality of that loss to it. It follows that the shipowner will lose his right to exemption if any his fault is even jointly causative of the loss even though it may not be the dominant cause, particularly in the event of unseaworthiness.¹

Chinese law is significantly different on this point from English law. It rejects the all or nothing injustice and apportions the damages in proportion to the degree of his responsibility for the loss on conditions that they succeed in discharging the burden of proof. Art.54 of CMC expressly provides “where loss or damage or delay in delivery has occurred from causes from which the carrier or his servant or agent is not entitled to exoneration from liability, together with another cause, the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to the causes from which the carrier is not entitled to exoneration from liability; however, the carrier shall bear the burden of proof with respect to the loss, damage or delay in delivery resulting from the other cause.” In *Guangzhou ETDZ construction I&E Trading Co v Sun Hing Shipping Co Ltd and its Guangzhou Branch*², the court apportioned liability accordingly between litigants.³ In *Wang Qinwen v Taizhou Jianghai Shipping Co, Guan Baoshun and Others*,⁴ the shipowner himself and the charterer defendants boarded the vessel together

of the damage arose from the ditching of the cargo in an attempt to refloat the vessel from grounding (negligent navigation). Others were related to the over ripening of the bananas due to insufficient power to preserve the cargo (unseaworthiness). The shipowner was held only responsible for the second group of damages. Cf. *Tulloch v Town Line (London) Ltd* (1923) 14 Ll. L. Rep. 122; *Ocean Steamship Company Ltd v Liverpool & London War Risks Insurance Association Ltd*, (1947-48) 81 Ll. L. Rep. 1 (H.L.).

¹ See *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance*(1940) 67 Ll. L. Rep. 253 (H.L.) per Lord Wright, at 259,260; *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255. Under Hague/Visby Rules art 4(2) (c)-(q) the exceptions themselves presuppose no fault by the carrier. So if the shipowner resorts to art.4(2)(a) or (b), there must not be a breach of his duty that is wholly or partially causative.

² Guangdong Higher People's Court, 28th Oct 1997.

³ See also *Hao Hui Co Ltd and Hai Yue Shipping Com v Wuchuan Im & Ex Trade Co*, Guangzhou Maritime Court, 11th Dec 2001, (2001) GHFCZ 158; *Xiamen Imports and Exports Ltd v COSCO Guangzhuo*, Selected Shipping Law Cases (Liu Jiazhen ed., 1998), p.71.

⁴ Ningbo Maritime Court, 6 Apr 2000, (2000) 1 YHSCZ 21.

sailing to another port. However, the vessel was unseaworthy as none of them were qualified seamen. The vessel went aground and sank. The court held that the plaintiff as a shipowner provided an unseaworthy vessel and should be held mainly responsible. The defendants did not have any qualification either and were mutually at fault. In the end, the court apportioned damages between the plaintiff and the defendant on 6:4.

3.9.6 Seaworthiness, an overriding obligation from the perspective of causation?

Following the above section, it is worth a separate discussion here about seaworthiness and causation. Notably, when the loss is partly caused by a breach of warranty of seaworthiness, and excepted perils and/or claimant's fault, it is highly likely that the shipowner will be responsible for the whole loss provided his breach is an effective cause of loss, even though it may not be the dominant cause.¹

In *The Christel Vinnen*,² Scrutton L.J. was of the view that the shipowner was liable only on the condition that unseaworthiness was a *dominant* cause of the resulting damage.³ However Lord Wright in *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance*⁴ disliked the adjective *dominant*. "If I may, however, venture to criticise the language of the learned Lord Justice [Scrutton, L.J. in *The "Christel Vinnen"*], I should prefer to avoid the word dominant... It may be preferred to describe it as an effective or real or actual cause, though the adjectives in my opinion in fact add nothing...the shipowner is liable though there are other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or

¹ *Smith, Hogg & Co Ltd v Black Sea & Baltic General Insurance*(1940) 67 Ll. L. Rep. 253 (H.L.) *per* Lord Wright at 259,260; *The The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255.

² *Supra*.

³ *Canadian Co-Operative Wheat Producers, Ltd. v. Paterson Steamships Ltd* (1934) 49 Ll. L. Rep. 421 (P.C.).

⁴ In that case the court found that both the unseaworthiness and the negligence of master. (1940) 67 Ll. L. Rep. 253 (H.L.).

omissions of the master, whether negligent or not, or a combination...”¹ In that case even the “but for” test was artfully tailored into a stricter one, “would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, *even though the disaster could not have happened if there had not also been the specific peril or action.* (Emphasis added)”² Again in *A/B Karlshamns Oljefabriker and Another v. Monarch Steamship Company, Ltd*,³ he emphasised that there could hardly be any event which could supersede or override the effectiveness of the unseaworthiness if it was a cause.⁴ Such a view is also supported by *Carver Carriage of Goods by Sea*.⁵

In *The Kamsar Voyager*⁶ Dean J. tried to compromise the contradictory views. He said “once unseaworthiness was established as a cause it would only be in very rare cases, applying the common sense approach, that the Court would disregard it provided that it was still present and operative at the time of the loss.”⁷ In his opinion the above view was “merely making a practical observation on the likely application of the overriding common sense approach rather than laying down a special rule of causation in the context of unseaworthiness.”⁸ Nonetheless, Lord Wright made it clear enough that once unseaworthiness was found an effective cause, then whether or not it was a dominant one was no longer important in deciding the liability and damages. Therefore inconsistent with its usual approach, English law in fact openly simplifies its process in deciding causation when unseaworthiness is involved.

Such a different treatment on the one hand corresponds to the

¹ *Ibid.*, at p259,260.

² *Ibid.*, per Lord Wright at 259.

³ (1948-49) 82 Ll. L. Rep. 137.

⁴ *Ibid.*, at p155.

⁵ “If unfitness of the ship becomes *a real cause* of loss of or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at common law or by express contract have contributed to cause the loss.” (emphasis added) Colinvaux, R. *Carver’s Carriage of by Sea* (13th edn 1982), p.108, para 143; see also Aikens, R. *Bills of Lading* (2006), Treitel, G. *Carver on Bills of Lading*, (2nd ed, 2005).

⁶ [2002] 2 Lloyd’s Rep. 57 (H.L.).

⁷ *Ibid.*, per Dean J. at 66.

⁸ *The Kamsar Voyager*, supra, per Dean J. at 67.

all-or-nothing position; on the other hand, reflects an improper overemphasis of the obligation of seaworthiness. The COGSA 71 and the Hague/Visby Rules are quite ambiguous in their wording on the hierarchy of different obligations. Art.3 (1) of COGSA 1971 (seaworthiness) simply states “the carrier shall ...make the ship seaworthy...” while 3 (2) (care of cargo) says “*Subject to the provisions of Article 4*, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.” (emphasis added) The fact that 3 (2) is made subject to the provision of art. 4 (exceptions) and 3 (1) is not so conditioned strongly hints that the obligation of seaworthiness in 3 (1) is superior to the obligation of caring for cargo in 3 (2), and the former is always described to be an overriding one.¹

Or is it? Apparently, one of the reasons that makes it *overriding* is based on the wrong assumption that exceptions provided in art 4 can still be relied on if the shipowner breaches art 3 (2) but not so when he breaches art 3 (1).² However as a trite law, exception should not be effective where the damage could have been avoided without the breach of obligation (say unseaworthiness, lack of care of cargo and so on).³ If the all or nothing view makes the seaworthiness an overriding obligation, certainly the same can be said to the care of cargo or non-deviation.⁴ Another possible explanation is that maybe the existence of unseaworthiness by default establishes the causation so that it deserves the title? The answer is no. Even if the ship is unseaworthy, the shipowner is not liable for all kinds of damage

¹ Lord Somervell gave his reason in *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105 (PC (Can)), at 113 “Art.3, Rule 1, is an *overriding* obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. 4 cannot be relied on.” (emphasis added); cf. *The Eurasian Dream*, supra, per Cresswell J. at 738; Chiu Tsz-wai, *The Concept of Seaworthiness in Marine Cargo Claims from an Australian Perspective: A Critique* (1999) 18(5) *Trading Law & Trading Law Reports* 412.

² This view can be seen in Baughen, *Shipping Law* (3rd edn 2004).p.113.

³ “If a peril of the sea (4 (2) c) and failure to care for the cargo (3 (2)) are determined to be concurrent causes of the damage, the carrier is responsible for the entire loss unless he shows what portion of the damages was due to the peril.” Tetley, *Cargo Claims* (4th edn Draft), Ch 13 p.22, see <http://www.mcgill.ca/maritimelaw/mcc4th/>

⁴ “When the loss is due to both a validly excepted cause and lack of proper care, the carrier is responsible, unless he can separate the loss resulting from each cause.” Tetley, *W.Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules* [2001] ETL 9-35.

occasioned to the cargo as the carrier is certainly entitled to exceptions if unseaworthiness is not causative.¹ It is just the same as the obligation of care of cargo. No hierarchical difference lies between the two. The word “subject to the provisions of article ...” in the statute and the wording like “overriding” is misleading and redundant in the author’s view.

In fact, other legislations have not followed the Hague/Visby Rules’ approach for the sake of clarity. Art.47 and 48 of CMC were copied from Hague/Visby Rules, but drafters warily deleted the qualifying “*subject to the provisions of Article 4*” and therefore avoid the misunderstanding. There is no Chinese case law² and authority supporting its superiority.³ The proposed US COGSA 99 treats seaworthiness and care of cargo equally and avoids the misleading.⁴ There is no clear policy supporting such a English view and it is should be subject to further review in the author’s opinion.

3.9.7 Causation issues in the carriage of dangerous cargo⁵

At common law the shipper impliedly undertakes not to ship dangerous goods⁶ without first notifying the carrier of their particular characteristics.⁷ This has been reinforced by art. IV rule 6

¹ *The Europa* [1908] P 84.

² In *Guangzhou ETDZ construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People’s Court, 28th Oct 1997, the container provided by the shipowner was uncargoworthy and thus a breach of warranty of seaworthiness. Apportionment was made by the Chinese court for the plaintiff’s own negligence.

³ Art.54 of CMC would certainly provide otherwise if Chinese law is the same as English law. Art.54 does not single out the warranty of seaworthiness. It says “where loss or damage or delay in delivery has occurred from causes from which the carrier or his servant or agent is not entitled to exoneration from liability, together with another cause, the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to the causes from which the carrier is not entitled to exoneration from liability...”

⁴ See sec.6(a) and (b).

⁵ This is largely about English law, for the simple reason that there is almost no Chinese authority on the subject.

⁶ The meaning of dangerous goods is not a concern of this thesis. Anyone interested in it can refer to S.1(2) of the Merchant Shipping (Dangerous Goods) Regulations 1981; *Minister of Food v Lamport & Holt* [1952] 2 Lloyd’s Rep 371; *The Giannis NK* [1998] 1 Lloyd’s Rep 337; Rose, F. *Cargo Risks “Dangerous Cargo”* (1996) 55 CLJ 601

⁷ *Brass v Maitland* (1856) 26 LJ QB 49.

of the Hague/Visby Rules.¹ In *The Giannis NK*,² the House of Lords confirmed that the liability under art. IV rule 6 was strict.³ It was held that art. IV rule 3⁴ of the Hague/Visby Rules did not qualify the shipper's obligations under art. IV rule 6, which means, in the words of Lord Lloyd, "the provision imposes liability on shippers in relation to the shipment of dangerous goods irrespective of fault or neglect on their part."⁵

An interesting question on causation follows in English law. If the shipper cannot escape liability by arguing that he was not at fault, can he nevertheless defend his case by the alternative means of proving that the loss was caused by the negligence of the carrier? At first appearance the answer is not very straightforward under the disguise of so-called *strict* liability. Nevertheless, keeping in mind that contributory negligence is not applicable here and the stubborn "all or nothing" position, if it can be established that it is the negligence of the carrier that *caused (or partly caused)* the loss, then the shipper should not be liable for that (partial) loss. The object of strict liability is to provide the carrier with the opportunity either to refuse the cargo or to take the necessary precautions to protect his vessel,⁶ but not to create a privilege. To exempt negligent shipowners from the liability for the dangerous cargo will contradict this object. It will also impose an unreasonable allocation of risk,⁷ where

¹ "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment..."

² [1998] 1 Lloyd's Rep. 337 (H.L.); Panesar, S. *The Shipment of Dangerous Goods and Strict Liability* (1998) 9(5) ICCLR 136.

³ See also *The Athanasia Comminos* [1990] 1 Lloyd's Rep. 227, per Mustill J. at 282; Girvin, S. *Shipper's Liability for the Carriage of Dangerous Cargoes by Sea* (1996) LMCLQ 487; cf. *Senator Linie GmbH & Co KG v Sunway Line, Inc.*, 291 F.3d 145, 2002 AMC 1217 (2d Cir. 2002); Wohlfeld, A. *The Senator Linie: Shipper's Strict Liability for Inherently Dangerous Goods*, (2003) 27 Tul. Mar. L.J. 663.

⁴ Art.4(3) "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants."

⁵ *The Giannis NK* [1998] 1 Lloyd's Rep. 337 (H.L.), at 342; The shipper cannot argue he is lack of knowledge of dangerous characteristics of the cargo. See *Brass v Maitland* (1856) 26 LJ QB 49.

⁶ Baughen, *Shipping Law* (3rd edn 2004).p.141.

⁷ The explanation of allocation of risk see *Brass v Maitland* (1856) 26 LJ QB 49, per Lord Campbell at 54; see also Gauci, G. *Risk Allocation in the Charterparty Relationship: An Analysis of English Caselaw Relating to Cargo and Trading Restrictions*, (1997) 28 J. Mar.

shipowners have no liability at all. Therefore the liability is strict only in the sense that it disregards the fault of the shipper as far as the cause of the damage is connected with the dangerous nature of the cargo itself. But it does not preclude the shipper from invoking the carrier's breach by way of defence under art.4(6).¹

At the same time, as contributory negligence is not applicable here and the apportionment between the negligent shipper and shipowner is unavailable, it is highly likely that the shipowner will take responsibility for the whole liability regardless of the shipper's contribution. In *The Fiona*,² shipowner's attempt to rely on art.6 of the Hague/Visby Rules as an indemnity clause failed in that the vessel was unseaworthy in the first place. In comparison, Chinese courts can split up the damages if they find both are causative and do not have to follow English court's "all or nothing" approach.

Apportionment is available in contractual default only if the damage is separable and can be attributed to each factor.³ In *The Kapitan Sakharov*⁴, undisclosed dangerous cargos were shipped and ignited during the voyage. The fire then spread to an inflammable cargo that had been wrongfully stowed under the deck in breach of duty of seaworthiness. The shipper was held liable for partial damage caused by the initial fire, and the shipowner was liable for the loss of the wrongly stowed cargo, as the dominant cause of each part could be imputed to shipper and shipowner respectively. A strikingly similar case appeared in Chinese courts (concerning to the limitation but not liability). In *Application for Setting up Limitation Fund by Ding Genyou, Taizhou Shujiang Binhai Shipping Co Ltd and Shanghai Hai Hua Shipping Ltd*⁵, one cargo owner shipped undisclosed dangerous cargo (Sodium Hydrosulfite, SH), which was

L. & Com. 629; the designation of liability is discussed by Wohlfeld, A. *The Senator Linie: Shipper's Strict Liability For Inherently Dangerous Goods*, (2003) 27 Tul. Mar. L.J. 663.

¹ This view is agreed by Wilson, J.F. *Carriage of Goods by Sea* (6th edn 2008), p.33.

² [1994] 2 Lloyd's Rep. 506 (C.A.); case comment see: *Hague Visby Rules – Dangerous Cargo*. (1994) 1(5) Int.M.L. 67.

³ On the presumption that the breach of contract does not give rise to a duty of care in tort independent of the existence of the contract.

⁴ [2000] 2 Lloyd's Rep. 255.

⁵ Fujian Higher People's Court, 30th Nov 2005.

unstable and ignitable and cannot be extinguished with water. At the same time, the charterer *Hai Hua* loaded 3 containers of dangerous cargo Sodium Persulfate (SP) (dangerous nature declared already) under the deck as opposite to the requirement of the IMDG. During the carriage, cargo SH first self-ignited and after it was finally put out, cargo SP inside the hatch exploded due to the high temperature. The vessel in the end sank. The court deprived the charterer's right to limitation for his gross negligence in stowage. When the charterer seeks reimbursement from the shipper (as is expected), English case *The Kapitan Sakharov* represents good law and is recommended to be followed by Chinese courts.

3.10 Causation and the construction of contractual obligations

Where an obligation is contained in a contract rather than a statute, matters of causation may of course arise. The contract may define the event which sets in motion the chain of consequences.¹ Also the indemnity clause in contract imports a test of causation² at least by implication.³ It may be worded so as to make one of several causes sufficient or the opposite. If in this respect it is misconstrued and the angle of view is incorrectly plotted, the view of causation will be wrong.⁴

3.10.1 Indemnity clauses: government charters and warlike operations

There is a group of cases concerning indemnity by the government under requisition during wartime. The legal questions

¹ *Moss Steamship Co. v. Board of Trade* (1923-24) 17 Ll. L. Rep. 13 (H.L.). Sect. 2 (1) (b) of the Indemnity Act 1920 "direct loss or damage suffered by the claimant by reason of direct and particular interference" was interpreted by court meaning loss or damage directly caused by such interference excluding loss due to the intervention of other factors.

² "A claim for damages is subject to the ordinary rules of remoteness discussed below under clause 12. A claim for indemnity is not subject to the same rules, but there must be an unbroken chain of causation between the signing of the bill of lading and the loss." *The Eurys*[1998] 1 Lloyd's Rep. 351 (C.A.), per Lord Staughton at 361.

³ *Royal Greek Government v Minister of Transport* (1949-50) 83 Ll. L. Rep. 228, per Devlin.J. at 237.

⁴ *E.g.*, Clause 8 of NYPE (1946) transfer responsibility for stowage from the owners to the charterers. See *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft MBH & Co KG* [2006] 2 Lloyd's Rep. 66.

involved certainly cast light on modern causation questions. The vessels were chartered by the government upon the terms of so-called charter-party T.99, which provides that the Admiralty should be liable in respect of warlike risk, while the owners through the master should be solely responsible for the management, handling and navigation of the steamer.¹ To succeed under the indemnity clause the shipowner had to prove that a casualty was proximately caused by the warlike operation among a series of events.² In these cases a common sense test was widely used by courts.³ When some separable losses were caused by the negligence while the others caused by the operation, then only the latter was supported.⁴ If the necessary causal link between the damage and warlike operations could not be found, the claim would be refused.⁵

3.10.2 Indemnity clauses: charterers, subcharterers and others⁶

In the shipping world, a vessel can be chartered many times. The breach of a charter by the shipowner may have the effect of putting the charterer in breach of contract against his subcharterer. As a

¹ *E.g.*, it usually contained *inter alia* the following provisions: "Warranted free ... from all consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer if she be totally lost at the time of such loss..." *Attorney-General v. Ard Coasters* (1921) 7 Ll. L. Rep. 150 (H.L.).

² See *The Adelaide Steamship Co., Ltd., v. Crown.* (1923) 14 Ll. L. Rep. 549; *Attorney-General v. Ard Coasters* (1921) 7 Ll. L. Rep. 150 (H.L.); *Peninsular & Oriental Branch Service v. The Commonwealth Shipping Representative* (1922) 13 Ll. L. Rep. 455 (H.L.).

³ *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* (1942) 73 Ll. L. Rep. 1 (H.L.) *per* Lord Macmillan at p.2. "The ordinary man if asked what caused the casualty would reply that...certainly the vessel would not have gone ashore ...but for the order which she received and obeyed to change her course to the eastward to avoid apprehended enemy action."

⁴ *Ocean Steamship Company, Ltd. v. Liverpool & London War Risks Insurance Association Ltd.* (1947-48) 81 Ll. L. Rep. 1 (H.L.). Owners could be reimbursed even if the casualty was caused jointly by the navigation of the ship and warlike operations, at least when the risk of the operation was particular high. *The Adelaide Steamship Co Ltd v Crown.* (1923) 14 Ll. L. Rep. 549 (H.L.) *per* Lord Chancellor at 550 "the negligence of the master may have contributed to the loss, but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches."; *cf.* *Hain Steamship Company, Ltd. v. Board of Trade* (1929) 34 Ll. L. Rep. 197.

⁵ *The Ramon de Larrinaga* (1945) 78 Ll. L. Rep. 167 (H.L.) at p. 176.

⁶ It should be noted that shipowners and charterers could possibly indemnify each other in responding to claims for oil pollution and alike. But this topic is outside the scope of this thesis. Relevant literature see Anderson, C.B. *Liability of Charterers and Cargo Owners for Pollution from Ships*, (2001) 26 Tul. Mar. L.J. 1; Gauci, G. *Risk Allocation in the Charterparty Relationship: An Analysis of English Caselaw Relating to Cargo and Trading Restrictions*, (1997) 28 J. Mar. L. & Com. 629.

matter of principle, whether the shipowner should be liable to indemnify his charterer in full against his liability to the sub-charterer depends on *inter alia* whether the breach of head contract causes his charterer to incur the liability,¹ unless it is expressly excluded by contract. The burden of proof is on the claimant, which would be relatively easy to discharge when he holds two identical contracts, provided his conduct is reasonable.² The usual approach to the measure of damages is the amount which the charterer has been ordered to pay to the sub-charterer by previous proceedings.³ Conversely, unreasonable conduct will break the chain of causation.⁴ For example, in chain contracts usually only one party (*e.g.* owner/disponent owner) has relevant evidence which can assist the charterer in his defence of the sub-charterers' claim. If for some reason he fails to do so and the charterer acts reasonably, the court is ready to accept causal connection and the charterer should be able to pass his liability to the owner,⁵ or *vice versa*.⁶

3.10.3 Other indemnity clauses

A charterparty usually contains an indemnity clause to reimburse one party for liabilities incurred during the performance of contract for reasons the other should be responsible, *e.g.*, to indemnify shipowners for any liabilities caused by charterers' instructions. It is common that indemnity clauses of this sort contain phrases like "any loss" and "all consequences".⁷ However, this does not literally mean

¹ *The Mass Glory* [2002] 2 Lloyd's Rep. 244.

² *Sandeman Coprimar SA v Transitos Y Transportes Integrales SL and Others* [2003] 2 Lloyd's Rep. 172. "In terms of causation, charges will be recoverable under English law if they were incurred as part of a reasonable response to the threat posed by the carrier's breach of the contract of carriage."

³ *The Sargasso* [1994] 1 Lloyd's Rep. 412 where the amount awarded in arbitration was held to be reimbursed from shipowners.

⁴ *The Vakis T* [2004] 2 Lloyd's Rep 465, the shipowner's claim failed because the real cause of the loss was that he brought a wrong claim against sub-charter.

⁵ *Ibid.*

⁶ *Tianjin International Shipping Co v Shantou Yuedong International Shipping Agency*, Tianjin Higher People's Court, 13 Aug 2002. It was the charterer who held the crucial evidence and refused to co-operate with shipowners. He was held to be responsible for the loss the shipowner sustained.

⁷ Clause 9 of the charterparty reads: "the charterer hereby agrees to indemnify the owners for all consequences or liabilities that may arise from the master or officers signing bills of lading or other documents or complying with such orders, as well as from any irregularity consequent thereon in the ship's papers..." *The Ramon de Larrinaga* (1945) 78 Ll. L. Rep. 167 (H.L.).

“all” consequences. The indemnity clause has to be curtailed by a process of construction,¹ and it is the consequence that is *proximately caused* by the concerned that will be covered. In *Royal Greek Government v Minister of Transport*², though instructed by time charterers to load a cargo of coal, gas emanating from which exploded the vessel, the court found no causation between the loss and instructions as the link between the two is weak.³ In *The Eurus*,⁴ the shipowner did disobey instructions but a local custom was so unusual that it broke the chain of causation.

Exemption and indemnity clauses are, in the absence of a contrary intention,⁵ not construed as applying to loss caused by the negligence of the party who has invoked them. In *The Fiona*⁶ the shipowner’s attempt to rely on art. IV rule 6 of the Hague/Visby Rules⁷ as an indemnity clause failed in that the vessel was unseaworthy in the first place and was the cause of the loss. *Portsmouth Steamship Company Ltd v Liverpool & Glasgow Salvage Association*⁸ provides an interesting illustration. In that case, the charter-party provided an indemnity clause.⁹ The causation was established in respect of part of the damage which was “a direct and natural consequence of the instructions”. But the rest was rejected because it was caused by defective pipes (unseaworthiness) which

¹ *D.A.Stathatos Steamship Company, Ltd., v. Cordoba Central Railway Company Ltd* (1931) 40 Ll. L. Rep. 274.

² (1949-50) 83 Ll. L. Rep. 228.

³ “It was not inevitable that gas or dust from the cargo would explode, it was not, in my judgment, improbable that the loading of a cargo capable of creating an explosive atmosphere would sooner or later lead to disaster.” *Ibid.*, per Devlin J. at 238.

⁴ *The Eurus* [1998] 1 Lloyd’s Rep. 351 (C.A.).

⁵ Such a clause can be seen in *Canada Steamship Lines Ltd. v. the King* [1952] 1 Lloyd’s Rep. 1.

⁶ [1994] 2 Lloyd’s Rep. 506 (C.A.).

⁷ Art 6: “Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.”

⁸ (1929) 34 Ll. L. Rep. 459 (KBD).

⁹ “The captain...shall follow the instructions of the charterers, who will furnish him...with the necessary sailing directions...The charterers hereby agree to indemnify the owners from any consequences, or liabilities that may arise from the captain following the charterers’ instructions...”

broke the chain of causation.¹

3.10.4 Other indemnities: the Chinese position

So far this part has concentrated on the extensive English case law on this subject. There is, however, very little difference on the whole between English and Chinese law. The Chinese position in respect of contractual indemnity is plainly the same as English law.² The only difference is that China has laid down these rules in legislature.

In practice, however, indemnities under Chinese law often arise in a slightly different context. Since multiple transportation is rife, Chinese law introduces a definition of *actual carrier*³ and *carrier*⁴ to protect the cargo interests, and makes both jointly and severally liable for any damage.⁵ Therefore in Chinese law, if shipper A has agreement with carrier B, B then entrusts C, C entrusts D or any others to carry them, the cargo owner can sue any⁶ or all⁷ of B, C, and D. Whomever is sued then has the benefit of a legal indemnity against the actual carrier or real wrongdoer. A causal nexus must be established by the claimant in each action.⁸ In *PICC Qingdao Branch*

¹ "If some act of negligence intervenes or some marine casualty intervenes then I think the chain of causation is broken and the indemnity does not operate." *Ibid.*, at 462.

² *Tianjin International Shipping Co v Shantou Yuedong International Shipping Agency*, Tianjin Higher People's Court, 13 Aug 2002; *Sino-Add (Singapore) PTE Ltd. v. Karawasha Resources Ltd*, Beihai Maritime Court, 5 Mar 2002, (2001) HSCZ 119.

³ Article 42 (2) of the CMC "the person to whom the performance of carriage of goods, or part thereof, has been entrusted the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract".

⁴ Article 42 (1) of the CMC "the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper".

⁵ This regime is effectively implanted from the Hamburg Rules. See article 60 of the CMC "where the performance of the carrier or part thereof has been entrusted to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage..."; cf. the Hamburg Rules art.10 (1) "Where the performance of the carriage or part thereof has been entrusted to an actual carrier... the carrier nevertheless remains responsible for the entire carriage ..." CMC art.63 "where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable within the scope of such liability"; cf. the Hamburg Rules art.10 (4) "Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several."

⁶ See *Orient Overseas Container Line Limited v Sinotrans Jiangsu Group Suzhou Co*, Shanghai Maritime Court, 2 Jun 2003, (2003) HHFSCZ 122, the cargo owner picked contractual carriers to sue for his own interests.

⁷ See *Shinkou Shipping Co Ltd v COSCO Container Lines Co Ltd and Shanghai Aoji International Freight Co Ltd*, Shanghai Maritime Court, 25 Feb 2003, (2002) HHDSC 376, both the carrier and the actual carrier were defendants.

⁸ *Shanghai Anhang Carriage Service Co Ltd v Nanjing Yuhua Barge Multi-transport Co*, Shanghai Maritime Court, 26 Oct 1999, (1998) HHFSCZ 566.

*v Xiamen Ocean Shipping Co*¹, the contractual carrier had compensated the cargo owner's loss and sought reimbursement from the defendant who was the actual carrier. But the court found there was insufficient causal link between the rust of cargo and river transport and dismissed it. In *Wuxi Shunlong Special Pipe Fittings Company v Yingkou Chuyun Port Economy & Trade Company*², it was certain that the carrier was at no fault and one of actual carriers must have breached the contract; however since he failed to point out which actual carrier caused the damage, his recourse was dismissed. If he has amicable settlement with the cargo owner, such an agreement must be reasonable. If he over-compensates what is allowed by law, then that additional part will be denied as it breaks the chain of causation.³

If there are some errors in the previous proceedings, his recourse from the actual carrier can still be upheld provided that the error has nothing to do with the carrier. In *China Sinotrans Tanggu Co v Cosco Tianjin International Freight Co Ltd*⁴, the defendant as actual carrier provided an unseaworthy vessel and the claimant as contractual carrier had to compensate the cargo owner in the previous proceeding, in which the court wrongly awarded more damages than legally allowed. Even so, in the recourse suit the court held the defendant's breach was the cause of the claimant's loss and awarded him the same amount despite the mistake made by the previous court. This remarkably corresponds to English law.⁵

3.11 Questions of causation on nomination of safe port/berth

Under a standard time charter charterers have to nominate a

¹ Tianjin Maritime Court, 29 Nov 2001, (2001)HSCZ 383.

² Hubei Higher People's Court, Sep17 2001, (2001) EHZZ 179.

³ *Shinkou Shipping Co Ltd V Uniglory Marine Corporation and Uniglory Hong Kong Co Ltd*, Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464.

⁴ Tianjin Higher People's Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=162>

⁵ The breach of charter-party remains an effective cause of the charterer's loss even if there is an error made by the arbitrators in *The Sargasso* [1994] 1 Lloyd's Rep. 412. "It does not seem to me that such an error should be held to break the chain of causation between the breach of contract and the loss sustained by the charterer as quantified by the arbitrators ..." *Ibid*, per Clarke J. at 417.

safe loading place.¹ If the place is unsafe and the vessel incurs any damage as a result, the charterer will be liable for the loss.² But as a matter of law he does not, merely by reason of such nomination, become liable for all damage sustained which would not have been suffered otherwise.³ Whether or not the shipowner can be compensated for the loss of an unsafe berth is consequent on the question of causation, which is whether the damage to the ship is *caused* by being ordered to the berth/port and whether the decision of the master to obey the order may in certain circumstances amount to a *novus actus interveniens*.⁴ Chinese law holds the same stance.⁵ A master who enters a berth/port which he knows to be unsafe rather than asking for another nomination might risk breaking the chain of causation and the application of the doctrine of *volenti non fit injuria* may arise.⁶ The charterer will be relieved, accordingly, from the liability which will otherwise have fallen upon them.⁷ But it must be shown that the choice to proceed was wholly unreasonable;⁸ particularly so, since it is the charterer's breach of contract by ordering the ship to an unsafe berth that places the master into an

¹ See NYPE 46 preamble "Vessel to be placed at the disposal of the Charterers, at ____ Vessel... to be employed, in carrying lawful merchandise, excluding (See Cl. 52) in such lawful trades, *between safe port and/or ports* in British North America. World wide trading, although intention is to dedicate the vessel for trading between __, but excluding ____".

² *Limertick Steamship Company v. W. H. Stott & Co.* (1921) 7 Ll. L. Rep. 69 (C.A.); *Brostrom & Son v. Dreyfus & Co.*, (1932) 44 Ll.L.Rep.136; *Reardon Smith Line, Ltd. v. Australian Wheat Board*. [1956] 1 Lloyd's Rep. 1 (P.C.); Maxwell,A. "Employment" from *Calm Waters to War Zones: The Unique Nature of Time Charters and a Time Charterer's Right to Exploit the Full Earning Power of the Vessel*,(2005) 79 Tul. L. Rev. 1505, 1515.

³ *Lensen Shipping, Ltd. v. Anglosoviet Shipping Company, Ltd*, (1935) 52 Ll.L.Rep. 141; *The Olive May* (1935) 51 Ll.L.Rep. 105.

⁴ *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills, Ltd.* [1955] 1 Lloyd's Rep. 349, at p 364, *per* Lord Singleton; similarly, Roche,J, in *Portsmouth Steamship Company, Ltd. v. Liverpool & Glasgow Salvage Association*, (1929) 34 Ll.L.Rep. 459 indicated that the master should not follow the instructions of the charterer if they led to obvious danger.

⁵ *Dahai Co v Haipa Fishing Co*, the Chinese Supreme Court, 1st Apr. 2004, (1997) JTZ 3; *Fujian Shipping Corp v Yantai Shide Minerals Ltd Co*, Shanghai Higher People's Court, 17 Apr 2002, (2001) HGJZZ 442.

⁶ *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd*, [1954] 2 Lloyd's Rep. 397, *per* Devin J. at 414.

⁷ The decision of the master to go to the berth with the knowledge of circumstances is the effective cause of the damage. See *Hall Brothers Steamship Company, Ltd. v. R. & W. Paul, Ltd.* (1914) 19 Com. Cas. 384.

⁸ "He was doing what any intelligent observer, knowing exactly how he was circumstanced, would have expected him to do." *Summers v. Salford Corporation* [1943] A.C. 283, *per* Lord Wright at p.297; *cf. G W Grace Co Ltd v General Steam Navigation Company, Ltd.* (1949-50) 83 Ll. L. Rep. 297, *per* Devin J. at 308; *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills, Ltd.* [1955] 1 Lloyd's Rep. 349, *per* Lord Singleton at 364.

awkward situation.¹ On the other hand, it has been held in a whole succession of cases that complying with the order alone does not break the chain and will not deprive the shipowner of a right to damages on conditions that he acts reasonably.²

3.12 Other breaches of contract by carriers

As to other breaches in shipping law cases, the general rules are the same. The claimant needs to prove that the asserted breach is the cause of his loss. If the chain of causation is broken by some external factors, then the defendant will not be liable for it. For example, the carrier is not allowed to release the cargo unless he is presented with the original bill of lading.³ This is also the case in China.⁴ Sometimes even if the shipowner does not do so, the shipper would very likely release the cargo himself without documents or payment under commercial pressure. But this line of argument is regarded as too speculative and will not be accepted.⁵ If a shipowner fraudulently backdates bills of lading, the carrier will be liable for all subsequent losses, where even the negligence of claimants might not be sufficient enough to break the chain of causation.⁶

¹ The reason lies behind this principle was expatiated by Devlin J. in *Compania Naviera Maropan S.A. v. Lloyd Pulp and Paper Mills Ltd* [1954] 2 Lloyd's Rep. 397 at 414 "...a man is entitled to act in the faith that the other party to the contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own enquiries to see whether it is or not...Even if the breach is clear, it is vital to the conduct of business that the promisee should be able, if he considers the breach a minor one, to proceed without sacrificing his right to be indemnified. That is just as important in a voyage charter as in any other sort of business."

² *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (H.L.); *Reardon Smith Line, Ltd. v. Australian Wheat Board*. [1956] 1 Lloyd's Rep. 1 (P.C.); but usually an experienced shipowner will do so under protest. See *The Batis* [1990] 1 Lloyd's Rep. 345; similar Chinese case see *Dahai Co v. Haipa Fishing Co*, The Chinese Supreme Court, 1st Apr. 2004, (1997) JTZ 3.

³ *The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424.

⁴ *China Minmetals Steel Com Ltd v Far Eastern Shipping Company*, Guangzhou Maritime Court, 10 Dec 2001, (2001) GHFS 25.

⁵ In *Trafigura Beheer BV Amsterdam v China Navigation Co Ltd* HCCL No 173 of 1998 (unreported), a similar argument was raised but rejected. The court held "[we are]... unwilling to accept the defendant's invitation, in effect, to use a crystal ball and to re-run the sequence of events in order to decide what would or would not have occurred if the cargo had not been so misdelivered by the defendant."; in *Center Optical (Hong Kong) Ltd v Jardine Transport Services (China) Ltd* [2001] 2 Lloyd's Rep 678, (CFI (HK)), the shipowner released two of the cargo and the rest cargo was released later by the shipper without document himself. But the court rejected the argument that those two cargo would be released by the shipper anyway and were thus not caused by the shipowner.

⁶ *Standard Chartered Bank v Pakistan National Shipping Corporation and Others (No. 2)* [2003] 1 Lloyd's Rep. 227.

3.13 Deliberate wrongdoing

As has been stated, in cases of fraud the deterrent purpose is overriding over the compensatory one.¹ There is a policy in place to impose more stringent remedies on an intentional wrongdoer.² “Between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes *directly caused* by his fraud.” (emphasis added)³ The enmity to fraud by English courts can be seen in *Standard Chartered Bank v Pakistan National Shipping Corporation and Others (No. 2)*⁴, where bills of lading were fraudulently antedated and the claimant’s voluntary payment to the third party was also a contributory cause of his loss. Cresswell, J of Commercial Court denied that there was any evidence strong enough to prove any fault of the claimant in mitigation or contributory negligence.⁵ But the Court of Appeal decided that the claimant’s voluntary payment to the third party was a contributory cause of its loss and deducted it accordingly.⁶ This was overruled when the case finally went to the House of Lords. As to the issue of contributory negligence, Lord Hoffmann restored the judgment by Cresswell, J.⁷ “A fraudulent defendant's liability should [not] be reduced on the ground that, for whatever reason, the victim should not have made the payment which the defendant successfully induced him to make”.⁸ Therefore English law adopts a board view when the deliberate wrongdoing is involved. An innocent plaintiff may call on a morally reprehensible defendant to pay the whole of the loss he has caused.⁹

¹ “Where possible the law seems to like to ride two or three horses at once; but occasionally a situation occurs where one must be selected. The tendency is then to choose the deterrent purpose for tort of intention, the compensatory purpose for other torts.” Williams, G. *The Aims of the Law of Tort* (1951) 4 C.L.P. 137. at p. 172.

² *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158.

³ *Smith New Court Securities Ltd v Scrimgeour Vickers* [1997] A.C. 254 (H.L.) per Lord Steyn at 280; Dugdale and Others, *Clerk & Lindsell on Torts* (19th edn 2006), p.1099.

⁴ [2003] 1 Lloyd's Rep. 227 (H.L.).

⁵ [1998] 1 Lloyd's Rep. 684.

⁶ [2000] 1 Lloyd's Rep. 218 (C.A.).

⁷ “If a fraudulent representation was relied on in the sense that the claimant would not have parted with his money if he had known it was false, it did not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either; the law simply ignored the reasons why he paid” [2003] 1 Lloyd's Rep. 227 at 232.

⁸ *Ibid.*, at 232, 237.

⁹ Hart and Honoré, *Causation in the Law* (2nd edn 1985), p. 304.

In comparison, in a Chinese shipping case *Agricultural Bank of China Shenzhen Branch Luohu Subbranch v Jun Huang Trading Development Co Ltd, Mr.Chen Wenshang and Others*,¹ the defendant committed smuggling by importing forbidden medicine. Similarly, the claimant's bank rushed to pay the third party and was contended by the defendant as a contributory negligence. This was accepted by the court and defendants were held liable for only 80% of the loss suffered by the claimant bank even though the act of defendant was fraudulent.

Under Chinese law, contracting parties have a general duty of good faith in conducting and performing contracts.² Contracts may be void as a result of the fraud.³ A void contract is void *ab initio*.⁴ It can be amended or cancelled on this occasion.⁵ However these relevant provisions have a potentially fatal weakness, because there are no special remedies relating to fraudulent conduct,⁶ and no such requirements to impose a harsh liability to deter it. Such a conduct in China is not in the least unusual, so foreign companies doing business with Chinese entities are understandably concerned about the ability of China's judiciary to protect their legitimate business interests in China. The paucity of necessary legal provisions curbing fraud is open to criticism as it might potentially increase fraud and burnish the otherwise good reputation of shipping law. Compared with English law, there are significant deficiencies and much room for more legislation on discouraging deliberate wrongdoing.⁷ The

¹ Guangzhou Maritime Court, 29th Nov 1999.

² Art.6 of CCL.

³ Art.58 of the General Principles of the Civil Law "Civil acts in the following categories shall be null and void: ...(3) those performed by a person against his true intentions as a result of fraud, coercion or exploitation of his unfavourable position by the other party;(4) those that performed through malicious collusion and is detrimental to the interest of the state, a collective or a third party..."; art.52 of the CCL "A contract is invalid in any of the following circumstances: (i) One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the state; (ii) The parties colluded in bad faith, thereby harming the interests of the state, the collective or any third party..."

⁴ Art.56 of the CCL.

⁵ Art.54 of the CCL "If a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or cancellation of the contract."

⁶ Williams,M. *Documentary Credits and Fraud: English and Chinese Law* [2004] Compared Journal of Business Law 155, 165.

⁷ A very broad art.6 might be relied on in the event of fraud. "The parties must act in accordance with the principle of good faith, no matter in exercising rights or in

author suggests that Chinese law and judges treat fraud differently as it is obviously not fair when the law lets the fraudster go easily; it is absurd that the claimant has to bear some loss which has been clearly intended by the fraudster. Chinese law maker should confirm the ambit of the fraud exception in China in the future.

3.14 Conclusion

Questions of causation are often elastic. English jurists are of the view that it is not capable of more precise formulation, and each case must be judged in the light of its own facts and by resorting, not to the refinements of the philosophical doctrine of causation, but to some common sense tests. English judges do not lend themselves to a mechanical application of strict rules. Chinese law is, by contrast, somewhat inflexible and stands at the other extreme. A worry frequently raised in China is that legal rules suggested by theorists or written law are imprecise and leave too much discretion for human judgment. However as we have found, the overall picture of causation is of a highly discretionary and unpredictable branch of law. It is impossible to find a single formula that remains meaningful for all. Though precise legal rules are preferred by Chinese jurists, legal doctrines that Chinese law actually adopts have little empirical content; even if they have, they are not applied literally, but admit of exceptions or alternative formulations. Moreover, questions of causal connections often depend to a great extent on the discretion of judges. The theoretical preoccupation of Chinese scholars with this subject has not prevented their courts from applying general knowledge which is commensurate to common sense in English law. This contradiction between the theory and practice and the reluctance to allow discretionary trial only confuse many judges. On the other hand, due to the short history of legal system building and hence lack of experience and tradition, low quality in legal education and their limited understanding of the law, Chinese judges are inexperienced in exercising their own discretion with less

performing obligations.”

opportunity compared with English judges. As a result Chinese judges have produced some absurd decisions. Therefore, the appeal court should pay attention to causation issues in decisions made by lower courts. Chinese judges should be encouraged to exercise discretion more.

Both countries accept the contributory negligence (or its equivalent), but the Law Reform (Contributory Negligence) Act 1945 only applies to tort unless the breach of contract will give rise to a duty of care in tort independent of the existence of the contract. This leads to the “all or nothing” injustice in contractual default, which is particularly acute in the carriage of goods by sea, and thus is subject to open criticism. As shown, the justification for English rule is often not clearly stated and it is not a satisfactory solution. It should be extended to contractual claims in its possible reform. There should be a mid-position where the plaintiff’s negligence could result in a reduction of damages and the principle of apportionment of damages is recommended. Under Chinese law, by contrast, contributory negligence does not impair the whole claim but simply causes a reduction in the damages payable. But there is a problem in Chinese law, *viz.* there is no general provision in the civil code expressing the doctrine of mutual fault as a whole. This should be paid more attention by drafters in the near future.

In shipping law very similar causal problems have occupied the courts for centuries, and yet still keep arising. This chapter provides ample examples to indicate important factors in deciding this. As a matter of fact, to answer the question of causation, a balance has to be struck between the random application of the idea of justice and philosophical niceties. English courts have performed better than Chinese courts in many aspects and will enlighten Chinese jurists. But in respect of the superiority of seaworthiness, it has been improperly over-emphasised by English law. It is highly likely that shipowners will be responsible for the whole loss provided the unseaworthiness is an effective cause of loss, even though it may not

be the dominant one. This superiority arises from the all-or-nothing position and ambiguity of the Hague/Visby Rules, and it has been proved to be not a logical one. Therefore this position is untenable in the author's view.

The question of apportionment of damages where two or more causes co-exist frequently arises in shipping law. As said, the English all or nothing approach might not be as satisfactory as the Chinese position. But the Chinese rule needs also change regarding the situation where the shipowner fails to discharge the burden of proof on proportion. Here the recommendation by the author is that the carrier should be liable for no more than 50% of the damages, instead of 100% which is the present position of Chinese law.

As pointed out, Chinese law has a potentially fatal weakness, because there are no special remedies curbing fraud. As compared with English law, there are significant deficiencies and much room for more legislation on discouraging deliberate wrongdoing. The author suggests that Chinese law should confirm the ambit of the fraud exception and treat it differently and harshly to punish deliberate wrongdoers.

Chapter 4 The Remoteness and Foreseeability Tests

4.1 Introduction

Many legal systems have to choose different legal rules to prevent damages from being too open-ended. In many jurisdictions, including France¹, Italy², Japan³, Hong Kong, and the Anglo-American countries, the remoteness rule is one of these important techniques used to limit damages,⁴ while German law adopts a “theory of adequate causation”⁵. Interestingly, a hybrid of the two theories can be found in Taiwan.⁶

There is a risk of confusion in this field if one does not define one's terms. The word “remoteness” is elastic and flexible. On the one hand, the legal concepts of remoteness and causation are not watertight.⁷ Remoteness may denote that there is insufficient nexus as well as referring to the question of whether or not a loss is foreseeable or within the reasonable contemplation of the parties.⁸ It is sometimes used in two ways or in a mixed sense because if it is foreseeable that A may lead to B and B occurs, there is likely to be a causal connection, or vice versa.⁹ On the other hand, despite the fact

¹ Art.1150 of the French Civil Code.

² Art.1223 of the Italian Civil Code.

³ Art.416 of the Japanese Civil Code.

⁴ Ferrari, F. *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, (1993) 53 La. L. Rev. 1257, 1259-1261.

⁵ “In some sense this theory bears a striking resemblance to English remoteness rule” Treitel, *Remedies for Breach of Contract* (1988), p.162; see also Schneider, E.C. *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, (1995) 16 U. Pa. J. Int'l Bus. L. 615, 660-661.

⁶ Art.216 of the Taiwan Civil Code provides a very similar provision of the remoteness rule. However due to the strong influence by German law, it is explained in their legal theory as a variation of causation. Zeng Shixiong, *Principles of the Law of Damages* (2001), p.59 and p.96.

⁷ Remoteness has more than one meaning, referring to both causation in law and the scope of the protection afforded by law. *McGregor on Damages*, p.98; *Stinnes Interoil G.M.B.H. v. A. Halcoussis & Co. (No. 2)* [1984] 1 Lloyd's Rep. 676; *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* [1995] Q.B. 375, 392; see also Ch 3 Causation.

⁸ *Smith v London and South Western Rail Co* (1870-71) LR 6 CP 14 *per* Blackburn.J “The legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical.”

⁹ See *The Eurys* [1996] 2 Lloyd's Rep. 408 *per* Rix J. at 423; *Royscot Trust Ltd. v. Rogerson* [1991] 2 Q.B. 297.

that it shares some of its characteristics with causation, it is a different legal concept. Causation is a question of fact, prior to remoteness, whereas remoteness of damages is a question of law,¹ and involves issues of public or social policy.² In *Stinnes Interoil G.M.B.H. v. A. Halcoussis & Co. (No. 2)*³, the majority of arbitrators were found to have failed to distinguish between causation and remoteness and their award was therefore reversed. Damages which do not satisfy the remoteness test are generally said to be too remote and irrecoverable. This is the remoteness rule the author proposes to use in the thesis.

4.2 The remoteness rule in contract law, English-style

The remoteness rule, appropriately enough, originated in a carriage case, namely *Hadley v Baxendale*⁴. In that case, the plaintiff's mill was brought to a standstill because his only crankshaft was broken. The plaintiff engaged the defendant carrier to take it to the factory to use as a pattern for a new one, which was then delayed by the defendant. The plaintiff sued to recover the profits he would have made without the extra delay. The general rule upon which the judgment was based was enunciated by Alderson B., that is, the damages that one party of the contract ought to receive in respect of breach of contract:⁵

“should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things,

¹ *Royal Greek Government v Minister of Transport* (1949-50) 83 Ll. L. Rep. 228, *per* Devlin at 237; *Chaplin v. Hicks*, [1911] 2 K.B. 786 *per* Farwell L.J. at p. 797; *Moss Steamship Co. v. Board of Trade*. (1923-24) 17 Ll. L. Rep. 131 (H.L.), *per* Viscount Finlay at p.141; there is a contradictory view alleging causation also contains policy factors. Malone, W.S. *Ruminations on Cause-in-Fact* (1956) 9 Stan.L. Rev. 60, 61 “even with reference to this issue of simple cause the mysterious relationship between policy and fact is likely to be in the foreground.”

² See *McGregor on Damages* (17th edn 2003), p.113-137, 162; *Swingcastle Ltd v Alastair Gibson* [1991] 2 A.C. 223 (H.L.), 238 *per* Lord Lowry; typically the law has to balance conflicting interests relying on remoteness. See *The Sea Empress* [2003] 1 Lloyd's Rep. 327; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

³ [1984] 1 Lloyd's Rep. 676.

⁴ (1854) 9 Ex. 341.

⁵ The view that *Hadley* only applies to contract has been challenged because there is no obstacle not to apply it to all forms of compensation for non-deliberate damage. See Tettenborn, A. *Hadley v. Baxendale: Contract Doctrine or Compensation Rule?* (2005) 11 Tex. Wesleyan L. Rev. 505, 520.

from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”¹

The circumstance that the delay in the delivery of the shaft would entail a loss of profit for the mill was found by the court to be not in the contemplation of the defaulting party. As a result the court held that the loss of profit was too remote and irrecoverable. The rule in *Hadley v Baxendale* was thus normally expatiated as two branches rules: the first limb dealing with generally foreseeable losses, and the second with exceptional losses in the contemplation of the particular parties.² In *Sandeman Coprimar S.A. v. Transitos Y Transportes Integrales S.L. and Others*³, for example, a cargo of tax seals was lost during transport. Charges incidental to the carriage of the goods including customs duties were expressly held to be an ordinary and foreseeable consequence, whereas the loss of guarantee to Spanish tax authorities for losing seals fell into the second group.

In the subsequent case *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*⁴, the delivery of a boiler was delayed for more than five months, as a result of which the claimant lost a particularly lucrative contract. The claim for particularly lucrative profits was dismissed but the general and conjectural sum reasonably to be expected as the loss of business was upheld.⁵ Another major interpretation of the remoteness rule came in the House of Lords in *The Heron II*.⁶ Their Lordships were in general unwilling to accept phrases such as “foreseeability” or “reasonable foresight”⁷ as the criterion of remoteness in contract, considering it

¹ *Ibid.* at p.355 *per* Alderson B.

² Sometimes it is called general and special damages respectively. See *Halsbury's Law of England* 12(1) (4th edn 1998), p.268.

³ [2003] 2 Lloyd's Rep. 172.

⁴ [1949] 2 KB 528.

⁵ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539, *per* Asquith L.J.

⁶ *The Heron II* [1967] 2 Lloyd's Rep. 457.

⁷ Adopted in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd; Mehmet Dogan Bey*

to be more appropriate to liability in tort.¹ Instead the House of Lords proposed the remoteness rule based on “reasonable contemplation”, even though they appear to be synonyms.² The wording “reasonable contemplation” was followed by most cases.³ In *The Vakis T*⁴, time-charterers incurred costs in sub-arbitration against voyage-charterers because of the alleged unseaworthiness. The arbitration tribunal addressed the issue of remoteness solely by reference to foreseeability. In its appeal, the court held it was inadequate and the correct test should be “reasonable contemplation.” The House of Lords has recently come back to remoteness again in *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)*⁵. The point in that case is whether damages payable to a shipowner for the late redelivery of a vessel should be limited to the difference between the charter and market rates of hire for the period of extended use on grounds of remoteness. All five law Lords have found in favour of the charterers, thus confirm the above point and reserved the decisions of the arbitrators, High Court and Court of Appeal. It would not be exaggerating to say that Lord Hoffman intended to redefine remoteness rule regarding the particular lucrative loss of profits. He commented: “[in order to recover such type of loss]... one must first decide whether the loss for which compensation is sought is of a “kind” or “type” for which the contract breaker ought fairly have taken responsibility...”⁶ *The*

v. G. G. Abdeni & Co., Ltd [1951] 1 Lloyd's Rep. 433.

¹ Foreseeability is quite flexible. It might be used in its common sense. See *The Lucille* [1984] 1 Lloyd's Rep. 244. It might also be used to denote causation. See *Royal Greek Government v Minister of Transport* (1949-50) 83 Ll. L. Rep. 228.

² But the usage of “reasonable foresight” has never been stopped in contract cases. Cf. *Addax Ltd. v. Arcadia Petroleum Ltd. and Another* [2000] 1 Lloyd's Rep. 493 at p.494 per Morison J.; *The Capricorn I* [1998] 2 Lloyd's Rep. 379 at p.385 per Colman J. Many judges do not see it of material significance. Sometimes the judges use “reasonable contemplation” or “foresight” interchangeably. See *The Fiona* [1994] 2 Lloyd's Rep. 506 at 522 per Lord Hoffmann “These rules limit damages recoverable for breach of contract to loss which was reasonably foreseeable at the time of the contract. The basis of this rule is that liability for damage which was not reasonably in the contemplation of the parties falls outside the scope of the contractual promise, even if it was caused by the breach.”

³ Cf. *Jackson v Royal Bank of Scotland* [2005] UKHL 3; *The Mass Glory* [2002] 2 Lloyd's Rep. 244; *The Vakis T* [2004] 2 Lloyd's Rep 465; *Nissho Company, Ltd. v. N. G. Livanos.* (1941) 69 Ll. L. Rep. 125 at 125 per Lord Caldecote; *Ströms Bruks Aktie Bolag v. John & Peter Hutchison* [1905] A.C. 515 at p.527 per Lord Davey; *The Sargasso* [1994] 1 Lloyd's Rep. 412.

⁴ *Vriner Marine Co Ltd v Eastern Rich Operations Inc* [2004] 2 Lloyd's Rep 465 at p.467. [2008] UKHL 48 (H.L.).

⁶ *Ibid*, per Lord Hoffman at para.15.

Achilleas signifies a shift in emphasis as the court's consideration will give to the question of "what would the proper scope of the guilty part's liability be?" and "whether the defaulting party has reasonably undertaken the liability for the claimed damages at the time he entered into the contract."

In the carriage of goods by sea, the urgent need of the cargo will be taken into account only if it has been communicated or incorporated into the contract,¹ while the ordinary loss from delay of carriage is generally recoverable even though the defendant has no knowledge of the existence or terms of specific trades.² In *Mehmet Dogan Bey v. G.G. Abdeni & Co., Ltd*³, the charterer delayed payment for freight until the sterling had been devalued. The court held charterers could not be taken to possess any imputed knowledge of the devaluation of currency when they made the contract and thus dismissed the claim.

4.3 The remoteness rule and the Chinese Contract Law of 1999

Prior to the enactment of the Chinese Contract Law 1999, there was no comprehensive nation-wide legislation governing contracts. China had a very confusing system of contract law with no less than three different statutes all operating concurrently, *i.e.*, the Economic Contracts Law concerning Foreign Interests (1986), the Economic Contract Law (1981) and the Technology Contract Law (1987).⁴ These arrangements were highly unsatisfactory as a result of problematic definitions, scope of coverage, glaring gaps in the provisions, not to mention overlaps and even outright contradictions.⁵ In compliance with the United Nations Convention on Contracts for the International Sale of Goods (1980), to which China acceded, it implanted the remoteness rule⁶ into the Economic

¹ *The Frances and Jane* (1929) 34 Ll. L. Rep. 128.

² *The Baleares* [1993] 1 Lloyd's Rep. 215.

³ [1951] 1 Lloyd's Rep. 433.

⁴ All three have been repealed.

⁵ Williams, *An Introduction to the General Principles and Formation of Contracts in the New Chinese Contract Law* (2001) 17 *Journal of Contract Law* 13,14-17.

⁶ Art.74 of the Convention says: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a

Contracts Law concerning Foreign Interests 1985¹ and the Technology Contract Law 1987². However the Economic Contract Law 1982 that regulated domestic transactions never admitted this legal rule. It reflects an interesting phenomenon in Chinese law: the remoteness rule only applied when a transnational legal relationship was involved. Owing to the limited application of the Economic Contracts Law concerning Foreign Interests 1985 and the Technology Contract Law 1987, most Chinese judges did not have the chance to use the rule, which explains their lack of experience in its application today. They mainly relied on the causation (“direct and indirect”)³ rule to decide the recoverability and measure of damages.⁴ For example, it was typically said that the recoverability and measurement of a particular damages should be determined by whether or not they were the direct consequences of the defendant's act.⁵

Fortunately contracts in China are now governed by the comprehensive Contract Law (1999). For the first time, remoteness of damages was implanted into Chinese contract law without any reservation. Art.113 of the Chinese Contract Law 1999 reads,

“Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the

consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

¹ Its art.19 says: “The liability of a party to pay compensation for the breach of a contract is equal to the loss suffered by the other party as a consequence of the breach. However, such compensation may not exceed the loss which the party responsible for the breach ought to have foreseen at the time of the conclusion of the contract as a possible consequence of a breach of contract.”

² Art.17 (2).

³ Direct loss is the loss of gain which the claimant could have received if the contract had been duly performed. (Han Shiyuan, *A Study on Damages for Breach of Contract*, p.307) Any other financial losses suffered as a result of the breach are called indirect loss and generally irrecoverable. As said “indirect loss is accepted academically, but in judicial practice, the claims for indirect loss have not been fully supported.” (Su Huixiang, *Modern Chinese Contract Law* (1992), p.316).

⁴ Bian Yingjian, *Compensation Liability of Indirect Damages in Collisions in Perspective of Causality*, (2003) 2 World Shipping 98.

⁵ Tong Rou, *General Rules of Civil Law* (1982), p.24. This is similar to the question posed by Lord Warrington in *Polemis v. Furness, Withy & Co* (1921) 8 Ll. L. Rep. 351, at 354, which had been overruled by the Privy Council in *The Wagon Mound* [1961] 1 Lloyd's Rep. 1.

contract and causes losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the interest receivable after performance of the contract, provided that this shall not exceed the probable losses caused by the breach of contract which had been foreseen or ought to have been foreseen when the party in breach concluded the contract.”

It is referred to as the “foreseeability rule” in China as in England, and there is no substantial difference between the rules. “Foreseen” instead of “reasonable contemplation” is used in the Chinese version, but this is a semantic rather than a substantive distinction. Nevertheless, the legal theory in China is still in its infancy. The application of remoteness rule is as a result greatly undervalued.

In the first place, the proper function of the remoteness rule is underestimated. Chinese judges have not fully accepted it in practice and are not used to it, a factor that may be due to the fact that it has not yet been officially accepted by Chinese tort law and is thus applicable in contract only.¹ Chinese judges thus often feel compelled to rely on the causation reasoning, even when the question falls into the domain of remoteness or other legal principles.² For instance, in *Guangzhou Nan Hua Xi Co Ltd v Guangdong Hong Kong Macau Shipping Co Ltd*,³ the claimant was forced to pay substantial liquidated damages to a third party under a contract of sale when a cargo was lost due to carriers’ breach. This loss would be too remote to recover in an English court, whereas it was rather unconvincingly rejected by the Chinese court on causation grounds (“for lack of factual basis”). Any person would struggle to take in this unconvincing *ratio decidendi* as there was clearly a causal link at least in a weak sense between the loss of cargo and the

¹ See tort law section, *infra*.

² Zhang Peilin, *Problems of Causation in Civil Compensation* [1996] Policy and Law Forum No.2, p.27.

³ Guangzhou Higher people’s Court, English case report available at: <http://www.ccmf.org.cn/english/case/show.php?sId=3491>

compensation to the third party. Compare this to the English case *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*¹, where the same *ratio decidendi* on causation in the first instance was overruled by the House of Lords in a similar situation concerning a shipowner's delay.² Instead, its measurement was decided on remoteness by the House of Lords, which was more appropriate and convincing.

Although Chinese judgments are written in a more formalistic style than common law, it must identify the relevant legal principles and then verify if the facts support their application. Public approval of judicial exercise of authority is utterly important. In a judgment, one litigant wins and the other loses. Put emotional factors aside, acceptance of a judgment requires public trust in the judiciary. It cannot acquire authority and convince litigants if the legal principle is wrongly plotted in judicial decisions. Judges must exhibit professionalism and responsibility. When the case is decided in an ad hoc and discretionary manner without reference to and reliance on appropriate rules, it will in turn cause lack of respect for the law. Therefore the accurate application of law and their predictability are particularly crucial in generating the trust and confidence in judicial decisions. Chinese judges should not rely on causation in measurement of damages all the time and should make efforts in applying the appropriate legal rules.

The second problem relates to the uncertainty and the unreliability of Chinese decisions. Most Chinese judges came into contact with the remoteness rule for the first time in 1999, with the introduction of the comprehensive Contract Law. As a result they have less experience compared with their English counterparts in applying the remoteness doctrine. Hitherto, it is currently difficult to predict if the court will even accept an argument of remoteness of damages in the first place. This has scarified legal consistency and

¹ [1905] A.C. 515.

² (1904) 6 F. 486 (the First Division of the Court of Session), Lord Kinnear's opinion resembles the Chinese one. He said "the one loss had nothing to do with the other [breach]."

legal certainty which is the cornerstone of the rule of law. Many similar cases result in conflicting judgments. A claimant will be concerned about his prospects of a successful recovery in the Chinese courts. This point is nicely illustrated by a line of Chinese cases (admittedly non-marine) concerning the liability of postal companies for losses resulting from failure in delivery. In one case, even mental compensation was awarded for the non-delivery of a university offer, despite the fact that the trigger for mental disease and the importance of the content were completely unknown.¹ By contrast, the loss of business arising from the delay of a letter was dismissed on the remoteness principle in another case.² In *Yu Ying, Yu Dingzhang and Gu Huilian v Wuhan City Hongshan Luo Jiashan Post Office and Wuhan Post Office*,³ the post office lost a letter which was urgently needed for the university application, as a result of which the claimant missed the deadlines of two universities. The mental damages were rightly rejected, but all other economic losses including communication, traffic and accommodation fees were upheld albeit its urgency was undisclosed.

The overriding practical need to ensure a reliable and predictable application of law is a paramount consideration in business. Chinese courts, however, proved ill prepared for safeguarding this certainty. The People's Courts are to certain extent mysterious, arbitrary, and unpredictable compared with English courts. These cases highlight the indeterminacy and uncertainty in the application of legal rules and principles. The outcome of litigation in the courts is in fact highly unpredictable. Different courts will make different decisions on the same facts because of an

¹ In 1998, a local post office failed to send an university offer and the claimant Zhang Suxia developed schizophrenia due to the anxiety. The remoteness rule was disregarded and the claimant was awarded 18,000 Yuan by the Lianshui County Court as mental damages. *Zhang Suxia v Post Office*, Lianshui County Court, Legality Daily Newspaper (17th Sep 1999); cf. *Dempsey v. Western Union Telegraph Co*, 58 S.E.9 (S.C.), where it was held the exposure and sickness resulted from the waiting could not be anticipated on a failure of a telegraph company to deliver to a telegraph "will be to Perry on morning train; meet me there."

² The post office lost a registered letter contained the delivery order. The claimant failed to collect the cargo as a result and lost a business chance. This loss of profit was upheld in the first instance but overruled in its appeal. See *Reply to Ma Weishan v Yunan E'shan County Post Office and Meng Hai County Post Office*, the Supreme Court, 30th Dec 1986.

³ Wuhan Higher People's Court, 25 Jul 2005, (2004) EMSZZ 19.

absence of conformity throughout the Chinese court system. Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent. Foreign companies doing business with Chinese entities are understandably concerned about the ability of China's judiciary to protect their legitimate business interests in China. Because the Chinese legal system is not consistent in terms of its laws and result, Chinese judges have greater latitude to arbitrarily adjudicate cases. This also encourages external influence on judicial decisions. The wrong signal sent is thus: know your court and know your judges. This greatly undermines the confidence in law by the public. It is therefore advocated that Chinese courts should transform its procedures and laws into a predictable and transparent system with the consolidation of existing practices and the application of uniform practices. The Supreme Court and appeal courts should take initiatives to eliminate the discrepancy and enhance the certainty and uniformity of justice in China.

Thirdly, due to its very different legal culture and tradition, the detailed explanation concerning the remoteness rule which people would expect from an English judgment is not often available in China, where judgments tend to take a more mechanical and mass-produced form. Chinese judges are more restricted by the written law and not used to expressing their ideas in clear terms. Decisions of this sort thus make little contribution to its understanding. Unacquainted with this rule, judges indeed sometimes make obvious mistakes in their decisions. For example in *Chengdong Labour Service Co. v Jiangsu Weining Recovery Hospital*,¹ the defendant failed to find out if an infectious disease was present in three workers sent by the claimant. The disease was subsequently discovered by the third party who had an agreement of employment with the claimant, a recruitment agency. The third party cancelled the contract for employing the rest 75 workers from the claimant, who lost a considerable commission. The claim for the loss of commission against the hospital was upheld by Jiangsu Xuzhou

¹ Jiangsu Xuzhou Intermediate People's Court, 27th Oct 2004.

Intermediate Court without considering the remoteness rule. Notably, if the case was heard in the English court, such a claim would be rejected as the hospital could not have contemplated the loss of commission as a result of their breach.

Fourthly and maybe more fatally, the application of the remoteness rule depends on the applicable law. The CCL has a general remoteness rule but it only applies to the carriage of goods by sea on limited occasions, whereas the CMC is the major legislation. Due to an awkward art.55 of CMC and the subsequent interpretation by many maritime court judges, consideration of remoteness seems out of the question when the CMC applies. This problem will be addressed in the next section.

To put it simply, remoteness of damages in China is still at the copying or imitating stage¹ and the key point to grasp this rule is admitted by Chinese scholars to learn from France and Anglo-American law.² The expatiation on remoteness found in English judgments will shed light on Chinese judges.

4.4 The remoteness rule in Chinese shipping law and its problems

Despite the generalisation of remoteness law in the Contract Law 1999, China has a very confusing system with no less than three different statutes all operating concurrently in Chinese shipping laws, the Chinese Maritime Code, the Chinese Contract Law and two regulations, the Rules of the PRC on the Carriage of Goods by Water (hereafter Rules) and the Detailed Rules of Implementation of Contract of Carriage of Goods by Water (hereafter Detailed Rules). According to art.2 of the CMC, its Ch. 4 “contract of carriage of goods by sea” only applies to the international carriage by sea, *i.e.*

¹ Li Chaoxin, *Discussion on the Principle of Foreseeability*, [2003] Journal of Jiangxi University of Science and Technology No.2 121; Ye Jinqiang, *Remoteness Rule of Damages and Compensations for Breach*, [2001] University of Nanjing Law Review, Spring, 220.

² Li Li, *Applications of Prediction Rules in Judicial Field*, [2002] Journal of Taiyuan University no.3, 243, 245; Yuan Zhaodai, *Remoteness Rule in Chinese Contract Law*, [2005] Tribune of Social Sciences No.8, 29.

the carriage between a Chinese port and a foreign port. The CCL will be applicable¹ to a contract of carriage when the CMC does not apply. The responsibilities of shippers and carriers in the carriage between Chinese ports are regulated by Rules and Detailed Rules, which abolished relevant exemptions on negligence in navigation² and adopted fault liability.³ Thus one is confined to the international carriage, one is for purely domestic contractual relationships and the third deals with the issue of obligations in the domestic carriage contract. Whether there is any justification for the existence of three different sets of rules is doubtful. They have sacrificed legal consistency and legal certainty. It leads to chaos, overlapping and outright contradictions. It could be argued that this causes more confusion and fragmentation than clarification and harmonisation. Hence the imminent task is to seek the harmonisation of existing overlapping legal rules and the establishment of a unified legal framework which are still operating on three parallel tracks.

On the whole, the approach of the CCL resembles English law; thus remoteness of loss is clearly relevant in principle in deciding the measure of damages (in contract).⁴ However, though Chinese shipping law has been upgraded in accordance with the international conventions, the CMC by contrast adopts a solution inconsistent with the CCL and that is hostile to the remoteness rule.⁵ Its art.55 says: "The amount of indemnity for the loss of the goods shall be calculated on the basis of the actual value of the goods so lost, while that for the damage to the goods shall be calculated on the basis of

¹ Art.123 of the CCL provides, "if there are provisions as otherwise stipulated in respect to contracts in other laws, such provisions shall be followed". It was applied in *Guangxi Hepu Gongguan Fireworks Factory v Dyna International Shipping Limited (Guangdong)*, 20th May 2003, Beihai Maritime Court, (2003) HSCZ 019.

² *Guangdong Cereals, Oils & Foodstuffs Corp v Nanjing Lianyun Corp*, Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91.

³ See art.21, 24 of Detailed Rules and art.48 of Rules. See also *Fujian Tea Factory v Fuzhou Harbour Affairs Management Bureau and Mawei Harbour Company Ltd, Selected Shipping Cases* (Liu Jiazhen ed. 1998), p.118

⁴ *Guangxi Hepu Gongguan Fireworks Factory v Dyna International Shipping Limited (Guangdong)*, 20th May 2003, Beihai Maritime Court, (2003) HSCZ 019; *Shenzhen Lianda Textile & Silk I & E Co Ltd v China Shipping Container Lines Co Ltd and Others*, Guangzhou Maritime Court, 3rd June 2003, (2003) GHFCZ 64.

⁵ Ironically the remoteness rule was applied before the CMC came into effect in *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*, Guangdong Higher People's Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 46.

the difference between the values of the goods before and after the damages, or on the basis of the expenses for the repair. The actual value shall be the value of the goods at the time shipment plus insurance and freight..." The purpose of the article itself is equivocal. At least it does not indicate in particular that the remoteness principle has been ruled out. Nonetheless it has been interpreted by a large number of decisions (if they raise the point at all) as a limit imposed by the CMC to damages. Resulting from this interpretation, remoteness has been *de facto* excluded. In *Beijing Fu Yang Hang v Sea Trade International Inc*,¹ the cargo owner had to compensate his buyer as the carried cargo was damaged due to the negligence of the defendant carrier. Under English law its recoverability would be determined by, *inter alia*, the remoteness doctrine; nevertheless, it was directly rejected on the grounds that the art. 55 did not recognise other types of damages and had in fact limited the measure of damages to the "value before shipment plus freight and insurance". The judges even went further to say that such a provision was to protect the shipping industry. In *Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd*², a cargo of frozen prawns was damaged. The claimant intended to claim for the price difference between the port of shipment and the port of discharge. Such an attempt was dismissed by the Ningbo Maritime Court because "[art.55 of] CMC does not allow the economic loss in event of cargo loss and damage...the submitted claims do not belong to the scope of compensation recognised by CMC and are irrecoverable".³ By this interpretation, the remoteness test is impotent in the carriage of goods by sea in a Chinese court: in other words, even if a consequential loss is clearly foreseeable, it remains uncompensable.

Furthermore, even in other maritime courts which do not

¹ Xiamen Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=4559>

² Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

³ *Cf. Sinosafe Insurance Co Ltd v Brother Shipping Company Limited*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98; *Shinkou Shipping Co Ltd v Uniglory Marine Corporation & Uniglory Hong Kong Co Ltd*, Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464.

interpret the art.55 so restrictively, attention in deciding the measure of damages has been given to causation rather than remoteness,¹ though the causation principle is incapable of answering the question on many occasions. Many Chinese maritime courts lose sight of remoteness and persistently ask whether a defaulted carrier who delayed the cargo has *caused* the liquidated damages which the owner has to pay under a sub-contract with the third party.² Here the court fails to identify the relevant legal principles and applies it to particular facts of each case. Because a causal link between the breach of a shipowner and the compensation to the third party by cargo owner exists at least in a weak sense, this compensation to the third party should be recoverable purely based by this analogy. In contrast, Chinese courts drew the opposite conclusion for “lack of causal nexus”. The legal basis for these decisions is decidedly weak which calls into question the capacity and impartiality of the Chinese legal system. If it can be solely dealt with on remoteness as it is in English law,³ this problem will not arise. Failing to reject claims on the appropriate reasoning, judgments can still be regarded arbitrary and capricious in the litigants’ eyes. As a result, the impact and authority of Chinese law are much reduced. As emphasised already by the author, the accurate application of law and their predictability are particularly crucial in generating the trust and confidence in judicial decisions. Chinese judges should exhibit professionalism and responsibility by desisting from relying on causation as the most convenient way in the measure of damages and should make in-depth analysis of other appropriate legal doctrines according to the legal merits of the case. The quality of judicial decisions and the public trust can only improve in this way.

¹ Zhang Peilin, *Problems of Causation in Civil Compensation* [1996] Policy and Law Forum No.2, p.27.

² *E.g.* in *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59, the court rejected such a claim because the breach was not the causative factor in the compensation for the liquidated damages.

it was believed that liquidated damages in his subcontract was not necessarily *caused* by the breach of the carrier

³ *Stroms Bruks Aktie Bolag v. John & Peter Hutchison* [1905] A.C. 515.

Another problem is that the emphasis on causation causes this area of law rather unpredictable because causation is a highly discretionary matter. Chinese judges have greater latitude to arbitrarily adjudicate cases. Hampered by their structure, their management, and the quality of judges, courts seem to be unable to adapt to those requirements of impartiality, consistency and predictability. The operation of law is indeed indeterminate and unpredictable. Different courts will make different decisions on the same facts because the overall competency of Chinese judges has not risen to a level that sufficiently meets practical needs and because of an absence of conformity throughout the Chinese court system. For example, the compensation to the third party as a result of the shipowner's breach was held recoverable on the grounds of causation in *Shenzhen Sinocean Shipping Co Ltd v Nanjing Hengfeng Shipping Co Ltd*.¹ Then the same claim was rejected in *Zhanjiang Sugar Development Co and Shanghai Sugar Tobacco & Wine Corp. v. Yingkou Shipping Corp. and Others*,² not on grounds of remoteness but for "lack of legal support and evidence." Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent. This ill in China's court system has not only aroused grave concerns among scholars, but has also become an issue more openly acknowledged by lawmakers. The generality of legal rules and the predictability of their application can generate the security of expectations that is essential in the operation of market capitalism. Without such predictability, it will only increase the cost of doing business and inhibit economic activities. As it is a paramount consideration to ensure a reliable and predictable application of law, the author suggest China should bolster the competency of judges by providing more training to existing judges and provide a stronger legal basis for accurate application of law. Chinese courts should transform its procedures

¹ Guangzhou Maritime Court, 26th Apr 2001, (2001) GHFSZ 9 (failure to provide a vessel); *Shenzhen Bao'an Dalong Trading Co v Guangzhou Kaida Shipping Co and Others*, Guangzhou Maritime Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 10 (cargo damage).

² Guangdong Higher People's Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 11.

and laws into a predictable and transparent system with the consolidation of existing practices and the application of uniform practices. Also, the possibility of acceptance of precedents should be under discussion for its obvious benefits in eliminating the inconsistency.

Even when Chinese judges have come across a clear remoteness problem, which they do on occasion, they have often applied the remoteness rule quite wrongly. Take the English case of *The "Heron II"*¹, where it was held to have been within the contemplation of a reasonable shipowner that delay of delivery might give rise to losses due to market fluctuation. In stark contrast, the same argument was dismissed by the Chinese maritime court in *Guangdong Cereals Oils & Foodstuffs Corp. v Nanjing Lianyun Ganghang Co.*² "There is not sufficient evidence to show the defendant could have foreseen that his failure in performance of the contract would cause the loss of falling price, therefore such claims should be rejected." The Rules and Detailed Rules only concern the question of responsibility and liability and say nothing about remoteness. As a result, the remoteness test has not normally been considered an appropriate one to apply when two rules apply.³

Overall in shipping cases, remoteness will generally not be considered an appropriate test when the CMC or two rules are applicable. But in the circumstance where the CCL applies to a shipping case, remoteness is recognised as a valid legal principle as it is under English law. The author does not agree with the CMC position and prefers the CCL and English approach as it accommodates a remoteness rule which remains functional in limiting damages. Because of its rejection in the CMC and the inadequate empirical data, the following comparison of a general

¹ [1967] 2 Lloyd's Rep. 457 (H.L.).

² Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91.

³ *Guangzhou Nan Hua Xi Co Ltd v Guangdong Hong Kong Macau Shipping Co Ltd*, Guangzhou Higher people's Court, English case report available at: <http://www.ccmto.org.cn/english/case/show.php?sid=3491>; *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 17.

remoteness rule will be mainly based on the CCL. As has been shown above, it is about time Chinese lawmakers rethought their stubborn position on remoteness in the CMC and two Rules, eliminated the inconsistency among three sets of rules and united them into one if possible.¹

4.5 Justifications and legal policy: England and China

The remoteness restriction to damages is based on the view that it is unfair to hold a defendant responsible for the infinite consequences of his breach which he could not have reasonably contemplated or foreseen.² From economic perspectives,³ its justification lies in the fact that it provides an incentive to encourage the exchange of information and promotes economic efficiency. A wide range of literature examines the *Hadley* rule from this point of view and builds theoretical models to prove that it is indeed efficient.⁴ A wave of empirical research is also used in law to prove it so.⁵ The rule encourages the promisee to communicate the possibility of such losses to the promisor if he intends the other to bear the risk.⁶ This incentive to disclose information which the defendant would otherwise not have to is efficient in leading to the optimal balance between the need for the exchange of information and the desire to minimise transaction costs.⁷ Typically in the carriage of goods by sea, because carriers are by default only liable for ordinary losses but not exceptional losses such as the loss of a particularly lucrative contract or the compensation to the third party by cargo

¹ Du Huawen, *The Unification of the Carrier's Liability in Carriage of Goods by Sea*, [2004] Sci/Tech Information Development & Economy no.1, 39.

² As Asquith L.J. pointed out in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at p 539, "[the claim,] if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable."

³ See Ch.2.

⁴ Johnston, J.S. *Strategic Bargaining and the Economic Theory of Contract Default Rules*, (1990) 100 Yale L.J. 615, 636-39; Adler, B.E. *The Questionable Ascent of Hadley v. Baxendale*, (1999) 51 Stan. L. Rev. 1547.

⁵ Geis, G.S. *Empirically Assessing Hadley v. Baxendale*, (2005) 32 Fla. St. U. L. Rev. 897, 956. The author conducted an empirical assessment of the *Hadley* rule and found that *Hadley* typically generated more social welfare than a full-damages default rule.

⁶ At that time the value of the information to the defendant is greater than the cost to the plaintiff of conveying that information to him. Bishop, *The Contract-Tort Boundary and the Economics of Insurance* (1983) 12 J. Legal Stud. 241, 254-55.

⁷ Harris, R. *Remedies in Contract & Tort* (2nd edn 2002), p.91.

owners, carriers can charge most cargo owners at a reasonably low price.¹ If the carriers agree to incur heavier responsibilities, they can simply increase the freight for the specified cargo. On the contrary, if the law imposes an unlimited liability on the carrier, he will have to charge every cargo owner a higher freight in order to shift his liability. The second scenario is less efficient than the first one. In brief, efficiency is advanced by the facilitation of mutually beneficial exchanges through the avoidance of overly extensive liabilities.²

As previously stated,³ the influence of Confucianism has been fundamental in Chinese society and penetrates deep into the law. There is always an inbuilt pressure within the Chinese legal system to render law morally defensible. According to Confucianism, there are five basic virtues that a man should have, *i.e.* courtesy, tolerance, trustworthiness, quickness, and generosity. Efficiency has never been included in this list of Chinese morality. Therefore Chinese law consciously keeps itself distinct from the unconventional western view of damages law. Although no-one seems to have suggested this in so many words, the fact that remoteness rule is not regarded as a dominant principle in Chinese damages law may well result from this factor.

Further remoteness is one of the techniques for ensuring that the question of legal policy is appropriately considered. Causation generally does not have this function.⁴ As there might be a measure of agreement among ordinary people in the majority of cases as to what justice requires, sometimes courts are guided by the justice of the results to which they lead.⁵ Under English law, the type of harm

¹ In these circumstances, the communication of information concerning consequential damages will involve a cost much more substantial than the cost of assembly and transmission. So it is only efficient if the defaulted rules of law recognise so and do not intervene. Eisenberg, M.A. *The Principle of Hadley v Baxendale*, (1992) 80 Cal. L. Rev. 563, 594-5.

² Halson, R. *Contract Law* (2001), p.498; see also Ayres, I. & Gertner, R. *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules* (1989) 99 Yale L.J. 87, 91.

³ See Ch 2.

⁴ Prosser, W.L. *Handbook of the Law of Torts* (4th edn, West Publishing Co. 1971) at p.236-37; but it is argued that policy is also recognised openly as the dominating factor in proximate cause. See Malone, W.S. *Ruminations on Cause-in-Fact*, (1956) 9 Stan.L. Rev. 60.

⁵ This logic was explained by Lord Wright in *The Liesbosch* (1933) 45 Ll.L.Rep. 123, at p.129 "The law cannot take account of everything that follows a wrongful act; it regards

suffered must be foreseeable; however, in regards to the egg-skull case,¹ the courts also apply the inconsistent but rather fair rule that the tortfeasor takes his victim as he finds him. In comparison, remoteness is less used in Chinese law. Much of its function has been carried out by causation, which is viewed by Chinese scholars as partly a question of legal policy.² As Chinese courts have to base their judgment on certain theories, they frequently admit exceptions by modifying it if a certain theory will in fact lead to unfair results. That's exactly what happens in Chinese egg-skull cases. In *Huang Quanying v Tu Zhihui and Tu Jinhui*³, 63-year-old Tu Shoujian (the father of claimants) was insulted by the defendant “in most malicious words”⁴ in a row and subsequently died of stroke. The court found the mainstream theory (consequence theory and adequate theory) unfavourable to the claimant, so they adopted the “condition theory”, which suggests that every condition in the absence of which the harm would not have occurred is a cause,⁵ and finally gave a fair judgment to the claimant.

4.6 Reasonable contemplation: imputed knowledge or actual knowledge?

Assuming the remoteness rule does apply, the question of what counts as the requisite knowledge arises. The English doctrine has developed the theory that there are two relevant kinds, imputed and actual.⁶ Under this approach, imputed knowledge means what everyone, as a reasonable person, is taken to know is liable to result from a breach of contract in the ordinary course. It is said to be the

some subsequent matters as outside the scope of its selection, because ‘it were infinite for the law to judge the cause of causes’, or consequences of consequences . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.”

¹ *Smith v Leech Brain & Co Ltd and Another* [1962] 2 QB 405.

² Liu Rui, *Theoretical Studies of Causation in Tort Law*, [2004] Comments on Civil and Commercial Law No.1, p.329; Liu Shiguo, *A Study on Causation in Tort Liabilities*, [1992] Jurisprudence studies No 2, 371 ; Wang Jiafu, *Creditor's Rights in Civil Law* (1991), p.477; Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p. 552.

³ Guangdong Maoming Intermediate Court, published in *Analysis of Tort Law Cases* (Li Qi, 2005), p.26.

⁴ *Ibid.*, p.27.

⁵ This theory generally only prevails in criminal law as it can produce too excessive liability in civil law. See Andre Tunc, *International Encyclopaedia of Comparative Law*, ch 7, p.33.

⁶ Cf. Harris, R. Remedies in Contract & Tort (2nd edn 2002), p.96.

subject matter of the first rule in *Hadley v. Baxendale*.¹ On the other hand, if the loss is exceptional and arises from unusual circumstances, then it is said that the question of his liability “can arise only when he had, at the time of contracting, *actual knowledge* of the special circumstance.”(emphasis added)² Such a case attracts the operation of the second rule so as to make special loss also recoverable.³

However in many cases the expressions of “actual” and “imputed” knowledge seem difficult to harmonise in principles governing the measure of general damages. The apparent discrepancies are mainly due to the mechanical classification of the two limbs of remoteness rule and the varying nature of the particular questions submitted for assessment. The connection of imputed knowledge with the first rule of *The Hadley* and actual knowledge with the second can be specious and mechanical.⁴ Such a dichotomy ignores the possibility that actual and imputed knowledge could overlap in each limb. When the loss arises from the ordinary course of things, logically it can be argued that most defendants could as a matter of fact possess the actual knowledge. In the so-called special circumstance, the imputed knowledge will suffice even if the defendant does not have such actual knowledge of the result, which every reasonable person in his position nevertheless would have.⁵ “Knowledge embraced not only actual knowledge but such knowledge as would be attributed to a reasonable person placed as the defendants were placed.”⁶ Take as an example *Addax Ltd. v. Arcadia Petroleum Ltd.*⁷, a case concerning the sale of oil. There,

¹ *Victoria Laundry (Windsor) v. Newman Industries* [1949] 2 KB 528 per Asquith L.J. at p.539.

² Harris, *Remedies in Contract & Tort* (2nd edn 2002), p96.

³ *Ibid.*

⁴ Such a connection could be seen in *Ströms Bruks Aktie Bolag v. John & Peter Hutchison* [1905] A.C. 515; *The Lips* [1987] 1 Lloyd's Rep. 131 at 139; *Monarch Steamship Co. Ltd. v. A/B Karlshamns Oljefabriker* (1948) 82 Ll.L.Rep. 137 at 153, 221.

⁵ The confusion by this connection can be seen in elusive circumlocution given by Robert Goff J. in *The Pegase* [1981] 1 Lloyd's Rep. 175 at 183. “In some cases, the Courts appear to be prepared to take into account knowledge of special circumstances (*i.e.*, circumstances outside the ordinary course of things) although such knowledge was not communicated by the plaintiff to the defendant -- such as knowledge of the nature of the plaintiff's business or knowledge of the existence of a market [imputed knowledge].”

⁶ *Caparo Industries Plc. v. Dickman and Others* [1990] 2 A.C. 605 at 638 per Lord Oliver.

⁷ [2000] 1 Lloyd's Rep. 493.

although the defendant argued they had no idea of the claimant's loss from special hedging transactions, the court held that the parties were sophisticated oil traders and had imputed knowledge of the concerned loss. As a result such a loss was recoverable.

The connection of imputed knowledge with the first rule in *Hadley* and actual knowledge with the second is thus unnecessary. Nowadays the remoteness rule is no longer stated in terms of two rules, but in terms of a single principle instead.¹ "The Courts have not been over-ready to pigeon-hole the cases under one or other of the so-called rules in *Hadley v. Baxendale*, but rather to decide each case on the basis of the relevant knowledge of the defendant."² If this is the case, it will suffice to adopt imputed knowledge as the sole criterion.³ So in shipping law, the carrier is not required to have the actual knowledge of whether there is another ship to perform the voyage as a substitute, or if there is any market of the same kind goods available at the destination.⁴ Similarly he does not need to know the particular terms of contract between the shipper and other parties. It will suffice if he processes imputed knowledge that cargo owners are shipping the goods in order to either fulfil some contracts or use by themselves and the breach might cause certain losses.⁵

In China, the remoteness rule in the CCL is expressed in a way that at first sight looks similar to the *Hadley* Rule. "Which has been foreseen"⁶ corresponds to the second limb and "ought to be foreseen" the first. However, in practice an abstract assessment is adopted. The test usually thus: what would a normally diligent person placed in the circumstances of the debtor have foreseen?⁷ If

¹ As Lord Reid said: "I do not think that it was intended that there were to be two rules or that two different standards or tests were to be applied." *Heron II* [1967] 2 Lloyd's Rep. 457 at 463.

² *The Pegase* [1981] 1 Lloyd's Rep. 175 at p.182 *per* Robert Goff.

³ *Silvey v Pendragon plc* [2001] EWCA Civ 784 (C.A.), "in our view, that the test in remoteness and, indeed in foreseeability, does not depend on actual knowledge, still less actual knowledge at the immediate point of contract, but imputed knowledge."

⁴ *Nissho Company, Ltd. v. N. G. Livanos.* (1941) 69 Ll. L. Rep. 125 at 125 *per* Lord Caldecote.

⁵ *Ströms Bruks Aktie Bolag v. John & Peter Hutchison* [1905] A.C. 515, 524.

⁶ Art.113 of the CCL.

⁷ Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.540.

the loss could have been foreseen by a reasonable person with the same knowledge of special circumstances that the defendant has, the defendant will be liable even though he did not at the time of contracting actually foresee or contemplate it. In *Ge Zhengguo v Shanghai Golden Horse Real Estate Co*¹, the defendant as a real estate developer did not have the actual knowledge that the defendant bought the property as an investment. But any reasonable developer would have imputed knowledge of this. So the decision was given in favour of the claimant.

4.7 Whose contemplation?

In *Hadley v Baxendale* the court referred to the contemplation as of *both parties*.² But without doubt it is the contemplation of the defendant or any reasonable person in his position that is the crucial factor. Chain contracts are common in shipping law. When multiple parties are involved in a chain of contracts, it should be noted that consideration should be given to the party in default rather than to others.³ In *The Mass Glory*⁴, Navios let the vessel to Goldbeam who subsequently sub-let it to Glencore. Due to the breach of contract by Glencore, Navios incurred loss of detention and Goldbeam had to indemnify Navios in full under the head charter. When Goldbeam sought compensation from Glencore, the arbitration tribunal based the remoteness rule on the contemplation of the claimant Goldbeam.⁵ This point was reversed in appeal. Insofar as the loss suffered by Navios and therefore by Goldbeam was not within Glencore's reasonable contemplation, Glencore could not be held liable to indemnify Goldbeam in respect of it.⁶ *Sandeman Coprimar S.A. v.*

¹ Shanghai First Intermediate Civil Court, 25th Feb 1999, (1999) HYMZZ 78.

² (1854) 9 Ex. 341 at 342 *per* Alderson.

³ *R & H Hall Ltd v WH Pim & Co Ltd* [1928] 30 LlLR 159 (H.L.); *cf. The Sargasso* [1994] 1 Lloyd's Rep. 412.

⁴ *The Mass Glory* [2002] 2 Lloyd's Rep. 244.

⁵ "The loss suffered by Navios was not too remote to be recoverable from Goldbeam in that *Goldbeam* must have been aware from the description of Navios as 'disponent owners' that Navios had taken the vessel on time charter and that it was not unlikely that a delay of 55 days would result in the vessel being redelivered late under the time charter rather than being fixed for further employment at current market rates." [2002] 2 Lloyd's Rep. 244 at 244 *per* Moore-Bick, J.

⁶ *Cf. the Vakis T* [2004] 2 Lloyd's Rep 465.

*Transitos y Transportes Integrales S.L. and Others*¹ provides another interesting example. Five successive carriers were involved in a carriage of tax seals without any intrinsic value, which were lost. The court held when applying the principle of remoteness, it is the contemplation of each defendant that matters. Because only the first defendant was aware of the nature of the seals and its consequence, *i.e.* the loss of tax seals meant the loss of a guarantee already paid to the tax authorities, so only this person was liable for the loss of guarantee. Art.113 of Chinese Contract Law suggests that it is “the party in breach” who should foresee the loss of his breach, so the same result should be achieved theoretically if a similar case is heard in China.²

4.8 The requisite degree of probability of the contractual test of remoteness

It is hardly ever possible in this matter to assess probabilities with any degree of mathematical accuracy. Expressions used in English law include “liable to result”³, “on the cards”⁴, “serious possibility”⁵, “a real danger”⁶, “grave risk”⁷, “probable result”⁸ and so on. But the most popular formulation is that the loss must be reasonably contemplated as a “not unlikely” consequence of the breach.⁹ On the one hand, it does not look to inevitabilities.¹⁰ “[Contractual parties] are not to be supposed to have had the gift of

¹ [2003] 2 Lloyd's Rep. 172.

² *Cf.* art 74 of the CISG and the French Code Civil, para 1150, which seem to be interpreted in the same way.

³ *Aruna Mills, Ltd. v. Dhanrajmal Gobindram* [1968] 1 Lloyd's Rep. 304 at p.305 *per* Donaldson J.

⁴ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at p.540 *per* Asquith L.J.

⁵ *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] 2 Lloyd's Rep 243.

⁶ *Monarch S.S. Co v Karlshamns Oljefabriker* (1948-49) 82 Ll. L. Rep. 137, *per* Lord du Parc at 159.

⁷ *Ibid.* at 235 *per* Lord Morton.

⁸ *Nissho Company, Ltd. v. N. G. Livanos.* (1941) 69 Ll. L. Rep. 125 at p.129 *per* Lord Caldecote.

⁹ See *The Kriti Rex* [1996] 2 Lloyd's Rep 171; *R. & H. Hall, Ltd. v. W. H. Pim, Junr., & Co., Ltd.* [1928] 30 LlLRep 159, at p.163 *per* Lord Shaw; *Peters (Allan) (Jewellers) v Brocks Alarms* [1968] 1 Lloyd's Rep. 387, at 392 *per* Megaw, J; *Heron II* [1967] 2 Lloyd's Rep. 457 at p.463 *per* Lord Reid; *The Vakis T* [2004] 2 Lloyd's Rep 465 at 467 *per* Langley J.; *The Mass Glory* [2002] 2 Lloyd's Rep. 244.

¹⁰ The probability was once held to be “reasonably certain”. See *The Parana* (1877) 2 P.D. 118, at 123, but the test was so strict that it had long been obsolete. *The Parana* was overruled by *The Heron II*, [1967] 2 Lloyd's Rep. 457 at 467,468 *per* Lord Reid.

prophecy.”¹ It is enough that the likelihood of the incident is a real danger.² On the other hand, it is not enough that loss is merely foreseeable as a result of the breach or only likely to occur in a small minority of cases.³ For example, although losses due to the devaluation of the currency resulted from the freight being paid late, it was irrecoverable in that the likelihood was not usual and hardly foreseeable.⁴ A particularly colourful illustration is the year 2000 Millennium Bug. If charterers and shipowners signed long-term contracts before the problem had drawn any attention, the loss or damage arising from it is probably irrecoverable. But if they had a contract after this problem had been spotted and widely discussed, then its loss could possibly be said foreseeable and recoverable.⁵

The exact degree of foreseeability has received comparatively little discussion in China, where the standard is merely said to be that of the reasonable man, a vague possibility⁶ which might invite disparate results. In view of its civil law background, Chinese law is unable to specify this subtle point. Chinese codes and statutes are concise, while English law are precise. Indeed, here the law provides no further details, and states principles in broad, general phrases. Besides, its concise judgment contributes little to the advancement of knowledge. English law, on the other hand, provides detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions. The discussion on the degree of foreseeability of English law will certainly enlighten Chinese judges and scholars.

¹ *Monarch S.S. Co v Karlshamns Oljefabriker* (1948-49) 82 Ll. L. Rep. 137 at 159 *per* Lord Du Parcq.

² In *Ströms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515, the carrier argued that the terms between the cargo owner and its buyer did not correspond precisely with the terms of carriage contract. The carrier might have fulfilled their contract in any other way (they did have the liberty to do so) and thus might leave the claimant in the lurch anyway. However such an ingenious argument failed the “not unlikely” rule. Certainty, as argued by the shipowner was not required by law.

³ *The Rio Claro* [1987] 2 Lloyd's Rep. 173.

⁴ *Mehmet Dogan Bey v. G. G. Abdeni & Co., Ltd* [1951] 1 Lloyd's Rep. 433.

⁵ Bolla, A.J. *A Brief Prelude: Hadley v Baxendale, Y2k, and Maritime Trade (Sometimes the Bowsprit Gets Attached to the Rudder)*, 8-WTR *Currents*: (1999) Int'l Trade L.J. 72, 76.

⁶ Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.541-543.

4.9 A further problem: the specificity of the knowledge required

English law takes a very clear view on the specificity of the knowledge required in order to make loss recoverable. What is required to be within the defendant's contemplation is the type or kind of loss, rather than the precise detail of the damage or the precise manner of its happening. Unseaworthiness in itself may occasion obvious dangers to cargoes and cause delay, but the law does not ask if the whole precise detail of the cargo accident is within the contemplation.

Nonetheless, there seems an odd exception in the case of loss of profits as the normally expected amount of loss places a ceiling on recovery. As explained in *North Sea Energy Holdings N.V. v. Petroleum Authority of Thailand*,¹ "loss of profits claimed by reference to an extravagant or unusual bargain is not of the same type as damages referable to bargains that are usual".² But in *Brown v KMR Services Ltd*,³ the same argument brought up by the defendant was rejected by court on grounds that the potential and direct consequence of the defendants' breach was foreseeable even though the loss was to an unprecedented extent. "The fact that the scale or amount of the losses was not foreseeable did not make [the type of loss] too remote".⁴ These are contradictory conclusions. It seems that after *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)*, the emphasis has been shifted⁵. Lord Hope said that the fact that the loss is foreseeable – the kind of result that the parties would have had in mind – is not the test of liability. Greater prevision is needed: the question to ask is whether the loss was a

¹ [1997] 2 Lloyd's Rep. 418.

² *Ibid.*, per Thomas J. at 437, 438; cf. *Sandeman Coprimar S.A. v. Transitos Y Transportes Integrales S.L.* [2003] 2 Lloyd's Rep. 172 at 180 per Lord Phillips.

³ [1995] 2 Lloyd's Rep. 513.

⁴ *Ibid.*, per Stuart-Smith at p.542; "if the kind of damage was reasonably foreseeable it is immaterial that the extent of the damage was not." *Banque Bruxelles Lambert v Eagle Star Insurance Co. Ltd.* [1995] Q.B. 375 per Sir Thomas Bingham at p.405; cf. *Essa v Laing Ltd* [2004] EWCA Civ 2, where the Employment Tribunal deducted damages because the defendant could not reasonably foresee the extent of the loss, which was reversed in its appeal as it was the kind of damage but not its extent that matters.

⁵ [2008] UKHL 48 (H.L.).

type of loss for which the party can reasonably be understood to have assumed.¹ As matter of fact, to ask the defaulting party to compensate some highly lucrative profits beyond the contemplation is not fair. If the second view is adopted, the carrier will have to increase the freight for all cargoes in his vessel so that he can cover up the increased liability for just a few cargoes with undisclosed lucrative profits. This is inefficient for the majority cargo owners. From this point of view, it is equitable to compensate the extravagant or unusual bargain only if the carrier has assumed responsibility for it. Though it is not in line with *restitutio in integrum*, circumstances are so infinitely various that, however carefully general rules are framed, in order to achieve a fairer conclusion they must be construed with some flexibility and not too rigidly applied.

Although the question of specificity is discussed in some detail in English jurisprudence, the same is not true under the Chinese law. It simply does not specify whether the type of loss or the amount of the loss should be foreseen. Although the first opinion is supported in majority of cases,² some scholars still hold the second opinion.³ But there is little justification for this opinion since it favors the defendant too much. It will clearly be necessary to clarify this point later in its future amendment, preferably in favour of the first view.

4.10 Knowledge communicated to the defendant

With regard to special circumstances such as profits for an extravagant bargain, the application of the remoteness rule is understood to be dependent upon the knowledge of defendants. But to what degree will such knowledge suffice? Take the case of a claim by a cargo owner against a carrier for some extensive and unforeseeable heads of damage. Would it be enough simply to give a casual oral notice to the clerk of the shipowner on booking? English law gave the answer “no”. The English position is not entirely clear,

¹ *Ibid.*, per Lord Hope, at para. 36.

² See above *Ge Zhengguo v Shanghai Golden Horse Real Estate Co*, Shanghai First Intermediate Civil Court, 25th Feb 1999, (1999) HYMZZ 78.

³ Tang Dehua, *Explanation of Chinese Contract Law* (2000), p.514.

but appears to be as follows: in order to recover in these circumstances, the first condition is that special circumstances should have been specifically *drawn to the attention*¹ of the defendant or have been *given notice to*² it by the plaintiff. The second condition is that the shipowner must assent expressly or impliedly to assuming the risk of loss flowing from such special circumstances.³ There is a view requiring a further condition, *i.e.* shipowners must receive additional consideration.⁴ The third condition has not been accepted by courts, so it will be sufficient if the first two conditions are satisfied.⁵ In *Panalpina International Transport Ltd v Densil Underwear Ltd*,⁶ a cargo of shirts for a Christmas market was delayed until late December. The court found that by the telephone conversation between plaintiffs and defendants, the goods should leave on 2nd Dec. and arrive within a reasonable time. Therefore the carrier was liable for the loss of a lucrative profit over Christmas period. In *Games for Pleasure Ltd v Trans-World Enterprises Ltd*⁷,

¹ See *Hadley v. Baxendale*, *supra* and *British Columbia Saw-Mill Co. v. Nettleship*, *supra*, both cases being concerned with a claim for damages by reason of the plaintiff's factory being prevented from working on account of late delivery of a part of machinery by the defendant carrier.

² *Nissho Company, Ltd. v. N. G. Livanos* (1941) 69 Ll. L. Rep. 125, at 128 *per* Lord Caldecote.

³ *The Pegase* [1981] 1 Lloyd's Rep. 175 at 183 *per* Robert Goff J. "Have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach."; *cf. Grebert-Borgnis v. Nugent*, 15 Q.B.D. 85; *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 112; *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 (H.L.).

⁴ Swinton, K. *Foreseeability: Where Should the Award of Contract Damages Cease? Studies in Contract Law* (Reiter & Swan eds. Toronto, 1980), p.69-74. Swinton argues that, even in cases where the carrier has knowledge of the cargo owner's business and of the importance of the particular cargo, the carrier might not be made liable for consequential losses because of the disparity between the carrier's potential liability and the consideration he has received (*i.e.* the freight rate is often fixed at a certain maximum by regulatory bodies). He argues that to make the carrier liable for consequential losses will undermine the present scheme of risk allocation.

⁵ Willes J. in *British Columbia Saw-Mill Co. v. Nettleship* (1868) L.R. 3 C.P. 499, stated it must be included into the contract. "Knowledge on the part of the carrier is only important if it forms part of the contract." *Ibid.* at p. 509. As a matter of fact, if the special circumstance has been incorporated into the carriage contract, mandatory convention or statute, (as suggested in *Buchanan & Co. v. Babco Forwarding and Shipping Ltd* [1978] A.C. 141; *cf.* similar case *Sandeman Coprimar S.A. v. Transitos Transportes Integrales S.L.* [2003] 2 Lloyd's Rep. 172) the defendant will certainly be liable for it. *Cf. Eastern Kayam Carpets Ltd v Eastern United Freight Ltd Case*, QBD 6 December 1983 (unreported); *The Frances and Jane* (1929) 34 Ll. L. Rep. 128 Nonetheless, such a requirement is too strict and was not accepted by Lord Upjohn in *The Heron II. Supra*, at p.484-485 and 421-422.

⁶ [1981] 1 Lloyd's Rep. 187.

⁷ 7 March 1990, CA (Unreported).

the carrier was told by the shipper that the goods were for display at a fair. Not only profits but also expenses for the accommodation, food, communication and car hire were upheld in the event of late delivery.

Art. 113 of the Chinese Contract Law has nothing explicit to say on this point. It is left to the discretion of judges and Chinese courts seem more likely to impose liability on the defendant on the basis of mere knowledge. In *Wang Qingyun v Mei Yang Photograph Service Co*¹, the claimant had only one photo of his parents, who died in 1976 Tangshan Earth Quake when he was just 3 years old. The uniqueness of the picture was undisclosed to defendants when they duplicated it. They then lost it. The court awarded the claimant the return of service fees and 8000 RMB as compensation for its uniqueness without examining the remoteness question in the first place.² This apparently is an untenable approach. It is unfair to impose potential extra damages of millions on a defendant if he has not assented to take the risk in the first place. The author suggests Chinese law should reconsider this position and update in the future amendment.

4.11 What is taken to be within or outside the contemplation of the parties to a carriage contract?

In England the remoteness rule has become one of the most efficient and flexible devices to limit damages in shipping law. By contrast, the Chinese position is more complicated. The acceptance of remoteness is consequent upon the applicable law and individual view of judges. In both systems there has been a tendency to sclerosis: that is, certain types of losses arising out of carriage have come to be regarded as recoverable or irrecoverable almost as a

¹ Tangshan Lubei District People's Court, 8th Sep 1997.

² Compensation for articles with unusual value was awarded in *Xiao Qing and Liu Weihua v State-run Xuguan Colour Picture Service*, as cited in [1999] Beking University Law Review vol 2 no.1, 679, where the defendant lost claimant's wedding pictures; cf. *Ai Xinmin v Blue Mountain Funeral Parlor*, Cited by Cheng Xiao, *Breach of Contract and Compensation for Non-pecuniary Damage, Civil and Commercial Review* (Liang Huixing ed., 2002) vol 25, p.105, where the defendant lost the ashes of the claimant's deceased brother. The claimant's claim was supported by court as the defendant clearly had the knowledge of its significance.

matter of law. But more recently it has been recognised that circumstances are so infinitely various that a case-by-case approach may be more appropriate. When applying the foreseeability test, judges should necessarily look to special circumstances from case to case such as: the usual experience as a reasonable carrier, the nature of the facts in question and how far they are unusual, and the extent to which such facts are likely to make delivery by the due date more critical, or to render the cargo owner's loss heavier in the event of non-fulfilment. The following categories intend to illustrate what is supposed to be foreseeable in the carriage of goods by sea and cast some light on the amendment of the CMC.

4.11.1 Loss of, damage to the cargo and failure to deliver

Loss of or damage to the cargo itself is obviously recoverable: no question of remoteness arises.¹ When the damage to cargo causes its condemnation by the authorities, the results of this were held to be within the contemplation of carriers and recoverable in England.² If the shipowner fails to load and carry the cargo, its natural and foreseeable consequence is that the owner of the goods is deprived of the benefit of having them at the agreed destination when they ought to have arrived. The loss he suffers is *prima facie* represented by the market value of the goods at that time and place.³ Whereas in China, where art.55 applies, damages are limited to the value before shipment, therefore the question of whether such loss is foreseeable is not a primary concern of Chinese judges. But it does not mean consequential losses will never be given when CMC applies. They might be recovered if incurred in the delay of cargo.⁴ Also where the CCL is applicable, other consequential losses are in principle

¹ "It has long been settled law that the owner of goods is entitled to sue and recover damages in respect of loss or damage to those goods." *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 at 468 *per* Hobhouse J.

² The wetting of the maize caused its condemnation by the Cuban authority. See *The Kefalonia Wind* [1986] 1 Lloyd's Rep. 273.

³ *The Kriti Rex* [1996] 2 Lloyd's Rep 171 at p.192, 193 *per* Moore-Bick J.

⁴ Art. 50 "...The carrier shall be liable for the economic loss caused by delay in delivery of the goods due to the fault of the carrier, even if no physical loss of or damage to the goods had actually occurred...". There are oddly contradictory policies behind this article and art.55, which will be addressed later.

recoverable subject to certain conditions.

4.11.2 Loss of profits on resale arising from loss of or damage to goods

In England the position here is straightforward: because a reasonable shipowner should understand the ordinary practices of the trade or business, it is taken to be within the contemplation that a loss of profit on resale might follow after his breach.¹ The law disregards the profit under each particular contract but adopts the market price of the arrived sound goods instead.²

Under Chinese law, the answer to this question varies according to the applicable law, and also to some extent according to the discretion of the individual judge. The CCL in principle adopts a similar position to English law. Before CMC came into effect in 1993, the position was rather chaotic in shipping law, with claims for loss of market being both rejected³ and accepted⁴ in similar circumstances. After the enactment of CMC however, claims for such a loss will be largely dismissed by Chinese courts either by art.55 without even discussing remoteness in the first place,⁵ or in any case because there will be said to be no sufficient causal link.⁶ In most cases, the court simply gave the cargo value at the loading port plus freight and insurance costs directly.⁷ If the freight has not been paid

¹ In *The Baleares* [1993] 1 Lloyd's Rep. 215 (C.A.) for a shipowner's delay in sending the vessel the court held "they must have realized that it was not unlikely that the charterers would have made forward sales at fixed prices and that they were likely to suffer loss from delay causing an increase in price." p227, 234 *per* Neill, L.J.; *cf. Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 (H.L.).

² The choice of this price is mainly the result of the mitigation rule and not of considerations of foreseeability. See Chapter 6 Measure of damages.

³ *Shanghai Export Base Constructing Jinqiao Co v Shanghai Yunhong Logistics Co Ltd, Feijie Shipping Co and Others*, Shanghai Higher People's Court, <http://www.ccmto.org.cn/hs/news/show.php?cid=732>

⁴ In *Kaini Chemical International Kong Hong Ltd v COSCO Shanghai*, Shanghai Maritime Court, <http://www.hecom.gov.cn/wtofadian/wen/wtoal/al177.htm>, the court awarded the market price as the proper measure of damages. In *China International Forestry Group v Taiwan Xinhang Shipping Holdings, Selected Shipping Cases* (Liu Jiazhen ed.1998), p.104, the sound value of the goods in destination was adopted to calculate the cargo value.

⁵ *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

⁶ *Guangdong Cereals Oils & Foodstuffs Corp. v Nanjing Lianyungang Ganghang Co.*, Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91.

⁷ *Guangzhou Etdz Construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997; *Grain & Oil (Group)*

by the claimant, then it will be based on the value before shipment plus insurance costs.¹ Such a rule does simplify the shipping claims. In a great deal of cases claimants only claimed for such even though they would had fair points to argue for other losses if they were in English courts. In one rare case where the court came across the remoteness rule, such a claim was wrongly said to be unforeseeable and irrecoverable.²

4.11.3 Profits from use of the goods

Under English law problems of remoteness have on occasion arisen in cases where an owner of cargo intended not to resell it but rather to use it for his own purposes. If the loss of, or failure to deliver the cargo makes this impossible the losses caused as a result will normally be regarded as within the contemplation of carriers.³ In *Montevideo Gas Co v Clan Line*⁴, where carriers mistakenly delivered steam coal for gas coal, the court held that it must have been within their contemplation that there would be loss of profits from the use of the former rather than the latter.⁵ But this purpose should be a reasonable one:⁶ peculiar circumstances or the particular needs of

General Co. v ASIL Gida Kimya Sanayi Ve Ticaret A.S., Tianjin Maritime Court, 18th Jul 2001, English case report available at <http://www.ccmto.org.cn/english/writ/judgmentDetail.php?sid=612>; *Chongqing Lifan Industry (Group) I/E Co Ltd and Others v Yongbang Trading International Freight Forwarder Ltd, Maosen Yuntong (Hong Kong) Ltd and Others*, Guangzhou Maritime Court, 20th May 2004, 2004 GHFCZ 10; *Hebei Huaye I/E Co Ltd v Yicheng Container Lines and Yicheng International Trade Co (Tianjin)*, Tianjin Higher People's Court, 25th Apr 2002, 2001 GJZ275. English case report available at <http://www.ccmto.org.cn/english/writ/judgmentDetail.php?sid=1152>

¹ *Shandong Animai By-Products I/E Corp v Hong Kong Yong He Shipping Co and Others*, Qingdao Maritime Court, 6th Apr 1999.

² *Guangdong Cereals Oils & Foodstuffs Corp. v Nanjing Lianyungang Ganghang Co.* Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91. "There is insufficient evidence to show the defendant could have foreseen that his failure in performance of the contract could cause the falling down of the price, therefore such claims should be rejected."

³ In *The Pegase* [1981] 1 Lloyd's Rep. 175 Robert Goff J. said there is "no rule of policy either excluding, or imposing special criteria in respect of, the recovery of damages for loss of profits, whether the relevant contract be a contract of sale or a contract of carriage, whether the breach be non-delivery or delayed delivery, and whether the profits claimed to have been lost are resale profits or profits from loss of use." *Ibid.*, at p183.

⁴ (1921) 6 Ll. L. Rep. 539; cf. *Shangxi Province Silk Imports and Exports Co v Guangdong Xihui Ltd and Others, Guidance and Reference for the Trial of Economic Cases* (compiled by the Economic Division of the Supreme Court), p.265.

⁵ Similarly in *Cory v. Thames Ironworks*, L.R. 3 Q.B.D. 181, the plaintiffs claimed certain damages peculiar to their special objects in buying a hulk. These they failed to recover, but they recovered a smaller sum of £420 as the loss which would have arisen in any event by the non-supply of a hulk if it had been intended for use for ordinary business purposes.

⁶ Cf. *The Pegase* [1981] 1 Lloyd's Rep. 175; *Victoria Laundry (Windsor) Ltd v Newman* 202

the claimant must be the subject of special discussion or communication. In *Gee v Lancashire & Yorkshire Ry Co.*,¹ for example, cotton was delivered four days late to a mill that was immobilised without it. The knowledge of the urgent need was not imposed on carriers, who thus escaped liability.² In comparison, in *The Frances and Jane*³, where a late-delivering carrier knew the terms of the plaintiff's contract with his buyer and the latter's urgent need of the cargo, he was held liable for the extra cost of express rail transport.

In English law, even when the loss is deemed too idiosyncratic to be recovered, the regular and conjectural loss which is less than he has actually suffered might be awarded instead so that the claimant does not have to leave empty-handed. Thus in *The Forum Craftsman*⁴ charterers, although they failed to be rewarded what they claimed because it was too remote, they still recovered the loss they would foreseeably have suffered (about a week of delay) as a result of the breach by shipowners.

For reasons stated before profits from use of the goods could probably be upheld if the CCL applies, which resembles English law. But when the CMC applies, due to the art.55 whether such purpose is within the contemplation of the carriers is irrelevant, and will either be rejected straightaway by art.55 or on causation.⁵

Industries Ltd [1949] 2 KB 528.

¹ (1860) 6 H. & N. 211.

² Similarly the loss due to the extremity of the plaintiffs' necessity, which drove the claimant to cereals as a substitute for coals, was rejected because it fell outside the contemplation of the parties; In *The Pegase* [1981] 1 Lloyd's Rep. 175 at p.185 *per* Robert Goff J. It was held the owners must have knowledge of the extent of the receivers' storage space or of the extent of their stocks in order to justify a claim for the loss of immediate need of the cargo.

³ (1929) 34 Ll. L. Rep. 128.

⁴ [1991] 1 Lloyd's Rep. 81.

⁵ Ironically, claims for the loss of uses of industrial materials (wool) were dismissed on remoteness in *Adlian SA Corp Ltd v P&O Nedlloyd BV and P&O Nedlloyd BV China Shipping Company Ltd*, Shandong Higher People's Court, 27 Nov 2001, 2001 LJZZ 39. "As to the loss caused by the suspension of production, the claimant did not provide evidence in support of its request; on the other hand, a marine carrier was not in a position to foresee that this damage would happen."

4.11.4 Particular terms of the sub-contract and compensation to third parties

There is a clear difference in principle between on the one hand, recognising the fact that in the event of interference with performance of the contemplated subcontract, loss will probably be caused to the cargo owner to some extent, and upon the other giving regard to the particular terms of a subcontract. Under English law the particular terms of the subcontract will usually be disregarded,¹ unless the shipowner has been specifically notified of the existence of these terms.² It is the same with the compensation to the third party, whether it is liquidated damages or not.³ The CMC will produce the same result,⁴ not on the grounds of remoteness, but either because of art.55 when it is interpreted as a limitation, or insufficient causal nexus between the two. When the two rules apply, the result is very similar.⁵ When the CCL applies, the compensation to the third party will be dismissed on remoteness, as it is in English law.⁶

4.11.5 Delay

Under English law, if a charterer delays in loading or discharging the cargo, the detention of the vessel and its subsequent financial

¹ "If a particular sub-sale is not within the contemplation of the parties when the contract of sale is made, damages are to be assessed without regard to it, and it makes no difference that the parties were aware that the buyer was a merchant dealing in and re-selling such goods." *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at p.489, *per* Devlin J.; *cf. Louis Dreyfus Trading Ltd. v. Reliance Trading Ltd* [2004] 2 Lloyd's Rep. 243.

² *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 *per* Devlin J. at p.436, "if...a subsale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not."

³ *Proctor, Garratt, Marston Ltd (Rosario) v Oakwin Steamship Company Ltd* (1925) 23 Ll. L. Rep. 222 (C.A.); *Heskell v Continental Express Ltd and Another.* (1949-50) 83 Ll. L. Rep. 438; *The Ocean Dynamic* [1982] 2 Lloyd's Rep. 88 (sale of goods).

⁴ *Huarun Machine Co and Hong Kong Minan Insurance v UUIE and Others, Selected Shipping Cases* (Liu Jiazhen ed. 1998), p.26; *Xiamen Imports and Exports Ltd v COSCO Guangzhuo*, *ibid.* p.71.

⁵ See *Shenzhen Sinocean Shipping Co Ltd v Nanjing Hengfeng Shipping Co Ltd*, Guangzhou Maritime Court, 26th Apr 2001, (2001) GHFSZ 9; *Zhanjiang Sugar Development Co and Shanghai Suger Tobacco & Wine Corp. v. Yingkou Shipping Corp. and Others*, Guangdong Higher People's Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 11.

⁶ *Shenzhen Lianda Textile & Silk I & E Co Ltd v China Shipping Container Lines Co Ltd and Others*, Guangzhou Maritime Court, 3rd June 2003, (2003) GHFCZ 64.

loss are obviously recoverable.¹ The same can be said to a shipowner who delivers late, where loss of profits from the delay to deliver the cargo is similarly treated.²

Art.50 of the CMC provides “The carrier shall be liable for the economic loss caused by delay in delivery of the goods due to the fault of the carrier, even if no physical loss of or damage to the goods had actually occurred...”³ Economic loss, it would seem, must include the loss of market. So inconsistent with the art.55 which has been interpreted as excluding any economic loss in respect of cargo loss or damage, this article accepts the economic loss arising from the delay, including the fluctuation of market or the loss of profits.⁴ Additionally, the same result can be achieved when the CCL⁵ or the two rules⁶ are applicable. The article itself is fair but there is a problem: as CMC seems exclude a remoteness rule, it cannot decide whether unusual or unforeseeable economic loss should be ruled out. This only invites disputes. Again, it shows it is untenable to exclude the remoteness rule in shipping law.

The other deficiency is of course, inconsistency. The dramatic increase in foreign trade has led to renewed interest in mechanisms for maritime dispute resolution in China. Yet the CMC is outdated in that the principles behind different articles in the same law can sit oddly with each other. CMC limits economic loss in respect of cargo loss or damage while it allows such as regards cargo delay in the very same law. This cannot be seen in any international conventions and foreign law. What happens if the delay of delivery concurs with the cargo loss or damage? It seems that economic loss will still be

¹ Cf. *The Mass Glory* [2002] 2 Lloyd's Rep. 244.

² *The Yanxilas (No.2)* [1984] 1 Lloyd's Rep. 676; *Brandt & Co. and F. W. Vogel & Co. v. River Plate Steam Navigation Company, Ltd* (1923-24) 17 Ll. L. Rep. 142.

³ Para. 3 of art.50 of the CMC.

⁴ *Jiangsu Cereals, Oils & Foodstuffs Import & Export Group v Hyundai Merchant Marine Co Ltd*, Shanghai Maritime Court 2001, 22 Apr 2003, HHFSZ 446.

⁵ *Shantou Hangxing Freight Co Ltd v Tianjin Qingfeng Freight Co Ltd*, Guangzhou Maritime Court, 7th Dec 2000, 2000 GHFSZ 65.

⁶ The loss of market, damage to the cargo, extra freight and so on were awarded in *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 17.

denied on this occasion. In *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*,¹ a cargo of steel shipped in an unseaworthy ship was delayed for 5 months and as a result was rusty upon arrival. The loss of market was given in the first instance but this was reversed on appeal.² The development of CMC and its largely incorporation of foreign legal rules were intended to provide a powerful legal assurance for China's maritime courts to try shipping cases justly and efficiently. Ironically the provision, which was intended to create a source of certainty and predictability, has had the opposite effect as being impracticable and inconsistent. Why? The answer is probably because of the customarily vague drafting style of Chinese legislators and their omission on details. The relevant provisions of CMC are mired in conflicting layers of policy, fail to achieve its primary purpose of facilitating maritime trade and will only invite disputes and cause costly and time-consuming litigation. These contradictory rules provided in the same law calls for a change in order to ensure the determinate and consistent operation of law. The author recommends that a uniform rule should be established by reference to English law. There shouldn't be any arbitrary limit on damages in respect of cargo loss or damage. Damages should be solely determined by remoteness, causation, mitigation and so on in all events.

4.11.6 Chain contracts and subcharters

In shipping practice, it is common to subcharter a vessel many times. In England it has been consistently held that the likelihood that there is a sub-charter in existence must have been recognised by both parties.³ Therefore it is foreseeable that a breach of charter on shipowners' part which renders the vessel unseaworthy will in

¹ Guangdong Higher People's Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 46.

² *Guangzhou NanHuaXi Co., Ltd v Guangdong HongKong Macau Shipping Co.,Ltd*, Guangdong Higher People's Court.

³ *Salen Rederierna AB v Antaios Compania Naviera SA*, QBD, 24 June 1983 (unreported); cf. When a vessel was time chartered for a period of three years for worldwide trading, the owners "would almost inevitably contemplate that it might be sub-chartered for some if not all of the period of the charter." *The Kriti Rex* [1996] 2 Lloyd's Rep 171 per Moore-Bick J. at p.203.

sequence cause charterers to incur liability to owners of cargo,¹ or subject to damages claimed by other parties, such as demurrage.² The costs incurred in defending the original action brought by the third party are also taken to be foreseeable.³ This is exactly the same in China.⁴

This however leaves a further issue. Most charters expressly incorporate an indemnity clause to this effect to avoid dispute⁵; if there is an indemnity clause, is its effect limited to those losses that are foreseeable, or does it cover all losses? In England the view that indemnity clause is subject to the remoteness test was expressed in *The Eurus*⁶ and later in *The Mass Glory*⁷. However Staughton L.J. in *The Eurus*⁸ in his *obiter dictum* disagreed with such a stance on indemnity. He was of the view that indemnity referred to “all loss suffered which was attributable to a specified clause whether or not it was in the reasonable contemplation of the parties”.⁹ From his point of view, a true indemnity clause could *per se* avoid the application of remoteness rule. In the authors’ opinion, such an argument is truly a question of construction. The default construction should accord with the remoteness rule. If the parties intend to extend it and indemnity clause is clearly expressed to have such an effect, then the remoteness rule could be excluded.¹⁰

In China, this position is prescribed by law.¹¹ Art. 60 of the CMC states, “where the performance of the carriage or part thereof has

¹ *The Kriti Rex* [1996] 2 Lloyd’s Rep 171.

² *The Capricorn I* [1998] 2 Lloyd’s Rep. 379.

³ *The Kate* (1935) 51 Ll. L. Rep. 321.

⁴ *Shanxi Yiyuan Steel Company v Hong Kong Ping An Group*, Chinese Supreme Court, *Guidance and Reference for Civil Trial* (Tang Dehua ed. 2002) vol.2 .

⁵ For example, the new edition of NYPE provides that cargo claims are to be apportioned in accordance with the latest edition of the New York Produce Exchange Inter-Club Agreement (ICA). See *the Elpa* [2001] 2 Lloyd’s Rep 596.

⁶ [1996] 2 Lloyd’s Rep. 408 (QBD) at p.432 *per Rix J.*

⁷ *The Mass Glory* [2002] 2 Lloyd’s Rep. 244.

⁸ [1998] 1 Lloyd’s Rep. 351 (C.A.).

⁹ *Ibid.*, at p 357.

¹⁰ “The extent of a person’s liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances.” *Halsbury’s Laws of England* (4th edn) vol. 20 par. 345.

¹¹ Discussion of this arrangement see Ma Jingjing, *Several Legal Issues relating to “Actual Carrier”*, [2005] Journal of Shanghai Maritime University no.1, 19; Ma Deyi, *The Double Attribute of Actual Carrier’s Liability*, [2005] Law Science Magazine no.3 35.

been entrusted to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage..." Art.65 continues: "The provision of article 60 to 64 of this Code shall not affect the recourse between the carrier and the actual carrier." In *Pearl River Container Transportation Co Ltd v P&O Nedlloyd BV*,¹ after compensating the claimant cargo owners, the multimodal transport operator was successfully reimbursed by the second-leg voyage carrier, including the costs incurred in litigation.² If the carrier reasonably settles his initial liability out of court, it will be accepted in the following claim for reimbursement as well.³ These are very similar to English law, even though remoteness is largely irrelevant here when CMC is applicable. The above argument on indemnity and remoteness has not been raised yet and the above English position should be studied by Chinese scholars for reference when it is put forward.

4.11.7 The nomination of a safe port or berth

The shipper or charterer may, conversely, be liable to the carrier. If, for example, charterers fail to nominate a loading place or provide cargo, they may face a claim for damages for the loss of freight.⁴ The nomination of an unsafe loading place is just as much a breach of contract as is the failure to nominate one. The damage sustained as a result of the vessel's grounding is said to be the natural and probable consequence of it.⁵ Likewise, the cost of engaging tugs for the

¹ Guangdong Higher People's Court, (2000) YFJERZZ.303, English case report available at <http://www.ccmto.org.cn/english/writ/judgmentDetail.php?sId=1149>

² Cf. *COSCO Group v Shandong SITC Container Lines Co Ltd and Others*, Qingdao Maritime Court, <http://www.ccmto.org.cn/hs/news/show.php?cId=3524>; *COSCO (Group) Corp v Shandong Jining Shengyuan Export Trading Co*, Qingdao Maritime Court, 30th Oct 2001.

³ *China Sinotrans Co Tanggu v COSCO Tianjin International Freight Co Ltd*, Tianjin Higher People's Court, 14th Jul 1999, *Selected Cases of People's Courts* (the Supreme Court ed. 2002), vol.1.

⁴ See the Chinese case of *Pan Pacific Shipping & Trading S.A. v Shenzhen Shekou Wanshida Co.,Ltd*, *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 24; *Fujian Shipping Company v Yantai Shide Minerals Ltd*, Shanghai Higher People's Court, 17th Apr 2002, 2001 HGJZZ 442, English report available at <http://www.ccmto.org.cn/english/case/show.php?sId=2066>

⁵ *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd*. [1955] 1 Lloyd's Rep. 349. "Where there has been a breach of safe port or analogous provisions in a charter-party, whether voyage or time, and damage to the ship flows therefrom...the shipowner is entitled to recover..." *Ibid.* at p. 369 *per* Hodson J.; cf. *Reardon Smith Line, Ltd. v Australian Wheat Board* [1956] 1 Lloyd's Rep. 1.

stranded vessel¹, the damage caused by ice in the nominated port², the loss and damage sustained by reason of trapping in a war zone³, costs of lighterage, towage, repairs, *etc.*⁴ following upon the casualty are all treated by courts as within the contemplation of the charterer when he nominates it. This area of law is absent from much Chinese authority and English law can be referred to when Chinese judges encounter the same problem.

4.11.8 Oil carriage

It has been held in England – and might well be held in China if foreseeability is regarded as relevant at all – that what is reasonably to be contemplated depends at least partly on the status of the parties. For example, the costs of hedging devices were held foreseeable for sophisticated oil traders, while it rarely happened in other businesses⁵ and was thus unforeseeable.⁶ Besides, the court is more likely to accept unusual profits in oil transactions because oil traders should be acquainted with the fact that the price in oil transaction is notoriously fluctuant. Viewed in this light, the tanker shipowner should be scrupulous about the legitimate instructions by the charterer, a slight breach of which might cause huge losses. In *The Ulyanovsk*⁷ the price of oil contract between the seller and buyer is fixed in accordance with the bill of lading date, which is common in oil transactions. The charterer (buyer) anticipated a falling market and therefore ordered the vessel not to berth and load until instructed otherwise. The master disregarded the legitimate instruction and completed on an early date. The charterer succeeded in recovering the loss of falling price.⁸

¹ *Brostrom & Son v. Dreyfus & Co* (1932) 44 Ll. L. Rep. 136.

² *G. W. Grace & Co., Ltd. v. General Steam Navigation Company, Ltd.* (1949) 83 Ll.L.Rep, 297.

³ *The Lucille* [1984] 1 Lloyd's Rep. 244.

⁴ *Lensen Shipping, Ltd. v. Anglo-Soviet Shipping Company Ltd* (1934) 50 Ll. L. Rep. 62.

⁵ *Addax Ltd. v. Arcadia Petroleum Ltd. and Another* [2000] 1 Lloyd's Rep. 493.

⁶ *Trafigura Beheer BV & Anor v Mediterranean Shipping Co SA* [2007] 1 C.L.C. 594.

⁷ *The Ulyanovsk* [1990] 1 Lloyd's Rep. 425.

⁸ "We were satisfied that Owners must have been aware that Neopetro were traders carrying on business of buying and selling oil for profit; that price movements in such commodities are to be expected; that it is not unlikely that late or premature loading of a vessel may have adverse consequence." *Ibid.* at 433, *per* Steyn J.

Even so, the court has to take into account various facts in each case and will not impose infinite knowledge on the contemplation of oil traders. If the fluctuation of oil market is caused by a government order, then such a loss is unforeseeable and irrecoverable.¹ It will be the same if it is caused by other unforeseeable reasons. In *The Eurus*², the vessel completed loading at 0130 on 1st Feb. However, as a result of a local custom (known as the “8 o’clock rule”), any oil shipment which was completed before 0800 on the first day of any month was treated as though it had been completed on the last day of the preceding month. Thus charterers received a January bill of lading instead of a February one. Both parties knew the fact that February price would be lower than the January price and the charter had in fact instructed the carrier to slow down the loading. Nevertheless, since 8 o’clock rule was outside the reasonable contemplation of both parties, the loss caused by price difference between two months was held irrecoverable. Again, Chinese law is lacking abundant cases. From a review of other Chinese cases, Chinese judges are inclined to rely on causation in all events. This, as has already been pointed out by the author, may be detrimental to the acceptance and authority of their judgments. English law here is hoped to enlighten Chinese judges. It shows that it is utterly important to analyse the case with reference to and reliance on appropriate legal rules. Remoteness as an effective legal rule should be fully accepted by Chinese judges. If the CMC applies, these claims will be very unlikely to recover anyway. But if foreseeability is regarded as relevant at all, it should not be so distinct from the English one.

4.11.9 Other breaches

1. Premature repudiation of charterparty

With respect to the wrongful repudiation of a charterparty by the

¹ See *the Rio Claro* [1987] 2 Lloyd’s Rep. 173, where the owner delayed in arriving and then the Egyptian authorities increased the official price of the crude oil. The loss of fluctuation of market price was held not reasonably foreseeable.

² *The Eurus* [1998] 1 Lloyd’s Rep. 351.

owner, it is taken to be within the reasonable contemplation that the other party will charter in a substitute vessel at any market rate.¹ This is the exact viewpoint of Chinese shipping law.² Likewise, if the vessel is occupied by the defendant exceeding what has been agreed, then what he should have been contemplated is the loss of use of the vessel, which usually takes the form of demurrage or damages for detention.³

2. Failure to provide a vessel

Similarly, if the shipowner fails to provide a vessel, then it is reasonably foreseeable that the charter will seek substitute tonnage.⁴ Such is also the case in Chinese shipping law.⁵ However, if a substitute is unavailable in market, the profit might also be supported. In *Salen Rederierna AB v Antaios Compania Naviera SA*,⁶ it was acknowledged that the likelihood that there was a sub-charter in existence must have been recognised by the owners when they hired the vessel, so the loss of profits in the sub-charter was awarded.

3. Loss of goodwill

As to a loss of goodwill, any reasonable carrier could hardly conceive of resulting from the breach of contract. In *The Pegase*,⁷ some customers of the cargo owner transferred their business to his competitor and he permanently lost them after a delay of 65 days caused by shipowners. However, since the carrier had no knowledge of his business, such loss was too speculative and too remote to be

¹ *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75; *SNIA Societa di Navigazione Industriale et Commercio v. Suzuki & Co.*, (1924) 18 Ll.L. Rep. 333; *Goldberg Ltd. v. Bjornstad & Broekhus*, (1921) 6 Ll.L. Rep. 73.

² *Fujian Guantou Shipping Co v Shenzhen Huanan International Shipping Co Ltd*, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 53.

³ See the English case *The Happy Day* [2002] 2 Lloyd's Rep. 487; the Chinese case of *Run Da Shipping Co v Daqing Economy Cooperation Corp.*, *Selected Shipping Cases* (Liu Jiazhen ed. 1998), p.126.

⁴ *The Lily Prima* [1976] 2 Lloyd's Rep. 487.

⁵ *Tangshan Haigang Dongfang Shipping Co Ltd v Nantong Tianshun Shipping Co Ltd*, Tianjin Higher People's Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=2286>

⁶ QBD 24 June 1983 (unreported).

⁷ [1981] 1 Lloyd's Rep. 175.

upheld. In China, due to the inclination to restrict the scope of compensation in shipping law, such claims could hardly be upheld. Nor could it be upheld by CCL. In a Chinese case *Shenzhen Lianda Textile & Silk I & E Co Ltd v China Shipping Container Lines Co Ltd and Others*,¹ the loss of a future contract was held too remote to be recovered according to CCL.

4.12 Exclusion of the remoteness rule

It is a rule of law that a claim for damages is subject to the ordinary rules of remoteness.² Yet the rule is clearly subject to the express intentions of the parties as shown by the terms of their contract. The parties can not only exclude liability for usual loss,³ but also attach liability to unforeseeable consequences, on the condition that there is an unbroken chain of causation between the breach and the loss.⁴ In both circumstances, the remoteness test will not apply. This position accords to the principles of CCL as well. Articles with the same purpose also appear in mandatory statutes,⁵ or conventions, *e.g.*, art. IV, rule. 6 of the Hague-Visby Rules reads,

“Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses *directly or indirectly* arising out of or resulting from such shipment.”
(emphasis added)

¹ Guangzhou Maritime Court, 3rd June 2003, (2003) GHFCZ 64.

² *Cf. Royal Greek Government v Minister of Transport* (1949-50) 83 Ll. L. Rep. 228; *Steamship Co. v. Board of Trade*. (1923-24) 17 Ll. L. Rep. 131; *The Pegase* [1981] 1 Lloyd's Rep. 175.

³ *E.g.* “Neither the Seller nor the Buyer shall be liable for consequential *indirect or special* losses or *special* damages of any kind arising out of or in any way connected with the performance of or failure to perform the agreement. In particular the seller shall in no circumstances be liable for more than the difference between the contract price and the market price ...” (emphasis added) *Bulk Oil (Zug) A.G. v. Sun International Ltd. and Sun Oil Trading Co. (No. 2)* [1984] 1 Lloyd's Rep. 531.

⁴ *The Eurys* [1998] 1 Lloyd's Rep. 351.

⁵ *Essa v Laing Ltd* [2004] EWCA Civ 2 Clarke L.J. at para 46 said “it does not follow that it [foreseeability] must be shown in the case of every statutory tort” and in that case, it was held section 32 of the Race Relations Act 1976 did not require a foreseeability test.

The explanation of “directly or indirectly” was put forward in *The Fiona*¹. Without doubt they refer to causation by the normal rule of construction. In addition, it was held that these words were intended to remove the limit on contractual damages normally imposed by the remoteness rule.² Lord Hirst said that the Hague-Visby Rules were first drafted in 1924 when there was some confusion between causation and remoteness. There was a tendency to speak of damage as “indirectly caused” when what was actually meant was that the damage was not reasonably foreseeable.³ According to this explanation, art. IV, r. 6 intends to compensate all consequential losses, foreseeable or not. This is very similar to the Chinese Seeds Law,⁴ which expressly provides the same thing,

4.13 Foreseeability in tort law⁵

Under English law, does the remoteness principle differ according to the legal classification of the cause of action? One would have expected that the answer should be no.⁶ But as a matter of fact there are differences.⁷

4.13.1 The test of tort: English law

Under English law, the right formula of foreseeability is “whether the damage is of such a kind as the reasonable man should have foreseen.”⁸ It is the foreseeability not the “direct and indirect” rule⁹

¹ *The Fiona* [1994] 2 Lloyd's Rep. 506.

² [1993] 1 Lloyd's Rep. 257 at 287 *per* Diamond J.; [1994] 2 Lloyd's Rep. 506 (C.A.), at p522, *per* Lord Hirst

³ Other examples see Rule C of the York-Antwerp Rules 1924. “Only such losses, damages or expenses which are *the direct* consequence of the general average act shall be allowed in general average”.

⁴ Its art.41 makes it very clear that the seeds dealer who sell faulty seeds shall be responsible for all the loss suffered by the farmer regardless of its foreseeability.

⁵ Foreseeability has many roles in tort law. To limit damages is just one of them. See Zipursky, B.C. *The Many Faces of Foreseeability*, (2000) 10 Kan. J.L. & Pub. Pol'y 156, 156. “Foreseeability is undoubtedly a muddle in the law of negligence.”; Cardi, W.J. *Purging Foreseeability*, (2005) 58 Vand. L. Rev. 739, 744-751; Cardi, W.J. *Reconstructing Foreseeability*, (2005) 46 B.C. L. Rev. 921.

⁶ In the words of Scarman L.J., it would be “absurd that the test of remoteness of damage should, in principle, differ according to the legal classification of the cause of action”. *H Parsons (Livestock) Ltd v Uttley Ingham & Co. Ltd.* [1978] Q.B. 791, 806.

⁷ *The Heron II* [1969] 1 A.C. 350, *per* Lord Reid, at 385-386.

⁸ *The Wagon Mound* [1961] 1 Lloyd's Rep. 1, *per* Viscount Simonds at 11.

⁹ *Smith v. The London and South Western Railway*, L.R. 6, C.P. 14, “when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not” *per* Baron Channell; *cf.*

that is the effective test,¹ and it applies to all unintentional torts.²

4.13.2 The differences and similarities of two formulae³

The English test of remoteness for contract is centred on whether the loss is reasonably contemplated as a not unlikely consequence of the breach. In contrast the one in tort focuses on the “reasonably foreseeable” consequence, even if it is only foreseeable as a possibility. In *The Heron II*,⁴ when contrasting the remoteness test in contract and tort it was emphasised that the tort test required only a low degree of likelihood of the loss to be reasonably foreseeable, lower than the contract one “not unlikely”.⁵ Having said that, a person guilty of tort will not be responsible in respect of mischief which could by no means have been foreseen and which no reasonable person would have anticipated. The second difference is that the time for applying the contractual formula is at the time of making the contract; while in tort the moment of occurrence of the wrong act or omission is decisive.⁶ In both formulae, it is the *event* giving rising to the loss⁷ that should be reasonably foreseeable. It is immaterial that the precise detail in which it has been caused, may not themselves have been foreseeable.⁸

Polemis v. Furness, Withy & Co (1921) 8 Ll. L. Rep. 351 at p.354, *per* Lord Warrington.

¹ *Cf. Sandeman Coprimar S.A. v. Transitos Y Transportes Integrales S.L. and Others* [2003] 2 Lloyd's Rep. 172 p.172 *per* Hegarty J.; *The Sea Empress* [2003] 1 Lloyd's Rep. 327.

² It was applied to the tort of nuisance in *the Wagon Mound (No.2)*, [1966] 1 Lloyd's Rep. 657 (P.C.), at p.713 *per* Moore-Bick J. “foreseeability of damage is a necessary element in determining liability in all cases of nuisance”; and the law of conversion in *Kuwait Airways Corporation v. Iraq Airways Co. (Nos. 4 and 5)*. [2002] 2 A.C. 883 at par. 538; *cf. Cambridge Water Co. v. Eastern Counties Leather Plc* [1994] 1 Lloyd's Rep. 261; *Jan de Nul (U.K.) Ltd. v. N.V. Royale Belge*[2000] 2 Lloyd's Rep. 700.

³ It is said that “foreseeability in tort cases has generally been, or at least has had the potential to be, broader than foreseeability in contract cases.” Galligan, T.C. *Contortions along the Boundary between Contracts and Torts*, (1994) 69 Tul. L. Rev. 457, 468; the justification for foreseeability in tort is to avoid creating an avalanche of new claims and thus accord to the concept of proximate cause. Schwartz, V.E. *The Remoteness Doctrine: A Rational Limit on Tort Liability*, (1999) 8 Cornell J.L. & Pub. Pol'y 421, 429.

⁴ *The Heron II* [1967] 2 Lloyd's Rep. 457.

⁵ *Ibid.*, at 485 *per* Lord Pearce; “The test of reasonable foreseeability in tort is generally more stringent, and less favourable to the wrongdoer, than the similar test in contract.” *Sandeman Coprimar S.A. v. Transitos Y Transportes Integrales S.L. and Others* [2003] 2 Lloyd's Rep. 172, *per* Lord Phillips at 177.

⁶ In *the Teh Hu* [1969] 2 Lloyd's Rep. 7, the amount of loss consequent on a tortious act at sea fell to be determined at the date when it was suffered.

⁷ See Tettenborn, *The Law of Damages*, p.138.

⁸ See *the Wagon Mound* [1961] AC 388; *Hughes v Lord Advocate* [1963] AC 837.

4.13.3 The test of tort: Chinese law

In China, the remoteness rule has not been officially accepted in Chinese tort law, as opposed to contract law.¹ The question of whether or not particular damages are recoverable in tort depends only on whether or not they are the direct consequences of the act.² By contrast, this “direct and indirect rule” has already been reversed and replaced by the foreseeability test in England.³ When hearing shipping cases, if it is sued in contract and CCL applies, at least remoteness is relevant in measuring damages; sued in tort, the courts will largely rely on causation and procedural reasons to limit damages,⁴ which make their decision rather unpredictable as one judge might see the tortious act the cause of the subsequent loss, by another’s view no causal link exists and is thus irrecoverable. The outcome of litigation in the courts should be predicable and reliable. The generality of rules, the predictability of their application and certainty of measure of damages in marine claims can generate the security of expectations that is essential in the maritime trade. However, if the measure of damages is different in similar cases depending on the applicable law or individual judges, the law fails to achieve its primary purpose of facilitating maritime trade and will only invite disputes. This will increase the costs of doing business. Therefore it is necessary to seek the harmonisation of existing overlapping legal rules and to establish a unified legal framework for the measure of damages. For this reason, remoteness and other legal principle (mitigation) should be introduced into Chinese tort law as well as contract law in order to ensure a reliable and predictable application of damages law whatever the basis of claims.

¹ “In respect of the limit of compensation for tortious liability, our country’s tort law has not yet accepted foreseeability rule.” Cui Jianyuan, *Contract Law* (3rd edn 2003), p.127.

² Tong Rou, *General Rules of Civil Law* (1982), p.24.

³ The “direct and indirect” rule was established in *Polemis v. Furness, Withy & Co* (1921) 8 Ll. L. Rep. 351 and was overruled by *the Wagon Mound* [1961] AC 388.

⁴ See *Xia Men Jianfa Co v Hongkong Meitong Shipping Co*, a case concerning to the delivery without the original bill of lading, *Selected Shipping Law Cases* (Liu Jiazhen ed. 1998), p.21; *Chen Zhiyou v Yan Jinghui and Others*, a case concerning to the conversion to a trawlboat, *Selected Shipping Law Cases* (Liu Jiazhen ed.1998), p.1.

4.14 Exception to foreseeability: deliberate wrongdoing

The foreseeability test is obviously designed to place limits on the liability for torts based on carelessness. But the justification to limit compensatory damages is less obvious when the tort is committed intentionally by the defendant.¹ This is how English law applies the principle:² An innocent plaintiff may call on a morally reprehensible defendant to pay the whole of the loss he has caused.³ In *Smith New Court Securities Ltd. v Scrimgeour Vickers*⁴ the House of Lords held that the victim of a fraud was entitled to damages for all his actual loss directly flowing from the deceit even if they were not foreseeable.⁵ It serves to discourage fraud.⁶ Fraud is commonly found in commercial world, particularly in relation to letter of credits, insurance and bills of lading.⁷ In shipping law, the shipowner may be liable in deceit for losses suffered by a bill of lading holder if he includes some untrue statements in the bill of lading. The victim can probably recover expenses and losses even caused by extraneous factors, such as an unforeseeable downturn in the market. Sometimes delivery without bills of lading could constitute deceit as well. "In such circumstances the argument of remoteness and unforeseeability is unsustainable."⁸ If a carrier deliberately destroys cargo, not only will he compensate all losses cargo owners have suffered, he will also lose the package limitation and global limitation.⁹

In comparison, there are no special provisions under Chinese law

¹ "In respect of torts where the essence of liability is dishonest conduct calculated to cause loss, there is no rule of remoteness at all." Tettenborn, *The Law of Damages*, p.139; cf. Williams, G. *The Aims of the Law of Tort* (1951) 4 C.L.P. 137, 172; Oliver Wendell Holmes, *The Common Law* (ed. M. De W. Howe), p. 106.

² Though oddly enough only in tort: remoteness does protect a deliberate contract breaker.

³ *Hart and Honoré, Causation in the Law* (2nd edn 1985), p. 304.

⁴ [1997] A.C. 254 (H.L.); cf. *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158.

⁵ "It does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen." *Ibid.*, per Lord Browne-Wilkinson at p.264.

⁶ *Smith New Court Securities Ltd. v Scrimgeour Vickers* [1997] A.C. 254 (H.L.), per Lord Steyn at p.280.

⁷ *Komerčni Banka AS v Stone & Rolls Ltd* [2003] 1 Lloyd's Rep 383; *La Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1988] 2 Lloyd's Rep 513.

⁸ *Eastern Kayam Carpets Ltd v Eastern United Freight Ltd Case* (unreported) QBD, 6 December 1983, per Hirst. J.

⁹ See ch 7.

imposing harsh liability to deter fraud.¹ This should be seen as an omission. Absent explicit provisions, it is up to the discretion of judges and the result is very unpredictable. In some cases, the English approach was accepted, *i.e.*, any loss or damage arising directly from such a fraud, foreseeable or not, will be recoverable. The loss of profits was given in *Xiamen Imports and Exports Ltd v Cosco Guangzhou*² where the shipowner antedated the bill of lading. The compensation to the third party was also upheld in *China Guang'ao Development Corp v Singapore LHS (private) Co Ltd (the Xinfu)*.³ As mentioned above, these would not be recoverable in normal circumstances. But if the judge holds a different view, then a more conservative decision will be given. The loss of profits and compensation to the third party were rejected, as would be in other non-fraudulent cases, in at least two cases.⁴

The inadequacies of laws become are a major source of injustice. Businessmen need the predictability and calculability of the consequences of entering into transactions and they need to forecast the likelihood of malfeasance and its legal consequence when such a likelihood indeed materialises. Chinese law is uncertain and unpredictable in the event of fraud. The uncertainty of law contributes to more litigious behaviour as each party easily find cases supporting their views. For example, in *Dezhou I/E Co v Guangdong Shipping Co Ltd*,⁵ the carrier fraudulently antedated the bill of lading. As regards the question of whether the loss of profit and compensation to the third party should be compensated, it was debated so intensely that the case was tried by three courts in five

¹ This has been discussed in Ch 3.

² *Selected Shipping Law Cases* (Liu Jiazhen ed. 1998), p.71; *Huarun Machine Co and Hong Kong Minan Insurance v UUIE and Others*, *Selected Shipping Law Cases* (Liu Jiazhen ed. 1998), p.26.

³ Guangzhou Maritime Court, *Typical Chinese Maritime Cases* (Jin Zhengjia ed.1998), p.407, where the shipowner issued advanced bills of lading and was regarded as a fraud; *cf. Ningbo Economic and Technological District Zone I/E Co v Yong Shunming (Spain) Co Ltd and Others*, Ningbo Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=61>, where the defendant forged bills of lading.

⁴ *La Filipina UY Gongco Corporation vs. Dexing Shipping Co and Others*, Guangzhou Maritime Court, 29th Dec 1998, the defendant forged bill of lading; *the Efes*, Guangdong Higher People's Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 48, the shipowner predated the B/L.

⁵ Shandong Higher People's Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=1324>

trials (including three retrials) over six years before it was finally held to be recoverable. This is impractical and uneconomic. The inadequacy of laws provide opportunities for judges to arbitrarily apply the law, particularly when they are motivated by personal interest or external pressures. Not to say, without an effective supervisory system, it is easy to envisage the case where the loosely drafted law is abused by unscrupulous judges and lawyers. As a result of all this, the impact and authority of law are undermined. So it is recommended the Chinese law should lay down specific guidelines for judges' reference in the same way as under English law. The fraud should be treated by law separately and harshly in order to deter such an act.

4.15 Conclusion

Remoteness is one of the most important mechanisms used to place some limits on the measurement of damages under English law. It is unfair to hold a defendant responsible for the infinite consequences of his breach which he could not have reasonably contemplated or foreseen. The CCL 1999 accepts a remoteness rule similar to that of English law. Nevertheless, its understanding is still in its infancy and its function is greatly undervalued. Other legal principles such as causation are more likely to be applied even though they are incapable of deciding measure of damages in all events. Its problem has been addressed by the author. As pointed out, the accurate application of law and their predictability are particularly crucial in generating the trust and confidence in judicial decisions. Failing to reject claims on the appropriate reasoning, judgments can be regarded arbitrary and capricious in the litigants' eyes. Chinese judges are reminded not to rely on causation in measurement of damages all the time and should make efforts in applying other appropriate legal rules. Besides, the conciseness of Chinese judgments contributes little to the advancement of the remoteness rule. The detailed explication provided by English cases in this chapter no doubt will enlighten Chinese judges and scholars.

More disappointedly, the CCL has rather limited application in the carriage of goods by sea, on which subject the CMC is the major legislation. CMC provides a faulty art.55, which limits damages to the cargo value at the port of loading in respect of cargo loss or damage. By many courts' interpretation, this article functions as a limitation provision and the remoteness rule is irrelevant in assessing damages in this event. For those courts that do not share this view, they usually prefer other legal principles over remoteness, typically causation. In either way, the remoteness test is not an essential factor in deciding damages in the carriage of goods by sea as it would be under English law. Because causation is highly discretionary, different courts might make different decisions on the same facts because the overall competency of Chinese judges has not risen to a level that sufficiently meets practical needs and an absence of conformity throughout the Chinese court system. Thus Chinese shipping cases become unpredictable and are consequent on the personal view of judges. As it is a paramount consideration to ensure a reliable and predictable application of law, the author suggest China should bolster the competency of judges by providing more training to existing judges and provide a stronger basis for accurate application of law. Also, the possibility of acceptance of precedents should be under discussion for its obvious benefits in eliminating the inconsistency. The author does not agree with the CMC position, not only because it is inconsistent with the CCL approach, but also because of its obvious injustice to the claimant (which will also be addressed in chapter 6).

Also the existence of three parallel sets of rules in the carriage of goods by sea only overlaps and contradicts each other and is thus scarifying legal consistency and legal certainty and cluttering the shipping law. The author suggests Chinese law-makers should take notice to the above and seek the harmonisation of existing overlapping legal rules and the establishment of a unified shipping legislation.

There is also a foreseeability test in English tort law. In contrast, Chinese tort law does not accept it at all. The foreseeability rule has been moulded by the Chinese court in a fashion more appropriate to the contractual context. Due to lack of sufficient controls of damages in tort law, Chinese courts sometimes produce contradictory decisions relying on a highly discretionary causation rule. However, if the measure of damages is different in similar cases depending on the applicable law or individual judges, there will be no respect to the law. Therefore, the importation of foreseeability into Chinese tort law naturally becomes one of the recommendations of this thesis.

Lastly, the foreseeability test does not apply to the deliberate wrongdoing under English law. The victim of a fraud is entitled to damages for all his actual loss directly flowing from the fraud, foreseeable or not. This situation has been totally omitted by Chinese written law. Once again, without guidelines it is up to the discretion of judges to decide the question. Contradictory decisions are randomly given in fraud cases as a result. Therefore it is recommended that Chinese law should lay down specific guidelines on the topic in the future. The laws on fraud should be tightened up as a matter of priority.

Chapter 5 Mitigation

5.1 Introduction

There is a well-established general principle in English law stating that compensation will not be allowed for losses which might have been reasonably avoided by the plaintiff. As Pearson L.J. explained in *Darbishire v Warran*,¹ “the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant.”² So if a vessel is damaged in a collision for which the other party admits liability, he must act reasonably in selecting a dock to fix it as soon as possible in order to put it back to market to earn profit.³ This is the principle of mitigation. It is fully developed in English law,⁴ so the ensuing discussion of this rule will be based on it. Moreover for the purpose of this thesis, it is to the aspect of carriage of goods that this chapter is addressed.

The term “duty” of mitigation has been justly noticed to be somewhat misleading.⁵ It is not used in the real sense where the breach of which is actionable; rather it merely operates *pro tanto* as a conditional bar to the recovery of damages.⁶ But when the principle is included in a contract in the form of written clause, it becomes an unquestionable duty in the real sense.⁷ To ask whether or not there is a need to mitigate in the first place is a matter of law, but to decide

¹ [1963] 1 W.L.R. 1067.

² *Ibid.*, at p. 1075.

³ *The Pacific Concord* [1960] 2 Lloyd's Rep. 270.

⁴ English cases on this point could be seen as early as 1677, in *Vertue v. Bird* (1677) K.B. 3 Keble 766. There the plaintiff left his horses standing too long in hot weather waiting for a delayed defendant. His claim for loss of horses was dismissed as he should have moved the animal to avoid the consequence.

⁵ *E.g.*, Tettenborn, *The Law of Damages* (2003), p.108, McGregor, *McGregor on Damages* (17th edn 2003), at p.222; Schmitthoff, C.M. *The Duty to Mitigate* [1961] J. Bus. L. 361; *The Solholt* [1983] 1 Lloyd's Rep.603, 608.

⁶ Bridge, M. *Mitigation of Damages in Contract and the Meaning of Avoidable Loss*, (1989) 105 L.Q.R.398, 399.

⁷ *E.g.*, *Colonia Versicherung AG v Amoco Oil Co* [1995] 1 Lloyd's Rep. 570.

whether the claimant has acted reasonably in mitigation is a matter of fact.¹ The onus of proof on the issue of mitigation is on the defendant, who must show that the plaintiff could have mitigated.²

The rule of mitigation is a legal reflection of reasonable human reaction to avoid or minimise loss.³ It also helps to avoid social waste. In the charterparty case of *The Almare Seconda and Almare Quinta*,⁴ the defaulting owner repudiated and put the released vessel into a rising market, and the charterer mitigated it by obtaining alternative shipping arrangements. The profit that the owner earned was more than the damages he was liable for the charterer. Thus both achieved their contractual objectives with minimal transaction costs and maximum gains. This is also a typical example of why mitigation is believed to be central to the idea of efficient breach under English law.⁵ The economic analysis of law expects maximising the value of the contract,⁶ and the mitigation rule performs as an incentive to break a contract where this will lead to resources passing to those who place higher values on them.⁷

The concepts of causation, mitigation and remoteness all serve to limit liability and the distinction between them can often be elusive. Indeed, mitigation is classified by some scholars as merely part of the remoteness rule.⁸ It has some support from the English judiciary. For example, Pill L.J. in *The Sivand*⁹ certainly identified the doctrines as such.¹⁰ This view, interestingly enough, has also been expressed occasionally in China.¹¹ But not all agree: thus Hobhouse L.J. in the

¹ Tettenborn, *The Law of Damages* (2003), p.122.

² *James Finlay and Company Limited v NV Kwik Hoo Tong Handel Maatschappij*. [1929] 1 KB 400.

³ As Viscount Haldane said, "reasonable human conduct is part of the ordinary course of things, which extends to the reasonable conduct of those who have sustained the damage and who are seeking to save further loss." *The Metagama* (1927-28) 29 Ll. L. Rep. 253 (H.L.) at 245.

⁴ [1981] 2 Lloyd's Rep. 433.

⁵ More details of efficient breach see Chapter 2.

⁶ Cooter and Ulen, *Law and Economics* (1997), p.229.

⁷ Harris, *Remedies in Contract and Tort*, p.109 and 307.

⁸ See Smith, *Atiyah's Introduction to the Law of Contract* (6th edn 2005), p.420.

⁹ [1998] 2 Lloyd's Rep. 97.

¹⁰ *Ibid.* at p.109,110.

¹¹ See *Zhenhua Machine & Technology Consultant Co v Hong Kong Ever Concord Line and COSCO Container Lines Co Ltd*, Tianjin Higher People's Court, 20th Nov 2002, where the court regarded the question of whether the costs incurred in mitigation should be

same case clearly thought the principles were distinct.¹ Likewise, the principle of mitigation is akin to that of causation.² Not surprisingly, it is a point of view in both countries that they are the same.³ Nevertheless, this seems unconvincing. The question of mitigation does not logically arise until the claimant has discharged the burden of proving an unbroken chain of causation between the wrong and the loss.⁴ Therefore it is an independent legal principle and should be discussed separately.⁵

5.2 English legal rules on mitigation

The legal principle of mitigation, under the more highly developed English approach, applies in both contract and tort.⁶ Analytically it breaks down into three closely interrelated rules. The first rule concerns the requirement to make reasonable efforts to mitigate the loss. Under this notion, a person who incurs loss is not entitled to stay idle and is bound to mitigate the effects of the defendant's wrong⁷ and, for that matter, external factors for which no one is liable.⁸ This principle arises frequently in cases of carriage of

recoverable as one of remoteness.

- ¹ *Ibid.*, at p.108, he said “this case involves a simple application of the doctrine of the mitigation of loss” and “questions of foreseeability are not relevant.”
- ² *Vinmar International Ltd and Another v Theresa Navigation* [2001] 2 Lloyd's Rep. 1, *per* Tomlinson J. at 15. it was said that the same decision could be achieved whatever principle was relied on.
- ³ *Standard Chartered Bank v. Pakistan National Shipping Corporation and Others* [2001] 1 All E.R. (Comm) 822 “An issue of failure to mitigate... can be characterised as an issue of causation”; *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75 at 88 *per* Goff J. “These three aspects of mitigation are all really aspects ... of the principle of causation”; *cf.* the Chinese case of *Panda Tool Co Ltd v Shanghai Thi Transport Co Ltd*, Shanghai Maritime Court, 12 Sep 2003, (2003) HHFSCZ 260. The court dismissed a claim for the cargo loss which he failed to mitigate on the grounds of causation.
- ⁴ These doctrines also differ in other aspects. *E.g.*, on the burden of proof and the application in fraud claims. See Tettenborn, *The Law of Damages* (2003), p.108.
- ⁵ Therefore a judge hearing a claim for damages might “find himself plunged into a murky pool” and is urged to “distinguish between the shallow end of mitigation of damages, the middle depths of causation of damages, and the deep end of remoteness of damages”. *The Borag* [1981] 1 Lloyd's Rep. 483 (C.A.) at 490 *per* Templeman L.J.
- ⁶ See Dugdale, Tettenborn and others, *Clerk & Lindsell on Torts* (19th edn 2006), p.1051.
- ⁷ In some circumstances, the defendant has a legal duty to hold down the damage or loss, typically in personal injury and death case. For example, any individual in charge of a vessel should render aid to those involved in a marine casualty. This duty was called mitigation in Sharpe, D.J. *Modifying the Amounts of Damages*, (1997) 72 Tul. L. Rev. 849, 850. This is not the meaning this chapter is dealing with because it comes from a requirement of humanitarianism at sea. See Lake, P.F. *Recognising the Importance of Remoteness to the Duty to Rescue*, (1997) 46 DePaul L. Rev. 315, 342.
- ⁸ Traditionally mitigation focuses on the wrong committed by the defendant. However, it can equally apply to the damage caused by excepted factors, *e.g.* strike. See *Bulman & Dickson v Fenwick and Company* [1894] 1 Q.B. 179; *DA Stathatos Steamship Company Ltd v Cordoba Central Railway Company Ltd* (1931) 40 Ll. L. Rep. 274.

goods. For example, a charterer should mitigate by chartering a substitute after a shipowner's repudiation and his claims will be based on the market rate for a substitute vessel.¹ The exact same position applies to the sale of goods,² which has been incorporated into S 51 (3) SGA 1979.³

The second rule is an active version of the first: it allows the claimant to recover from the defendant any reasonable expenses in mitigation, *e.g.* additional costs incurred in reselling the cargo damaged in transit;⁴ or expenses incurred in finding a replaced charterparty after the repudiation of charterer, such as port charges at the new port and costs of bunkers consumed in sailing to other places looking for business.⁵ Moreover if the additional loss or damage results notwithstanding the reasonable mitigation, this further loss is also recoverable.⁶ This indemnity performs to encourage the claimant to mitigate. In *The Sivand*⁷, to reduce his loss the plaintiff hired an experienced contractor who lost a barge during its performance which the plaintiff had to reimburse according to the standard contract between them. As the concerned indemnity clause is fairly reasonable and common in such a contract, the additional cost in the unsuccessful mitigation was upheld by the court.

The third rule is that when an effort to mitigate is successful, the benefit accruing from it will be deducted from the recoverable

¹ *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 (H.L.); *The Johnny* [1977] 2 Lloyd's Rep 1.

² If a seller wrongfully refuses to deliver goods due under a contract for the sale of goods, he cannot just sit back on an available market. He is generally required to make a substitute contract to reduce his loss with all reasonable speed. See *Bourgeois v Wilson Holgate & Co., Ltd.* (1920) 4 Ll. L. Rep. 1; *AKAS Jamal Appellant v Moolla Dawood, Sons & Co.* [1916] 1 A.C. 175.

³ The *prima facie* measure of damages is, therefore, the difference between the contract price and the market price at the time of contractual performance. See *Millett v. Van Heek & Co* [1921] 2 K.B. 369; *Garnac Grain Co. Inc. v. Faure & Fairclough Ltd.*, [1967] 1 Lloyd's Rep. 495; *Dampskibsselskabet Norden AS v Andre & Cie SA* [2003] 1 Lloyd's Rep. 287.

⁴ *Standard Chartered Bank v Pakistan National Shipping Corporation and Others (No. 3)* [1999] 1 Lloyd's Rep. 747.

⁵ *The Concordia C* [1985] 2 Lloyd's Rep. 55. However if the ballast voyage to the new appointed port is part of the process of earning freight under the substitute charter, the expenses incurred will not be recoverable to avoid over-compensation. *The Noel Bay* [1989] 1 Lloyd's Rep. 361. The expenses must be reasonable and the concerned damage it intends to avoid or reduce must itself be recoverable. *Riyad Bank v Ahli United Bank (UK) Plc* [2005] 2 Lloyd's Rep. 409.

⁶ *Cf. the World Beauty* [1969] 1 Lloyd's Rep. 350 *per* Winn L.J. at 357.

⁷ [1998] 2 Lloyd's Rep. 97.

damages. This is so even though his mitigating measures have exceeded those dictates of the law require of him under the first rule.¹ For example, in *The World Beauty*² after a collision with the defendant's vessel the charterer completed repairs and managed to advance a previously planned charter by 100 days earlier than schedule. The monetary value of this advancement was given credit to the defendant as a result of the successful mitigation. On the other hand if the benefit obtained is independent of any mitigating action, damages will not be reduced.

5.3 Mitigation: Chinese law

5.3.1 The requirement: not to increase or to minimise?

Chinese law has also adopted the principle of mitigation. It is sometimes labelled a "duty", but this characterisation has been justly criticised for the same reason as it is in England.³ It is explained as an *indirect duty*⁴ or *quasi-duty*⁵ by respected Chinese writers.⁶ The principle is said to be attributed to "the duty to perform and enforce contracts in good faith."⁷ Chinese scholars also appreciate its social functions, *i.e.*, to avoid the waste of social wealth.⁸ But unlike English

¹ "When in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act." *British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Co* [1912] A.C. 673, *per* Viscount Haldane L.C. at 689.

² [1969] 1 Lloyd's Rep. 350.

³ Cui Jianyuan, *Contract Law* (2003), p.273; Han Shiyuan, *Mitigation Rules*, [1997] Study of Law no.123.

⁴ Shi Shangkuan, *General Study on Civil Law* (1970), p.27; Tong Rou, *Chinese Civil Law-General Principles* (1990), p.85.

⁵ Under Chinese law other quasi-duties include the duty to inspect cargo (CCL art.158 "Where an inspection period was prescribed, the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period...") and the duty to notify the insurer when the insured risk increases. (CIL art.36 "...if there is any increase in the risk exposure of the subject matter insured, the insured shall... immediately notify the insurer...Where the insured fails to notify the insurer as stipulated in the preceding paragraph, the insurer shall not be liable for any loss incurred by occurrence of insured events caused by an increase of the risk exposure of the subject matter insured.")

⁶ Which means it is similar to a legal duty but not enforceable and thus not a duty in legal sense. Wang Zejian, *Civil Law Theory and Cases Study* (vol.4, 1991), p.98.

⁷ It is said to be derived from art. 4 of GPCCL. "In civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed"; *cf.* CCL art. 6 "Good Faith. The parties shall abide by the principle of good faith in exercising their rights and performing their obligations."

⁸ Fang Liufang, Guo Mingrui, *New Study on Civil Law* (1988), p.502; Han Shiyuan, *A Study on Damages for Breach of Contract*, p.378.

law, Chinese law distinguishes more sharply between three related rules of mitigation. The first and second rule are discussed under the heading of mitigation in contract law and mutual fault (or fault of victim) in tort law respectively. The third rule of mitigation is discussed under the heading of set-off of advantages and losses.¹ Most notably and importantly, however, the Chinese conception of mitigation is much narrower than the English one.

Art.114 of the General Principles of Chinese Civil Law (GPCCL) states “if one party incurs losses owing to the other party's breach of contract, it shall take prompt measures to prevent the losses from *increasing*; if it does not do so promptly, it shall not have the right to claim compensation for the *additional* losses.” (emphasis added)

Art. 119 of Chinese Contract Law (CCL) similarly provides “the innocent party's duty to mitigate in case of breach: Where a party breaches the contract, the other party shall take appropriate measures to prevent *further loss*; where the other party sustains further loss due to its failure to take appropriate measures, it may not claim damages for such *further loss*. Any reasonable expense incurred by the other party in preventing *further loss* shall be borne by the defaulting party.” (emphasis added)

As can be seen, the mitigation rule under Chinese law concentrates on the idea of augmentation, *i.e.*, the aggravating party shall not *increase* the loss after the breach, but he is not required to take active actions to *minimise* it. Insofar as the inaction would not worsen the damage, he is safe by remaining idle even though the loss could easily be lessened by taking some active measures. The rule is therefore also called the “no-increase-in loss rule” in China.² The majority of Chinese textbooks also provide the definition of mitigation from this perspective. “Mitigation means...a debtor is not liable for the part of loss which has been increased by reason of

¹ Shi Shangkuang, *Law of Obligation* (1990), p.298.

² Wang Liming, *A Study on Contract Law* (2003),p.660; Fang Shaoshen, *Damages for Breach of Contract* (1999), p.200; Ma Qiang, *New Problems and Case Study of the Law of Obligation*, p.270.

claimants' acts."¹ "If the aggrieved party fails to take prompt and effective measures to avoid augmenting the loss whenever possible, he is not entitled to damages for that increased part."² In *Panzhuhua Dongqu Shunda Construction Co v Panzhuhua Huilin Real Estate Development Co*,³ the defendant repudiated a construction contract and told the plaintiff builder to stop working. The plaintiff however kept all 164 workers on the construction site for 180 days at a high cost, which was an act found by court "irresponsibly augmenting the loss". Similarly in another case, the claimant increased the loss by leaving a broken container unattended for a month and was held unable to claim the extra loss resulting from it.⁴ These results are admittedly the same as would apply in England: but others may not be. Suppose in the first case the plaintiff had left his own machinery at the construction site, incurring no actual maintenance cost but unreasonably refusing to put them to an alternative use to make profit; or in the second case the claimant had looked after the cargo well, but failed to take further steps to minimise the loss (*e.g.*, resell it before it is rotten). Here the results would be opposite to the English law position, because he did not *increase* the loss at all even with his *laissez-faire* attitude. There are many illustrations suggesting so. For example, under Chinese law a carrier is not required to pay fines to customs on cargo owner's behalf even if the non-payment might cause confiscation.⁵ In stark contrast, English law certainly demands the master to pay it instead on this occasion, or he will be liable for the loss caused by his failure to mitigate.⁶

5.3.2 Mitigation limited to contract

It should be noted that the Chinese mitigation rule is not a general limitation method for all monetary claims but is restricted to

¹ Fang Shaoshen, *Damages for Breach of Contract* (1999), p.200.

² Zhang Ming'an, *Civil Obligations* (2002), p.113.

³ Sichun Higher People's Court, 16 May 2005, (2005) CMZZ 144.

⁴ *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd*, Guangdong Higher People's Court, 28th Oct 1997.

⁵ *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

⁶ Colinvaux, R. *Carver Carriage by Sea* (13th edn 1982), p.1473.

contract law. It could have been prescribed as a general rule in GPCCL, but the rule appears in Section 2 “civil liability for breach of contract” of Chapter 6 “civil liability” that only applies to contract, while Section 3 “civil liability for infringement of rights” (tort law section) simply does not have the equivalent. Instead, art. 131 (in section 3) of the GPCCL says “if a victim is also at fault for causing the damage, the civil liability of the injuring party should be reduced.” As discussed in Chapter 3, Chinese law recognises the principle of apportioning damages to the degree of the aggrieved party’s fault. Thus Chinese tort law deals with this question on the principle of mutual fault or fault of victim,¹ *i.e.*, the victim’s fault takes the form of his failure to perform the duty to mitigate,² and the damages will be reduced to reflect a proportion of his responsibility.³

Similar to its contract law view, the aggrieved party is only required to avoid augmenting the loss in tort law. “If an obligor is himself at fault in bringing about or augmenting the damage, the debtor should not bear full responsibility.”⁴ Art.2 of the Interpretation concerning to Several Issues in Application of Law on Compensation for Damage and Injury to Person provides: “If the victim deliberately or negligently bring about or *increase* the damage, according to art. 131 of the General Principles of Civil Law the liability of injuring party for compensation should be lessened or exempted... when art.106 Para 3 applies, if the victim is found grossly negligent, his liability for compensation could be lessened.”(emphasis added)⁵ Art.1 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure reads “loss or damage including the loss of vessels or

¹ *E.g.* Mutual fault is one of the general principles of compensation in tort law; principle of mitigation has not been accepted in many tort law textbooks. See Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.273; Liu Shiguo, *A Contemporary Study on Damages for Tortious Act* (1998), p.121.

² Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.430; Fang Shaoshen, *Damages for Breach of Contract* (1999), p.177.

³ Anglo-American law retains both comparative fault and the duty to mitigate, see Dugdale, A (ed.), *Clerk & Lindsell on Torts* (19th edn 2006), p.145 and p.1805. The relation between them is not always clear.

⁴ Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.218.

⁵ Note: art.106 para 3 “Civil liability shall still be borne even in the absence of fault, if the law so stipulates”.

structures caused by collision is recoverable...As for the loss caused or increased *by the claimant's fault*, it shall not be recoverable (emphasis added)."¹ In *Chen Quandi v Leqing Oriental Ships Constructing and Fixing Factory and Pacific Fishery Shipping Co*² the crew left open the watertight door during the rescue of a vessel after a collision. The vessel in the end sank. The crew's negligence was seen an obvious fault on the plaintiff's part which "has increased the loss", and damages were accordingly reduced.

It is odd that mitigation in tort law is assimilated into the topic of "mutual fault". Legal theory has clearly perceived that the failure to mitigate has a special nature. Perhaps it could be said that mutual fault is the more important test where the injured party is partly responsible for the event *giving rise to* the loss while the reference to the injured party's mitigation is more apt where the party fails to take steps to avoid the harmful effects of an event *brought about solely* by the defendant's default. Moreover, to make apportionment according to the degree of the aggrieved party's fault both workable and conceptually sound is not an easy one and seems over-complicated.³ It seems a pure guesswork to decide the percentage of the fault he contributes. As there is no logical ground for the mitigation rule not to apply in tort law equally,⁴ this arrangement is "very rare legislation indeed".⁵ Most importantly, the measure of damages should be certain and predictable irrespective of the applicable law. It is necessary to seek the harmonisation of legal rules and to establish a unified legal framework for the measure of damages. More Chinese courts are notably inclined to ignore this arrangement in tortious case.⁶ This makes the Chinese stance more

¹ Other similar provisions see art.18 of the Railway Law, art.21 in the Regulations of Contract for Waterway Cargo Transportation; art.20 of the Detailed Regulations of Contract for Carriage of Cargo by Air; art.311 of CCL.

² Qingdao Maritime Court, 18th Sep 2000.

³ See Eggeson, *What Went Wrong with 'Mitigation of Damages'? A Proposal for Two-Tiered Fault Allocation*, (2005) 48-APR Res Gestae 26.

⁴ Indeed it is suggested by a Chinese writer that the doctrine should not necessarily be restricted to cases of this kind. See Wang Liming, *A Study on Principles of Tort Law* (1992), p.330; Wang Liming, *Difficulties of Civil Law in the Period of Reform and Opening* (1992), p.356.

⁵ As remarked by a Taiwanese Scholar Wang Zejian, *Civil Law Theory and Cases Study* (5th edn vol. 6, 1996), p.313.

⁶ *Wei Zhenren, Li Wenxiu and Others v Beihai Hengtong Shipping Group Co Ltd*, Beihai 229

unwelcome and outdated. Naturally this is another aspect subject to further review and revising in the author's opinion.

5.4 Morality, mitigation and contract law

5.4.1 Confucian morality, contractual discipline and the Chinese mitigation rule

Obviously, the Chinese version is narrower than the English one. The English obligation to *reduce* the loss is understandably more stringent than the Chinese “*no-increase-in loss*” position. The reason for such an arrangement by Chinese law is not clearly stated. It might simply have never occurred to the drafters of the CCL that there was a problem about the person who failed to reduce loss, and against the person who increased it. Alternatively and more likely, it may reflect a fundamental difference between the approaches to breach of contract that have been adopted by each system. The Chinese position reflects an inbred reluctance to correct a wrong with the help from the aggrieved party because it loathes a breach of contract and regards it as a form of moral wrongdoing.

As noted in Chapter 2 of this thesis, the Chinese legal system has been powerfully influenced by Confucianism, which requires people to behave in accordance with the concept of *Li* (virtue). Confucianism has supplied one of the most comprehensive attempts to give contract law a philosophical grounding. Trustworthiness has always been deemed as one of the five basic *Lis* a man should have.¹ Trustworthiness is such a glorified virtue that there is no exception to its persistence whatsoever, neither in the name of pursuing fortune, nor in the period of deprivation.² To keep a promise is

Maritime Court, 15 Dec 2004, (2004) HSCZ 012.; *Guangzhou Shipping (Group) Co Ltd v Wuhu Changjiang Shipping Co and Wanjiang Steamer Co*, the Supreme Court, (2001) MSTZ 3, 17th Jul 2002, where both courts applied the mitigation rule regardless of the fact that it was sued in tort.

¹ Confucius, *The Analects of Confucius* (Lunyu), BC 475 ?, Ch 17 Verse 6.

² “Riches and honors are what men desire. If they cannot be obtained in the proper way, they should not be held. Poverty and lowliness are what men hate. If they cannot be avoided in the proper way, they should not be abandoned. If a superior man abandons virtue, how is he to live up to his reputation? The superior man never acts contrary to virtue, not even for a meal's period, nor during hectic times, nor in destitution.” *Ibid.*, Ch4 Verse 5.

regarded as indispensable in a man's integrity.¹ Besides, any conduct guided by gain is unacceptable by Confucian.² Thus to break a promise for gains will not be tolerated.

Chinese society has been ruled by Confucianism for over 2000 years and the law is always subject to Confucian rites. It is taken by Chinese legal scholars as a given that promises are morally binding. The worship of Confucian virtues lead the Chinese to scorn anyone who cannot keep their word. Breach of contract for gain is especially despised. The bitter enmity is deeply ingrained in Chinese legal scholars and judges; it influences the best design of the law and alters the social value of use of the damages law.³ Not to forget, "contractual discipline" was once greatly emphasised.⁴ In this background, to ask an aggrieved party to minimise loss for a defaulter's interests is "morally indefensible". The rule may therefore reflect a deliberate legal policy that the law would deter any breach and not lend any sympathy to the defaulting party.

5.4.2 Efficient breach and the English mitigation rule

In English society to keep promises is morally praiseworthy, but it lacks an agreed philosophical explanation to justify the enforceability of promises in the first place. As a result, English contract law is more realistic and not designed to promote morality. Contracts are regarded as exchanges, pure vehicles for the flow of goods and services to their most highly valued use. Breach of contract will not be deterred on purpose provided the aggrieved party receives full compensation. The idea of efficient breach finds a market in English law and justifies any conduct which would

¹ "I know not what a man without trustworthiness may accomplish. Be it large or small, how could a carriage move without its yoke-bar?" *Ibid.*, Ch2 Verse 22.

² "Conduct guided by profit is the cause for much complaint" (or "Conduct guided by profit will be much murmured against" in another version of translation). *Ibid.*, Ch4 Verse 12.

³ As seen in an authoritative textbook: "freedom to breach recognised by the common law is against traditional Chinese morality, *i.e.* keeping promise... and thus are unacceptable by the public opinion." Han Shiyuan, *A Study on Damages for Breach of Contract*, p.99.

⁴ "The public as well as the private side (state-owned enterprises and private enterprises) must both strictly adhere to ordering contracts and purchase contracts... Damage to contracts must be forbidden." *People's Daily* (8th June 1960), editorial; see also Fang Shaoshen, *Damages for Breach of Contract* (1999), p.148, "it should be advocated to strictly perform the contract and maintain the seriousness of contract ..."

increase social wealth or social welfare.¹ English law recognises and condones opportunistic behaviour in contractual parties. Remedies form the legitimate way out of the contract,² or even a way to induce the parties to act efficiently.³

In these contexts, mitigation provides an incentive to breach. Whether a party chooses to breach depends on the relative costs and benefits of performance and non-performance. When he chooses so, the innocent party must switch these resources to the next best use for the defaulting party's interests and there is no moral obstacle to do so under English law. The benefit received from these mitigation steps will be taken into account when assessing damages for the breach. If gains received by the defaulting party are more than damages awarded to the innocent party, it will achieve a socially desirable result, *i.e.* maximising the society's well-being without harming anyone's interests. Also, mitigation avoids social waste, as the innocent party has to bear the responsibility for his failure to do so. Further, the default legal rule of mitigation makes certain the obligation of both parties each time an untoward contingency arises and thus saves the costs incurred in the renegotiation of the terms of the contract. In this way, it combines the goal of maximising social values and minimising social costs, which perfectly accords with the criterion of efficiency.⁴

5.4.3 Problems in Chinese law

It is all very well for the law to disapprove of running after gain and lighten the effect of mitigation so as not to be seen to encourage it. However, much the same argument applies when the innocent party exploits an opportunity to remain idle at the other parties'

¹ Posner, *Economic Analysis of law* (6th edn 2003), p.118-126; Kornhauser, L.A. *An Introduction to the Economic Analysis of Contract Remedies*, (1986)57 U. Colo. L. Rev. 683, 687; Hoffman, D.A. *Can Law and Economics be Both Practical and Principled?* (2002) 53 Ala. L. Rev. 335.

² Mediana, *Renegotiation, Efficient Breach and Adjustment: The Choice of Remedy for Breach of Contract as a Choice of a Contract-Modification Theory, Comparative Remedies for Breach of Contract* (McKendrick, E. ed.2005), p.52.

³ Note: the review of this theory has been addressed in Ch2 and will not be repeated here.

⁴ Posner, *Economic Analysis of Law* (6th edn 2003), p.118—126.

expenses because it is not in conformance with the *bona fide* doctrine. It of course has a bad impact on social waste. This is the first paradox created by the Chinese mitigation rule.

Secondly, however clear the theoretical distinction, it can be remarkably difficult in practice to distinguish *to reduce* from *not to increase*. Take the example of the requirement to buy a substitute cargo, which in England is regularly applied – whether by statute¹ or otherwise² – to a claimant complaining of destruction, or non-receipt, of a cargo he was entitled to. Under Chinese law there are some difficulties in harmonising this requirement and the “no-increase-in loss” position. If a carrier fails to deliver and the market is rising, it is incumbent on the innocent party to buy in a substitute to avoid augmenting the loss according to the Chinese mitigation rule; but if the market is falling, by the same theory he need not do so. As market price is fluctuating most of the time, the claimant will be struggling between to mitigate or not to everyday. This is simply impractical and will only constitute a hindrance to the normal economic activities. English law is more practical than Chinese law. It is reasonable to ask the aggrieved party to enter into the market buying a substitute, instead of increasing the loss by staying idle. After all, the waste could be without making too strenuous efforts.

As a result, the requirement to enter into the market is only recognised by a few Chinese scholars³ and incorporated in a few specified regulations;⁴ it is still not a statutory requirement for the sale of goods and the carriage of goods by the general law.⁵ There is even a body of opinion saying that to seek for substitute is not

¹ See s 50, 51. of the Sale of Goods Act 1979.

² *AKAS Jamal Appellant v Moolla Dawood, Sons & Co.* [1916] 1 A.C. 175; *Millett v. Van Heek & Co* [1921] 2 K.B. 369; *The Johnny* [1977] 2 Lloyd's Rep 1.

³ Sun Yaming, *Important Issues of Civil Law Principles* (1991), p.227.

⁴ Art. 10 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure reads “assessment of the loss of operating period: if the vessel is totally lost, the period for loss of operating shall be based on the reasonable time to find a substitute vessel, with a maximum 2 months...”

⁵ *E.g.*, as regards to Chinese law on sale of goods, none of 45 articles of Chapter 9 (contract of sale) in the CCL prompts the mitigator to mitigate by entering into the market as it does by s.50, 51. of the Sale of Goods Act 1979.

necessary.¹ For the same reason, the market value rule adopted by English law cannot be assimilated into Chinese law either.² *E.g.*, none of the 129 articles in Chapter One (general provisions) and 40 articles in Chapter Nine (contract of sale) of CCL are concerned with such a rule, specifying that the measurement of damages for cargo loss or damage should be based on the market value of sound cargo at the destination,³ as it is under English law. The CMC completely rejects the market rule by its art.55, which provides that damages for loss or damage of the goods will be based on the value of the goods *at the time of shipment* plus insurance and freight – a formulation which by implication also excludes any mitigation duty. Accordingly, in cases of the carriage of goods by sea the question of whether the buyer or claimant should enter into the market is answered essentially arbitrarily.⁴ Since art.55 in effect assesses damages only on the basis of the value at the time of shipment, it becomes unnecessary for the cargo owner to buy in a substitute at the destination, which will usually cost more than that at the port of shipment (as damages). Typically cargo owners will usually resort to a maritime court and get permission from it before they go into the market, which has gradually become a common practice in China.⁵ This cumbersome practice only adds transaction costs and is completely unnecessary.

¹ Wang Liming, *Liability for Breach of Contract* (2nd edn, 2003), p.515, “In china, apart from special situation, *e.g.*, the cargo is liable to rot and need urgent treatment, generally speaking substitute buying and reselling is not allowed. Therefore the market price of the cargo is not adopted by Chinese law.”

² See chapter 6.

³ On the other hand, Chinese law is notoriously lacking in systematic statements of principle, a very similar rule to the English market value rule (thus the substitute buying must be taken into account) does appear in one place: namely, Chapter 17 of the CCL (referring to the contract of carriage). But it has limited application and only applies to the carriage of goods when the CMC is not applicable.

⁴ In a few cases he has been required to do so. See *COSCO Guangzhou v World Link Transport Co Ltd and Mr. Wen Jianming*, Guangzhou Maritime Court, 27th Dec 2000, (2000) GHFSZ 41; *China Ping An Insurance Company v. Hong Kang Eversall Shipping Ltd*, Wuhan Maritime Court, 20th May 1996; *Qingdao Sugar Wine & Non-staple Foodstuff (Group) Co and China Pacific Insurance Hainan Co v Nanjing Grandextend Shipping Co Ltd*, Haikou Maritime Court, 21st Jul 2000, (2000) HSCZ 064; *cf. Yili Fire & Security (Hong Kong) Co Ltd v Dalian Yinfa Finance Plaza Co Ltd*, Liaoning Higher People’s Court, 7th Dec 1996.

⁵ For example, to sell damaged cargos by auction with the help of court. See *China Ping An Insurance Company v. Hong Kang Eversall Shipping Ltd*, Wuhan Maritime Court, 20th May 1996; *The Efes*, Guangdong Higher People’s Court, as quoted in *Analysis and Comments on Typical Maritime Cases* (Jin Zhengjia ed. 1998), case 48.

From the Chinese government's viewpoint, attracting foreign investment and facilitating business activities in order to strengthen its economic system have been the most important policy of the past 20 years. Although many commercial laws bearing a close resemblance to Western laws have been passed to achieve this goal, the warning signs have always been there. They can be found in the wording of the laws themselves, drafted by conservative lawmakers. Here is a typical example. The Chinese law position is open to considerable criticism, based as they are on an unattractive argument of form over substance. Market-centred economy requires an increasing need for formal legal rules that facilitate transactions, provides incentives to engage in transactions and lowers transaction costs. The author contends that the current position result in high costs of transacting and inefficiency and is therefore untenable. Systemic safeguards for trading and efficiency become more and more important. The existing mitigation rule should be amended and there should be a requirement to buy in the substitute to facilitate international trade in favour of a realistic, practical and efficient economic order.

Apart from the above two major legislations, some other regulations in China are apparently based on the orthodox mitigation rule: for example the Interpretation concerning Several Issues in Application of Law on Compensation for Damage and Injury to Person;¹ the Provisions on Several Issues relating to Disputes on Cases of Futures.² Both require the claimant *not to increase* the loss. However it is noteworthy that some Chinese regulations have broadened this concept so that it comes to much the same thing as the English one. For example, art.41 of the Chinese Insurance Law reads, “upon the occurrence of an insured event, the insured shall be obligated to adopt all necessary measures to *prevent or minimise*

¹ Art.2 “if the victim has deliberate intent or fault in giving rise to or increasing the damage, according to article 131 of Civil Law Principles its liability of compensation should be lessened or exempted...”

² Art. 28 “if the futures company dissents from the balance of futures dealing, the futures brokering institution shall take steps to avoid increasing the loss, or the futures brokering institution shall be liable for the increased loss...”

losses...” (emphasis added) Art.1 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure says: “damages recoverable for the claimant include the loss of vessels or structures caused by collision... reasonable expenses and loss incurred in *reducing or minimising* the loss ...”(emphasis added)¹ Moreover, judges on occasion interpret art.119 of the CCL more liberally than was seemingly intended. In *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*,² the judge made an extensive interpretation of art.119 and said that it required the claimant to *reduce* the loss by keeping cargo in cold storage, even though art.119 only reads *not to increase*.

In sum, Chinese law fails to achieve their desired purpose and instead merely increases transaction costs, causes social waste and leads to inefficiency.³ If there are excessive laws underpinning moral standards which are impractical, there is a real danger that the law is followed more in the letter than in the spirit, especially when their mixture does not have the intended effect. The operation of market capitalism depends on the existence of incentive to engage in economic activities, and the security of expectation of economic benefit flowing from such activities is an essential element of such incentive. Such security can only be provided by the predictable application of state coercion through logically formal and rational law. Without a clear requirements of entering into market, contractual parties are confused about their obligation after the breach and this uncertainty might be a factor that discourage them doing business in China. As proved, the orthodox view is leading to injustice and is impractical. It constitutes a real hindrance to economic activities. Therefore both CMC art.55 and the narrow Chinese mitigation rule (CCL art.119) need to be revised. The

¹ But bear in mind that this does not say, as such, that the plaintiff must mitigate loss: only that, if he does, he can charge the defendant with the cost (*i.e.* the second English rule at the beginning of this chapter).

² Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

³ Which provides a perfect example of failed default rules in legislature. See Korobkin, R. *The Status Quo Bias and Contract Default Rules*, (1998) 83 Cornell L. Rev. 608.

Chinese mitigation rule should require the innocent party to *minimise* the loss as under English law.¹

5.5 When to mitigate

5.5.1 General considerations: English law

A claimant cannot come under a duty to mitigate unless and until the contract is broken or the damage is done.² If a party to a contract repudiates it, the other party has an option to accept or not to accept it. If he chooses not to, technically there is still no breach of contract and the duty of mitigation has not yet arisen, even if it is a “near-certainty that the breach will occur”,³ otherwise he might be prejudiced if he is required to act promptly in relation to what may well be a disputed default.⁴ This is the case in anticipatory breach of contract as well.⁵ In *The Liepaya*⁶, the chance to mitigate came one day earlier than the acceptance of repudiation by the shipowner, and the shipowner was entitled to refuse it.⁷ On the other hand if the aggrieved party accepts the breach, from the point of his acceptance the other party is in breach of contract and he is bound to take steps to reduce his loss.

The length of time depends on the circumstances. As far as contracts for the carriage of goods are concerned, generally speaking the plaintiff is assumed by law to enter into the market immediately after the breach has been accepted to find a substitute.⁸ In the case of anticipatory breach, this time can be prior to the performance of contract.⁹ But both parties may claim damages as at

¹ Wei Fan, *Mitigation Rule and Efficient Breach --- A Comparison between Chinese Law and English Law*, (2007) 39 *The Bracton Law Journal* 57, 66.

² *The Derby* [1985] 2 *Lloyd's Rep.* 325.

³ Tettenborn, *Law of Damages*, p.110.

⁴ Treitel, *G.H. Remedies for Breach of Contract: A Comparative Account*, p.117.

⁵ Gareth and Peter, *International Encyclopaedia of Comparative Law*, Honore, A.M. Tunc, A. (ed.), vol 7 Ch15 Breach of contract, p.90.

⁶ *The Liepaya* [1999] 1 *Lloyd's Rep.* 649.

⁷ *Cf. The Solholt* [1981] 2 *Lloyd's Rep.* 574

⁸ *E.g.*, the next day of repudiation. *Cf. Kaines (UK) Ltd v Osterreichische Warrenhandels-gesellschaft Austrowaren Gesellschaft MBH* [1993] 2 *Lloyd's Rep.* 1.

⁹ *Cf. Garnac Grain Co. Inc. v Faure & Fairclough Ltd.*, [1967] 1 *Lloyd's Rep.* 495, *per Lord Pearson* at 514, “...if the buyer had a reasonable opportunity of mitigating the damage by buying the goods at a lower price at an earlier date (after the acceptance of repudiation but before the contract date for performance), a reduction of the damages may be

a later date if it is reasonable to delay going into the market. In *The Liepaya*¹ considering the fact that only two charterparties were available as rivals to the one ultimately obtained and the type of vessel made it less attractive to potential charterers, the court held two weeks time in finding a replacement was justified.² In *Standard Chartered Bank v Pakistan National Shipping Corporation and Others (No.3)*,³ because there was no ready market for a fraudulently ante-dated bill of lading, the plaintiff was not blamed for spending seven months in getting an unsatisfactory replacement.

5.5.2 Legitimate rights: English law

Problems can arise when an aggrieved party refuses to accept a repudiatory breach, typically an anticipatory one, and holds the party in default to his contract. Theoretically he is not bound to accept that repudiation and thus no requirement for mitigation arises⁴ even though it may be unreasonable to do so. But this rule is subject to a condition:⁵ it is not applicable where the plaintiff has no legitimate interest, financial or likewise, in performing the contract rather than claiming damages,⁶ as economic efficiency should override the wishes of the innocent party to hold the contract alive.

This situation arises frequently in shipping law. The first scenario is that there has been a repudiatory breach of charterparty by the charterer, and the owner of the vessel elects to keep the contract

appropriate.”

¹ *Supra*.

² Similarly in *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814, after the difficulty of replacing employment was proved, the court gave allowance about ten day for the plaintiff to mitigate.

³ *Supra*.

⁴ If the plaintiff has a contractual or legal duty to keep the contract alive, he is certainly free to do so. In *Anglo-African Shipping Company of New York Inc v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 610, the defendants repudiated the contract but the plaintiffs, a confirming house (Confirming house means a financial institution acting as an intermediary between overseas traders and local importers and exporters. A confirming house is chiefly engaged in financing the movement of goods into the country by offering short-term credit to importers and guaranteeing, or confirming, payment to the suppliers), proceeded to make delivery and succeed in his suit for payment. This is because the confirming house was under an absolute duty to deliver the goods by terms of his contract, which was contradictory to the duty of mitigation.

⁵ Burrows, *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.75; *Cheshire & Fifoot's Law of Contract* (10th edn 1981), p.600 and 601.

⁶ *White & Carter Ltd. v McGregor* [1962] A.C. 413, *per* Lord Reid at 431.

alive and claims the charter hire by performing its outstanding contractual obligations. In *The Alaskan Trader (No.2)*¹ the court held that the shipowner must accept the repudiation and take the redelivery of a vessel notwithstanding serious disrepair.² Again in *The Puerto Buitrago*,³ the exactly same problem arose as to the charterer's right to hand the ship back seriously damaged, which was approved by the court.⁴ However a third case of this nature went to different direction. In *The Odenfeld*,⁵ at the time of the repudiation the charter still had about 6 1/2 years to run with many possible variables in the market rate and the performance of the vessel. The court held it was difficult to say a claim for damages would have been an adequate remedy in this case, so it was held that the owners were not obliged to accept the charterer's repudiation.

The second scenario is well settled. When the charterer/shipper fails to give orders (say the nomination of discharging port) within a certain time in accordance with the carriage contract, it is the duty of the master to keep the ship for a reasonable time after the expiration of the stipulated number of hours.⁶ But if the nomination is so delayed that it amounts to repudiation, the shipowner should not wait for an unlimited period but accept it and then mitigate losses by discharging at a port which in the master's opinion will be the one most likely to be selected by the charterers.⁷

¹ [1983] 2 Lloyd's Rep. 645.

² Because the charterer had "no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages." *Ibid.*, per Lloyd. J. at 651.

³ [1976] 1 Lloyd's Rep. 250.

⁴ Lord Denning said the shipowners by insisting the repair actually "seek to compel specific performance of one or other of the provisions of the charter--with most unjust and unreasonable consequences--when damages would be an adequate remedy. I do not think the law allows them to do this." *Ibid.* at 255.

⁵ *The Odenfeld* [1978] 2 Lloyd's Rep. 357.

⁶ *Proctor, Garratt, Marston Ltd (Rosario) v Oakwin Steamship Company Ltd* (1925) 23 Ll. L. Rep. 222, the charterparty requires orders to be given within 24 hours after the arrival in port of call.

⁷ *Ethel Radcliffe Steamship Company Ltd v W & R Barnett Ltd* (1926) 24 Ll. L. Rep. 277, per Bankes L.J. at 279 "It seems to me reasonably plain that, when once the delay in the giving of orders by the charterers is such that it manifestly appears that the delay is such as to amount to a repudiation of the contract by the charterers, the shipowners' right is not to remain for an unlimited time at the port of discharge; but to accept the repudiation and to do what, under the circumstances, is best in mitigation of the damages."

5.5.3 Chinese law position

The question of when to mitigate has rarely been raised in Chinese courts. Chinese written law is unhelpful on this point. It only says “where a party breaches the contract, the other party shall take appropriate measures...”¹ As it is usually difficult to mitigate in relation to what may well be a disputed default, it should be the time when the innocent party chooses to terminate the contract that the duty starts in the author’s view. But there is another school of view holding that unless the aggrieved party has reasonable expectation about the future performance by another, he should start to reduce his loss as soon as he *knows* of the possibility of breach in the future.² This view is too stringent to the claimant and it disallows a necessary time for him to either examine or accept the breach. So the first view is preferable.

What about an anticipatory breach then? If the plaintiff learns of the defaulted party’s clear attempt to breach and is aware of his highly likely non-performance, when will the duty start? Some think mitigation does not start unless it becomes an actual breach to ensure that the unfettered right to terminate the contract will be not otherwise affected.³ Some disagree and advocate that “the innocent party has the duty (to mitigate) when actual performance becomes impossible, even though the contract has not been terminated yet.”⁴ In the author’s opinion, because an actual breach and an anticipatory one are essentially of the same nature, he is under duty to mitigate as soon as the contract has been terminated by the plaintiff. Right from that point, losses can be reasonably avoided by the plaintiff and should not be borne by the defendant.

A further question is that in face of a repudiatory breach, is he justified in proceeding to perform his part disregarding the other party’s unwillingness and the fact that it is unnecessary? One view is

¹ Art. 119 of the CCL.

² Wang Liming, *Liability for Breach of Contract*, (2nd edn 2003), p.517.

³ *Ibid.*, p.135.

⁴ Han Shiyuan, *A Study on Damages for Breach of Contract*, p.401.

that he is entitled to perform in spite of the repudiation and can then claim the agreed sum.¹ Many others believe the aggrieved party should desist and claim damages only. They argue that he will unjustifiably augment his loss by continuing to perform after the repudiation.² The judicial view is not clear as cases of this nature are very rare. In reported cases similar to *The Alaskan Trader (No.2)* or *The Puerto Buitrago*, such a breach by shipowners has largely been accepted by charterers.³ But the maritime court did favour the second view in one case. In *Shanghai Jifu Shipping Co Ltd v The Third Leqing Carriage Co and Zhao Diancang*,⁴ the charter refused the anticipatory repudiation by the shipowner and remained idle. The court held the duty to mitigate started notwithstanding his objections and awarded a month's rent to the charterer because it was reasonable to find a substitution within one month. This resembles the English approach and is commendable. But considering the fact that contractual discipline is over-emphasised in China, it is still doubtful whether this approach can be followed by other courts, even though it is indeed preferable. The author nevertheless regards it as good law as it accords with economic reality and promotes economic efficiency. There will be huge social waste if the law does not stop one party from performing the unwanted part and force the other party to accept it.

5.6 The criterion of reasonableness in English law

The criterion of reasonableness is said to be one of pure fact and needs to be judged independently in each case.⁵ The plaintiff is not "under any obligation to do anything otherwise than in the ordinary course of business",⁶ but he must act with the defendant's as well as

¹ Li Zhongyuan, *Dealing with Certain Difficulties on the Application of Anticipatory Breach*, [2001] Dongwu Law Review 312.

² Han Shiyuan, *A Study on Damages for Breach of Contract*, p.399; Han Shiyuan and Cui Jianyuan, *Anticipatory Breach and Chinese Law*, [1993] Legal Studies no.3, 132.

³ *Wuhan River Sea Shipping Co v Nanjing Hengfeng Shipping Co*, Wuhan Maritime Court, 7th Jun 2002, (2002) WHFSZ 6; *Zhuhai Yuechao Seeland Shipping Co v Zhuhai Xin Hong An Logistics Co Ltd*, Guangzhou Maritime Court, 7th Jun 2004, (2003) GHFCZ 499.

⁴ Shanghai Maritime Court, 27th Oct 2003, (2003) HHFSCZ 189.

⁵ *The TFL Prosperity* [1983] 2 Lloyd's Rep. 18.

⁶ *Dunkirk Colliery Company v Lever* (1878) L.R.9 Ch. D. 20, per James L.J. at 25; cf. *Doyle v Olby (Ironmongers) Ltd*, [1969] 2 Q.B. 158, per Lord Denning at 167 "He should take such

his own interests in mind. So the inaction of charterers after repudiation by the shipowner was held unjustifiable even if it was “a sensible business decision” made in their own business interests.¹

5.6.1 Replacement

So far as the contract of carriage of goods is concerned, the *prima facie* mitigation measure after the breach is to find a replacement,² unless the cost is unreasonable.³ Any loss resulting from market movements after the time of breach is caused not by the breach but by the injured party’s failure in mitigation.⁴ If the vessel fails to sail by the contractual date, the charterer should achieve an alternative shipping arrangement to reduce his loss.⁵ The replacement should “correspond as closely as possible with the actual charter-party.”⁶ But if the circumstances justify it, the nearest equivalent will do.⁷ In *Blue Falcon Shipping Co v Islamic Republic of Iran*⁸ the charterer repudiated the voyage charterparty. The market was weak at that time and was expected to remain weak for some months. The shipowner then looked around for long-term employment instead, which was held reasonable by the court. In respect of commodities with an extremely volatile price such as oil, sugar *etc.*, there are two relevant markets *i.e.*, physical and terminal

steps as may be prudent, and reasonably within his power to mitigate the loss.”

¹ *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75; *cf. Dampskibsselskabet Norden AS v Andre & Cie SA* [2003] 1 Lloyd's Rep. 287; *Bulk Oil (Zug) A.G v Sun International Ltd and Sun Oil Trading Co. (No. 2)* [1984] 1 Lloyd's Rep. 531; likewise, the fear of future boycotts is not a justification for a charterer not to seek non-union labour during a strike. *DA Stathatos Steamship Company Ltd v Cordoba Central Railway Company Ltd* (1931) 40 Ll. L. Rep. 274.

² *Cf. Jamal v. Moolla Dawood Sons & Co* [1916] 1 A.C. 175, *per* Lord Wrenbury at 179.

³ *The Maersk Colombo* [2001] 2 Lloyd's Rep. 275 (C.A.), to replace the damaged crane would cost an extra 1.7 million and the claimant had never contemplated so. It was held the replacement value was unrecoverable.

⁴ Treitel, *G.H. Remedies for Breach of Contract: A Comparative Account*, p.117.

⁵ *The Almare Seconda and Almare Quinta* [1981] 2 Lloyd's Rep. 433; *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 (H.L.).

⁶ *Golden Strait Corporation, supra, per* Mance L.J. at 754, confirmed by the House of Lords, *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 (H.L.); *cf. the The Johnny, supra, per* Sir David Cairns at 4.

⁷ *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 Lloyd's Rep. 216; *Hinde v Liddell and Others* (1874-75) L.R. 10 Q.B. 265.

⁸ QBD, 6 February 1990 (unreported).

market,¹ both of which can be entered into for the sake of mitigation.² If the innocent party wants to displace this *prima facie* requirement to find a replacement, he must show it contravenes the governing principle and so works injustice.³ For example, in *The Kriti Rex*,⁴ convinced by the carrier that repairs would not take long, the plaintiff let go a substituted vessel and waited for the original one. This decision was unwise with hindsight but the court held that they did not act unreasonably.

5.6.2 The standard is not demanding

The shipping business involves reconciling complex interests every day. In order to extricate himself in emergency, a plaintiff may be driven to adopt some measures which should not be minutely examined at the behest of the defendant who causes the trouble in the first place.⁵ So when a plaintiff adopts one reasonable method from two alternatives, he will not be liable even if it is not so effective as another.⁶ Moreover, erroneous judgment is likely to happen in difficult circumstances. In *The Metagama*,⁷ the court accepted its reasonableness notwithstanding the failure in a desperate attempt to save the vessel after the collision. In *The Nour*⁸ the carrier used excessive water to extinguish the fire and damaged other cargos, which was held to be “over-zealous”, an unsuccessful but nevertheless reasonable measure in mitigation.⁹ Besides, there is

¹ Physical market is where the parties intend to sell or buy the goods and the terminal market is where the parties do not insist on an actual performance. Terminal market is widely used as a stop-loss or avoid-loss transaction to protect a long physical position. Thus both markets could be entered into as a reasonable step to minimise the loss in respect of particular goods.

² If he adopts the latter, although he is still required to enter into it immediately, however due to its unique operation, the price and date of the replacement achieved is usually for the next few months. *E.g.*, in *Gebruder Metelmann GMBH & Co KG v NBR (London) Ltd*, [1984] 1 Lloyd's Rep. 614, the seller accepted the repudiation on 21 Jan, they then immediately effected a forward sale on the Paris terminal market for the price of May, which was held a reasonable mitigation step.

³ *Dampskibsselskabet Norden AS v Andre & Cie SA* [2003] 1 Lloyd's Rep. 287.

⁴ *Supra*; *the Palmea* [1988] 2 Lloyd's Rep. 261.

⁵ *E.g.*, *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, *per* Lord Macmillan at 506. “It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.”

⁶ *Gebruder Metelmann GMBH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep. 614.

⁷ (1927-28) 29 Ll. L. Rep. 253 (H.L.); *cf.* *Mellona*, 3 Wm. Rob. 7.

⁸ *The Nour* [1999] 1 Lloyd's Rep. 1.

⁹ *Cf.* *Vinmar International Ltd and Another v Theresa Navigation SA* [2001] 2 Lloyd's Rep.

no compulsion to embark upon complicated litigation against the third party under the guides of mitigation,¹ unless it will not risk his money or stain his reputation.²

5.6.3 Mitigation and contractual obligation

As a general rule, the plaintiff must not recklessly defend his interests. For example, he cannot breach his own contract in the name of mitigation. Thus an instruction ordering masters not to sign any pre-paid bills of lading is not mitigation but a breach.³ Chinese law holds the same position. In *Tianjin Zhehai Shipping Service Dept v Ningbo Economy & Technology Development Zone Jinxiang Fuel Co Ltd*,⁴ for disputes over unpaid fees the shipowner closed the hatch and stopped loading for one day. His defence of mitigation was rightly dismissed by court.⁵

On the other hand, the principle of mitigation could not be invoked in order to escape from defendants' obligations.⁶ Take the example of nomination of safe port, in *Reardon Smith Line Ltd v Australian Wheat Board*,⁷ in holding that the charterers were liable to the shipowners for the damage sustained as a result of nomination of unsafe port; Lord Somervell of Harrow in his obiter said it "... does

1, contamination in loaded cargo was found at early stage due to the carrier's failure to clean up the tanks. Facing considerable delays the plaintiff had to continue loading in the hope that it would lessen. This decision whilst unwise in hindsight, was held not unreasonable.

¹ "A seller who has committed a breach of contract cannot, in my opinion, compel his buyer who has not broken his contract to take action to minimise the damage by claiming from another money to which he knows he is not entitled - a proceeding which will ruin his credit in the business world." *James Finlay and Company Limited v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, per Scrutton L.J., at 410.

² *The Marine Star* [1996] 2 Lloyd's Rep. 383, the third party was the plaintiff's associated refinery. So there was no reason for the plaintiff not to enforce a force majeure clause in their contract against his associated company to exempt his liability; see also *Bulk Oil (Zug) A.G. v Sun International Ltd. and Sun Oil Trading Co. (No. 2)* [1984] 1 Lloyd's Rep. 531 where a claimant failed to take advantage of a contractual clause to cancel the contract with his supplier for interests of his group.

³ *Federal Commerce & Navigation Co Ltd Respondents v Molena Alpha Inc and Others Appellants* [1979] A.C. 757 (H.L.).

⁴ Tianjin maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cId=4484>

⁵ See also *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

⁶ *Marimpex Mineraloel Handesgesellschaft MBH & Co KG v Avin Oil Trader Maritime Co*, QBD, 13 February 1987 (unreported). As said, it should not "exalt above obligation of the defaulting defendants and minimise in a way that imposes a still greater loss on the mitigator himself." Goetz and Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, (1983) 69 U. Virginia LR 967, 975.

⁷ [1956] 1 Lloyd's Rep. 1 (P.C.).

not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done...an aggrieved party must act reasonably and try to minimise his damage."¹ This view was tested in *The Kanchenjunga*.² Both Hobhouse J. at first instance and Lord Brandon in the House of Lords concurred with such a view.³ However this view was rejected by Lord Goff. He said "If it were right that the owners' refusal to load at Kharg Island constituted a reasonable step taken in mitigation of damage, it would follow that, had the ship instead entered Kharg Island and suffered bomb damage while loading there, the charterers could have escaped all liability for such damage on the ground that the owners had failed to mitigate their damage by refusing to enter the port."⁴ This seems to be a better view in the author's opinion. The argument is rather ingenious yet it confuses the rights and obligations of contractual parties and the true relationship between contractual obligations and mitigation. Contractual obligations are primary and mitigation is secondary. The former should not be avoided by invoking principle of mitigation. The integrity of contract might otherwise be harmed.

5.6.4 Cost of cure

On many occasions, the plaintiff has to fix the damaged vessel or other chattels in order to put it back into the market as a profit-earning machine. He must choose such a time and place for carrying out the repairs as would involve the minimum delay and expense.⁵ Cost of cure will not be allowed if some cheaper alternative elsewhere can make good his loss.⁶ The costs should not be spent

¹ *Ibid.*, at p.10.

² [1990] 1 Lloyd's Rep. 391 (H.L.).

³ See *The Kanchenjunga* [1987] 2 Lloyd's Rep. 509 at 516; [1990] 1 Lloyd's Rep. 391 (H.L.), at 393. Lord Brandon said that owners might have been able to succeed in insisting not sailing to the port "if they had pleaded and proved that the ship's master, in refusing to load at Kharg Island [nominated port], had acted reasonably so as to mitigate the damage..."

⁴ *Ibid.*, at p.401.

⁵ *Joyner v Weeks* [1891] 2 Q.B. 31; *The Puerto Buitrago*, *supra*.

⁶ Hazelwood and Tettenborn, *Marsden on Collisions at Sea* (13th edn 2003), p.561-2; in *The Pacific Concord* [1960] 2 Lloyd's Rep. 270, the vessel was fixed in London where the time and expense spent were far greater than any other ports. Accordingly 10 days for the prolonged fixing were deducted; see also *Darbishire v Warran* [1963] 3 All ER 310.

extortionately,¹ unless there is no alternative course which will provide what he requires, or none which will cost less.² The burden to show so is on the claimants.³ Only in exceptional circumstances could his inaction possibly be excused. In *The Griparion (No. 2)*⁴ the repair of the vessel would cost £ 1m and the market was so weak that it could hardly earn any profit even if it had been fixed. The shipowner was held justified not to fix the vessel and lay it up after a premature redelivery of vessel by the defendant.

5.6.5 Offer from the other party

In commercial contracts it is generally reasonable to accept an offer from the party in default,⁵ which can sometimes even extinguish his loss.⁶ If a shipowner wrongfully refuses the offer from a repudiated charterer, his claims will be deducted.⁷ But there is no need to accept a substantially different performance of contract.⁸ The reasonableness of offer has to be judged according to the circumstance of each case. Suppose the shipper damages the vessel by carrying undisclosed dangerous cargos which are discharged afterwards by the shipowner, then he offers to ship the same cargo by promising to repair it. Since the shipper has already tainted his reputation, the shipowners may not be required to accept his offer in this context.⁹

¹ In *The Alecos M* [1991] 1 Lloyd's Rep. 120, \$150,000 spent on a spare propeller for a 14-year old vessel was held unreasonable and dismissed as doing so was disproportionate to the financial consequences of the deficiency; see also *Radford v. de Froberville*, [1977] 1 W.L.R. 1262; *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 W.L.R. 650.

² *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 W.L.R. 650, per Staughton L.J. at 660.

³ *The Alecos M* [1990] 1 Lloyd's Rep. 82 per Steyn J. at p. 84.

⁴ [1994] 1 Lloyd's Rep. 533; cf. *The Rozel* [1994] 2 Lloyd's Rep. 161; *The Maersk Colombo* [2001] 2 Lloyd's Rep. 275.

⁵ *Payzu v. Saunders* [1919] 2 K.B. 581, per Scrutton L.J. at 589; *Robert A. Hillman, Keeping The Deal Together After Material Breach--Common Law Mitigation Rules, The UCC, and the Restatement (Second) of Contracts*, (1976) 47 U. Colo. L. Rev. 553.

⁶ *R. Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Ltda* [1970] 2 Lloyd's Rep. 14.

⁷ *Sous Secretaire d'Etat Au Ministere des Travaux Publiques Charge de la Marine Marchande v W & R Barnett* (1924) 19 Ll. L. Rep. 120; *Societe Navale de L'Ouest v R W J Sutherland & Co.* (1920) 4 Ll. L. Rep. 185; contract of sale case see *Heaven & Kesterton Ltd v Etablissements Francois Albiac & Cie.* [1956] 2 Lloyd's Rep. 316, per Devlin J. at p. 321; *Payzu Limited v Saunders* [1919] 2 K.B. 581; *Brace v Calder and Others* [1895] 2 QB 253; *The Solholt*, *supra*.

⁸ *Heaven & Kesterton Ltd v Etablissements Francois Albiac & Cie.* [1956] 2 Lloyd's Rep. 316.

⁹ In *The Liepaya*, *supra* the shipowner was held justified not to accept an offer from the charterer as it might affect his suit for the previous breach.

5.7 The standard of reasonableness in Chinese law

5.7.1 General considerations and disputes in Chinese law

Art. 114 of the GPCCL requires the plaintiff to take *prompt* measures. Art.119 of the CCL requires to “take *appropriate* measures” and the expense should be “reasonable”. On the whole, the standard of reasonableness is not dealt with in detail by the written law. One Chinese writer suggests the plaintiff should “try to do their best”.¹ Others suggest “as long as his action is in accordance with the principle of good faith, it will satisfy the requirement.”² These answers are very similar to the English ones. The question of reasonableness necessarily involves an inquiry into each case’s circumstances. It is flexible and Chinese courts are given a considerable degree of discretion in deciding it. Chinese shipping law has provided ample illustrations. When asked by the shipper to sign a clean B/L inconsistent with the cargo’s appearance, the carrier can terminate the contract, discharge the cargo and keep it in storage on behalf of the shipper.³ When the cargo is found damaged, the plaintiff should then reinforce the packing before the second leg of carriage.⁴ If the cargo is liable to rot, he is required to dispose of it immediately.⁵ To avoid further collision between the vessel and dock, expenses in hiring a tug boat will be necessary.⁶ If the carrier has to wait for the shipper’s direction, he will not be blamed for staying idle meanwhile.⁷ He will not be compelled to take

¹ Han Shiyuan, *A Study on Damages for Breach of Contract*, p.391.

² Wang Liming, *Liability for Breach of Contract*, p.546; the examples of reasonable mitigation provided by Chinese textbooks are rather simple, which include: the victim should keep for the goods properly on behalf of the defaulting party; an appropriate measure is a reasonable one that could be possibly achieved by a plaintiff, provided it is not at extremely high costs and not against his reputation or commercial morality; after the breach the plaintiff should not hold up earning profit. Wang Liming, *ibid*, p.461-462.

³ *COSCO Guangzhou v World Link Transport Co Ltd and Mr. Wen Jianming*, Guangzhou Maritime Court, 27th Dec 2000, (2000) GHFSZ 41.

⁴ *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365.

⁵ *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

⁶ *Qingdao Harbour Bureau Oil Harbour Co*, *supra*.

⁷ *Qingdao Huaqing I&E Co Ltd v AP Molloer-Masersk A/S*, Shandong Higher People’s Court, 17th May 2004, 2004 LMSZZ 1.

litigation against the third party¹ or risk his own legal rights or properties² under the guides of mitigation. But he should defend properly in suits brought by the third party against him as a reasonable mitigation.³

Notably, as to cost of cure, Chinese law lays down the reasonableness standard in even greater detail than English law. Art. 2 (2) of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure provides a statutory standard of reasonableness for the cost of cure, "...The conditions to compensate for damage to the vessel are: the vessel should be repaired at the nearest port, unless the claimant can prove the choice of other places could minimise the loss, save expenses or have other reasonable grounds. When a temporary repair can keep the vessel operating, temporary repair will be sufficient..."⁴

Similar to English law, the decision made by one party in difficult time will not be judged in hindsight. In *Nantong Topshare Shipping Ltd v Yangzhou Yuyang Shipping Co Ltd and Tianjin/Kobe Shipping Ltd*,⁵ a failed attempt to ground the vessel after the collision was held reasonable. In *Zhanjiang Huayang Oil Co Ltd v Guangxi Xihui Shipping Co Ltd*,⁶ a vessel collided with a gas pipeline. Although only superficial exterior damage was found in the pipeline, for fear of its possible interior damage which might leak chemicals and cause disastrous environmental damage, the port authority decided to stop operating and make a thorough inspection at an extremely high cost. All these measures were proved unnecessary in the end, but the court approved of these cautious mitigation measures. In *Hanjin Shipping Company Ltd v AT*

¹ *Bank of China Insurance Co Ltd v Shanghai JY Container Development Co Ltd*, 20th Apr 2003, Shanghai Maritime Court, (2002) HHFHCZ 34.

² Han Shiyuan, *A Study on Damages for Breach of Contract*, p.367.

³ *Yicheng Shipping Co v Nippon Yusen Kaisha Line Ltd*, Tianjin Maritime Court, <http://www.ccmr.org.cn/ss/news/show.php?cId=5325>

⁴ Other similar provisions see art.4, 10 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure; art.166 of CMC.

⁵ Guangzhou Maritime Court, 24 Jul 2002, (2001) GHFCZ 109.

⁶ Guangzhou Maritime Court, 3 Sep 2001, (2001) GHFZZ 12.

Container Line Ltd and others,¹ pouring water into the whole hold for just one burnt but unreachable container was justified by the urgency of the accident. In respect of the measures that are not up to the required standard, when one surveyor company is enough, hiring another from a foreign country at a high cost will be seen as unreasonable.² To send a tugboat in an attempt to tow back the vessel whose redelivery has been expressly refused by another party was held to be “increasing the loss”.³

5.7.2 Tort law

As stated above, because of the unique arrangement of Chinese law, the principle of mitigation does not apply to tort law. Instead the principle of mutual fault (contributory negligence) serves the same purpose: if the loss is caused or increased by the fault of the victim, the liability of the defendant may be attenuated or even extinguished. A victim’s fault takes the form of his failure to perform the duty to mitigate. For example, if a substituted purchase after a conversion is at a price considerably higher than market price, he might be held to be responsible for the augmentation because it is *caused by his fault*. Here the Chinese court does not ask what steps are reasonable but tries to discover any fault on the plaintiff’s part.⁴ Causation is the primary factor and reasonableness only the second. Even though this arrangement is not very logical itself (as mentioned above), at least it covers most of the same ground and functions equally well.

5.7.3 Other differences between Chinese law and English law

One Chinese decision clearly suggests that a party needs to put

¹ Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140.

² *Orient Overseas Container Line Inc v Sinochem Corp Shandong Yantai I&E Co and Yantai Tuhsu Tea Import and Export Co Ltd*, Shanghai Maritime Court, 20 Nov 2002, (1998) HHFSCZ 419.

³ *Guangzhou Dengdai Shipping Co. v. Guanzhou Salvage Bureau*, Guangzhou Maritime Court, 25 Aug 2004, (2004) GHFCZ 96.

⁴ *Chen Quandi v Leqing Oriental Ships Constructing and Fixing Factory and Pacific Fishery Shipping Co*, Qingdao Maritime Court, 18th Sep 2000.

his reputation at risk by pressing or suing the third party such as his contractor. In *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*,¹ the cargo was sent to the wrong destination by the carrier. The shipper has to compensate for his client's loss. But his subsequent claims for reimbursement from the shipowner were dismissed by the court on the grounds that he should be tougher in the negotiation with his clients. This decision is open to considerable criticism. Apparently it is unfavorable that Chinese law over-emphasises the contract discipline and disregards the particular facts of each case. Secondly, a carrier is not required to pay a fine to customs on cargo owner's behalf even though the non-payment might cause its confiscation,² while English law holds the opposite.³ This reflects an inbred reluctance to correct a wrong with the help of aggrieved party. Lastly, English law holds that the aggrieved party should accept a reasonable offer from the defaulting party. Such an issue has not yet been raised in China. Given its inherent dislike of breach of contract, it is expected to be rejected by Chinese courts. If so, the Chinese position is once again not practical. The mixture of morality and law seems to be counter-productive because social resources will be wasted on this occasion.

Chinese legal principles are frozen into codes and often rigid doctrine, which are imposed on courts, whereas most common law rules can be changed from time to time, subject to the doctrine of *stare decisis*. Chinese law is "closed", in the sense that every possible situation is governed by a limited number of general principles, while English law is "open", in the sense that new rules may be created or imported for new facts. Consequently, as similarly demonstrated in other aspects of law, a fairer justice is more likely to be achieved by the English court. Thus it is hoped this chapter will enlighten Chinese judges and the comparison of these small aspects of law could demonstrate a bigger picture and prompt Chinese

¹ Tianjin Maritime Court.

² *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

³ Colinvaux, *R. Carver Carriage by Sea* (13th edn 1982), p.1473.

scholars to rethink their approach to law.

5.8 Deduction of benefits

5.8.1 English law

A causal nexus between the breach and the profit must exist in order to deduct the benefits from the mitigation. It must be the one arising out of the consequences of the breach.¹ In *The Fanis*,² the charterer fortunately made some profits by selling bunkers on board the substitute vessel on its redelivery. This benefit was held to be just a “collateral” element to the owners’ breach and not deductible as there was insufficient causal nexus between the breach and the profit.³ To distinguish between a collateral benefit and one that is the direct result of the breach is obviously a difficult one. Generally speaking, if the mitigating measure forms part of a continuous dealing with the defendant, this will be deemed out of the consequences of the breach and it has to give credit to the contract breaker.⁴ So insurance is disregarded but insurance interests are deductible benefits.⁵ In *The Chekiang*⁶ after a collision the plaintiff did some permanent repairs and annual maintenance at the same time; time for the latter was deducted. In *The World Beauty*⁷ the plaintiff’s vessel started on another charter several days early due to a collision. The monetary benefits were brought into account because employing the vessel was a direct consequence of the wrong. This is so even if there is no duty on him to act in the first place.⁸ For example, when the vessel collides with another, the court will give credit to the defendant if the plaintiff manages to get through their work without it⁹ or carry the cargo with another vessel

¹ *British Westinghouse Electric, supra*, at p.690 *per* Viscount Haldane L.C; *The World Beauty, supra*, *per* Winn L.J. at p.357.

² *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd* [1994] 1 Lloyd's Rep. 633.

³ *Ibid.*, *per* Mance J. at 637.

⁴ *Cf. The Briton* [1975] 1 Lloyd's Rep. 319 (C.A.).

⁵ *Harbutt's Plasticine Ltd v Wayne Tank & Pump Company Ltd* [1970] 1 Lloyd's Rep. 15.

⁶ (1926) 25 Ll. L. Rep. 173 (H.L.).

⁷ [1969] 1 Lloyd's Rep. 350.

⁸ *Dunkirk Colliery Company v Lever* (1878) L.R. 9 Ch. D. 20, *per* James L.J.

⁹ *The Susquehanna*(1926) 25 Ll. L. Rep. 205.

without extra cost.¹

On the other hand if the benefits are the result of independent or disconnected transaction actions and not from the mitigating steps, then the profit is not deductible.² For example the claimant might have contracts with loss-free provisions which enable him to get a reimbursement from his buyers even in the event of cargo damage.³ This fact will be treated as *res inter alios acta* rather than a benefit from mitigation. Another example is: the consignee or shipper makes the decision not to take advantage of the market immediately after the cargo is lost.⁴ The consequences from his decision to bide his time are independent of the wrong and should not be visited upon the shipowner, as he could have done the same thing anyway even without breach.⁵ The cargo owner is entitled to reap the benefit if he does get some.⁶

*Aitken, Lilburn & Co v Ernsthausen & Co*⁷ provides a colourful illustration. The defendant charterer was required to ship 1519 tons of cargo under the contract. A fire broke out and destroyed 1000 tons that had been loaded. He then breached the contract by refusing to load the remaining 519 tons. The shipowner in that case filled up the vessel with other cargoes in order to minimise their loss. In considering the deduction the court held that for the space of 1000 tons of cargo, the shipowner had lost that freight and accordingly could use it on their own account. The freight was not credited against damages. But for the space of 519 tons cargo it was

¹ *The Hebridean Coast* [1960] 2 Lloyd's Rep. 423.

² Cf. Beale, H.G. *Chitty on Contracts* (29th edn, 2004), par. 27-093; *Mamidoil-Jetoil Greek Petroleum Company SA and Another v Okta Crude* [2003] 1 Lloyd's Rep. 1.

³ E.g., a clause which divides the time of passing property and risk. See *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1967] 2 Lloyd's Rep. 315; cf. *The Sanix Ace* [1987] 1 Lloyd's Rep. 465.

⁴ As said by Lord Wrenbury in *Jamal v. Moolla Dawood Sons & Co* [1916] 1 A.C. 175, "if the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises."

⁵ So the delaying buyer in a fluctuating market will gain if the market falls and lose if it rises which is like an investor. Michael G. Bridge, *Market Damages in Sale of Goods Cases - Anticipatory Repudiation and Mitigation*, [1994] J.B.L. 152, 154.

⁶ *Staniforth v Lyall* (1830) 7 Bing. 169; *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 65.

⁷ [1894] 1 Q.B. 773.

incumbent upon the shipowner to mitigate, therefore the freight they earned for it went in reduction of such damages. An interesting hypothesis follows, *i.e.* what if the carrier only manages to fill up part of the vessel, say 1200 tons cargo. Should this benefit give credit to 519 tons space first and the rest go to shipowner's account or the reverse? The author prefers a simplified solution, that is, the benefit should be divided in proportion of 519/1000. Other solution would be too complicated and speculative to be feasible. From a cost-efficient view, a solution of apportionment is the most convenient way.

5.8.2 Chinese law

Under Chinese law the deduction of benefits from mitigation steps is discussed under the heading of set-off of advantages and losses,¹ which is seen as one of the basic rules of civil law.² More often than not the party that incurred loss may have his losses partially or wholly met from outside sources other than recovery from another party. The principle of set-off of advantages and losses asks whether such collateral sources of compensation, side by side with contractual or tortious liability, should be taken into account in calculating damages.³ The justification of this principle is said to be *restitutio in integrum* and to prevent a plaintiff being overcompensated.⁴ This concept is very similar to collateral benefits in English law.⁵ Art. 2 (2) of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure provides "when the damage of the collision is repaired together with others, for damage incurred in other accidents or for routine maintenance, damages shall be restricted to the expense and loss caused by the concerned collision." In both countries there are

¹ Shi Shangkuang, *Law of Obligation* (1990), p.298; Cui Jianyuan, *Contract Law*, (2003), p.277.

² Yang Lixin, *Application and Study of Civil Law Cases*, (1994),p.35; Shi Shangkuang, *supra*, p.298.

³ Cui Jianyuan, *Contract Law* (2003), p.218.

⁴ Han Shiyuan, *A Study on Damages for Breach of Contract*, p.407; Wang Zejian, *Civil Law Theory and Cases Study* (vol.4, 1991), p.174.

⁵ See John Fleming, *International Encyclopaedia of Comparative Law*, Tunc,A .(ed.), vol 6 part 2 Ch 11, p.3.

scholars suggesting that it might not be desirable to deduct the whole of the extra advantage for fear that it would give innocent parties insufficient incentives to take efficient steps in mitigation.¹ But these ideas have hitherto not been accepted in either country's courts. In the author's view, their views are not feasible. This is because firstly, there seems to be no empirical evidence suggesting that there will be little incentive to mitigate without the extra advantage. Secondly, it might place too much burden on the litigants and courts to decide the appropriate deduction. Not to mention, it is difficult to lay down any guideline for judges to follow, which will inevitably invite disputes.

In China the benefits must accrue to the aggrieved party in consequence of his relief from his obligations.² Under English law the test to deduct is said not to be a causation one,³ while in China it has been expressly said that to deduct the advantages, there must have been *adequate causal connection* between the breach and the advantage.⁴ This serves the same function as under English law. The difference between the two countries' approaches seems only semantic. In *Fujimax Co Ltd v National Saudi Arabia Shipping Co and Ningbo Shipping Agency Co Ltd*,⁵ the carrier delivered the wrong goods whose owner disclaimed the ownership. The court deducted the value of wrong cargo processed by the plaintiff in assessing damages as the benefit was adequately caused by the breach. The same result would probably be achieved by the English "out of consequence of breaches" formula. In *Guangdong Cereals, Oils & Foodstuffs Corp v Nanjing Lianyung Corp*,⁶ the demurrage arose in the performance of the substituted charterparty.

¹ Donald, *Remedies in Contract & Tort*, p.120; Wang Liming, *A Study on Liability of Breach of Contract*, p.468.

² Zhang Ming'an, *Civil Obligations* (2002), p.285; Wang Liming, *Principles of Contract Law and Analysis of Cases* (2001), p.665.

³ *McGregor on Damages*, p.266.

⁴ "If there is a sufficient and close causal connection between the defendant's default and the benefits to the plaintiffs, then they are deductible." Fang Shaoshen, *Damages for Breach of Contract* (1999), p.201; see also Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.397; Cui Jianyuan, *Contract Law* (2003), p.220; Yang Lixin, *Application and Study of Civil Law Cases* (1994), p.32-33.

⁵ Ningbo Maritime Court, 8th Aug 2001, <http://www.ccmt.org.cn/hs/news/show.php?cId=63>

⁶ Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91.

The claim for reimbursement was refused by the court because no causal nexus could be established, which resembles the result in the English case *The Fanis*.¹

Similar to English law, Chinese law will deduct the benefits even if there is no duty on him to act in the first place;² insurance payments and employer's subsidies are disregarded in Chinese law;³ gains arising from voluntary acts of the third party are likewise disregarded. A creative decision was seen in *Heshan Supply and Marketing Group Means of Production Co v Zengcheng Licheng Shipping First Co and Zengcheng Shipping (Group) Co*,⁴ where the shipper rescued some of the damaged cargo. It was held the shipowner could "either deduct the monetary value of saved cargo from damages or alternatively compensate for all economic losses but keep the saved cargo himself."

However, there seems to be one significant difference between the two. As said, to choose when to enter into the market is an independent factor and will be disregarded under English law. By contrast, due to the concrete approach in assessment and the confusion over the market rule,⁵ Chinese law does take it into account. In *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd*⁶ the cargo incurred damage during transit. The cargo owner managed to sell the cargo at a higher price than the market price and it was deducted as a gain from mitigation steps in opposition to the English position.⁷ This is certainly not fair because the cargo owner may lose his money when he sells too cheaply while still lose the benefit when he strikes a bargain. There should be a mid-position so that he can recoup the

¹ [1994] 1 Lloyd's Rep. 633.

² *Qingdao Harbour Bureau Oil Harbour Co v Schiffarts Gesellschaft Hansa Constance MBH & Co, Hansa Treuhand Schiffsbeteiligungs AG & Co and M/T Provence SA*, Shandong Higher People's Court, 25 Sep 2002, (2002) LMSZZ 31.

³ *Zhao Zheng v Yin Fahui*, 9 Sep 1991, the Supreme Court, MTZ 1.

⁴ Guangzhou Maritime Court, 19th Jul 2002, (2002) GHFCZ 220.

⁵ This will be dealt with in chapter 7.

⁶ Guangzhou Maritime Court, 15th Dec 2004, (2004) GHFCZ 540/541/542/544/545.

⁷ See also *Yili Fire & Security (Hong Kong) Co Ltd v Dalian Yinfa Finance Plaza Co Ltd*, Liaoning Higher People's Court, 7th Dec 1996.

benefit when the market rises and lose some if it falls. There should be a balance between the risk of his decision and the outcome of him taking the risk. The Chinese position favors the defendant justifiably. Again, the incipient mitigation rule and the consequent confusion over the market rule should take the blame.

5.8.3 New for old

Chinese and English law have different attitudes towards “new for old”. English law dislikes placing a burden on the plaintiff to relieve the defendant from some of the unavoidable consequences of his wrong.¹ If the plaintiff achieves some benefit from a new replacement for something partly used, his damages will not be deductible under English law.² *E.g.*, the cost of repairing the burnt house was awarded notwithstanding the betterment the plaintiff had achieved on the basis of substitution of new material for old.³ The reason is practical rather than principled and has to do with cash flow.⁴ But there is one exception. If the betterment is more realistic and feasible, betterment will be taken into account. In *The Baltic Surveyor*⁵ the owner replaced the property with 8 years left with the one with 30 years lifespan, the betterment conferred corresponding advantage on the claimant and was therefore deducted.

In contrast to English law, Chinese law adopts the opposite starting point. Bent on a legal policy of *restitutio in integrum*, Chinese law takes very seriously the position that an award of damages should not actually enrich the plaintiff. Hence it takes the view that courts must give credit in reduction of damages for betterment in any event.⁶ For example, art. 8 of the Regulations on

¹ Or as in most cases it was called forced betterment. See *Harbutt's Plasticine Ltd, supra*, per Widgery L.J. at p.29; cf. *The Gazelle* (1844) 2 W. Rob. 279, per Dr Lushington at p.281; *Lagden v O'Connor* [2004] 1 A.C. 1067 per Lord Slynn of Hadley at p.1080.

² For instance, the court awarded the cost of a machine accessory with a longer life-span than the broken one in *Bacon v Cooper (Metals) Ltd.* [1982] 1 All ER 397.

³ *Hollebone and Others v Midhurst and Fernhurst Builders Ltd and Others* [1968] 1 Lloyd's Rep. 38.

⁴ “Although the claimant may have made a gain in balance sheet terms, it is not clear when, if ever, he will realize it in hard case.” Tettenborn, *The Law of Damages*, p.104.

⁵ [2002] 1 Lloyd's Rep. 623.

⁶ Han Shiyuan, *A Study on Damages for Breach of Contract* (1999), p.417.

Property Damage arising from Collision between Vessels or Vessel and Structure says, “the assessment of value of the vessel is based on market price of similar vessel at the place of collision...if no such price is available, it shall be measured by the original purchase price or cost of shipbuilding in deduction of the depreciation (4%-10% *per year*)...” Art.12 provides, “assessment of damages for the structure ... damages for part loss or total loss shall be based on reasonable cost of cure or cost of rebuilding subject to a deduction for depreciation.” In *Guangzhou Xingsha Harbour Co v Qingdao Xinda Shipping Co and Hainan Jinxinda Shipping Co Ltd*,¹ new for old was considered and deducted in a claim for the cost of cure after a collision. It might receive an opposite decision in English courts.² In *Shanghai Container Port Ltd Co v Shanghai Vessel Construction Co*,³ the vessel collided with a crane which had 30.5 tons’ capacity. The port authority bought another one with 50 tons’ capacity. The court rejected the cost of new modern crane but assessed damages by the cost of 30.5 tons’ crane deducting the depreciation.

Thus if English law more or less purportedly leaves the claimant overcompensated by not deducting betterment from the full repair,⁴ Chinese law stands at another extreme, often leaving the innocent party not fully recovered. This is a typical demonstration of two judicial styles in two countries. Compared with Chinese judges, English judges focus on fact patterns. They analyse cases presenting similar but not identical facts, extracting from the specific rules, and then, through deduction, determine the often very narrow scope of each rule, and sometimes propose new rules to cover facts that have not yet presented themselves. By contrast, Chinese judges focus rather on legal principles. They identify their function, determine their domain of application, and explain their effects in terms of rights and obligations. At this stage, general effects are deduced. Yet exceptional aspects are difficult to generate. They are not capable of

¹ Guangzhou Maritime Court, 1 Aug 2000, (1999) GHFSZ 75.

² See *The Pactolus* (1856) Sw 173; *The Bernina (No 3)* (1886) 6 AspMC 65.

³ Shanghai Maritime Court, (1999) HHFHCZ 33, 27 Sep 2002.

⁴ Burrows, A. *Remedies for Torts and Breach of Contract* (3rd edn 2004), p.246.

taking into account subtle differences or fine-tuning the legal principle in each case. Here the Chinese position is not free from criticism because the betterment is compelled by the wrong. Although the fundamental purpose of this rule is to prevent unjust enrichment, it could be argued that, before the claimant realises the added value and pocket it in full in the market he couldn't be said to be unjustly enriched. There is no "profit" in reality at all in the sense that it is not materialised. Thus the technical application of *restitutio in integrum* has in effect under-compensated the plaintiff. This position is arbitrary and should be corrected in the author's view.

5.9 Shipping law illustrations

What is required by law depends on the facts, but even in similar factual situations, disparate results are possible, depending on whether the judge sees the glass as half full or half empty.¹ The previous part of this chapter has already provided many shipping cases and some others will be provided in this part to indicate important factors in deciding this and will help readers to grasp the gist of it.

5.9.1 Breach by shipowners

Where the shipowner has repudiated the contract, *e.g.*, fails to carry the goods, delays in carriage, withdraws the vessel or commits other repudiatory breaches, the claimant may be able to take steps to mitigate in the following ways. First he may obtain substituted transport including other means of conveying the cargo if necessary, to get the cargo to the destination and then claim for expenses in mitigation as damages.² The substitution must be made immediately,³ and not in an "imprudent or extravagant manner".⁴ Chinese shipping

¹ George Chandler, *Damages to Cargo: The Measure of Damages to Cargo – Redux*, (1997) 72 Tul. L. Rev. 539, 550.

² *I.e.*, the difference between the higher market rate of freight and contract rate for chartering in a substitute ship for the balance of the charter period and all other additional costs for arrangement. *The Timawra* [1996] 2 Lloyd's Rep. 166; *The Lily Prima* [1976] 2 Lloyd's Rep. 487; *The Elena d'Amico* [1980] 1 Lloyd's Rep. 75.

³ *Snia Societa di Navigazione Industriale et Commercio v Suzuki & Co* (1924) 18 Ll. L. Rep. 333; *Goldberg Ltd v Bjornstad & Broekhus* (1921) 8 Ll. L. Rep. 7.

⁴ Colinvaux, R. *Carver Carriage by Sea* (13th edn 1982), p.1472

law holds the same stance.¹ Alternatively, he may buy the substitute cargo at the port of destination or the nearest available market, especially when the substituted vessel is not readily available.² But his claims must deduct the value of the goods left at the port of loading and other saved expenses such as the amount of freight and insurance upon them.³ If he cannot find a substitute of the same quality and thus has to buy one with superior quality, such a mitigation step will be accepted by the court.⁴ In comparison, Chinese law is very ambiguous in substitute buying. Especially in shipping law, art.55 of CMC actually makes such a requirement unnecessary. As a consequence, an innocent party usually does not choose so to avoid disputes.⁵

Under English law, when the carrying vessel runs aground, the charterer is not entitled to abandon the cargo but should transship and sell the cargo at the nearest destination.⁶ If the cargo is damaged, the cargo owner should sell it at the best price he can find.⁷ It might be reasonable for him to destroy it if it might endanger his market reputation⁸ or expose him to future liability⁹. When the cargo is contaminated by residues of previous cargo and is rejected by the consignee, in mitigation of their loss the charterers can arrange for the vessel to proceed to another port for potential buyers and claim for expenses of doing so.¹⁰ Chinese law is essentially the same in this aspect. It has been held that the claimant can buy back

¹ *Guangdong Cereals, Oils & Foodstuffs Corp v Nanjing Lianyun Corp*, Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91; *Shanghai Jifu Shipping Co Ltd v The Third Leqing Carriage Co and Zhao Diancang*, Shanghai Maritime Court, 27th Oct 2003, (2003) HHFSCZ 189; *China Sinotrans Co Tanggu v COSCO Tianjin International Freight Co Ltd*, Tianjin Higher People's Court, 14th Jul 1999, *Selected Cases of People's Courts* (2002 Vol.1)

² *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 (H.L.); *Nissho v Livanos* (1941) 69 Ll.L.Rep. 125.

³ *Heimdal v Questier & Co Ltd* (1948-49) 82 Ll. L. Rep. 452.

⁴ *Hinde v Liddell and Others* (1874-75) L.R. 10 Q.B. 265.

⁵ There will be further discussion about this in Ch 6..

⁶ *The Isla Fernandina* [2000] 2 Lloyd's Rep. 15.

⁷ *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd*, Guangzhou Maritime Court, 15th Dec 2004, (2004) GHFCZ 540/541/542/544/545; *China Pacific Property Insurance Co Ltd (Hainan) v Guangzhou Gangxin Shipping Co Ltd*, Guangzhou Maritime Court, 9th Oct 2004, (2003) GHFZZ 92.

⁸ *Cf. American case Sony Magnetic Prods., Inc. v. Merivientioly*, 1989 AMC 1259 (11th Cir. 1989).

⁹ *Cf. American case Pine St. Trading Corp. v. Farrell Lines, Inc.*, 1977 AMC 426 (Md. Ct. of App. 1976).

¹⁰ *The Sonia* [2003] 2 Lloyd's Rep. 201.

its own cargo detained by Customs due to the shipowner's breach and can claim damages therefrom.¹ After damaged cargo has arrived, the cargo owner should minimise the loss by separating damaged and undamaged cargo in order to sell a better price.² He should repack the cargo for the sake of safety in the second leg of carriage.³ Chinese maritime court has held that selling damaged cargo without survey in the first place was an imprudent method, and claims were accordingly deducted.⁴ In China, mitigated selling is usually done by an auction organised by the court,⁵ while mitigating buying rarely happens in practice for lack of legal support.

5.9.2 Breach by charterers or cargo owners

When the charterer or shipper breaches the contract by not providing cargo, the owners should seek to fill up the ship,⁶ with a freight as good as possible.⁷ He is obliged to take a less lucrative contract if that is the best replacement under the circumstances.⁸ If the charterer or shipper offers to load at a reduced rate of freight, the owner is obliged to accept that offer. This point presumably will not be accepted in China but is commendable and is recommended by the author. The amount of substituted freight so earned by the shipowner will be deducted in assessing damages.⁹ If it amounts to as much as should be earned under the previous one, the damages will only be nominal.¹⁰ Under Chinese shipping law, if the cargo could not be delivered to the planned destination for unexpected reasons, the carrier must ask for direction from the consignee. If the cargo

¹ *Hebei Metals & Minerals Import & Export Co v Orient Overseas Container Line Ltd*, Zhejiang Higher People's Court, 7 Dec 2001, (2001) ZJEZZ 109.

² *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Higher Peoples' Court, 25 Dec 2001, (2001) GJZZ 257.

³ *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365.

⁴ *Qingdao Sugar, Wine & Non-staple Foodstuff (Group) Co, China Pacific Insurance Hainan Co v Nanjing Grandextend Shipping Co Ltd*, Haikou Maritime Court, 21 Jul 2000, (2000) HSCZ 064.

⁵ *China Ping An Insurance Company v. Hong Kang Eversall Shipping Ltd*, Wuhan Maritime Court, 20 May 1996; *The M.N.Efes*, <http://www.ccmt.org.cn/hs/news/show.php?cid=1727>.

⁶ *The Riza and the Sun*, *supra*; *The Athinoula* [1980] 2 Lloyd's Rep. 481.

⁷ *The Pearson* 1894 17 CB (NS) 352; *Aitken, Lilburn & Co v Ernsthausen & Co* [1894] 1 Q.B. 773.

⁸ *The Argentino* (1889) L.R. 14 App.Cas. 519.

⁹ *The Gina Juliano* [1984] 2 Lloyd's Rep. 477.

¹⁰ *The Briton*, *supra*.

owner delays in giving orders, the carrier should wait for a reasonable time and then he can either sell them at the nearest local market or return it to the loading port in mitigation.¹

5.9.3 Exception clause

Even if the contract contains an exception clause, it will not excuse the shipowner if the consequence could be avoided by reasonable efforts in mitigation. Take *DA Stathatos Steamship Company Ltd v Cordoba Central Railway Company Ltd*² for example: the contract contained a strike exception clause.³ Though there was union strike in the port, the shipowner was held unreasonable not to find non-union labour to discharge the cargo.⁴ In *Bulman & Dickson v Fenwick and Company*⁵ Lord Esher pointed out that “a strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing.”⁶ Here the relevant Chinese cases are sparse and Chinese courts might favour the shipowner instead considering its persistence in contract discipline and lack of flexibility. Thus these English cases will be introduced to Chinese judges for their reference.

5.9.4 Dangerous cargo

In the carriage of dangerous cargo, any reasonable expenses incurred in preventing or removing the danger caused by it is recoverable. *E.g.*, in *The Orjula*⁷ expenses incurred in decontaminating, reconditioning, discharging, cleaning and restowing the leaking drums were upheld by courts. In the Chinese

¹ *Qingdao Huaqing I&E Co Ltd v AP Molloer-Masersk A/S*, Shandong Higher People's Court, 17 May 2004, 2004 LMSZZ 1; *SITC Steamship Co Ltd v Xiamen Haomen Food Co Ltd*, Xiamen Maritime Court, 20 May 2004, (2004) XHFSCZ 20.

² *DA Stathatos Steamship Company Ltd v Cordoba Central Railway Company Ltd* (1931) 40 Ll. L. Rep. 274

³ “In case of strikes, lock-outs . . . which prevent or delay the discharging, such time [for unloading] is not to count, unless the vessel is already on demurrage.”

⁴ “If the charterers, instead of taking up the non possimus attitude which I think they did take up, had really been helpful, the discharge could have been started.” *Ibid.*, per Wright J. at 278.

⁵ [1894] 1 Q.B. 179.

⁶ *Ibid.*, at p.185.

⁷ [1995] 2 Lloyd's Rep. 395.

case *Hanjin Shipping Company Ltd v AT Container Line Ltd and others*,¹ in order to put out a fire caused by the dangerous cargo, the carrier filled the hold with CO₂, sprayed the container with water, and in the end poured water into the whole hold. All these expenses and costs were held recoverable.

5.9.5 Detention and release of vessel

In estimating damages for the detention of vessel, it must be considered whether or not the shipowner is required to mitigate and whether the action is conducted in a reasonable manner. Because the master could discharge cargos in a warehouse to preserve his lien, it was held an unreasonable manner to keep them on board for 27 days.² When the vessel was detained because the consignee failed to pay a small sum for dues, it was held the master should pay it himself.³ In contrary to this English case, there is an awkward Chinese decision holding that a carrier does not need to pay fine to customs on cargo owner's behalf even if its serious delay might cause confiscation.⁴ This is another example of the marked contrast in judicial style between two countries. English judges focus on particular facts in each case. They are capable of discovering subtle discrepancy among similar cases, then adjust the specific legal rule relevant to the present facts and set out lengthy enumerations of specific applications. Chinese judges instead focus on the systematic consistency and the intellectual coherency. They identify the legal principle, and apply it to general facts of the case. But whether the legal rules should be adjusted to a better justice is not a primary concern. The law should facilitate the trading rather than hinder it. Chinese law protects the so-called contract discipline at the cost of the other party. This is in favour of form over substance and is untenable.

¹ Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140.

² *Mors-Le-Blanch and Another v Wilson and Another* (1872-73) L.R. 8 C.P. 227; cf. *Smailes* (1906) 12 Com.Cas117.

³ Colinvaux, *R. Carver Carriage by Sea* (13th edn 1982), p.1473.

⁴ *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

On the other hand, when the vessel is detained by cargo interests or the third party, the carrier should act promptly to release the vessel.¹ In *The Nour*² the arrest of the vessel was not lifted for a month within the Christmas and New Year period. The claimant succeeded in proving that the shipowner failed to arrange a release promptly and 10 days was deduced accordingly in assessing damages.

5.9.6 Delivery without B/L

When the cargo is delivered without bills of lading, the plaintiff should not be compelled to bring an unpredictable and risky suit against the receiver in the name of mitigation, especially when he is in a foreign country. In *The Ines (No.2)*³ the defendant carrier located cargo's position after their wrongful release. They asserted that the plaintiff must immediately obtain an injunction through the Russian courts as mitigation, but the plaintiff only intended to lend his name to any proceedings at the expense and risk of the shipowner, which was supported by the court.⁴ This is good law and Chinese judges are suggested to learn from it.

5.10 Impecuniosity and mitigation

If the plaintiff is unable to mitigate by lack of funds, it was held in *The Liesbosch*⁵ that the damages should be deducted. The decision has been subject to the criticism from the beginning.⁶ It was overruled by *Lagden v O'Connor* in the end.⁷ The House of Lords held that the injured party's lack of means would not affect his ability to recover his loss unless his impecuniosity was not reasonably

¹ Boyd, S.C. *Scrutton on Charterparties and Bills of Lading* (20th edn 1996), p. 389.

² [1999] 1 Lloyd's Rep. 1.

³ *MB Pyramid Sound NV v Briese Schiffahrts GmbH & Co KG MS Sina* [1995] 2 Lloyd's Rep. 144.

⁴ *Evans & Reid v Cornouaille* (1921) 8 Lloyd's Rep 76, per Hill J. at p.77 "to tender a law suit is no mitigation of the plaintiffs' loss by reason of the defendants' wrongful delivery of the goods."

⁵ (1933) 45 Ll. L. Rep. 123.

⁶ It "has been on the run for at least 30 years: often cited, rarely approved, and frequently distinguished---adroitly or otherwise." Tettenborn, A. *Compensating the Cash-strapped: The Sinking of the Liesbosch*, [2004] LMCLQ 135,135.

⁷ [2004] 1 A.C. 1067.

foreseeable.¹ This view accords with the reality. For example in the carriage of oil, a VLCC tanker can carry more than 300,000 tons of crude oil worth well in excess of \$100,000,000.² It is fairly foreseeable that no company in this world processes cash flow to buy in the substitute.

In stark contrast, Chinese law is a stronghold of the old-fashioned principle once established in *The Liesbosch* and prejudices the financial inability of the aggrieved party, especially in commercial disputes. The reasoning is said to be that a businessman should rationally foresee the potential commercial risk and have funds ready to cope with it. The failure to mitigate due to lack of funds is a result of his own fault of unpreparedness and must be borne by himself.³ Such a thought was reflected in the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure. Art.10 says, “assessment of loss of operating period: If the vessel is totally lost, the period for loss of operating shall be based on the reasonable time to find a substitute vessel, with a maximum 2 months...” In no way can the plaintiff claim for more than 2 months’ profits even if more profits are lost due to his impecuniosity.⁴

With respect, however, the scepticism and criticism concerning the *Liesbosch* decision equally applies here. For a start there is no merit in forcing a plaintiff to do what he cannot afford to do. Then Chinese law has to face an acute paradox as its law singles out the cash-strapped which blatantly betrays its communist ideology and is in nature a sheer discrimination.⁵ It is also in opposition to the

¹ “This rule applies to the economic state of the victim in the same way as it applies to his physical and mental vulnerability. It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages.” *Ibid.*, per Lord Slynn at p.1088.

² On the basis of the New York Mercantile Exchange Light Sweet Crude Oil price on 20 Feb.2007, \$58.33/ barrel, \$427.56/tonne, the value would be \$128,268,000. The price of oil is available at http://www.nymex.com/lsc0_fut_cso.aspx

³ Si Yuzhuo, *Law of Collision at Sea*, p.479.

⁴ *Wei Haihua v Guangzhou Haichang Oil Carriage Development Co Guangzhou Maritime Court*, 9th Sep 1998, (1998) GHFSZ 35.

⁵ *Cf.* The criticism to the old *Liesbosch*. “In certain circumstances the rich can afford the no-frills service, whereas the poor have to content with the deluxe version.” Tettenborn, *Compensating the Cash-strapped: The Sinking of the Liesbosch*, [2004] LMCLQ 135, 136;

principle that the defendant must take his victim as he finds him.¹ In short, it is time Chinese law rethought this position.

5.11 Conclusion

The rule of mitigation is adopted in both countries to keep compensation within reasonable bounds. But there are some significant differences between the two, *i.e.* the requirement of mitigation is merely *not to increase* under Chinese law while asked by English law to *minimise* the loss. This conflict is the result of a more general conflict between two fundamentally different ways of viewing contracts, *i.e.* a theory of efficient breach and the morality of trustfulness and promises. It is more distinctive philosophical ideas behind them that shaped the field of mitigation in which Chinese and English law unfold today. This proves that the difference in law is anything but a coincidence.

In both countries, law tends to select and defend a variety of moral principles accepted by the community. In English law moral forces are relatively weaker compared with Confucianism in Chinese society. Many English scholars advocate that the legal system should take its moral direction entirely from what “economists refer to as welfare economics.”² Wealth maximisation is deemed as a firmer basis for contract law than ethical theories.

By contrast, Chinese law takes as given that promises are binding. It seems morally indefensible to ask the innocent party to minimise losses for defaulting party’s interests. But the connection of law with morality does not necessarily guarantee that law will be

“you harm somebody who is a millionaire and thereby increase the damages you have to pay, or a talented pianist whose hands are damaged which also increases the damages you have to pay, when the victim is impecunious, as so many of us are these days...” *Perry v. Sidney Phillips & Son* [1982] 1 All ER 1005, *per* Sir Patrick Bennett at 1013; *Dodd Properties v Canterbury City Council* [1980] 1 W.L.R. 433, *per* Megaw L.J. at p.453; Coote, *Damages, The Liesbosch, and Impecuniosity* [2001] CLJ 511.

¹ *Cf. Clippens Oil Company v Edinburgh and District Water Trustees* [1907] A.C. 291, at 303 *per* Lord Collins, “the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act.”

² Kaplow, L. & Shavell, S. *The Conflict Between Notions of Fairness and the Pareto Principle*, (1999) 1 Am. L. & Econ. Rev. 63, 68.

morally reputable. There is always a danger whenever the law is excessively ethical. When the law treats anyone who runs after gain as “morally indefensible” and lightens the effect of mitigation rule to deter it, the same can be said to the innocent party who remains idle at the other parties’ expense. More importantly, it is not feasible to distinguish *reducing* from *not increasing* in practice. As market price is fluctuating, such a rule becomes unenforceable in terms of the requirement to buy in a substitute. Actually art.55 of CMC makes such a requirement unnecessary. As a consequence, innocent cargo owners usually do not buy in the substitute to avoid disputes. The Chinese law position is open to considerable criticism, based as they are on an unattractive argument of form over substance. Market-centred economy requires an increasing need for formal legal rules that facilitate transactions, provide incentives to engage in transactions and lower transaction costs. The author contends that the current position results in high costs of transacting and inefficiency and is therefore untenable. The existing mitigation rule should be amended to facilitate international trade in favour of a realistic, practical and efficient economic order. It is recommended by the author that both art.55 of CMC and the narrow Chinese mitigation rule (art.119 of CCL) should be revised and broadened. The Chinese mitigation rule should require the innocent party to *minimise* the loss as under English law.¹

Further, the Chinese mitigation rule is not a general limitation method for all monetary claims but only restricted to contract law. As proved, there is no logical ground for this strange arrangement and some Chinese courts are notably inclined to ignore it and start applying the mitigation rule in tortious cases. So it is subject to further review whether there is any significance for Chinese law to maintain this stance.

This chapter has also found some problems in other aspects such

¹ Wei Fan, *Mitigation Rule and Efficient Breach --- A Comparison between Chinese Law and English Law*, (2007) 39 *The Bracton Law Journal* 57, 66.

as new for old, impecuniosity and mitigation, offers from the other party, mitigation and acceptance of an anticipatory breach *etc.*, where many Chinese rules seem obsolete and need to be revised. Chinese legal principles are frozen into codes and often rigid doctrine, are imposed on courts, whereas most common law rules can be changed from time to time, subject to the doctrine of *stare decisis*. Chinese law is "closed", in the sense that every possible situation is governed by a limited number of general principles, while English law is "open", in the sense that new rules may be created or imported for new facts. Consequently, as demonstrated in this chapter, Chinese judges are not capable of taking into account subtle differences or fine-tuning the legal principle in each case whereas a fairer justice is more likely to be achieved by the English court. Thus it is hoped this chapter will enlighten Chinese judges and the comparison of these small aspects of law could show a bigger picture and prompt Chinese scholars to rethink their approach to law. This chapter also provides plenty of shipping illustrations indicating what to do or not to do in mitigation, which will be helpful as well.

Chapter 6 Measure of Damages

6.1 Measure of damages in the carriage of goods by sea: English law

At the outset, it is necessary to make an important point about the difference in outlook between English and Chinese law as regards damages. In English law, in a marked contrast to Chinese law, the setting of the measure of damages is regarded not as a rule of thumb but very much a precise matter of law.¹ Hence there is – to a Chinese lawyer – an astonishing amount of authority on it. This is the result of the application of various legal rules discussed in the previous chapters.² The question of the proper measure of damages for a wrong is moulded, among other things, by causation, reasonableness,³ mitigation and remoteness – all of which have their own detailed collection of caselaw. Take the remoteness rule for example. This has been litigated in many claims for damages from a breach of a contract of carriage.⁴ “Measure represents the loss which may fairly and reasonably be considered as arising naturally, *i.e.* according to the usual course of things, from the breach of contract.”⁵ Take another example of mitigation: in *Radford v. de*

¹ “The measures of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject.” *The Chekiang* [1926] A.C. 637(H.L.) *per* Lord Sumner p. 643.

² As observed by Evans L.J. in *The Sivand* [1998] 2 Lloyd's Rep. 97, “the defendant is liable for what the law regards as the consequence of his wrongful act, identifying its consequences on a common sense basis and distinguishing in particular between what has caused rather than provided the occasion for the plaintiff's loss, subject to reasonable foreseeability of the particular kind of loss, and subject also to loss which results from negligence of the plaintiff or those for whom he is responsible, in breach of duty to mitigate his loss...”

³ Reasonableness is arguably one of the independent legal principles in deciding damages. As Lord Lloyd put it in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 at p. 367B, “mitigation is not the only area in which the concept of reasonableness has an impact on the law of damages.” But in this thesis, it has been addressed in every other legal principles such as remoteness, causation, mitigation *etc.* Therefore a separated discussion is not seen as necessary.

⁴ See *R. & H. Hall, Ltd. v. W.H. Pim, Junr., & Co., Ltd.* (1928) 30 Ll. L. Rep. 159 (H.L.); *La Pintada* [1984] 2 Lloyd's Rep. 9 (H.L.); *The Lips* [1987] 2 Lloyd's Rep. 311 (H.L.); *Monarch Steamship Co., Ltd. v. A/B Karlshamns Oljefabriker, supra*; *The Heron II, supra*.

⁵ *Dampskibsselskabet Norden AS v Andre & Cie SA* [2003] 1 Lloyd's Rep. 28, *per* Toulson, J. at p.292; as to the loss arising from the urgent need of the use of carried cargo, the loss of particular high profits will be too remote to recover. See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. Emotional distress can be rejected on the same principle. See an American case *Anyangwe v. Nedlloyd Lines*, 909 F. Supp. 315, 1996 AMC 1083 (D. Md. 1995) where the claims for emotional distress and the premature birth of

Froberville,¹ Oliver J. said “[as to] the measure of damages and the plaintiff's duty and ability to mitigate...to some extent at least, they are mirror images, particularly in cases of damages for breach of contract...Indeed, although the two concepts of measure and mitigation may be logically distinct, I doubt whether, at any rate in the context of a contractual claim, they can practically be treated separately.”² Therefore the cargo owner's loss of profits on a resale contract will not be awarded if there is a market in which they could buy in the substitute.³

Non-pecuniary loss is seldom claimed in the carriage of goods by sea.⁴ In any case, it is usually likely to be regarded (as in China) as precluded almost as a matter of law.⁵ We are only discussing pecuniary loss in this thesis, which can be roughly classified into cargo values, profits realised through carriage, profits under resale contract, losses of use, other reasonable expenses, liability to the third party and other economic losses.⁶ As regards damages for cargo value, there are (excluding pure consequential losses) two types of assessment: the market value and the cost of replacement,⁷ with the former providing the *prima facie* measure.

her baby following the carrier's failure to deliver supplies in time for a wedding were denied failing to satisfy the remoteness rule. But it is worth noting that English courts are more likely to deny emotional distress outright these days rather than arguing whether they are too remote. See *Johnson v Gore Woods & Co* [2002] 2 A.C. 1 (H.L.).

¹ [1977] 1 W.L.R. 1262.

² *Ibid*, at p. 1272; *cf. The Alecos M* [1991] 1 Lloyd's Rep. 120.

³ *Vinmar International Ltd And Another v Theresa Navigation SA* [2001] 2 Lloyd's Rep. 1.

⁴ This is because the carriage of goods by sea is generally not aimed at mental satisfaction and thus non-pecuniary damages can hardly be given. *Johnson v Gore Woods & Co* [2002] 2 A.C. 1 (H.L.); *Watts v Morrow* [1991] 1 WLR 1421; *Addis v Gramophone Co Ltd* [1909] AC 488; see generally Veitch, *Sentimental Damages in Contract* (1977) 16 UWOLR 227; Holmes, R. *Mental Distress Damages for Breach of Contract*, (2004) 35 Vict. U. Wellington L. Rev. 687.

⁵ *Johnson v Gore Woods & Co* [2002] 2 A.C. 1 (H.L.); *cf. Santiago v. Sea-Land Service*, 366 F. Supp. 1309, 1974 AMC 673 (D. P.R. 1973), a claim for mental and spiritual anguish resulting from the non-delivery of an automobile was rejected. See also *Soto v. Caribe* 2000 AMC 226 at p. 231, (P.R. Supr. Ct. 1996).

⁶ This classification is also adopted in Anderson, R.R. *Incidental and Consequential Damages*, (1987) 7 J.L. & Com. 327. But the classification seems endless by various criterion, *e.g.*, it can be regrouped into five measures of damages including substitute-price, lost-surplus, opportunity-cost, out-of-pocket-cost, and diminished-value. See Cooter, R. *Damages for Breach of Contract*, (1985) 73 Cal. L. Rev. 1432.

⁷ Sometimes the two conceptions refer to the same assessment. *E.g.*, in the event of total loss of cargo, it is the same whether the cargo owner's loss is assessed by the cost of cure (cost of substitute) or the market value.

6.1.1 Lost or damaged goods: market value and other recovery under English law

In the event of non-delivery, damage to or loss of cargo¹ in the carriage of goods by sea,² what claimants have actually lost is the benefit of which he has been deprived through the breach,³ and thus can be measured by the value of the goods at the time when, and the place where, they should have been delivered.⁴ This is certainly so for non-delivery of goods. In the instance of cargo damage, the measurement is usually the difference between the market value of sound and damaged cargo at the destination.⁵

It is based on the presumption of a substitute contract: that is, the claimants are presumed by law to go into the market and purchase the replacement at the present price.⁶ But it should be noted that even though the market rule seems to be invoked quite commonly these days and is in practice regarded as a *prima facie*

¹ Market value is the starting point of measuring damages in all three circumstances. See *Goldco Imports Ltd. v. The Meitoku Maru* [1966] Ex. C. R. 498 at p. 503-504.

² But, it should be noted, not universally. The CMR convention, for example, provides a different rule: damages for loss of or damage to goods are assessed in reference to their value at the place where they are accepted plus any carriage charges. See art.23 of the Convention.

³ Treitel, G.H. *Damages for Non-Delivery*, (1991) 107 LQR 364, 366.

⁴ "The damages recoverable by the goods owner are such as will put him into the position he would have been in if the goods had been duly delivered, and are therefore the value of the goods at the time when, and the place where, they should have been delivered." *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 *per* Lord Goff of Chieveley at p. 479; *cf Williams Brothers v. Agius Ltd.*, [1914] A.C. 510 (sale of goods).

⁵ In other words, Arrived Sound Market Value (A.S.M.V.) less Arrived Damaged Market Value (A.D.M.V.) ASMV (arrived sound market value) is a term mainly used in America (See *Otis Mcallister & Co v Skibs-A/S Marie Bakke* [1959] 2 Lloyd's Rep 210) and Canada (*the Farrandoc* [1967] 1 Lloyd's Rep 232; *Nabob Foods Ltd v Cape Corso* [1954] 2 Lloyd's Rep 40), meaning if the cargo is damaged or lost during transit, the measure of damages should be based on the value of the damaged cargo or lost cargo at the time and place of its delivery or when it should have been delivered. It is only occasionally used in English case law. See *Oranje Ltd v Sargant & Sons* [1924] 20 Ll.L.Rep. 329, *per* Rowlatt J.

⁶ In *Williams Brothers v Agius Ltd* [1914] A.C. 510, (H.L.), Lord Moulton at p. 530-531, observed that "He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled."

rule,¹ it is by no means invariable,² as there could be other reasonable measure of damages, *e.g.*, sending the cargo to the destination by other means,³ evaluation⁴ or loss of profits (if any).⁵

6.1.1.1 What is market value?

An available market is “where goods can be freely bought and sold for delivery to and from the place of delivery of the [damaged] goods”.⁶ If there is a market at a destination with published listings,⁷ the market value can be easily obtained.⁸ This principle is enshrined in the Hague-Visby Rules, which provide that the value of the goods be fixed according to the “commodity exchange price”; if there is no such price, it should be according to the “current market price” or, in the absence of both, by reference to the “normal value of goods of the same kind and quality.”⁹ In the normal case of lost cargo while in the course of carriage, the date is to be taken at the time of due delivery at the port of discharge.¹⁰ If there is no price for that day, the nearest sales dates govern.¹¹ The principle is based on the view

¹ See *Rice v. Baxendale* (1861) 7 H. & N. 96. *per* Blackburn J. “Setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner”; *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 *per* Lord Goff of Chieveley at p. 479; *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515, *per* Lord Davey at p. 529; *Blackburn J., O'Hanlan v. Great Western Ry. Co.* (1865) 6 B. & S. 484, 491.

² See Tettenborn, A. *The Law of Damages*, p.474; *cf. the Kriti Rex* [1996] 2 Lloyd's Rep 171, *per* Moore-Bick J.. at p.193.

³ *Scrutton on Charterparties and Bills of Lading*, p.394 ff; *A/B Karlshamns Oljefabriker and Another v. Monarch Steamship Company Ltd.* (1948-49) 82 Ll. L. Rep. 137, (H.L.).

⁴ *Cf. Southern Express Company v. Owens*, 41 Southern Rep.752 (Alabama). Absent of evidence of the market value of a lost manuscript it was proper to permit the plaintiff to testify as to the amount of time he had spent in the preparation of the manuscript and what he considered it worth, on the ground that where an article was so unusual in character that the market value could not be determined, damages must be ascertained in some rational way.

⁵ *Rodocanachi v. Milburn Brothers*, (1886) 18 Q.B.D. 67 at p. 76-77, *per* Lord Esher.

⁶ In *The Sanix Ace* [1987] 1 Lloyd's Rep. 465, where cargo was damaged by culpable unseaworthiness of the vessel, damages were assessed by reference to the sound arrived value of the goods which were not affected by the fact that the owner of the goods had sold them at a higher price; *cf. The Athenian Harmony (No.1)* [1998] 2 Lloyd's Rep. 410.

⁷ A wide variety of grains, oil, chemicals, foods, cotton and rubber are widely traded and reported.

⁸ There is another view that the best evidence of market value of the sound cargo at the point of destination is the price charged by the seller in the underlying transaction. See Vafidis, M.P. *Remedies for Breach of The Contract of Carriage*, (1991) 3 U.S.F. Mar. L.J. 77, 80. But this cannot be seen a *prima facie* position of English law.

⁹ Article IV 5 (b), para 3; *cf.* Art 23 (2) of the CMR adopts the exact same wordings.

¹⁰ In *the Kriti Rex* [1996] 2 Lloyd's Rep 171, the court took into consideration the normal time for the voyage, then added a few days as allowance and got the arrival date. *Cf. Staniforth v. Lyall* (1830) 7 Bing. 169.

¹¹ *The Juno* [1986] 1 Lloyd's Rep. 190, 194.

that any loss resulting from market movements after that time is not caused by the breach but by the injured party's failure to mitigate.¹ The relevant price should be the wholesale² and buying price.³ There is usually no formal market for the damaged goods. When the damaged goods are actually resold, the resale price will often be strong evidence of its market value.⁴

6.1.1.2 What if there is no market

The importance of an available market is simply to provide a reliable indicator of the monetary value of the goods. However sometimes evidence of the market price for such goods at a different place and even at a different time may be the only available means of quantification of loss.⁵ In other words, there is no such market available.⁶ Apparently, the Hague/Visby Rules leave aside this question and therefore may cause uncertainty and inconsistent interpretation by different courts. It has been suggested that the Hague/Visby Rules lay down only a *prima facie* measure which can be departed from where the circumstances require, *e.g.* when no market is available.⁷ Such a view was applied at the first instance in the Australian case of *El Greco (Australia) Pty Ltd and Another v Mediterranean Shipping Co SA*.⁸ Where faced with a lack of evidence as to the value of the goods in port of discharge, the judge took

¹ Treitel, *G.H. Remedies for Breach of Contract: A Comparative Account*, p.117.

² In *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317, a letter shown by the buyer of the claimants describing the price and margin of profits was not accepted as it failed to point out whether the price was wholesale or retail sales.

³ There could be a substantial divergence between the buying price and selling price, as was shown in *The Texaco Melbourn, supra*; *The Kriti Rex supra*. Furthermore, it should be noted that in some circumstances, typically where chattels are destroyed as a result of the defendant's wrongful act, it is the sale price instead of the buying price that matters. The reason is that beyond commercial sector, many claimants simply are not interested in replacing their damaged chattel at all. Therefore the medium of a notional sale by the claimant is the neatest solution. See Tettenborn, A. *The Law of Damages*, p.267.

this thesis is mainly concerned with commercial trading while substitute buying as mitigation is presumed by law.

⁴ *The Athenian Harmony (No.1)* [1998] 2 Lloyd's Rep. 410.

⁵ *The Good Friend* [1984] 2 Lloyd's Rep. 586.

⁶ *The Athenian Harmony (No.1)* [1998] 2 Lloyd's Rep. 410 *per* Colman J. at 416, "it is thus only if the evidence is of market prices at different places and at different times which are so remote from the place and time of delivery as to be of no probative value in arriving at the sound and damaged value of the goods that it can be said that market prices do not help and that there is thus no available market."

⁷ See Diamond, A. *The Hague-Visby Rules* [1978] LMCLQ. 225, 248.

⁸ [2004] 2 Lloyd's Rep. 537 Fed Ct (Aus) (Full Ct).

reference to the one at port of loading instead. But this was overruled in its appeal, because “it is not appropriate to treat the plain words of art.4, r.5(b) as optional so that invoke price of loading when no market is available.”¹ In this view the Hague/Visby Rules preclude an award of damages on any other basis, however difficult to prove. By contrast, there are some contradictory old English cases where the court held that the value might be estimated by taking the cost of the goods to the shipper and adding the estimated profit to that when no other means of quantification of loss is available.² It was also held that as a very last resort he can recover his damages based on c.i.f. invoice price less the resale price of damaged cargo.³ The Australian court’s interpretation seems to accord with the intention of the Hague/Visby Rules and the spirit of English case *The Texaco Melbourne*⁴ and *The Athenian Harmony (No.1)*⁵ where it was suggested that even if there was no available market the value of the goods at relevant time and place must still be “ascertained as best it can on the available evidence”,⁶ and is thus recommendable.

The evidential problems confronting both parties can be tough.⁷ Probative value of price at different places or at different dates is surely weak,⁸ but they might be very helpful for a court to deduce the value of the goods at the time and place prescribed by the Hague/Visby Rules, albeit with a certain adjustment.⁹ *The Athenian Harmony (No.1)*¹⁰ is a vivid illustration. In that case, a cargo of kerosene was contaminated due to the carrier’s failure to clean the tank. But there was no available market for either the sound goods or the damaged goods due to the command economy in operation in

¹ *Ibid.*, at p. 591, per Allsop, J.

² *Rodocanachi v. Milburn Brothers*, (1886) 18 Q.B.D. 67 at p. 76-77, per Lord Esher.

³ *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317.

⁴ *Supra*.

⁵ [1998] 2 Lloyd's Rep. 410.

⁶ *The Texaco Melbourne*, *supra*, per Lord Goff at p. 429.

⁷ *The Good Friend* [1984] 2 Lloyd's Rep. 586 illustrates the evidential problems in arriving at the measure of diminution in value of the goods encountered in such cases.

⁸ The price at which the holder of the bill of landing sold cargo five months before was held not very satisfactory evidence of the value at the time of the breach in *the Arpad* (1934) 49 Ll. L. Rep. 313; cf. *The Texaco Melbourne* [1994] 1 Lloyd's Rep.473 (H.L.); *Rodocanachi v. Milburn* (1887) 18 Q.B.D. 67 at p. 76 (C.A.).

⁹ In *the Kriti Rex* [1996] 2 Lloyd's Rep 171, the price of bananas in northern European countries plus transportation was accepted concerning UK price.

¹⁰ [1998] 2 Lloyd's Rep. 410.

port of discharge (Iran). In order to ascertain the cargo value at port of discharge (Hormuz, Iran) on 17 Sep, the court adopted a complicated formula. The only price available was Platts quoted Mediterranean price¹ of kerosene (U.S.\$167.50) on 31 Aug. The purchasing price at Yanbu (Saudi Arabia) was U.S. \$174.50 *per ton* on 31 Aug. There was a differential of U.S.\$7 *per tonne* between it and Platts quoted Mediterranean price on that day. Platts quoted Mediterranean price for 17 Sept. was U.S.\$171.50. By analogy, U.S.\$171.50+7=178.50 becomes the price at Yanbu on 17 Sep. Freight from Yanbu to Hormuz was another U.S.\$6 *per tonne*, thus giving a delivered price of U.S.\$184.50 at Hormuz on 17 Sep.

Moreover, the formula provided by Hague/Visby Rules is faulty in terms of damaged goods because there is less likely to be an available market for it than for sound goods. In the absence of supporting evidence, the actual price used when dealing with a third party will often be strong evidence of the market value.² This should be confirmed by the Hague/Visby Rules in the author's view. These problems existing in the Hague/Visby Rules need to be attended to by English scholars and judges.

6.1.1.3 Abstract measurements

Suppose a plaintiff has lost less than the value of the goods, for example because in fact he has replaced them cheaply.³ Should a court assess the damages on the value of the goods or simply by his

¹ Though there is an available Platts quoted Gulf price, which on the face of it is a geographically closer value point, it was disregarded because it was based on Far East f.o.b. prices which were then increased to Gulf prices by the freight from the Far East to the Gulf, thus a less reliable one compared with a straightforward Platts quoted Mediterranean price.

² *Braun v Bergenske Steamship Company* (1921) 8 Ll. L. Rep. 51; *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515. Curiously there are no express provisions under English law confirming this. Arguably it is implied by art.50 (2) and art.51 (2) of the Sales of Goods Act 1979. Such a price must, however, be business-like. It must "not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration." *Spencer v. Commonwealth of Australia*, (1907) 5 C.L.R. 418 at 431 *per* Isaacs, J. In *El Greco (Australia) Pty Ltd and Another v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep. 537, Fed Ct (Aus) (Full Ct), the transactions between the claimant and its buyer were found to be not sufficiently cognizant of the market conditions. Therefore, that price was rejected by the court.

³ On the other hand, if he has lost more, this will probably be a matter for remoteness *etc.*

actual loss? These two options are generally called the abstract and concrete method.¹ The abstract method is assessed by a reference to market prices disregarding any price at which he in fact covers or resells,² whereas the concrete method refers to the reasonable costs the claimant actually spends.³

Generally, English law favours abstract assessment as the *prima facie* rule in breach of carriage of goods by sea,⁴ as well as in sale contracts.⁵ The purpose is to ascertain the objective monetary value of the goods and not their utility to the cargo owner in circumstances peculiar to him.⁶ Another reason of this is that the claimant is presumed by law to enter into the market buying substitute at that abstract price as mitigation. In *Rodocanachi v Milburn*,⁷ the claimant sold cargo at a price less than the market price prevailing at the port of delivery. This fact was held to be irrelevant because the value must be taken “independently of any circumstance peculiar to the plaintiff”.⁸ It is the same even though the aggrieved party had not gone into the market mitigating at all.⁹

Even so, since a market for damaged goods is usually not

¹ Cf. Treitel, G.H. *Remedies for Breach of Contract: A Comparative Account*, p.111.

² There could be no difference between the abstract and concrete assessment time to time, especially to some unique goods with no market at all, e.g., large machines. See *the Arpad* (1934) 49 Ll. L. Rep. 313.

³ Of course neither method necessarily forms the limit of recovery. Incidental and consequential loss can be recovered in addition to it.

⁴ The exercise required to quantify the damages in the carriage of goods by sea involves the objective and principle similar to sale of goods. See *The Arpad* (1934) 49 Ll. L. Rep. 313; *The Texaco Melbourn* [1994] 1 Lloyd's Rep. 473 (H.L.).

⁵ It is codified by the Sale of Goods Act 1979. s.51 (3) reads, “where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.”

⁶ Another possible reason is that the abstract measure will make sure that claims would not be distinct on basis of tort or contract. It was said “if the measure of damages in the case of the non-delivery or total loss of the goods in breach of contract cases is defined by reference to the monetary value of the lost goods entirely abstracted from the “circumstances” or contracts of the receiver, there can be no conceptual basis for any different approach where the claim is for damage to the goods and is tort-based as distinct from contract-based.” *The Athenian Harmony (No.1)* [1998] 2 Lloyd's Rep. 410, per Colman, J. at p.416.

⁷ (1887) L.R. 18 Q.B.D. 67.

⁸ *Ibid.*, per Lord Esher at p.77; cf. *Acatos v Burns* (1877-78) L.R. 3 Ex. D. 282, the cargo was sold at a price lower than the market value; *The Arpad*, this price was higher than the market price.

⁹ Cf. *Pye Ltd v B G Transport Service Ltd* [1966] 2 Lloyd's Rep. 300, in order to dodge customs, the claimant faked contract of sale with a price substantially lower than the market value. The assessment was still based on the market price.

available, it is said that the actual price used when selling to a third party will often stand as strong evidence of “the market value”. This method, strictly speaking, is a concrete one and should be seen as an exception. Another exception is when the plaintiff has replaced the goods more expensively. This cost of replacement might still be recovered subject to the general principle of reasonableness and mitigation. This will be dealt with in the next section.

6.1.2 Damaged goods: cost of repairs or cure¹

As previously stated, the difference of value between sound and damaged cargo will usually be the normal measure of damages for damaged goods. That is, the diminution in value.² But measure of cost of cure might be adopted instead on two occasions. Firstly, it is possible for the claimant to recondition or repair the damaged goods at a reasonable cost,³ as required by mitigation. Damages can then be based on the cost of cure instead of the market value rule,⁴ subject always to requirements of mitigation and reasonableness. In *The Iron Gippsland*⁵, it was reasonable for the plaintiff to reprocess a contaminated cargo of oil and therefore the cost of cure was held to be the appropriate measure of damages. Another possibility is when the market depreciation cannot be ascertained, then cost of reinstatement may also be given.

On the other hand, if the plaintiffs have difficulty adopting this approach, “value minus price” will still be the normal measure of damages, even though it is substantially more than the reinstatement costs. In *The Athenian Harmony (No.1)*⁶, it would cost about U.S.\$ 7

¹ In cases of non-delivery, the market value and the cost of cure could be the same. In *the Kriti Rex* [1996] 2 Lloyd’s Rep 171, the court clearly equalised the two measures by saying “that loss is to be measured by the market value of the bananas, that is, the replacement cost.” *per* Moore-Bick, J.at p.199.

² Although it needs to be pointed out that the *prima facie* measure for damaged goods generally is the cost of repair. See Tettenborn,A. *The Law of Damages*, p.278. HcGregor,H. McGregor on Damages (17th edn), p.1030. Perhaps sea carriage is different, as in reality these damaged goods are more likely to be sold instead of being repaired.

³ Similarly, the shipowner should repair his damaged vessel to put it to the market in order to earn freight.

⁴ For example, to tranship the cargo to the destination in other vessels. *Monarch Steamship, supra*.

⁵ [1994] 1 Lloyd's Rep. 335, Sup Ct (NSW).

⁶ [1998] 2 Lloyd's Rep. 410.

per tonne to restore 16,333.852 tonnes of contaminated oil, while the depreciation of value was U.S.\$26.50 per tonne. However there were logistical and refinery planning difficulties involved in reinstatement as the Iranian plaintiff was desperately short of such capacity due to the war. Therefore the court adopted the depreciation measure instead of the restoration cost,¹ even though the cost was \$ 318,510 more.²

6.1.3 Cargo delay³

If there is physical damage by reason of deterioration during a prolonged journey this is clearly recoverable, where the normal market value rule will apply.⁴ Presuming only pure economic losses arise from the delay; however, matters are not so easy. It is often said that the measurement can be established by the difference between the market value of the goods on the day they should have been delivered and their value on the date of their actual delivery, provided the concerned goods are for immediate resale⁵ or one of inherently seasonal nature.⁶ Thus a drop in the price of the concerned commodity at its destination will be recoverable.⁷ Where the owner decides to use the cargo himself and does not concern the fortuitous decline in its market price, the damages can be measured

¹ It was commented that "the ordinary method of calculating loss in cases of damage to bulk cargoes is market value reduction and not restoration cost." But such is not a matter of law. See *ibid.*, per Colman J. at p.419.

² Cf. *The Maersk Colombo* [2001] 2 Lloyd's Rep. 275 (C.A.). To replace the damaged crane would cost an extra £ 1.7 million and the claimant had never contemplated so. Replacement value was held unreasonable and the resale value of the crane was given instead.

³ Unlike damage to goods, which is a matter of tort or contract, delay is contract only.

⁴ See *Glynn and Others v Margetson & Co and Others* [1893] A.C. 351 (H.L.), where the cargo was rotten during prolonged voyage; cf. *The Parana* (1877) 2 P. D. 118; *Baldwin & Co v The London, Chatham, and Dover Railway Company*(1881-82) L.R. 9 Q.B.D. 582.

⁵ Cf. *Contigroup Companies, Inc. v Glencore A.G.* [2005] 1 Lloyd's Rep. 241, a case on the analogous point of late delivery by a seller. In that case, the mentioned measure was rejected because it was within the contemplation of the parties that the buyer would have to compensate a sub-buyer for any loss, including loss of profit as a result of the delay. Therefore the compensation that the buyer had paid to his sub-buyer was justified as the measure of damages.

⁶ *Gatoil International Inc. v Tradax Petroleum Ltd.* [1985] 1 Lloyd's Rep. 350, per Bingham, J. at 367; *Dunn and Others v. Bucknall Brothers* [1902] 2 K.B. 614 (C.A.); *The Ardennes* (1950) 84 Ll. L. Rep. 340; *Collard v South Eastern Rail Co* [1861-1873] All ER Rep 851; *Wilson v. The Lancashire and Yorkshire Railway Co.*, (1861) 9 C.B.(N.S.) 632; *The Wave* [1981] 1 Lloyd's Rep. 521 (time charter); this was arguably acclaimed as the *prima facie* measurement for delay of delivery. See *The Heron II*, *supra*; *Heskell v Continental Express Ltd and Another*, *supra*; *McGregor on Damages*, p.907.

⁷ *The Heron II*, *supra*.

by the depreciation, interest on capital value, maintenance and wages attached to the delay.¹ However, there is an exception to the above:² when the claimant suffers no adverse financial consequences from late delivery, *e.g.*, he holds adequate stocks anyway, there is no point awarding him damages on either basis.³ The measurement for any other financial losses resulting from the delay will be dealt with in other sections.

6.2 Measure of damages in the carriage of goods by sea: Chinese law

It is very interesting to see how Chinese and English courts follow the same principle of *restitutio in integrum* but end up with rather different measures of damages. A similar market rule has not been established in China as a general rule (it only appears in chapter 17 of the CCL with limited application to the carriage of goods by sea). Measure of damages in Chinese shipping law has been developed in a fragmentary and unsatisfactory manner.

6.2.1 Chinese law background: how basic legal principles differ from English law

The evolution of English market rule is a natural result of interactions among basic legal principles including remoteness, causation and mitigation. Under Chinese law, each of these rules is more or less distinct from its English counterpart. It is necessary to repeat these principles before coming to the main point. In brief, Chinese courts place much more emphasis on causation; the idea of mitigation appears only in a somewhat rudimentary form, and

¹ *Sunley & Co Ltd v Cunard White Star Ltd.* (1940) 66 Ll. L. Rep. 134 *per* Clauson L.J. at p.138, the court upheld the claims for depreciation and interests tied up with the delayed tractor for his public work. In *The Rio Sun* [1985] 1 Lloyd's Rep. 350, the loss of use of money for 30 days' delay was measured by interests based on the c.& f value of the unprocessed cargo. This method was also adopted by others as the normal measure of damages for delayed delivery. See *The Heron II*, *per* Lord Reid at 465-466 and 386-388.

² Tettenborn, A. *The Law of Damages*, p.476. For this reason, the learned author argues that "it is often difficult to state any standard measure for delayed delivery of goods by a carrier, save that the owner can claim in respect of any financial losses resulting from the delay which are not too remote, such as deterioration in the goods."

³ Only nominal damages were upheld in *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] 3 W.L.R. 181, CA.

remoteness features hardly at all. It is not surprising that a similar market rule cannot be established in China.

Starting with causation and remoteness: causation was once used as the only means to limit damages; at present Chinese tort law has not officially adopted the remoteness rule universally, and it is applicable only to parts of contract law.¹ As a result, causation is still pressed into service as the dominant means to limit damages. This is not only so when the claimant sues the other party in tort in the carriage of goods by sea, but also when the suit is based on contract.² This outcome can be unfortunate, with Chinese courts still deciding questions of remoteness or mitigation by reference to a rather unwieldy causation analysis. In *Guangzhou Guangzhou Nan Hua Xi Co Ltd v Guangdong Hong Kong Macau Shipping Co Ltd*,³ cargoes were lost due to carrier's breach. The claimant compensated to the third party according to their contract of sale. This loss would be too remote to recover in an English court as these factors are not within the contemplation of a carrier, whereas Chinese court analysed the case on grounds of causation.⁴ Take for example the English case of *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*,⁵ where the plaintiffs were unable to complete their contract with a third party due to the shipowners' failure to deliver. It was held on causation (as it would be if under Chinese law) in the first instance that the dates of delivery did not exactly coincide with those in their contract with the third party and therefore the buying-in was not *caused* by shipowners' default.⁶ This reasoning resembling the Chinese one was however reversed by the House of Lords: causation

¹ See generally chapter 4 remoteness and chapter 5 mitigation.

² This is odd because the Chinese Contract Law has accepted a remoteness rule similar to the English one.

³ Guangzhou Higher people's Court, English case report available at: <http://www.ccmf.org.cn/english/case/show.php?sid=3491>

⁴ *E.g.* in *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59, the court rejected such a claim because liquidated damages in his subcontract was "not necessarily caused by the breach of the carrier"; as to the loss of market price, it was held "in view of the loss of market price...the falling market is not necessarily caused by the delay in releasing cargo... and has nothing to do with the carrier".

⁵ [1905] A.C. 515.

⁶ (1904) 6 F. 486 (the First Division of the Court of Session), Lord Kinnear's opinion resembled the Chinese one. He said "the one loss had nothing to do with the other [breach]."

could be established even if two dates did not coincide with each other. It was inappropriate to analyse the case by causation. Instead, the concerned question should be plainly regarded as a question of remoteness which provides a more convincing ground.¹ This should shed some light on Chinese judges.

Not to forget, the causation enquiry has more discretionary factor in nature compared with remoteness and mitigation, and as a consequence the conclusion of it can be highly uncertain depending on whether the judge sees the glass as half full or half empty. Chinese courts usually deny a causal nexus between the loss of market and the breach of shipowners. This makes a general market rule like the English one (which takes into account the loss of market) unacceptable in China and the market value of the destination is thus irrelevant in assessing damages. Furthermore, the development of the mitigation rule has been stunted, at least when compared with English law. The aggrieved party is not required by law to *minimise* loss but only to prevent it from *increasing*.² Insofar as the inaction would not worsen the damage, he is safe by remaining idle even though the loss could easily be lessened by taking some active measures. The rule is therefore also called “no-increase-in loss” rule in China.³ It contradicts with the requirement to buy in the substitute and the English market value rule. *E.g.*, if a carrier fails to deliver and the market is rising, it is incumbent on the innocent party to buy in a substitute to avoid augmenting the loss according to the Chinese mitigation rule; but if the market is falling, by the same theory he need not do so. As market price is fluctuating

¹ See Chapter 4.

² Art.114 of the General Principles of Chinese Civil Law (GPCCL) provides “if one party incurs losses owing to the other party's breach of contract, it shall take prompt measures to prevent the losses from increasing; if it does not do so promptly, it shall not have the right to claim compensation for the additional losses”; art. 119 of Chinese Contract Law (CCL) provides “the innocent party's duty to mitigate in case of breach: Where a party breaches the contract, the other party shall take appropriate measures to prevent further loss; where the other party sustains further loss due to its failure to take appropriate measures, it may not claim damages for such further loss. Any reasonable expense incurred by the other party in preventing further loss shall be borne by the defaulting party.”

³ Wang Liming, *A Study on Contract Law* (2003), p.660; Fang Shaoshen, *Damages for Breach of Contract* (1999), p.200; Ma Qiang, *New Problems and Case Study of the Law of Obligation*, p.270.

most of the time, the claimant will be struggling between mitigating or not mitigating everyday. As a result, Chinese law does not appear to recognise a general and consistent obligation to mitigate in the case of destruction of property by entering into the market for replacements.¹ This again obstructs the recognition of the English market value rule.

6.2.2 Lost and/or damaged goods: the treatment of the “market value rule”, or its equivalent in Chinese law

Chinese law position can break down into three rules as follows:

1. A primary “market value rule” like the English one does not exist in the basic civil law.

As there is no such a provision in the basic civil law (GPCCL), there is no official basis for the market value rule similar to the English one. Decisions have not imported one either. The CCL was enacted in 1999 and praised for its update of modern legal rules, but none of 129 articles in Chapter One *General Provisions* and 40 articles in Chapter Nine *Contract of Sale* concern with such a rule.

2. A similar market value rule is provided by the CCL, but (importantly) with a curiously limited application.

Chinese law is notoriously lacking in systematic statements of principle. A very similar rule to the English one does appear in one place, however: namely, Chapter 17 of the CCL (referring to the contract of carriage). As will be remembered, it provides that the compensation for loss or damage to cargo shall be calculated on the prevailing market price at the destination when it has – or should have been – delivered.² Therefore measurement of damages is

¹ See generally chapter 5 Mitigation.

² Art. 312 (Amount of Damages in Cases of Loss of Cargo) “Where the parties agreed on the amount of damages in case of damage to or loss of the cargo, the damages payable is the prescribed amount; if the amount of damages was not prescribed or clearly prescribed, and cannot be determined in accordance with Article 61 hereof, it shall be calculated by the prevailing market price at the destination when the cargo was or should have been delivered. Where a law or administrative regulation provides otherwise in respect of the method for calculation of damages and any limitation on damages, such

usually accessed by the sound cargo value at the port of delivery in respect of total loss.¹ For cargo damage, it is either the difference between the value of sound and damaged cargo at the port of delivery,² or the sound value at the port of delivery multiplying its depreciation percentage.³ It resembles English law,⁴ except that Chinese courts only accept a concrete measurement (which will be dealt with later). The rule itself is fair and sound; the only criticism is that it is not applied as a general rule, for example to contracts of sale and indeed to damages generally.

3. The CMC rejects the English market value rule and measures damages on the basis of value of the goods *at the time of shipment*--- a unique measure.

To make matters yet more complex, it must also be borne in mind that the application of CCL (Ch 17) is quite limited; it is restricted to contracts of carriage to which the CMC is *not* applicable. In practice this means that Chapter 17 is only relevant to coastal or internal carriage between two Chinese ports, since international carriage⁵ is always governed by the CMC.⁶ The CMC rejects the “market value at the port of discharge” and instead provides for indemnification on the basis of actual value of concerned cargo. “Actual value” is crucially defined as “the value of the goods *at the time of shipment*

provisions shall apply.”

¹ *Guangxi Hepu Gongguan Export Fireworks Factory v Guangdong Dyna International Freight Agency Co Ltd and others*, 20 May 2003, (2003) HSCZ 019; *Yili Fire & Security (Hong Kong) Co Ltd v Dalian Yinfa Finance Plaza Co Ltd*, Liaoning Higher People’s Court, 7th Dec 1996.

² *China Pacific Property Insurance Co Ltd (Hainan) v Guangzhou Gangxin Shipping Co Ltd*, Guangzhou Maritime Court, 9th Oct 2004, (2003) GHFZZ 92; *Guangzhou Wuhang Shipping Co v Guiping Baisha Waterway Carriage Co*, Guangzhou Maritime Court, 20 Dec 2000, (2000) GHFSZ 115.

³ *Foshan Shunde Dafeng Enterprise Development Co v Tangshan Ruide Shipping Co Ltd and Others*, Guangzhou Maritime Court, 14 Oct 2003, (2003) GHFCZ 285; *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd*, Guangzhou Maritime Court, 15th Dec 2004, (2004) GHFCZ 540/541/542/543/544/545; *Lianyungang Native Products & Animal By-Products Imp. & Exp. Corp v Liangyungang Harbour Bureau the 3rd Service Co*, *supra*.

⁴ *Cf. William D. Branson Ltd v Furness (Canada) Ltd (In Liquidation)* [1955] 2 Lloyd’s Rep 179 (P.C.).

⁵ Including the carriage between the Mainland and Hong Kong, Macao or Taiwan.

⁶ According to art.2 of the CMC, its Ch. 4 “contract of carriage of goods by sea” only applies to the international carriage by sea, *i.e.* the carriage between a Chinese port and a foreign port; the carriage between Chinese ports is regulated by Rules, Detailed Rules and the CCL. Two rules regulate the responsibilities of shipowner and shipper; CCL regulates the contractual rights and obligations between the two.

plus insurance and freight” (emphasis added)¹. There could be a significant difference between the value of the goods at the time of shipment plus insurance and freight (the Chinese position) and the value of goods at the destination (the English position). Obviously, the value of cargo at destination is presumably higher than that of the shipment; otherwise businessmen will not bother to carry them all over the world. Compared with the value at the time of shipment, value at the destination should contain in addition a combination of cost, insurance, freight, customs duties, administrative expenses and a fair margin of profit. Therefore Chinese law deprives a considerable amount he deserves and under-compensate him. This is not fair. (This problem will be analysed in detail in the following section)

6.2.3 Concrete assessment on the basis of the value of goods

Chinese theorists accept a similar categorisation to that referred to above; they call them the “subjective” and “objective” method respectively.² Suppose the shipper paid \$10 to his supplier. The market price was only \$9 at the port of shipment. He sold the exact cargo to a third party at \$13. At the time of the performance, the market price in the place of delivery was \$15. After the cargo was lost, he reasonably bought in a substitute at \$15.5 from a local seller.

1. Concrete measurement: CCL.

¹ Art.55 reads “loss of the goods shall be calculated on the basis of the actual value of the goods so lost, while that for the damage to the goods shall be calculated on the basis of the difference between the values of the goods before and after the damage, or on the basis of the expenses for the repair. The actual value shall be the value of the goods at the time of shipment plus insurance and freight.” Application of art.55 see *Heshan Supply and Marketing Group Means of Production Co v Zengcheng Licheng Shipping the First Co and Zengcheng Shipping (Group) Co*, Guangzhou Maritime Court, 19th Jul 2002, (2002) GHFCZ 220; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266; *PICC Property and Casualty Co Ltd (Fangcheng Branch) v Zhanjiang Carriage Group the 3rd Co Ltd*, Guangxi Higher People’s Court, 19 May 2004, (2004) GMSZZ 6; *PICC Zhejiang Branch v NSCSA National Shipping Corp and CMA CGM SA*, Shanghai Maritime Court, 24 Dec 2001, (2001) HHFSCZ 286; *Hainan Taiye Trading Co Ltd and Hainan Jingang Industrial Co Ltd v Far Eastern Shipping Company and Yuli Shipping Co Ltd*, Guangzhou Maritime Court, 3 Apr 2001, (2000) GHFSZ 145.

² See Wang Liming, *Liability for Breach of Contract*, p. 516-521; Han Shiyuan, *A Study on Damages for Breach of Contract*, p.442-450.

The basic measurement for cargo loss under English law will be \$15, which is an abstract or objective measurement, disregarding any factors particular to the claimant. The CCL provides that damages shall be calculated on the prevailing value at the destination when the cargo is, or should have been, delivered.¹ But how is the value surmised? There seems wide confusion amongst academics. One view supports the subjective method (\$15).² Another, however, says that the subjective and objective valuations are both acceptable in principle and are up to the plaintiff, *i.e.* the plaintiff recovers the higher of the two (\$15.5).³ The third view advocates the subjective method (\$15) as a *prima facie* rule but does not exclude the objective one (\$15.5) if necessary.⁴

As a matter of judicial practice, however, none of these has been accepted by Chinese courts. They generally equate the value to the concrete price at which the claimant actually sells the same goods to the third party,⁵ in contrast with English law,⁶ *i.e.* \$13 in the above hypothesis, with possibly only one exception in theory: when there has been no sale and the claimant is simply moving his own cargo from one place to the other. Here the court may have to refer to its abstract market price. In *Guangxi Hepu Gongguan Export Fireworks Factory v Guangdong Dyna International Freight Agency Co Ltd and Others*,⁷ where the CCL was applied, the price in his contract of sale was accepted by court as the “market price at the destination”. The burden of proof to provide such a value is on the claimant.⁸ Such a

¹ Art. 312 of CCL, *supra*.

² Cui Jianyuan, *A Study of Liability of Contract* (1992), p.224.

³ “When actual resale price is different from the market price... it is the aggravated party who shall decide which method to assess damages.” See Wang Liming, *Liability for Breach of Contract*, p.521; Zeng Shixiong, *Principles of Law of Damages* (2001), p.123-4.

⁴ Han Shiyuan, *A Study on Damages for Breach of Contract*, p.444-5. He believes it is relatively easier to prove the subject measure compared with the objective one. He continues that when the objective method becomes easily ascertainable, both the court and the claimant are entitled to choosing one.

⁵ The Chinese view also corresponds to Vafidis, M.P. *Remedies for Breach of The Contract of Carriage*, (1991) 3 U.S.F. Mar. L.J. 77, 80, where he says that the best evidence of market value of the sound cargo at the point of destination is the price charged by the seller in the underlying transaction.

⁶ *The Texaco Melbourne* [1994] 1 Lloyd’s Rep.473 (H.L.) “If there is evidence of a market price, the price at which goods have been pre-sold is irrelevant.”

⁷ 20 May 2003, (2003) HSCZ 019.

⁸ His claims will be rejected without such evidence even though the shortage of cargo has been confirmed by court. See *China Minmetals Steel Com Ltd v Victory Castle Shipping Ltd*, Guangzhou Maritime Court, 15 Dec 2003, (2003) GHFCZ 108.

price was accepted again in *Shenzhen Bao'an Dalong Trading Co v Guangzhou Kaida Shipping Co and Others*,¹ but the court particularly emphasised in its obiter that it should “not be over the price published by Bureau of Commodity Prices in the same area for the same period.” In the above example, \$13 is lower than \$15 so \$13 is an acceptable award. But if the market falls to \$12, then \$12 would apply instead according to this obiter. Whether this obiter will be followed by other Chinese courts is uncertain, because in the author’s opinion, it is a question of reasonableness and the court should examine the individual circumstances of each case. The obiter is an over-simplification as it compares the figure arbitrarily without further enquiring into particular facts of each case, which is not preferable. The fatal problem which might stop it from being followed by other courts is the lack of legal support. There are no such requirements by any law or regulation. Therefore the validity of this obiter remains doubtful in the author’s view.

2. Concrete measurement: the CMC.

When the CMC is applied, the value of lost goods is measured by the value at the time of shipment plus insurance and freight² (somewhat inconsistent to the CCL where it requires the value at the destination). Similarly, the court only accepts the concrete price at which he *buys* the cargo from the third party (supplier)³ or any costs he actually incurs for the cargo;⁴ that is \$10 in the above example (in comparison to \$13 if CCL applies). So the market price prevalent at the time of shipment (\$9) or at the destination (\$15) will be

¹ Guangzhou Maritime Court as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases (1998)*, case 10.

² Art.55 of CMC.

³ *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266; *Heshan Supply and Marketing Group Means of Production Co v Zengcheng Licheng Shipping First Co and Zengcheng Shipping (Group) Co*, Guangzhou Maritime Court, 19th Jul 2002, (2002) GHFCZ 220; *PICC Property and Casualty Co Ltd Zhanjiang Branch v Cross Seas Shipping Corp, Croatia Line and Lucky Seaway Services Pte Ltd*, Guangzhou Maritime Court, 29 Dec 2000, (1999) GHFZZ 47; *Zim Israel Navigation Co Ltd v Sun Hing Shipping Co Ltd*, Guangdong Higher People’s Court.

⁴ *PICC Property and Casualty Co Ltd (Fangcheng Branch) v Zhanjiang Carriage Group the 3rd Co Ltd*, Guangxi Higher People’s Court, 19 May 2004, (2004) GMSZZ 6; *DSM Citric Acd (Wuxi) Co Ltd v Sparkle International Enterprises Ltd, Rwei Cheng Shipping SA and Jui Pang Shipping SA*, Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183.

disregarded. But there might be one exception: if the shipper is shipping cargo he has already owned, that is, he does not buy it from the third party, then abstract method presumably applies. For damaged cargo, the value of sound cargo is identified in the same way,¹ which is usually the price used when dealing with a third party, as it is under English law. It has effectively become a routine for an importer to submit the original sale contract with suppliers and the invoice² and an exporter³ to submit his contract of sale/invoice with his buyer in order to prove such a value.⁴ The value declared in the customs declaration for customs entry will also be accepted by the court as it usually provides the accurate evidence of such value before its import or export.⁵

3. Reasons for applying a concrete measurement, and its evaluation.

The preference for concrete measurement is probably due to the fact that concrete loss is relatively easier to prove with solid evidence, such as the sale contract.⁶ The abstract market price, on the other hand, is too uncertain for Chinese courts' liking.⁷ It is time-consuming with the need for expert evidence. Another advantage of the Chinese position, which may well lie behind its wide acceptance, is that under it a Chinese claimant – unlike an English one – will recover only his actual loss, and hence over-compensation is avoided. In *China Pacific Property Insurance Co Ltd (Hainan) v Guangzhou*

¹ *China Forage Import & Export Co. v Chinese-Tanzanian Joint Shipping Co*, Guangzhou Maritime Court, 15th Oct 2000.

² Sometimes even including the copy of Letter of Credit. See *PICC Property and Casualty Co Ltd Zhanjiang Branch v Cross Seas Shipping Corp, Croatia Line and Lucky Seaway Services Pte Ltd*, Guangzhou Maritime Court, 29 Dec 2000, (1999) GHFZZ 47; *PICC Guangdong v Cyprus Maritime Co Ltd and Santa Cruz Shipping Company Limited, supra*.

³ *Sinosafe Insurance Co Ltd v Brother Shipping Company Limited*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98.

⁴ *PICC Guangdong v Cyprus Maritime Co Ltd and Santa Cruz Shipping Company Limited*, Guangzhou Maritime Court, 29th Dec 2000, (2000) GHFSZ 79; *PICC Guangdong v Shenzhen Jinxiu International Freight Co Ltd*, Guangzhou Maritime Court, 20 Oct 2003, (2003) GHFCZ 390.

⁵ *Zhejiang Tianlong Textiles Co Ltd v Sun Ocean Express Co Ltd*, Shanghai Maritime Court, 25 Mar. 2004, (2003) HHFSCZ 220.

⁶ Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.432-433.

⁷ It can be argued that the abstract market price is referring to some index and therefore is as easy to establish as the other. However, mainland China is geographically wide and sometimes there can be more than one index available (say a port between Shanghai and Hong Kong can refer to both). This thought might put off Chinese lawmakers.

Gangxin Shipping Co Ltd,¹ after the cargo was salvaged, the cargo owner did not put it to auction but waited for an entire month before selling it at a price 25% higher than its estimated value.² The adventitious advantage from this delayed selling was taken into account by the Chinese court, whereas English courts would more likely disregard this fact.³ Therefore a Chinese court would decide a case such as *Rodocanachi v Milburn* differently.

The downside of the Chinese rule is that loss resulting from the fluctuation of the market is not relevant in claims for damages in respect of cargo loss or damage, whatever the applicable law, as the court usually assigns cargo value a concrete price. Such a claim has been rejected on the grounds of unforeseeability (which is odd compared with English law where such a damage is held foreseeable and recoverable),⁴ “it is not reasonable to foresee the falling of the price as a result from his failure to carry”;⁵ and more commonly on causation, “the falling market is not necessarily caused by the delay of delivery... and has nothing to do with the carrier”.⁶ In contrast English law takes market movements into account by adopting the abstract method. This is more favourable as it is clearly foreseeable and caused by the shipowner’s breach by common sense.

In summation, a practice of concrete assessment will prevail under Chinese law unless it yields recovery based on a value unreasonably higher than the subjective market price of cargo. The author has to admit that it is something of a misnomer to call this

¹ Guangzhou Maritime Court, 9th Oct 2004, (2003) GHFZZ 92.

² *Cf. Yili Fire & Security (Hong Kong) Co Ltd v Dalian Yinfa Finance Plaza Co Ltd*, Liaoning Higher People’s Court, 7th Dec 1996 (sale of goods), the claimant had to sell the concerned goods at a price that was reasonable, but still lower than the market price. This was accepted by the court as the benchmark against which his loss was measured.

³ Under English law the fact that plaintiffs use the damaged goods or resell them at a higher or lower price would generally not provide any evidence of the value of damaged goods unless the measure represents objectively-assessed valuation of the goods. See *Rodocanachi v Milburn* (1887) L.R. 18 Q.B.D. 67 *per* Lord Esher at p.77. The claimant sold the cargo at a price less than the market price prevailing at the port of delivery; *Acatos v Burns* (1877-78) L.R. 3 Ex. D. 282, the cargo was sold at a price lower than the market value; *The Arpad*, the price was higher than the market price.

⁴ *Ströms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515.

⁵ *Guangdong Cereals Oils & Foodstuffs Corp. v Nanjing Lianyungang Ganghang Co*, Guangzhou Maritime Court, 11 Sep 2000, (2000) GHFSZ 91.

⁶ *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59.

Chinese rule “market value rule” as it clearly rejects a true market value prevalent in the relevant place. It is more a “contract price rule”. However, for the convenience of comparison, the change of name is deemed unnecessary.

6.2.4 Problems in measure of damages for cargo damage

In respect of cargo damage (as contrasted with total loss), the official measure of recovery is an award on “the basis of the difference between the values of the goods before and after the damage, or on the basis of the expenses for the repair.”¹ The criterion used to choose between the two, although there is a lack of case studies, seems to be reasonableness.² Compared with the “value” criterion in the case of destruction, this wording is ambiguous because it fails to clarify the time and place of the value. Chinese courts have two choices to measure damages with respect to cargo damage.

Most Chinese courts do what is done in the case of destruction: they value the cargo at the port of shipment (normally by reference to the price paid to the supplier), take the price of disposal as post-damage value, deduct the latter from the former, and then the difference becomes the damages.³ As a variant,⁴ damages can also be measured by the cargo value at the port of shipment multiplying by its depreciation percentage proved by survey report.⁵ This method rules out a margin of profit, so it does not represent the true loss incurred by the claimant. Claimants’ attempts to base their claims on

¹ Art.55 of the CMC.

² *I.e.*, depending on which measure is more reasonable to adopt.

³ *Adlian SA Corp Ltd v P&O Nedlloyd BV and P&O Nedlloyd BV China Shipping Company Ltd*, Shandong Higher People’s Court, 27 Nov 2001, 2001 LJZZ 39; *Teda Enterprises Canada-Inc v Norasia Container Lines Shipping Agency Ltd and Compania Sud Americana De Vapores SA*, Tianjin Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cId=5584>

⁴ There might be another variant of these two measurements, *i.e.*, when the claimant is an insurer on subrogation, damages will generally be based on his compensation to the cargo owner, unless the carrier proves otherwise or the court finds it unreasonable. *PICC Guangdong v Shenzhen Jinxiu International Freight Co Ltd*, Guangzhou Maritime Court, 20 Oct 2003, (2003) GHFCZ 390; *Jinshi Trading Co Lianyungang Shipping Co Ltd*, Tianjin Maritime Court, 18th Apr 2005, (2005) JHFSCZ 37; *Ping An Insurance Co v Hong Kong You Hang Shipping Co*, *Selected Shipping Cases* (Liu Jiazhen ed. 1998), p.41.

⁵ *Deqing County Xinshi Oil Factory v. Dynamic Care S.A. Panama*, Shanghai Maritime Court, 12th Jun 2001, 2000 HHFSC 407.

value at the port of delivery have been squashed by some courts either for “lack of relevant legal support”;¹ or by reasons of art.55: “The defendant argued that the test should be the difference of cargo value before and after the damage at the port of delivery. This measure is influenced by the fluctuation of market price, which is different to art.55 of the CMC and should not stand.”²

In stark contrast, the very same submission is accepted in a small number of cases.³ This is the second option for Chinese judges, by which damages are assessed by the difference of cargo value between its sound value and damaged value at the port of delivery, or its sound value at the port of delivery discounted by its depreciation percentage. It takes into account the margin of profit he would have achieved through the transportation, represents the true measure and resembles English law. There can be many differences between the two approaches. In *China Forage Import & Export Co. v Chinese-Tanzanian Joint Shipping Co*,⁴ his loss calculated in this way is 4,570,683.98 RMB, but only 2,679,847.15 RMB calculated by the first method.⁵ There is 1,890,836.83 RMB (£126,056)’s difference.⁶

In achieving the brevity, the CMC occasionally treats certain matters in a way that is too concise and renders the provisions ambiguous. Vague or conflicting provisions in Chinese law may lead to arbitrary application of these rules in particular cases. These two methods have been chosen randomly by Chinese courts. Coupled

¹ *Zhejiang Grand I & E Co Ltd v Malaysia International Shipping Corporation Berhad*, Ningbo Maritime Court, (2002) YHSCZ 23.

² *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Higher Peoples’ Court, 25 Dec 2001, (2001) GJZZ 257; cf. *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, *supra*.

³ *Zhanjiang Sugar Development Co and Shanghai Suger Tobacco & Wine Corp. v. Yingkou Shipping Corp. and Others*, Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 11; *Shenzhen Bao’an Dalong Trading Co v Guangzhou Kaida Shipping Co and others*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 10.

⁴ Guangzhou Maritime Court, 15th Oct 2000.

⁵ 1,145.459 tonnes cargo was damaged, the value at port of loading + insurance + freight were 2,339.54 RMB *per tonne*. That was 2,679,847.15 RMB according to the CMC. Its market price at the port of destination was 3,990.26 RMB, so that was 4,570,683.98 RMB if sued in English court.

⁶ Take the exchange rate on 5 Mar 2007, 1:15.

with incompetency of judges and corruption in legal system, it is easy to envisage the case of this type could be abused by unscrupulous lawyers and judges. If it happens, people's faith in law and the legal system would be severely damaged.

On the other hand, even if judges do not abuse their excessive discretionary powers. Different Chinese courts will make different decisions on the same facts because of ambiguity in law and an absence of conformity throughout the Chinese court system. Without the element of stability and predictability that judicial decisions should provide, Chinese judgments can seem arbitrary and capricious. The litigants cannot predict the likely outcome of litigation and adjust their behaviour accordingly. It will only increase the cost of doing business and inhibit economic activities. This inconsistency also encourages external influence on judicial decisions. A bad circle indeed. In the above case, the court gave only 2,679,847.15 RMB according to art.55 without further explanation. If the case was heard in an English court, the award would be at least 4,570,683.98 RMB. There is no justification for this discrepancy and it should be subject to revision.

6.2.5 Cargo delay

To begin with, it has to be pointed out that the Chinese definition of delay provided by the CMC is a faulty one. Delay is defined by the Hamburg Rules, CCL and other regulations as failure to deliver at the port of discharge within the time agreed in the contract of carriage, or absent such agreement, within a reasonable period.¹ However, the CMC art.50 provides a definition without the second requirement. It reads "delay in delivery occurs when the goods have

¹ Art. 5(2) of the Hamburg Rules: "Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case"; art.290 of CCL: "A carrier shall carry the passenger or goods safely to the agreed destination within the agreed time period or within a reasonable time period." And art.34 of the Rules of the PRC on the Carriage of Goods by Water "A carrier shall carry the goods safely to the agreed destination within the agreed time period or without such a agreed time, within a reasonable time period..."

not been delivered at the designated port of discharge within the time expressly agreed upon.” This has been interpreted by Chinese courts that if the carriage contract fails to expressly stipulate the delivery date, the carrier will not be liable for the damage of delay no matter how long the journey has been postponed.¹ This is an obvious omission and needs to be rectified.

The measure of damages for pure economic loss arising from a delayed delivery before the CMC came into effect was the rate of interest upon the value of the goods over the period of delay.² At present, however, Chinese law resembles the English position and is more generous towards the margin of profits or loss of market which will be disallowed in cargo loss or damage. Art.50 reads, “the carrier shall be liable for the *economic losses*³ caused by delay in delivery of the goods due to the fault of the carrier, even if no loss of or damage to the goods had actually occurred... (emphasis added)” Economic loss, it would seem, must include loss of market or other financial losses resulting from the delay.⁴ In *Chinese Woods East China Co v Milena Ship Management Co Ltd and Charter Harvest Shipping Ltd*,⁵ the market value of a delayed cargo of timber fell significantly during the delay. The court assessed the cargo value at the destination, so loss of market was upheld.⁶ This, as discussed before, would not be

¹ In *Guangzhou Cereals, Oils & Foodstuffs Import & Export Corp. v Shenzhen Haige Longwei International Freight Co Ltd and Shidai Shipping*, Guangzhou Maritime Court, 10 Dec 2001, 2001 GHFCZ 224, the judges said “the carrier will bear the responsibility for delay only on conditions that the contract has specified a date of arrival ...”

² In *Guangxi Beihai City I/E Trading CO v Sukissed Marine Co.,Ltd and Michael Kritikakis Group Salvage Towage*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 47, the cargo was delayed for 4 months. The court awarded 4 months’ interests attached to the cargo value as the profits.

³ Here the “economic loss” equals to the term “consequential loss” of English law.

⁴ Jiang Yifeng, *Recoverability of Economic Losses in Damages in Dispute over Carriage of Goods by Sea*, (2001) 12 Annual of China Maritime Law 33.

⁵ Shanghai Higher People’s Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=653>; *Zhejiang Ouhai Trading Co Ltd v Mitsui O.S.K. Lines (China) Ltd*, Ningbo Maritime Court, 25th Dec 1998.

⁶ In *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 17, the maritime court gave a judgment in favour of the defendant and awarded the loss of market, damage to the cargo, extra freight and so on as damages for 80 days’ delay; cf. *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*, Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46, where the CMC had not come into effect and the court rejected the fluctuation of market, oddly on the grounds of remoteness. “The drop of market price is not within the contemplation of the carrier when he made the contract. The claimants failed to notify the carrier about the possible drop in price or made a special clause on it. It is unfair for the carrier to bear the

recovered in cases concerning non-delivery or cargo damage.

CMC has made a u-turn on consequential losses, typically the loss of market arising from delay of delivery, which will not be recovered in damage to or loss of cargo. It artificially categories carriage accidents into three groups and provides contradictory rules respectively. In practice, delay in delivery is generally accompanied by physical loss or damage. When this happens, can loss of market be awarded? In *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*,¹ the cargo was delayed for 5 months and the cargo of steel became rusted. Loss of market was upheld in the first instance but rejected by appeal court.² So the recovery of loss of market for delay depends on the existence of physical loss or damage. This is, by all accounts, absurd. It is just another loophole in CMC. CMC was intended to create a source of certainty and predictability on basis of absorbability of and drawing lessons from foreign advanced legislating techniques, yet has had the opposite effect as being inconsistent among itself. Not only do courts have difficulty applying these conflicting rules, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law. As a result of all this, the impact and authority of CMC are much reduced. Since the relevant provisions of CMC are mired in conflicting layers of policy, fail to achieve its primary purpose of certainty, clarity and consistency, it calls for a change in order to ensure the determinate and consistent operation of law.

6.2.6 Criticism of the special “market rule” provided by art.55 of the CMC

It might be difficult to reconstruct the market price at the port of

responsibility for the loss in the market price.”

¹ Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46.

² The reason for its rejection was, oddly, that it failed in the remoteness test. *Cf Guangzhou Nanhuaxi Co., Ltd v Guangdong HongKong Macau Shipping Co., Ltd*, Guangdong Higher People’s Court, English Case report available at <http://www.ccmr.org.cn/english/case/show.php?sId=3491>

discharge (as the English position), and it is true that the Chinese position gives an immediate figure for the purposes of calculation. But art.55 has become seriously outdated. It once served its purpose, but now it clutters the legal landscape and is well past its prime, if it ever had one. Its revising is long overdue for the following reasons.

1. Unfairness

The first problem with art.55 is that it produces unfair results, which is oddly inconsistent with the solicitude generally shown in Chinese law for *restitutio in integrum*. Whatever its benefits, it is not a true measure of loss suffered by the claimant. The importer of the goods is deprived of the benefit of having them at the agreed destination when they ought to arrive: what he has lost is thus a combination of cost, insurance, freight and in addition, customs duties, administrative expenses and a fair margin of profit. By rigidly limiting the “actual value” of the goods to the value at port of shipment, Chinese shipping law effectively rules out the latter three, hence undercompensates him and unjustifiably favours the carrier. This is against one of the fundamental values of law, justice and cannot be excused. The illustrations are various. In *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*,¹ the cargo damage was 7,455,790.40 RMB based on value at the port of discharge (English law position) but only 6,035,117.20 RMB (Chinese law position) based on port of loading. The plaintiff was 1,420,673.20 RMB (about £94,712)² short of full compensation due to art. 55.³ In

¹ Tianjin Higher Peoples’ Court, 25 Dec 2001, (2001) GJZZ 257.

² Take the exchange rate on 5 Mar 2007, 1:15.

³ Similarly *Fujimax Co Ltd v National Shipping Co of Saudi Arabia and Ningbo Shipping Agency Co Ltd*, Ningbo Maritime Court, 8th Aug 2001, damages were \$91,740 according to the CMC. If heard in English courts, damages would possibly be \$155,100; *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, there were 395,522.53 (RMB)’s difference between the two prices; *Kolon International Corp v Zhanjiang Harbour Bureau*, Guangzhou Maritime Court, 28 Dec 2000, (1998) GHFSZ 11, there was \$129,140 difference between two methods; cf. *Shantou Shengping Electrical Fuel Co Ltd v Guangzhou Harbour Bureau Huangpu Service Co Ltd*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998) case 14. It is worth mentioning that since the measure of damages in many countries is a matter of procedure to be governed by the *lex fori*, this bias in favour of one party provides a strong incentive for the forum shopping.

theory he can insure against such a loss.¹ But when the insurer exercises his right of subrogation, he will not be better off than the cargo owner,² unless the shipowner has no objection to his claim for full compensation (as has happened once).³ Again, by increasing the premium rate this additional liability will still be shifted back to the insured in the end.

Indeed, the problems with art. 55 are not limited to under-indemnification: on occasion it will have the opposite effect and actually over-compensate a claimant. If the price at the port of discharge is significantly lower than that ruling at the port of loading adjusted by the addition of freight, *etc.*, damages awarded under art. 55 will arbitrarily enable the claimant to evade what would otherwise have been a bad commercial decision (while the English approach, by contrast, remains neutral). In *PICC Property & Casualty Co Ltd v Cross Seas Shipping Corp & Others*,⁴ the price at the port of the loading (India) plus insurance and freight was 2182.98 RMB *per* tonne, while it was only 1650 RMB *per* tonne at its destination (Guangdong, China). The plaintiff had made an unwise deal. But the application of art.55 produced an absurd result: he who contracted with a reckless shipowner who damaged the cargo was the lucky one as he could escape his unwise deal and would be happily restored to the position before the contract (2182.98 *per* tonne as he did in this case); he who contracted with a diligent shipowner who carried the cargo safely to the destination was the unlucky one, as he would incur significant loss from the falling of market. This scenario will never happen under English law. It strongly illustrates the absurdity of this article

2. Incoherency

¹ Art. 219 of the CMC reads “the insurable value of the subject matter shall be agreed upon between the insurer and the insured.”

² It was rejected when the compensation was much higher compared with the cargo value at the port of shipment. *PICC Guangdong v Shenzhen Jinxiu International Freight Co Ltd*, Guangzhou Maritime Court, 20 Oct 2003, (2003) GHFCZ 390.

³ *Ming An Insurance Co (HK) Ltd v Eversall Shipping Ltd (St. Vincent) and Yingkou Shipping Co*, Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 33.

⁴ Guangzhou Maritime Court, 29 Dec 2000, (1999) GHFZZ 47.

The application of Chinese laws is notoriously unstable and inconsistent. The principles between different laws can sit oddly with each other. There is an obvious conflict between CCL and CMC. For the carriage between Chinese ports, an inconsistent but fairer legal principle will be adopted where the CCL applies,¹ *i.e.* the measure will be assessed by the cargo value at the destination. This resembles the English solution, but is in sheer opposition to the CMC.² There are other inconsistencies as well.

The first is that some Chinese courts curiously favour exporters and discriminate importers by reference to art.55. As shown above, the loss of importers for the purpose of damages is usually based on the value of cargo at the port of loading, which is generally lower than the price at destination and will not fully compensate his actual loss. This should be the same for exporters, but it is not. In at least two Chinese cases,³ it was the selling price to the third party (effectively the cif price), instead of the price he paid to his suppliers that was accepted as the value at the port of loading, and thus he suffered no loss at all. This approach for exporters is inconsistent to the one for importers and does not have justifiable grounds.

Secondly, even within the same law, the principles behind different articles can be contradictory to each other. Art.55 may be outdated concerning cargo loss or damage, but other articles in the same law make a dramatic reversal as far as cargo delay is concerned. As to damages for delay, Chinese law resembles the

¹ Before the CCL came into effect, art.3 of the Regulations on Measurement of Damages in Cargo Carriage Accident (repealed) adopted a rule similar to the CMC and was applied in many cases. See *Zhejiang Lishui Industrial Supply and Marketing Co. v China Railway the 19th Bureau the 2nd Section Logistics Corp and Dalian Harbour Wan Tong Shipping Holdings Co Ltd*, Guangdong Higher People's Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 12. The article reads, "the compensation is based on the [cargo] price at the place of the beginning of the carriage on the same day; compensation for the cargo damage shall be assessed by the depreciated value."

² However in one case where the CCL applied, damages were based on the cargo value at the port of loading without further explanation, which should be regarded as an error in the application of law. *Shanghai United Salt Transportation Agency Co Ltd v Jiangsu Shipping Co (Shanghai)*, Wuhan Maritime Court, 30th Jul 2001, (2001) WHFSZ 43.

³ *Sinosafe Insurance Co Ltd v Brother Shipping Company Limited*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98; *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd and its Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997.

English position and is far more generous towards the margin of profits which is disallowed in loss of cargo.¹ It is unsatisfactory that the recoverability of a certain type of loss can be consequent upon the type of accident. Not only do courts have difficulty applying these conflicting rules, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law. The consistent and predictable application of law is particularly crucial in generating the trust and confidence in law. The consistency of legal rules and the predictability of their application can generate the security of expectations that is essential in business. Uncertainty will lead to difficulties in calculating a claimant's prospects of a successful recovery in the Chinese courts. The absence of a uniform legal system, the fragmented law of damages and the consequential unpredictable nature of the decisions of maritime courts will lead to criticism from litigants. Therefore Chinese courts should transform its law of damages into a predictable and coherent system with the consolidation of existing consistent practices and elimination of contradictory provisions.

3. Inconsistency in interpreting art.55

Apart from the problems outlined above, Chinese courts have, it is suggested, interpreted art. 55 perversely in other respects. In particular, it has been applied not as a *prima facie* measure of loss, but instead as a rigid limit on damages. In *Beijing Fu Yang Hang v Sea Trade International Inc*,² the judge said "claims for damages in respect of cargo loss and damage will be limited by the actual value of the cargo. The carrier will not be responsible for any other losses incurred by the claimant. The purpose is to give credit to the risky nature of the marine transport and to protect carriers." Similarly, in *Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel*

¹ *Chinese Woods East China Co v Milena Ship Management Co Ltd and Charter Harvest Shipping Ltd*, Shanghai Higher People's Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=653>; *Zhejiang Ouhai Trading Co Ltd v Mitsui O.S.K. Lines (China) Ltd*, Ningbo Maritime Court, 25th Dec 1998.

² Xiamen Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=4559>

*Navigation Co Ltd*¹ the court held that “the CMC does not allow *the economic loss* in event of cargo loss and damage...the submitted claims are not recognised by CMC and thus irrecoverable.” (emphasis added)²

This, it is respectfully suggested, is a serious misinterpretation of art. 55.³ Its initial objective was to provide a basis for calculating the value of cargo and to provide an immediate figure. It was not designed to decide recoverability for consequential losses, which have to be judged by the basic principles of damages law. It is illogical and unwise to view art.55 as another limit along with the package and global limitation. However, art.55 becomes an expedience when courts turn down other types of consequential loss which are, in principle, recoverable, *e.g.*, the loss of profits under the contract of sale was rejected on this ground.⁴ Chinese lawmakers should be on the alert for the misapplication of this article and strive to correct it.

4. The measurement of loss is too subjective.

Further, art.55 is too subjective (as is a good deal of the rest of the Chinese law of damages). It does not accept an abstract market price unrelated to a particular contract (the same criticism goes equally to the CCL). Instead, the price under a contract with a third party is usually accepted by the court as the sound cargo value,⁵ unless it is unreasonably higher than the market price evaluated by

¹ Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

² *Cf. Shinkou Shipping Co Ltd v Uniglory Marine Corporation & Uniglory Hong Kong Co Ltd*, Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464; *Sinosafe Insurance Co Ltd v Brother Shipping Company Limited*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98.

³ For example there are many other cases holding clearly the opposite view. *E.g. Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59; *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59, both courts clearly did not interpret art.55 as a limit. Instead they still determine the recoverability of different heads of damages on basic legal principles.

⁴ *Fujimax Co Ltd v National Shipping Co of Saudi Arabia and Ningbo Shipping Agency Co Ltd*, Ningbo Maritime Court, 8th Aug 2001, “art.55 excludes the profit under his sub-contract.”; *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Higher Peoples’ Court, 25 Dec 2001, (2001) GJZZ 257, “the claim for the fluctuation of market price is contradictory to art.55 of the CMC and should not stand.”

⁵ *Xishuangbanna Jinshui Logistics Co Ltd v Yang Guangming, Niezhong and Others*, Beihai Maritime Court, 12 May 2005, (2005) HSCZ 001.

the local Bureau of Commodity Prices.¹ For non-delivery of cargo, cargo value is determined by the price at which the cargo was purchased from the third party (supplier) or any costs actually incurred for the cargo; with regards to damaged cargo, damages will generally be the difference between the buying price and the selling price. As explained above, the loss of the market is thus not relevant in claims for damages in respect of cargo loss or damage, and thus not satisfactory.

All in all, in pursuit of damages law's traditional goal of restitution, bizarre and arguably unjust applications of art.55 continue to surface. There is now emerging a conflict between the long-standing notion of restitution (CCL remedies and CMC in respect of cargo delay) and a fettered remedy provided by the CMC in respect of cargo loss and damage. This inconsistency creates a considerable confusion of both policy and law. It has in turn bred uncertainty and inhibited uniformity, which promotes expensive and inefficient litigation. Further because Chinese judges have greater latitude to arbitrarily adjudicate cases. This excessive power also encourages external influence on judicial decisions and exposes Chinese judges to the risk of corruption, something lawmakers worry about most. This arrangement can be seen as something of an anachronism. Given these criticisms, it is certainly the time to revisit CMC and the author would like to urge its ratification. Any change of the article should refer the value of cargo as the price at the place of destination. The wrong interpretation of the said article as a limitation to damages should be overruled by the appeal court.

¹ The court pointed it out that such a price should not exceed the market price. See *Shantou Shengping Electrical Fuel Co Ltd v Guangzhou Harbour Bureau Huangpu Service Co Ltd*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 14; *PICC Property and Casualty Co Ltd v Hainan Lingao Qiongjing Shipping Co Ltd*, Guangzhou Maritime Court, 24 June 2004, (2003) GHFCZ 356.

6.3 Consequential loss

The terms economic loss¹ and consequential loss² are not very illuminating, as all damage is in a sense economic or consequential. There is not a universally accepted meaning attached to each term. In Chinese law it is the same, and no serious attempt has been made to distinguish the two.³ Purely for the purposes of the present thesis, the term economic loss will be used here to refer to any financial damage a claimant might raise in court, whether legally recoverable or not. As opposed to this, consequential loss refers to the loss flowing from the original damage: *e.g.* the loss of specific profits the claimant would have made.⁴

Under English law, there appears to be no policy excluding, or restricting, the recovery of consequential loss; everything depends

¹ As to economic loss, Prof. Tetley defines it as non-physical loss and leaves it to tort and delict. In *Black's Law Dictionary*, economic loss is defined as a monetary loss which is usually recoverable in a lawsuit on any basis; under Chinese law, its meaning is equivalent to "consequential loss" of English law.

² As to the meaning of consequential loss, there are at least three views. According to Prof. Tettenborn, consequential loss is the one "naturally resulting from the defendant's breach." see Tettenborn, *The Law of Damages* (2003), p.394; which is supported in *Jowitt's Dictionary of English Law* Vol. 1 (2nd edn 1977), at p.453, "it is which is the direct result of a breach of a duty of care or, in the case of a breach of contract, such damage actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach". The second view is provided by Prof. Tetley. He defines "consequential loss" as non-physical damage, such as loss of future business and loss of reputation, but arising from a breach of contract only. The third view is provided in *Black's Law Dictionary* (7th edn 1999), p.418. It denotes losses that do not flow directly and immediately from an injurious act but that result indirectly from the act; the courts are of the view that "consequential loss" precludes any loss which directly and naturally results in the ordinary course of events, see *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep. 55, at p.62; *Millar's Machinery Co v David Way & Son* (1934) 40 Com. Cas. 204 *per* Roche L.J. at p.210; *Saint Line Ltd. v. Richardsons Westgarth & Co. Ltd.* [1940] 2 K.B. 99; the above view is concurred by *Halsbury of Law* (4th edn) 12 (1), p.268, which makes it clear that it falls into the second limb of *Hadley v Baxendale*. See also Bulow, *Consequential Damages and the Duty to Mitigate in New York Maritime Arbitrations*, [1984] LMCLQ 622, 624.

³ For example, "economic loss" in Chinese law denotes damages that are recoverable in theory, which equals "consequential loss" in English law. See art. 50 of the CMC, "the carrier shall be liable for the economic losses caused by delay in delivery of the goods due to the fault of the carrier, even if no loss of or damage to the goods had actually occurred, unless such economic losses had occurred from causes for which the carrier is not liable as provided for in the relevant." On the other hand, it can also denote to heads of damages that are generally irrecoverable, which is similar to its original meaning in English law. See *Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd*, where the court held "the CMC does not allow the economic loss in event of cargo loss and damage...the claims submitted are not recognised by CMC and thus irrecoverable".

⁴ The author does not deem it necessary to call for the unification of these meanings as the correlation between a certain group of losses and their names are not the concern of law and will not affect its recoverability. The definition provided by this thesis is purely for the convenience of research.

on the circumstances of the particular case.¹ When there is a market, the claimant can always buy equivalent goods to fulfil his purpose, which will diminish some consequential loss to a large extent, *i.e.*, his loss of profits through use or resale.² In the absence of an available market,³ consequential loss including loss of profits through use or resale is in principle recoverable subject to remoteness, causation and reasonableness rules. Arguably the claim for the cost of replacement, if greater than the value of what has been destroyed, should be regarded as a consequential claim and subject to those principles.

In comparison, Chinese law is inconsistent and more complicated. When the CMC applies, most consequential losses, especially the loss of profit through resale or use, will definitely be excluded in respect of cargo loss; the same is true of cargo damages in the majority of cases; on the other hand, at least in theory, such losses are recoverable for cargo delay (though subject to other conditions). If the CCL applies, by contrast, it brings Chinese law closer to the English position: thus consequential loss is in principle recoverable, always assuming it is not too remote, *etc.* Therefore, the question of whether or not consequential losses are recoverable under Chinese law depends largely on the applicable law, and even then on the view of individual judges. This is, for obvious reasons, unsatisfactory, and calls for a change.

¹ *The Pegase, supra, per* Robert Goff J. at p.184; however it should be pointed out that this is certainly the case in contract. In tort there is a rule precluding recovery for any economic loss not consequent on physical loss or damage suffered by the claimant. See *Murphy v Brentwood District Council* [1990] 2 Lloyd's Rep. 467; MacGrath, M. *The Recovery of Pure Economic Loss in Negligence--An Emerging Dichotomy*, (1985) 5 Oxford Journal of Legal Studies 350.

² "Normally compensation on that basis would reflect the cost of going into the market in order to buy a substitute cargo which would in turn enable the injured party to achieve whatever price might be obtainable under his forward contract assuming that to be higher." *Vinmar International Ltd and Another v Theresa Navigation SA* [2001] 2 Lloyd's Rep. 1, *per* Tomlinson, J. at p.15.

³ For example, when no similar cargo can be bought or sold. See *The Arpad* (1934) 49 Ll. L. Rep. 313; *Heimdal v Questier & Co* (1948-49) 82 Ll. L. Rep. 452.

6.3.1 Profits that would have been realised through carriage

Would-be profits can be separated into two categories. From the perspective of shippers, the market value of cargo at its destination includes a margin of profit compared with its costs at loading port plus freight and insurance;¹ otherwise, there would be no point in shipping the cargo at all. Unless the shipper wishes to use the cargo, this profit (or loss of market) is recoverable in England as a matter of law;² however, it has been ruthlessly excluded by art.55 of the CMC in respect of cargo loss or in most cases of cargo damage because it only refers to cargo value as the one at the port of the shipment.³ In at least four cases, indeed, Chinese judges went even further and suggested that art.55 “does not allow the economic loss in event of cargo loss and damage”⁴ and “it [art.55] literally limits the compensation recoverable by the claimants in order to protect carriers”.⁵ Oddly, however, this restrictive attitude is confined to cargo loss or damage cases. When the cargo owners claim for pure economic loss arising from the delay, it is recoverable.

Nevertheless, if the CCL applies, a would-be profit margin that might have been realised through transportation will be included in damages, as Chinese courts refer to the cargo value as the one at the port of delivery, which is almost the same in English law except that

¹ For cases referring to loss of profits in this sense see *Heimdal v Questier & Co* (1948-49) 82 Ll. L. Rep. 452, *per* Morris, J. at p.471. The loss of profit was based on the market price at the destination.

² *The Baleares* [1993] 1 Lloyd's Rep. 215 (C.A.).

³ *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997; *Grain & Oil (Group) General Co. v ASIL Gida Kimya Sanayi Ve Ticaret A.S.*, Tianjin Maritime Court, 18th Jul 2001; *Chongqing Lifan Industry (Group) I/E Co Ltd and others v Yongbang Trading International Freight Forwarder Ltd, Maosen Yuntong (Hong Kong) Ltd and others*, Guangzhou Maritime Court, 20th May 2004, 2004 GHFCZ 10; *Hebei Huaye I/E Co Ltd v Yicheng Container Lines and Yicheng International Trade Co (Tianjin)*, Tianjin Higher People's Court, 25th Apr 2002; *Shandong Animai By-Products I/E Corp v Hong Kong Yong He Shipping Co and Others*, Qingdao Maritime Court, 6th Apr 1999.

⁴ *Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

⁵ *Beijing Fu Yang Hang v Sea Trade International Inc*, Xiamen Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=4559>; *cf. Sinosafe Insurance Co Ltd v Brother Shipping Company Limited*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98; *Shinkou Shipping Co Ltd v Uniglory Marine Corporation & Uniglory Hong Kong Co Ltd*, Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464.

damages will be assessed by reference to the concrete price under the contract with the third party.

6.3.2 Profits under resale contracts.

A cargo owner that intends to resell goods upon arrival, as many do, may be deprived of the expected profits under that resale contract if the goods do not arrive. Under the *restitutio in integrum* principle, this type of loss ought to be recoverable: it represents, after all, something the claimant would have received had his rights been respected but now will not. And indeed English law largely takes this view: the existence of a possible resale contract and the fluctuation of the market are regarded as being within the contemplation of a reasonable shipowner in the modern shipping world.¹ They will thus be recoverable unless there is a good reason to deny the claim.² Therefore a claim for the drop in the price of the concerned commodity at its destination is recoverable.³

However, if this profit is peculiar to him according the *Hadley*,⁴ it will be refused in the absence of evidence of the defendant's agreement to bear responsibility, or at the very least knowledge of its likelihood.⁵ In *Horne v Midland Ry Co*,⁶ for example, the loss of a

¹ "A carrier must have known that in all probability the goods are carried in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract... might cause a breach of contract with some manufacturer or merchant in England." *Stroms Bruks Aktie Bolag v. John & Peter Hutchison*, [1905] A.C. 515 (H.L.) *per* Lord Macnaghten, at p.524; *cf.* an obsolete case *The Parana*, (1877) 2 P.D. 118, where the opposite conclusion was reached. It is worth mentioning this is subject to a rule limiting the claimant to a reasonable resale price: an unforeseeably high one will not be recoverable.

² For example, when there is a ready market at destination where the cargo owner can buy in a replacement.

³ See *The Heron II* [1967] 2 Lloyd's Rep. 457; *Dunn and Others v. Bucknall Brothers*, [1902] 2 K.B. 614; *Collard v South Eastern Rail Co* [1861-1873] All ER Rep 851; *Wilson v. The Lancashire and Yorkshire Railway Co.*, (1861) 9 C.B.(N.S.) 632; *Schulze & Co v The Great Eastern Railway Company* [1887] L.R. 19 Q.B.D. 30.

⁴ Such as limited storage space or urgent need of the cargo. See *The Pegase*, *supra*; but the court will not take into account the unforeseeable profits level. The fact that a loss is unforeseeably big did not prevent its recovery in *Jackson v Royal Bank of Scotland* [2005] UKHL 3.

⁵ "...Unless the charter was made with reference to and with knowledge of that contract of sale by the charterers with their buyers, damages for breach cannot be recovered which are referable to the loss sustained by the charterers in regard to their particular contract of sale." *Heimdal v Questier & Co* (1948-49) 82 Ll. L. Rep. 452, at p.473 *per* Morris, J.; *cf.* *Scaramanga, Manoussin & Co. v. English & Co.*, 1 Com. Cas. 99; *Transfield Shipping Inc v. Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 (H.L.).

⁶ (1872-73) L.R. 8 C.P. 131.

military supply contract of an unusual and particularly lucrative kind following a carrier's delay was not allowed as a head of compensation.¹ Nevertheless, if such situation has already been communicated to the carrier, then there is no necessary obstacle to its recovery. In *Games for Pleasure Ltd v Trans-World Enterprises Ltd*,² a sample missed an exhibition due to the shipowner's delay. Because the purpose of such carriage was within the contemplation of the carrier, would-be profits on one hundred games out of 240 was given.³ In *Panalpina International Transport Ltd v Densil Underwear Ltd*,⁴ the cargo was delayed for the Christmas market, which was known by the carrier. His would-be lucrative profit was held to be foreseeable and recoverable. Nevertheless, the burden of proving profits is on the claimant and might be formidable. Proofs of anticipated profits are usually not conclusive and are too speculative for the court's liking. In *The Mormacsaga*⁵, the court found that the profits could be as high as 40% and as low as 10% or even 5% depending on the market, and gave an allowance of 15% of cif price as profits in damages.⁶

Chinese courts will reject such head of damages as a matter of law when art.55 applies,⁷ whether the lost profits are merely ordinary or unusually lucrative,⁸ especially when they interpret the concerned article narrowly.⁹ Even where they do not interpret it as

¹ Cf. *The Arpad* (1934) 49 Ll. L. Rep. 313; *The Ardennes* (1950) 84 Ll. L. Rep. 340; *Great Western Railway Company v Redmayne* (1865-66) L.R. 1 C.P. 329; *Heskell v. Continental Express Ltd.*, (1950) 83 Ll.L.Rep. 438.

² 7 March 1990, (C.A.) (Unreported).

³ Cf. *Simpson v The London and North Western Railway Company* (1875-76) L.R. 1 Q.B.D. 274.

⁴ [1981] 1 Lloyd's Rep. 187 (the carriage by air).

⁵ [1968] 2 Lloyd's Rep. 184, Ex Ct (Can), at p.192.

⁶ As remarked "sometimes, in fixing the amount of lost profits, tribunals appear to be simply "baby splitting," awarding lost profits at the mid-point between the claimant's and the respondent's respective valuations." Gotanda, J.Y. *Recovering Lost Profits in International Disputes* (2004)36 Geo. J. Int'l L. 61, 62.

⁷ *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

⁸ Cf. English case *The Mormacsaga* [1968] 2 Lloyd's Rep. 184, Ex Ct (Can), where 15% of cif price was given as profit to consider the profit under resale contract in addition to the cargo loss, whereas in China only the cif price would be allowed.

⁹ I.e., to interpret it as a limit to damages. See *Beijing Fu Yang Hang v Sea Trade International Inc*, Xiamen Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cid=4559>; *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218; *Shinkou*

such, and ascertain its recoverability on basic legal principles, this head of damages will still be rejected and the attention in deciding recoverability has been given to causation rather than remoteness,¹ even though the causation principle is not an appropriate means of limiting damages here.² It is not the concern of judges' as to whether or not such a loss is within the contemplation of the party in default or whether he is capable of buying a replacement. Another common *ratio decidendi* on which the courts reject such a claim is "lack of legal support"³. These rationalisations have both been criticised by the author for their illogicality.⁴

When the CCL applies, damages will be reckoned by reference to the concrete price under the contract with the third party (the buyer) disregarding the abstract market value.⁵ The position under the CCL more or less resembles the English position. The only difference is that on this occasion, Chinese law provides an immediate amount of damages and compensates the true loss regardless of the market price, while English law looks to the market price and disregards the claimant's own circumstances, which may yield a recovery different from his true loss. On the other hand, the English method is responsive to market fluctuation and takes into account substituted buying while in China market fluctuation is unrecoverable and Chinese law turns a blind eye to the requirement of mitigation. Resulting from this, there is even a body of literature in China suggesting that to seek for substitution is not necessary.⁶ Many

Shipping Co Ltd v Uniglory Marine Corporation & Uniglory Hong Kong Co Ltd, Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464; *Sinosafe Insurance Co Ltd v Brother Shipping Company Ltd*, Guangzhou Maritime Court, 16 Sep 2002, (1999) GHFSZ 98.

¹ Zhang Peilin, *Problems of Causation in Civil Compensation* [1996] Policy and Law Forum No.2, p.27; *The Efes, supra*; *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59.

² Because a causal link between the breach of a shipowner and the compensation to the third party by cargo owner exists at least in the weak sense, causation cannot be relied on to reject such claims. This *ratio decidendi* looks ill-assorted in that it has to deny a causal link which clearly exists.

³ *Zhejiang Grand I & E Co Ltd v Malaysia International Shipping Corporation Berhad*, Ningbo Maritime Court, (2002) YHSCZ 23.

⁴ See Ch 3 and Ch 4.

⁵ *China Pacific Property Insurance Co Ltd (Hainan) v Guangzhou Gangxin Shipping Co Ltd*, Guangzhou Maritime Court, 9th Oct 2004, (2003) GHFZZ 92; *Guangxi Hepu Gongguan Fireworks Factory v Dyna International Shipping Limited (Guangdong)*, 20th May 2003, Beihai Maritime Court (2003) HSCZ 019; *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd, supra*.

⁶ Wang Liming, *Liability for Breach of Contract*, p.515 "In china, apart from special

Chinese claimants, indeed, have an incentive to remain idle after the other party's breach, in case the courts find their replacement-buying unnecessary. Typically cargo owners will usually consult the court and get permission from it before they go into the market.¹ This part of Chinese law fails to achieve its desired purpose and instead would merely increase transaction costs and is therefore a failure.² As concluded before, the art.55 and the narrow Chinese mitigation rule need to be revised.

6.3.3 Loss of use

Under English law if a party is deprived of the use of its property and a replacement is not available, loss of reasonable user profits or other benefits may be recovered, *e.g.* the loss of use of a tractor for construction.³ But it is subject to basic legal principles of damages law introduced in other chapters of this thesis. In *Montevideo Gas Company v Clan Line*,⁴ for example, the carrier delivered the wrong cargo which produced less gas than the right cargo. The money value of the deficiency in production was upheld as it was not peculiar to the plaintiff and was foreseeable.⁵ This is the remoteness rule, so he should not be entitled to recover profits for "extravagant or unusual purpose".⁶ In *British Columbia Saw-Mill Co v Nettleship*,⁷ one case of machinery essential for the erection of a saw-mill was missing. The loss of a year's profits resulting from the stoppage of business was refused as such damage was not within the carrier's reasonable contemplation. A similar result was reached in *The*

situation, *e.g.* the cargo is liable to rot and needs urgent treatment, generally speaking substitute buying and selling are not allowed. Therefore the market value rule is not adopted by Chinese law."

¹ For example, to sell damaged cargo by auction with the help of court. See *China Ping An Insurance Company v. Hong Kang Eversall Shipping Ltd*, Wuhan Maritime Court, 20th May 1996; *The Efe*, *supra*.

² See Korobkin, R. *The Status Quo Bias and Contract Default Rules*, (1998) 83 Cornell L. Rev. 608.

³ *Sunley & Co Ltd v Cunard White Star Ltd*. (1940) 66 Ll. L. Rep. 134 (C.A.); *cf. Millen v Brasch & Co*. (1882-83) L.R. 10 Q.B.D. 142. The loss of use of clothes were allowed with the burden of proof on the claimant.

⁴ (1921) 8 Ll. L. Rep. 192.

⁵ *Ibid.* at p.196.

⁶ *Cf. The Pegase* [1981] 1 Lloyd's Rep. 175; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

⁷ (1867-68) L.R. 3 C.P. 499; *cf. the classical case Hadley v Baxendale, supra; Gee v. The Lancashire and Yorkshire Railway Co.*, (1860) 6 H. & N. 211.

*Pegase*¹, where the carrier had no knowledge of the extent of the cargo owners' storage space and his urgent need of the cargo. On this occasion, the court might measure the damages by the depreciation of the goods, interest on capital value, its maintenance costs and wages.² In *Romulus Films Ltd v William Dempster Ltd*,³ the carrier delayed sending film equipment. The cost of duplicating some props in London was held too remote to be recoverable. Even so, the court was prepared to allow this by form of interest upon the value of cargo for a certain period.⁴

In China, by contrast, there seems to be no coherent legal principle behind the different rules of recovery applicable to different types of damages. The criterion of recoverability depends on what type of marine accident is involved, which is very bizarre and calls for uniformity. On the one hand, the loss of user profit arising from cargo loss or damage is subject to art.55 of CMC and will either be rejected immediately,⁵ or rejected for lack of a sufficient causal nexus. In *Zhejiang Grand I & E Co Ltd v Malaysia International Shipping Sdn Bhd*,⁶ the claimant's claim for the loss of use due to contamination of cargo was disallowed by the court by reason of art.55 on the traditional Chinese basis of "lacking legal support". On the other hand, art.55 does not apply to claims for delay. Loss of user profits is in principle recoverable.⁷ Chinese courts are prepared in particular to allow it in the form of compensation for loss of use of money – that is, interest on capital notionally tied up. Thus interest on the price of the cargo for 4 months' delay was awarded in *Guangxi Beihai City I/E Trading CO v Sukissed Marine Co Ltd and Michael Kritikakis Group Salvage Towage*.⁸ As said, these

¹ [1981] 1 Lloyd's Rep. 175.

² *Sunley & Co Ltd v Cunard White Star Ltd.* (1940) 66 Ll. L. Rep. 134, per Clauson L.J. at p.138.

³ [1952] 2 Lloyd's Rep. 535.

⁴ 5 percent's interest on the cargo's value as user profits in *The British Columbia and Saw-Mill Co v Nettleship* (1867-68) L.R. 3 C.P. 499; *The Heron II* [1967] 2 Lloyd's Rep. 457, at p.465-466, per Lord Reid.

⁵ This argument failed in *Adlian SA Corp Ltd v P&O Nedlloyd BV and P&O Nedlloyd BV China Shipping Company Ltd*, *supra*.

⁶ Ningbo Maritime Court, (2002) YHSCZ 23.

⁷ CMC art.50, *supra*.

⁸ Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 47.

uncertainties and inconsistencies nevertheless necessitate ratification.

Under English law, it is acknowledged that the likelihood that there is a sub-charter in existence must have been within the contemplation of the cargo owner.¹ Therefore the loss of reasonable use of the vessel arising from the cargo owner's breach is generally recoverable.² This is the same under Chinese law. In *Nantong Topshare Shipping Ltd v Yangzhou Yuyang Shipping Co Ltd and Tianjin/Kobe Shipping Ltd*,³ the loss of use is calculated by reference to art.10 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure.⁴ Such loss can also be measured by reference to the demurrage rate.⁵

6.3.4 Other reasonable expenses or losses

In addition to the common claims for a loss of profits, the aggrieved party of a carriage contract may suffer miscellaneous losses. Subject always to mitigation, causation, remoteness and so on, an award of compensatory damages should in principle cover them; only thus can the aggrieved party be put in the same financial position as if the contract had been duly performed. The most common illustration of this type of recoverable expenditure is the one incurred in mitigation. Thus costs incurred in retrieving, searching for or replacing carried goods are recoverable,⁶ as are deviation expenses incurred in earning the replaced rent after a

¹ *Salen Rederierna AB v Antaios Compania Naviera SA*, 24th June 1983, QBD (unreported).

² *Nolisement v Bunge & Born*. [1917] 1 K.B. 160, (C.A.); cf. *Professor Gruvel v The Barry Graving Dock and Engineering Company* (1926) 25 Ll. L. Rep. 434.

³ Guangzhou Maritime Court, 24th Jul 2002, (2001) GHFCZ 109; cf. *Qingdao Harbour Bureau Oil Harbour Co v Schiffarts Gesellschaft Hansa Constance MBH & Co, Hansa Treuhand Schiffsbeteiligungs AG & Co and M/T Provence SA*, Shandong Higher People's Court, 25 Sep 2002, (2002) LMSZZ 31.

⁴ It reads "the loss of use of vessel should be calculated by the average net profits of two voyages before and after the accident; if not available, it should be calculated by the average net profits of other relevant voyages."

⁵ *Xiamen Yicheng Shipping Co Ltd v Yunfu Pyrite Enterprise Group Corp*, Guangzhou Maritime Court, 29th Dec 2000, (2000) GHFSZ 95.

⁶ *Heskell v Continental Express Ltd* (1949-50) 83 Ll. L. Rep. 438; *Woodger v The Great Western Railway Company* (1866-67) L.R. 2 C.P. 318; *Millen v Brasch & Co.* (1882-83) L.R. 10 Q.B.D. 142; *The British Columbia and Saw-Mill Co v Nettleship* (1867-68) L.R. 3 C.P. 499.

charterer's repudiation.¹ Other instances are legion: they include the cost of reprocessing contaminated cargo;² hedging purchases;³ the extended hire of cameras because of the delay of a film equipment;⁴ salvage expenses for burned cargo;⁵ transshipment costs,⁶ *etc.* Not only expenses, but also the subsequent further losses arising from a reasonable but failed mitigation step can be recoverable.⁷

There is no doubt that, as a matter of English law, communication and transport costs incurred in mitigation are in principle recoverable.⁸ Although claims for travel expenses,⁹ hotel expenses,¹⁰ and employee wages¹¹ can raise difficulties of remoteness or causation, they are in principle recoverable. Thus in *Games for Pleasure Ltd v Trans-World Enterprises Ltd*,¹² hotel expenses, food, telephone calls, car hire and so forth were all accepted as the purpose of delivery was within the contemplation of the carrier.¹³

¹ *The Sonia* [2003] 2 Lloyd's Rep. 201; *The Concordia C* [1985] 2 Lloyd's Rep. 55.

² *The Iron Gippstand*, *supra*.

³ *Addax Ltd. v. Arcadia Petroleum Ltd. and Another* [2000] 1 Lloyd's Rep. 493.

⁴ *Romulus Films Ltd*, *supra*.

⁵ *The Subro Valour* [1995] 1 Lloyd's Rep. 509; *The Eurasian Dream No 2* [2002] 2 Lloyd's Rep. 692.

⁶ *The Isla Fernandina* [2000] 2 Lloyd's Rep. 15; *The Almare Seconda and Almare Quinta*, *supra*; even though it is unusually high, it will be recoverable as long as it is foreseeable. See *The Frances and Jane*, *supra*.

⁷ *The Almare Seconda and Almare Quinta* [1981] 2 Lloyd's Rep. 433.

⁸ *Woodger v The Great Western Railway Company*, *supra*, per Montague Smith, J. at p.321 "[The compensation] might, no doubt, include cab-hire, or other reasonable expenses, if the plaintiff had to call several times at the company's office in endeavouring to recover the goods."; cf. *Sunley & Co Ltd v Cunard White Star Ltd.*(1940) 66 Ll. L. Rep. 134, per Clauson L.J. at p.138.

⁹ *Wilson v Lancashire & Yorkshire Rly*, *supra*.

¹⁰ *Woodger v The Great Western Railway Company*, *supra*.

¹¹ *Gee v. The Lancashire and Yorkshire Railway Co.*, (1860) 6 H. & N. 211.

¹² 7 March 1990, (C.A.) (Unreported).

¹³ Other recoverable expenses include the increase in the import duty during delay (*The Ardennes* (1950) 84 Ll. L. Rep. 340); extra warehousing and storage charges for the cargo (*The Aliakmon*, *supra*); sorting costs (*Pacol (Canada), Ltd. v. M/V Minerva*, 523 F. Supp. 579, 583, 1982 AMC 1365, 1369 (S.D.N.Y. 1981)); survey fees for the potential damage (*European Gas Turbines v Msas Cargo International Inc*, QB, 26 May 2000 (unreported); Tettenborn, A. *The Defaulting Carrier's Liability in Respect of Undamaged Goods* [2001] LMCLQ 203); the survey fee made pointless because the shipowner repudiated the charterparty. (*The Kaliningrad and Nadezhda Krupskaya* [1997] 2 Lloyd's Rep. 35); expenses incurred in reconditioning the damaged goods (*Brandt & Co. and F. W. Vogel & Co. v. River Plate Steam Navigation Company, Ltd* (1923-24) 17 Ll. L. Rep. 142); the loss of demurrage consequent upon the shortage of cargo (*The Altus* [1985] 1 Lloyd's Rep. 423); expenses incurred in the carriage of dangerous cargo (*The Orjula* [1995] 2 Lloyd's Rep. 395), *etc.* If the claimant failed to secure a cheaper price in the contract of sale just because of the repudiation by the shipowner, this loss was recoverable. (*The Baleares* [1993] 1 Lloyd's Rep. 215; *Featherston v Wilkinson and Another*(1872-73) L.R. 8 Ex. 122).

On the surface, Chinese law resembles English law here. Any reasonable expenses incurred in mitigation can be recovered by the claimant. These include transshipment costs¹ or extra freight² for the substitution voyage; survey fees,³ extra disposal fees;⁴ separating and sorting fees,⁵ repacking fees;⁶ salvage expenses for the damaged cargo.⁷ It also includes, as does English law, further damage caused by reasonable but unsuccessful mitigation attempts.⁸ Any other reasonable losses or expenses are also in principle recoverable.⁹

However, the resemblance is superficial. There are at least three important differences.

1. The first difference: art.55.

The first difference between the laws of these two countries is concerned with art.55 of the CMC. Where art.55 applies, some judges interpret it (wrongly, as suggested above) not so much as a measure of the value directly lost, but as an overriding global limit to damages for cargo loss or damage, which greatly narrows down the scope of compensation. In *Shinkou Shipping Co Ltd v Uniglory Marine Corporation & Uniglory Hong Kong Co Ltd*,¹⁰ expenses incurred in sorting damaged cargo and other disposal fees were

¹ *China Sinotrans Co Tanggu v Cosco Tianjin International Freight Co Ltd*, *supra*.

² *Nanjing Shipping Co v Fujian Huian Liancheng Shipping*, *supra*.

³ *China Ping An Insurance Company v. Hong Kong Eversall Shipping Ltd*, Wuhan Maritime Court, 20th May 1996; *PICC Beijing Branch v Mitsui OSK Lines Ltd*, Shanghai Maritime Court, 21 Apr 2004, (2004) HHFSCZ 162

⁴ *Dezhou I/E Co v Guangdong Shipping Co Ltd*, *supra*.

⁵ *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, *supra*.

⁶ *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365; *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd*, *supra*.

⁷ *Qingdao Sugar, Wine & Non-staple Foodstuff (Group) Co, China Pacific Insurance Hainan Co v Nanjing Grandextend Shipping Co Ltd*, Haikou Maritime Court, 21 Jul 2000, (2000) HSCZ 06.

⁸ *E.g.*, the loss of whole cargo due to the failure to salvage part cargo on fire. *Hanjin Shipping Company Ltd v AT Container Line Ltd and others*, *supra*; *cf. Nantong Topshare Shipping Ltd v Yangzhou Yuyang Shipping Co Ltd and Tianjin/Kobe Shipping Ltd*, *supra*; *Zhanjiang Huayang Oil Co Ltd v Guangxi Xihui Shipping Co Ltd*, *supra*.

⁹ Other recoverable expenses include: any costs incurred in legal action, *e.g.*, expenses applying for the injunction to discharge cargo, (*The Topaz*, *supra*) or expenses in arresting a vessel or freezing a letter of credit (*China Guang'ao development Corp v Singapore LHS (private) Co Ltd*, *supra*); extra port charges, special tally expenses and electricity fees for the detain of the cargo (*Sitc Steamship Co Ltd v Xiamen Haomen Food Co Ltd*, Xiamen Maritime Court, 20th May 2004, (2004) XHFSCZ 20); storage fees, customs fines and extra cargo disposal fees resulting from delay (*Xiamen Imports and Exports Ltd v COSCO Guangzhuo*, *Selected Shipping Law Cases* (Liu Jiazhen ed., 1998), p.71).

¹⁰ Shanghai Maritime Court, 21 Aug 2002, (2001) HHFSCZ 464.

dismissed by the court because “it does not belong to the scope of compensation prescribed by [art.55 of] the CMC.” (At the same time a claim for survey fees was accepted on the somewhat unconvincing basis that “inspection is the precondition to submit a claim for cargo damage.”) This decision was followed by many others as a matter of good law. Some expenses such as the storage fees for a prolonged period,¹ loss of VAT refund, refrigerating fees² and port operating charges³ were all reasonable, clearly foreseeable and were caused by the breach of the carrier, but they were dismissed by Chinese courts because of the said article. By contrast, these would be recoverable in English courts. Art.55 once again is the centre of disputes.

2. The second difference: overemphasis on causation and consequent unpredictability.

It is also worth noting that for the reason expressed above, the practice of Chinese courts is to emphasise causation more often than remoteness when hearing such claims, even when remoteness might be regarded as more appropriate.⁴ The judgment cannot convince litigants. Take the example of *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd.*⁵ There, because of the delay of delivery, the claimant faced increased interest charges from their bank. Such a loss will generally be rejected as too remote under English law. In comparison, Chinese courts rejected it on the grounds of causation. “Such a loss is not adequately caused by the delay of carrier.” Such a *ratio decidendi* is not persuasive compared with the remoteness explanation as it is hard to say that there is no causal link between them. Judicial decisions are not mechanical applications of general rules, and there must be inherent logic

¹ *China Forage I&E Co. v Chinese-Tanzanian Joint Shipping Co*, Guangzhou Maritime Court, 15th Oct 2000.

² *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

³ *Jinshi Trading Co Lianyungang Shipping Co Ltd*, Tianjin Maritime Court, 18th Apr 2005, (2005) JHFSCZ 37.

⁴ Cf. relevant part in chapter 3 causation and ch 4 remoteness.

⁵ Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46.

between the outcome and interpretation of the facts of the case. Failing to provide convincing explanations, judgments will be challenged by litigants. Therefore the accurate application of law and their predictability are particularly crucial in generating the trust and confidence in judicial decisions. Chinese judges should not rely on causation when measuring of damages all the time and should make efforts in applying the appropriate legal rules.

Secondly, a pure causation approach is highly discretionary, and this is a feature which many Chinese judges are not used to because of the short history of legal system building and hence lack of experience and tradition. When Chinese judges have excessive discretionary powers, it will inevitably increase the potential for mistakes or even abuse. This makes Chinese shipping cases highly unpredictable. In *Gang Ao International Co. Ltd v Hanjin Shipping Co. Ltd, T-tanker Private Co. Ltd and M.T.M Ship Management Private Ltd*,¹ the claimant failed to earn a commission fee for a letter of credit because the carrier delivered the cargo without bills of lading. This loss was hardly foreseeable, and an English claimant would have faced grave difficulty in recovering it. However since Chinese courts found a causal connection between the two, it was allowed. Conversely, some fairly reasonable claims have been rejected. In *Hanjin Shipping Company Ltd v AT Container Line Ltd and others*,² the court held survey fees for the damaged vessel are not “necessarily caused” by the breach of the shipper (who provided dangerous cargos) and rejected it. This is, with respect, a wrong decision based on the inappropriate application of causation. It raises the alarm that doctrines of causation are always open-ended enough to allow judges to exercise discretion in a subjective and personal way. This should be closely watched by appeal court and legal scholars. Causation alone should not be over-emphasised in claims for damages.

¹ Guangxi Higher People’s Court, 28th Dec 2004, 2004GMSZZ 10.

² Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140.

3. The third difference: the specific case of communication and traffic expenses

As to the question of communication and travel expenses, Chinese courts do not ask if it is foreseeable, reasonable or necessary, as it would be under English law, but primarily ask whether or not it is *caused* by the breach. As said, this produces an unpredictable and highly subjective result. In *Longsea Xiandai Lab Equipment Co., Ltd v Shenzhen Jiebang Freight Service Co*¹, because of the carrier's breach, the shipper missed an exhibition in Mexico. Travel and accommodation expenses incurred while looking for the cargo were rejected "because there is no necessary causal connection between the two." Other common grounds on which Chinese courts reject such types of damages include "lack of any support of legislation"² and "lack of evidence".³ Sometimes the *ratio decidendi* was not disclosed.⁴ At the same time claims of this sort have succeeded in many other cases. In *Heilongjiang Foodstuff Trading Co Ltd v Deligo Pte Ltd*⁵, a similar claim was upheld, ironically on the same grounds of causation. It was also allowed in claims for collision,⁶ wrongful detention of cargo⁷ etc.

Chinese judges have greater latitude to arbitrarily adjudicate cases. Hampered by their structure, their management, and the

¹ Guangzhou Maritime Court, 24th Oct 2003, 2003 GHFCZ 286.

² *Wuwei Baihua Fengye Natual Hygienical Medicine Co v CMA CGM*, Tianjin Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cId=5582>

³ *PICC Guangdong v Shenzhen Jinxiu International Freight Co Ltd*, Guangzhou Maritime Court, 20 Oct 2003, (2003) GHFCZ 390; *China Pacific Property Insurance Co Ltd (Hainan) v Zhanjiang Canghai Shipping Co Ltd*, Guangzhou Maritime Court, 15th Dec 2004, (2004) GHFCZ 540/541/542/543/544/545; *China Pacific Property Insurance Co Ltd (Hainan) v Guangzhou Gangxin Shipping Co Ltd*, Guangzhou Maritime Court, 9th Oct 2004, (2003) GHFZZ 92.

⁴ *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 17; *The Efes*, *supra*; *Nanjing Textile I&E Co v Shanghai Jieda International Shipping Co Ltd and Others*, Shanghai Higher People's Court, (1996) HGJZZ 532.

⁵ Guangzhou Maritime Court, 27 Feb 2002, (2000) GHFSZ 68; *cf. Tianjin International Shipping Co v Shantou Yuedong International Shipping Agency*, Tianjin Higher People's Court, 13 Aug 2002; *Qingdao Sugar, Wine & Non-staple Foodstuff (Group) Co, China Pacific Insurance Hainan Co v Nanjing Grandextend Shipping Co Ltd*, Haikou Maritime Court, 21 Jul 2000, (2000) HSCZ 064.

⁶ *Wei Haihua v Guangzhou Haichang Oil Carriage Development Co*, Guangzhou Maritime Court, 9th Sep 1998, (1998) GHFSZ 35.

⁷ *Chinese Woods East China Co v Milena Ship Management Co Ltd and Charter Harvest Shipping Ltd*, *supra*.

quality of judges, courts seem to be unable to adapt to those requirements of certainty, consistency and predictability. Different courts will make different decisions on the same facts because the overall competency of Chinese judges has not risen to a level that sufficiently meets practical needs and there is an absence of conformity throughout the Chinese court system and inadequacy of laws. The author suggest China should bolster the competency of judges by providing more training to existing judges and provide a stronger basis for accurate application of law.

6.4 Liability to third parties as a head of damage

A breach by a defendant, *e.g.*, where a shipowner fails to provide a vessel,¹ may have the effect of putting the claimant in involuntary breach of his own contract with some third party, creating liabilities in damages and for legal costs. As a matter of English law this type of loss can be recovered, provided only that it is within the contemplation of the shipowner, answerable by the shipowner in causation and cannot be mitigated. In *The Ocean Dynamic*,² for example, the claimant had to pay a settlement when a cargo of cherries was found to contain broken glass. The settlement was held reasonably foreseeable in that case and recoverable.³ Nevertheless the courts are generally unprepared to accept such damages, either because they were regarded as too remote to recover,⁴ or because such costs were not caused by the other's breach.⁵

Chinese courts, by contrast, tend to reject this sort of claim outright.⁶ There are a number of pretexts for this. One is art.55 of the CMC, at least as regards those courts that regard it as a hard

¹ *Proctor, Garratt, Marston Ltd (Rosario) v Oakwin Steamship Company Ltd* (1925) 23 Ll. L. Rep. 222, (C.A.).

² [1982] 2 Lloyd's Rep. 88.

³ *Cf. Proctor, Garratt, Marston Ltd (Rosario) v Oakwin Steamship Company Ltd, supra.*

⁴ *Heskell v Continental Express Ltd and Another* (1949-50) 83 Ll. L. Rep. 438.

⁵ *E.g.*, in *The Vakis T* [2004] 2 Lloyd's Rep 465 the cost of sub-arbitration was held not caused by the breach of shipowner but by his own decision to bring another action.

⁶ Chinese courts are particularly picky about it. In *Shantou Hangxing Freight Co Ltd v Tianjin Qingfeng Freight Co Ltd*, Guangzhou Maritime Court, 7th Dec 2000, 2000 GHFSZ 65, the court held, to support such a claim, the claimant must also provide adequate evidence to prove that his sub-buyer did actually incur such loss. This burden of proof is formidable as such evidence is usually unavailable.

and fast limit on recovery. Other courts may not see art.55 as a limit on recovery; nevertheless, they are not unlikely to deny third-party liability claims on other grounds, such as causation¹ or a lack of factual basis.² (Ironically enough, before the enactment of the CMC, causation arguments had been employed in order to uphold such claims³). Anyway, none of the present decisions are based on remoteness rule, which is significantly different from English law. This is not only because of the inflexible art.55, but also because the remoteness test has a very limited application in Chinese law and the courts have not been fully aware of its function.

On the other hand, the rejection is still not universal. Third party liabilities are recoverable in a few cases, such as those arising out of charterparties: thus, for example, a time charter can recover from a shipowner the compensation he has paid to his voyage charter due to the shipowner's breach.⁴ This is because the possibility to sublet is within the reasonable contemplation of a shipowner.⁵ Chinese courts in fact do the same⁶ as the English court did in *The Sargasso*, though for a different reason (*i.e.* art 63 of CMC)⁷.

¹ *Shanxi Industrials Products I&E Ltd v Trans-Am United (China) Ltd and Others*, Tianjin Maritime Court, 18 Sep 2001, (2001) HSCZ59, the court checked the terms of sale contract and found the cargo owner should not pay compensation to the party in the first place, so they rejected the claim; *cf. Shangxi Province Silk I&E Co v Guangdong Xihui Ltd and Others, Guidance and Reference for the Trial of Economic Cases* (the Economic Division of the Supreme Court ed.), p.265; in *The Efes, supra*, the carrier issued advanced bills of lading and the consignee rejected the cargo. The claimant paid compensation to his sub-buyer. The indemnity for the compensation was rejected by court because "there is no direct causation between the carrier's act and the loss to the third party."

² *Guangzhou NanHuaXi Co., Ltd v Guangdong Hong Kong Macau Shipping Co., Ltd, supra*, where the settlement with the third party was rejected for "lack of factual basis," a very vague *ratio decidendi*.

³ The liquidated damages paid to the third party according to their contract was recoverable before 1992 because "this expenses results from the breach of the carrier" (*Shenzhen Bao'an Dalong Trading Co v Guangzhou Kaida Shipping Co and others, supra*); so were costs incurred in defending the claim against the third party (*Guangxi Beihai City I/E Trading Co v Sukissed Marine Co Ltd and Michael Kritikakis Group Salvage Towage, supra*) and settlement for compensation with the third party, "as it is directly resulted from the delay of the carriage." (*Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 17).

⁴ *The Sargasso* [1994] 1 Lloyd's Rep. 412.

⁵ *Ibid.*

⁶ *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co, supra*; *Pearl River Container Transportation Co Ltd v P&O Nedlloyd BV, supra*; *China Sinotrans Tanggu Co v COSCO Tianjin International Freight Co Ltd, supra*; *Shinkou Shipping Co Ltd v Uniglory Marine Corporation and Uniglory Hong Kong Co Ltd, supra*.

⁷ Art.63: "Where both the carrier and the actual carrier are liable for compensation, they shall jointly be liable within the scope of such liability."

6.5 Other economic losses

Under English law, there are certain economic losses that will be rejected by courts almost as a matter of law. They can hardly be conceived by any reasonable carrier as a likely result of the breach and will fail in causation and remoteness tests. They include the loss of future business,¹ the loss of business reputation,² and so on. In *The Pegase*,³ as a result of the severe delay caused by a shipowner, some customers failed to place repeat orders with the plaintiff and transferred their business to his rivals. The claim for loss of goodwill was however rejected as it was too remote to recover.⁴

There are only two Chinese cases concerned with it in nearly 300 shipping cases, which makes it somewhat difficult to draw reliable conclusions. In *Shenzhen Lianda Textile & Silk I & E Co Ltd v China Shipping Container Lines Co Ltd and Others*,⁵ the consignee (buyer) cancelled a future order with the claimant (seller) after a delay caused by the shipowner. The claimant then sued the carrier for loss of potential profits. The court rejected it for two reasons. The first one was that the claimant failed to prove that a future contract of sale truly existed and that his buyer had indeed cancelled it. The second reason is that this head of damages was not within the contemplation of the carrier by art.113 of CCL. In another case,⁶ the plaintiff asked for an apology from the carrier who repudiated the charter, which was rejected without disclosing the *ratio decidendi*.

6.6 Normal transit losses

The quantum of damages may be adjusted slightly if there are normal transit losses⁷ during the carriage. This loss is inevitable due

¹ *E.g.*, where the cargo fails to arrive for a fair. See *Games for Pleasure Ltd v Trans-World Enterprises Ltd*, *supra*; but it (missing a fishing season) was indeed awarded to a fishing boat for the damage caused by negligence of a dock company, which is not the subject of this thesis.

² *Cf. Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393.

³ [1981] 1 Lloyd's Rep. 175.

⁴ *Ibid.*, *per* Robert Goff, J. at p.186.

⁵ Guangzhou Maritime Court, 3rd June 2003, (2003) GHFCZ 64.

⁶ *Qinzhou City Qinzhou Port Xinan Shipping Agency Co Ltd v Fuzhou Jinfan Shipping Co*, *Beihai Maritime Court* (First trial), 28th May 2004, (2004) HSCZ 012.

⁷ Also called transit loss tolerance or transit allowance (*The World Prestige* [1982] 1

to the cargo's nature, transporting, handling the goods or imprecise measurement of goods, and should be deducted if it is within a reasonable limits. But there is no universally accepted standard used to judge reasonableness of its scale. Sometimes both parties make an agreement on this figure beforehand to avoid disputes.¹

6.6.1 English law

The amount of any deduction is generally decided on according to evidence from "commercial persons in the industry".² Such a figure is usually less than 1%, but can be as high as 5%³ of the whole carried cargo depending on the particular circumstances of each case. Under the Hague/Visby Rules, the carrier will be exempt from liability for cargo loss or damage caused by "wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods".⁴ A similar clause was also included in some bills of lading.⁵

6.6.1.1 Loss due to the nature of cargo

Many types of cargo are inclined to shrink, evaporate or deteriorate during the carriage, no matter how diligent a carrier has been. This type of loss happens without the fault of carriers. Potatoes tend to lose water during carriage and 1% was deducted;⁶ turpentine has a strong propensity to vaporize, thus 5.86 % was accepted;⁷ wheat, especially weevil cargo loses weight from shrinkage and up to

Lloyd's Rep. 60), wastage (*The Captain Gregos* [1990] 1 Lloyd's Rep. 310) or transpiration losses (*Palmaco Inc and Fireman's Fund Insurance Company v. American Resident Lines Ltd & Others* 1978 A.M.C. 1715).

¹ 3% for a cargo of carrot was agreed by both parties in *Young, Glover & Co and Agricultural Products Cooperative Marketing Union of Cyprus v Red Sea Development Corp* [1968] 2 Lloyd's Rep 489.

² *The World Prestige* [1982] 1 Lloyd's Rep. 60.

³ 5.86% in *The Auditor*, (1924) 18 Ll. L. Rep. 464; 4.3% in *The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337, 4% in *The Kriti Rex* [1996] 2 Lloyd's Rep 171.

⁴ Art. IV 2 (m).

⁵ *Ministry of Food v Lamport & Holt Line Ltd* [1952] 2 Lloyd's Rep 371, Clause 2 of the bill of lading provides that "That the master, owners, or agents of the vessel ... shall not be responsible for loss, damage, or injury arising from wastage, inherent vice of merchandise ... effects of climate..."

⁶ *The Polar* [1993] 2 Lloyd's Rep. 478.

⁷ *The Auditor*, (1924) 18 Ll. L. Rep. 464; *De Monchy v Phoenix Insurance Company of Hartford and Another* (1929) 34 Ll. L. Rep. 201.

1.2% was once acknowledged;¹ cotton seed loses moisture due to hot weather and can lose 1% of the whole weight;² similar things happen to sugar³ and timber⁴; banana is fragile and it is expected to lose 1-4% during carriage as an unavoidable result of the handling.⁵ Such wastage is particularly common in oil bulk carriage.⁶ Oil sticks to the side of the oil tanks and pipes and cannot be striped out, which leaves a certain amount of oil remaining on board.⁷ Its evaporation⁸ and sedimentation⁹ can also cause shortages upon delivery.¹⁰ All the above contribute to wastage and as high as 1.19% was accepted by court.¹¹ It should be noted that if the shortage is caused by inefficiency or break down of the vessel's pumps, such a loss will not be deducted.¹²

6.6.1.2 Inaccuracy induced by imprecise measurements

Clearly the allegation of short delivery depends upon the measurements taken on loading and discharging. It is taken by different people at different places (port of loading and discharging) using different measuring equipment.¹³ Such an allegation cannot stand if any part is inaccurate or unreliable. In this sense, it is very doubtful whether or not there is a *loss* in the first place. In *North Shipping Company Ltd v Joseph Rank & Co Ltd*,¹⁴ the court found

¹ *North Shipping Company Ltd v Joseph Rank & Co Ltd* (1926) 26 Ll. L. Rep. 123.

² *Bibby & Sons Ltd v Russo-British Grain Export Co Ltd* (1934) 48 Ll. L. Rep. 61.

³ *The London Transport Co Ltd v Trechmann Bros* [1904] 1 K.B. 635, where the court noticed that "sugar must of necessity change in weight [during carriage]".

⁴ *Spaight v Farnworth* (1880) 5 Q.B.D. 115.

⁵ *The Kriti Rex* [1996] 2 Lloyd's Rep 171.

⁶ As a matter of fact, because the weight of oil is expected to lose after the carriage and affect the freight to pay, many shipowners only charge prepaid freight. See *Exxonvoy 1969 art.2*; cf. *The Metula* [1978] 2 Lloyd's Rep. 5.

⁷ *The World Prestige* [1982] 1 Lloyd's Rep. 60; see also *Avin Chartering SA v Portunus Navigation Co Inc*, CA, 16 December 1981 (unreported).

⁸ Which was suggested about 0.2% to 0.25% of the total cargo in *The Nitsa* [2000] 1 Lloyd's Rep. 563, HC (Pak).

⁹ Cf. *Palmaco Inc and Fireman's Fund Insurance Company v. American Resident Lines Ltd & Others* 1978 A.M.C. 1715.

¹⁰ Other possible reasons include settling out as water on an ocean voyage (*The Ypatianna* [1987] 2 Lloyd's Rep. 286, it contribute 0.3% of the loss.), flaring-off, leakages (*The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337) and so on.

¹¹ 0.55% in *The Ypatianna* [1987] 2 Lloyd's Rep. 286; 0.5% in *The Nitsa* [2000] 1 Lloyd's Rep. 563, HC (Pak); 1.19% in *The World Prestige*, *supra*.

¹² [1982] 1 Lloyd's Rep. 60; see also *Avin Chartering SA v Portunus Navigation Co Inc*, CA, 16 December 1981 (unreported).

¹³ Its inaccuracy was clearly shown in *The Kriti Rex* [1996] 2 Lloyd's Rep 171 where the number of discharged boxes was even more than loaded.

¹⁴ (1926) 26 Ll. L. Rep. 123.

that the recipient tallied empty cargo bags, and multiplied the weight of one bag to figure out the whole weight after discharge. It was highly likely that they had received the cargo but just lost some empty bags, which effected the result. There was also doubt cast on the accuracy of the machine and the successful and fair selection of the bags to be weighed. Therefore the court denied the claim for short delivery.¹ This problem is particularly acute in the carriage of dry bulk cargo. Usually it is weighed by scales at loading and discharge, and compared to the deadweight calculated for the vessel through a draft survey. This seems bound to produce significant differences.²

6.6.1.3 Proof and evidence

Generally the cargo-owner can raise a *prima facie* case against the shipowner by showing that there is a discrepancy between cargo delivered and marked in the bill of lading. This can be rebutted by proving that it was caused by normal transit losses.³ This argument is particularly potent when the missing part is very small and unexplainable,⁴ unless the shipper proves otherwise.⁵ Alternatively, he can argue that the measurement adopted in tallying cargo was inaccurate and unreliable, especially when there is no convincing theory of why the cargo is missing.⁶ But for any assertion of a serious crime, *i.e.*, cargo was stolen by the shipowners, the claimant must give irrefutable evidence. Otherwise the court is more likely to accept the theory of wastage from shipowner's side.⁷ There will not be any automatic deduction by implication unless the shipowner

¹ Similarly in *The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337, there was 4.3% shortage of loaded oil based on the shoreside evidence after discharge. Because such an evidence was probably imprecise, the court rejected claims for short delivery.

² Chandler, G.F. *The Measure of Damages to Cargo*, (1997) 72 Tul. L. Rev. 539, 559.

³ *The Nitsa* [2000] 1 Lloyd's Rep. 563, HC (Pak).

⁴ In *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, it was suggested a tiny shortage was inevitable and that the cargo owner was in a position to sue only when he found shortage unjustifiable.

⁵ The shipper could not prove any bad stowage or unseaworthiness whatsoever, and as a result lost the case even though as high as 5.86% of cargo disappeared. *The Auditor*, (1924) 18 Ll. L. Rep. 464.

⁶ *North Shipping Company Ltd v Joseph Rank & Co Ltd* (1926) 26 Ll. L. Rep. 123.

⁷ *The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337.

defends himself.¹ It is suggested that such deduction should not be taken into consideration in respect of total loss.² However, this view has not been accepted by English courts and 1-4% allowance was given in *The Kriti Rex*.³ Given the fact that the carrier has no fault in causing such a loss, this approach is favourable.

6.6.2 Chinese law

Although art.51 (exemption of liability) is entirely based on art. IV (2) of the Hague/Visby Rules, it has some minor differences. It replaced “wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods”⁴ with “nature or inherent vice of the goods”.⁵ This makes its position less clear. But considering the fact that a carrier will not be liable for “... any other causes arising without the fault of the carrier or his servant or agent”,⁶ there should not be any substantial difference between the laws of the two countries on transit losses. The Chinese version hereby seems to be too concise and renders the provision ambiguous. The author suggests restoring the original wording of the Hague/Visby Rules in order to avoid any misunderstanding.

Compared with English courts, Chinese courts are less flexible and arguably too harsh towards such defence. They refuse to draw inference even when the circumstance justifies, *e.g.*, when there is no better evidence or theory to explain a tiny amount of shortage other than transit losses. In *PICC Property and Casualty Co Ltd (Hebei) v China Shipping Development Co Ltd*,⁷ there was 0.545% loss of palm oil. There was no evidence proving any wrongdoing of the shipowner during transit, and it seemed highly likely that such

¹ 0.55% of the loss was deducted from damages as the wastage. *The Ypatianna* [1987] 2 Lloyd's Rep. 286; 1% loss was deducted as wastage and the rest 1.25% was eligible for damages as lost cargo. *De Monchy v Phoenix Insurance Company of Hartford and Another* (1929) 34 Ll. L. Rep. 201; 1% wastage in *Bibby & Sons Ltd v Russo-British Grain Export Co Ltd* (1934) 48 Ll. L. Rep. 61.

² Tetley, W. Tetley, W. *Marine Cargo Claims* (4th edn 2008), Ch 15, p. 21, available at www.mcgill.ca/maritimelaw/mcc4th/

³ [1996] 2 Lloyd's Rep 171.

⁴ Art. IV (2) m of the Hague/Visby Rules.

⁵ Art.51 (9) of the CMC.

⁶ Art.51 (12) of the CMC.

⁷ Tianjin Maritime Court, (2005) JHFSCZ 141, 19th Apr.2005.

loss was due to the inaccuracy of measurement or to wastage, as was suggested by surveyors. This argument would probably be accepted if raised in an English court. However, the Chinese court only deducted 0.5% and stubbornly gave a decision in favour of claimant for the rest 0.045% loss of cargo. In *DSM Citric Acid Wuxi Co Ltd v Sparkle International Enterprises Ltd, Rwei Cheng Shipping SA and Jui Pang Shipping SA*,¹ there was 1.19% loss of cassava when the vessel arrived at destination. Cassava is liable to shrink. The court held that “It is commonly accepted in shipping circles that there will be 0.5% allowance deductible in damages for bulk cargo.” Therefore, the carrier was held responsible for the remaining 0.69% shortage of cargo (\$13,028.68). This 0.5% came from a government document the Rules for Inspecting Weight of Imported and Exported Cargos---Draft Survey, which was promulgated by the Bureau of Imported and Exported Inspection as an internal guide for its employers. It may be a good reference, but it is not law and it is strange to see Chinese courts prefer its evidential value over expert evidence proving otherwise. From a review of Chinese cases, Chinese courts are notably persistent in giving 0.5% as a benchmark for bulk cargo, fishmeal², Brazil beans³ or soybeans⁴, even when the injustice was obvious. The allowance is even smaller in some cases. In *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*,⁵ there was about 1.12% short delivery of fuel oil compared with the bill of lading figure. The court held that 0.4% was deductible as the “shipping custom”. In *Shenzhen Bao’an Dalong Trading Co v Guangzhou Kaida Shipping Co and others*,⁶ only 0.3% was held deductible for a carriage of rape-seeds.

Chinese courts need clear guidelines providing answers to each

¹ Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183.

² *Guangdong Dongling Group Ltd v Niko Maritime Inc (Liberia)*, Guangzhou Maritime Court, 22 Oct 2003, (2003) GHFCZ 342.

³ *PICC Guangdong v Cyprus Maritime Co Ltd and Santa Cruz Shipping Company Limited*, Guangzhou Maritime Court, 29th Dec 2000, (2000) GHFSZ 79.

⁴ *Deqing County Xinshi Oil Factory v. Dynamic Care S.A. Panama*, Shanghai Maritime Court, 12th Jun 2001, 2000 HHFSC 407.

⁵ Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

⁶ Guangzhou Maritime Court as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 10.

question, They do not want to risk making mistakes because this will affect their annual performance appraisal.¹ Thus they would rather resort to an outdated government regulation or even an in-house guideline than accept expert evidence, or reach any decisions on their own discretion because the former is deemed more authoritative. In *Shantou Shengping Electrical Fuel Co Ltd v Guangzhou Harbour Bureau Huangpu Service Co Ltd*,² in respect of a shortage of cargo coal, they only deducted 1.5% as transit losses. This was because the court found that art.5 of the Measures for Coal Delivery gave 1.5% allowance for such a transit loss. This regulation was promulgated by the Department of Coal and Department of Railway in 1966 for the carriage by railway, and whether or not it applied to the carriage by sea in the first place was even doubtful. Even so, the Chinese court would rather base their decisions on an outdated official document than on a reasonable survey report. The stubbornness and inflexibility was clearly shown in *PICC Guangdong v Cyprus Maritime Co Ltd and Santa Cruz Shipping Company Limited*,³ where the defendant argued that apart from a 0.5% allowance for wastage, they should be given additional allowance considering the inherent inaccuracy of draft survey. The court declared that "the error of draft survey has already been taken into account and a necessary adjustment must have already been given when the surveyor reached his conclusion" and so rejected their fair argument. Nevertheless, the Guangzhou Maritime Court is more willing to take into account all facts of the case. In *Guangdong Dongling Group Ltd v NIKO Maritime Inc (Liberia)*,⁴ it gave a 0.91% allowance for Brazil beans due to water loss and then gave an additional 0.5% to reflect the inaccuracy of draft survey, which produced a reasonable decision. In general, the carrier is more likely

¹ Judges have legitimate reasons for being cautious. Under the Tentative Methods for Pursuing the Liabilities of Judicial Adjudicators of People's Courts for Violating Laws during Adjudication, they can be held liable if in adjudicating and enforcing a case, they "intentionally violate any laws and regulations that are related to adjudication work" or if they "negligently violate any laws and regulations that are related to adjudication work and this leads to serious consequences." art. 1, 2 of the Methods.

² As quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 14.

³ Guangzhou Maritime Court, 29th Dec 2000, (2000) GHFSZ 79.

⁴ Guangzhou Maritime Court, 22 Oct 2003, (2003) GHFCZ 342.

to be responsible for such a loss in China with less generous allowance than in England. This is another typical example of the Chinese judicial style, straightforward yet inflexible, basing on the unattractive argument of form over substance. Thus it have difficulty in achieving justice in each particular case. To Chinese judges, an arbitrary figure provided by an obsolete regulation is even more convincing and admissible than a fair amount proven by experts and surveyors. Here the judge does not ask what is the fair result, instead he is only concerned with what law can be relied on. It is hoped that this chapter could possibly raise the concern and prompt Chinese judges to think of this problem in their decision-making and rectify it. Many Chinese carriers include a specified clause on transit losses in their contracts to avoid this injustice.¹ This method is recommended by the author to other carriers operating in China.

6.7 Conclusion

Measure of damages is the result of the application of various legal rules discussed in previous chapters. Under Chinese law, each of these rules is more or less distinct from the English one. Chinese courts overly emphasise causation, have a rudimentary explanation of mitigation and omit remoteness most of the time. It is not surprising that measure of damages is different, especially an English market rule cannot be established in China as a general principle.

Under English law damages are measured by the value of the goods at the time when, and the place where, they should have been delivered. As a comparison, the CCL provides damages shall be calculated on the prevailing market price at the destination. But art.55 of the CMC refers to market value as the price at the time of shipment plus insurance and freight, which is significantly different from English law (and its own CCL). It might be difficult to reconstruct market price at the port of discharge, and Chinese law

¹ *Shanghai Xinlv Multimodal Shipping Co v Fujian Pingtan Pacific Shipping Co Ltd*, Shanghai Higher People's Court, 13 Sep 2002, (2002) HGMSHZZ 75.

has the advantage of providing an immediate figure. However, art.55 is *not* a true measure of damages and the compensation is less than the claimants' true loss. It produces unfair results, which is oddly inconsistent with the solicitude generally shown in Chinese law for *restitutio in integrum*. Moreover, even within the same law CMC, the principles behind different articles are contradictory to each other. This inconsistency creates a considerable confusion of both policy and law. There is now emerging a conflict between the long-standing notion of restitution (CCL remedies and CMC in respect of cargo delay) and a fettered one provided by the CMC in respect of cargo loss and damage. The consistent and predictable application of law is particularly crucial in generating the trust and confidence in law. The absence of a uniform legal system, the fragmented law of damages and the consequential unpredictable nature of the decisions of maritime courts will lead to criticism from litigants. Not to mention, there are also problems relating to measure of damages for damaged cargo where the relevant provision in CMC is too concise and renders the provisions ambiguous. There are at least two methods of calculating damages for damaged cargo. Different Chinese courts will make different decisions on the same facts. It is certainly the time to revisit CMC and the author would like to urge the ratification of art.55.

The English market value rule disregards any price at which the claimant in fact covers or resells, thus is an abstract assessment. By contrast, Chinese courts always favour a concrete assessment. The court only accepts the concrete price at which he buys the cargo from the third party (supplier) or any costs he actually incurs for the cargo when the CMC applies, and the price at which he sells to the third party when the CCL applies. Chinese law will compensate his true loss regardless of the market price, while English law looks for a market price irrelevant to claimant's own circumstance, which may be different from his true loss. However the English method is responsive to market fluctuation and takes into account mitigation

while Chinese law is insulated from market change and rejects mitigation. This might cause injustice to any claimant who intends to mitigate after the breach, which is not satisfactory.

The third difference is that under English contract law, there appears to be no rule of policy excluding, or restricting, the recovery of consequential loss; everything depends on the circumstances of the particular case. In comparison, Chinese law is inconsistent and less predictable. If the CMC applies, most consequential losses, especially loss of profits through resale or use are more likely to be excluded in respect of cargo loss or damage, and in theory can be recoverable for the cargo delay subject to other conditions. If the CCL applies, it brings Chinese law closer to the English position and consequential loss is in principle recoverable, always assuming it is not too remote, *etc.* Therefore, under Chinese law the recovery of a certain head of damages depends largely on the applicable law and the view of individual judges, which leads to inconsistent decisions. Not only do courts have difficulty applying these conflicting rules, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law. As a result of this, the impact and authority of law are much reduced. The consistency of legal rules and the predictability of their application can facilitate commercial trading. Without such consistency, it will only increase the cost of doing business and inhibit economic activities. Therefore Chinese courts should transform its law of damages into a predictable and coherent system with the consolidation of existing consistent practices and the application of uniform practices.

In the last part of this chapter, the author shows that the accepted trade allowance is much smaller compared to English law. This is because, arguably Chinese judgments focus on form over substance. To Chinese judges, an arbitrary figure provided by an outdated regulation is even more authoritative and admissible than experts' opinion. This is not beyond criticism. To avoid this injustice, it is recommended to include a clause on wastage allowance in

carriage contracts.

Chapter 7 Limitation

7.1 Introduction and the history of the limitation regime

One of the unique features of shipping law is the shipowner's right to limit liability for loss or damage arising from the carriage. There are two main forms at the moment: package limitation, which caps the compensation for each unit damaged during carriage regardless of its value, and global or gross limitation, which sets a ceiling on the amount of damages in respect of all claims against the shipowner arising out of one incident. Thus, after the courts assess the damages using the legal principles introduced in previous chapters, the amount of damages will be capped if it exceeds the limitation. This works as a final limitation on damages in the carriage of goods by sea. The idea of global limitation dates back to the *contrat de commande* in the twelfth century.¹ Its earliest introduction into English law can be traced back to the eighteenth century.² In those days, a shipowner stood to lose a great deal more than his investment as a result of marine accident. Ideally his loss should be limited to the amount actually invested. This regime was one of the protectionism in the form of state support for the shipping industry so that people could be encouraged to embark on adventures of unusually risky nature.³

¹ The *contrat de commande* was a commercial device whereby a merchant could limit his liability in a trading venture to the extent of the goods or funds which were entrusted to another for use in that particular venture. See Note, *Limitation of the Liability of Shipowners*, (1935) 35 Colum. L. Rev. 246, 247 fn.1; then the Hanseatic Ordinances of 1614 and 1644 limited the liability of a shipowner to the value of his vessel. See Donovan, J.J., *The Origins and Development of Limitation of Shipowners' Liability*, (1979) 53 Tul. L. Rev. 999.

² The Responsibility of Shipowners Act, 7 Geo. 2, c. 15 (1734) provided that the total liability for losses due to the master and mariners' embezzlement and theft were limited to the value of the ship and the freight for the voyage. This system was soon introduced to all losses occurring without the privity or knowledge of the shipowner. See the Responsibility of Shipowners Act, 53 Geo. 3, c. 159 (1813).

³ As expressly stated in the preamble of the Responsibility of Shipowners Act, 7 Geo. 2, c. 15 (1734) "[I]t is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein ... which will necessarily tend to the prejudice of the trade and navigation of this kingdom ..."

7.2 Necessity of two regimes

It seems fashionable to treat limitation as an anachronism, especially as to the continued retention of package limitation.¹ In fact, China has already abolished package limitation in coastal carriage but it still maintains the one for international carriage.² The package limitation continues to serve two important (though separate) functions. First, it protects the carrier from the risks associated with cargoes of high undisclosed value.³ Secondly, and perhaps more significantly, by providing a standard level of liability, it enables him to calculate his risks in advance so that he can offer uniform and cheaper freight rates, which in turn is of benefit to most shippers. The shipowner can charge more for high value (or at least high-liability) cargoes than for others. This is in accordance with the efficiency theory. That is why the Hamburg Rules, hailed as the successor of Hague/Visby Rules in certain jurisdictions, still favour such arrangements despite strong criticism.⁴

The marine world has more sympathy towards gross limitation⁵ (though there are strong arguments to the effect that even its retention is no longer justifiable⁶). The reasoning is that, at large,

¹ Especially, the package limitation only matters for a small number of high-value consignments and containers, but not for most ordinary commodities in general.

² The Regulations on Carriage of Goods by Water (RCGW) will apply and carriers do not have the benefit of any package limitation. *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 17.

³ This is one problem about remoteness: only the nature of the loss needs to be foreseeable, while its amount needn't be. In a Chinese case *Switzerland Bern Insurance Co v Senator Lines GMBH and Tianjin Container Pier Co Ltd*, Tianjin Maritime Court, 25th June 2002 (settlement mediated by the court), the cargo owner's banknote and securities printer worth of 17,190,000 RMB (about £1,227,857) was totally damaged. A carrier might know he was carrying a precision machine, but its particularly high value was apparently unknown to him. Without package limitation, the carrier would have incurred an unconscionable loss compared to his profit. In practice, this "large undisclosed liability" rationale reflects very common commercial practice. Many, if not most, non-marine carriers and warehousemen have specific terms limiting liability to a given sum unless the consignor has declared a larger value (and, normally, paid a larger freight).

⁴ Criticism in English literature see Lord Mustill. *Ships are Different--Or are They?* [1993] LMCLQ 490; Chinese literature see Deng Ruiping, *The Plights and Solution of Compensation for Tortious Infringement by Vessels*, (1998) 5 Modern Law Studies 412.

⁵ See Griggs, P. *Limitation of Liability for Maritime Claims: the Search for International Uniformity*, [1997] LMCLQ. 369; Allen, C.H. *Limitation of Liability*, (2000) 31 J. Mar. L. & Com. 263, 263; Schoenfeld, J.A. *Limitation Of Liability: The Defense Perspective*, (2004) 28 Tul. Mar. L.J. 219.

⁶ Stone, D.J. *The Limitation of Liability Act: Time to Abandon Ship?* (2001) 32 J. Mar. L. & Com. 317, arguing that it creates a considerable confusion of both policy and procedure which promotes expensive and inefficient litigation; when the regime was introduced, an

vessels are still at the mercy of an unfathomable sea.¹ Statistically, a certain number of accidents are inevitable, even with the help of modern technology.² The establishment of a limitation fund will cap the shipowner's liability and prevent it going bankrupt from one single accident.³ It also provides a calculable risk and thus makes it easier and cheaper to obtain insurance cover for the maximum liability, which in turn benefits cargo interests with reasonable freight rates.⁴ It is a subtle and complicated mechanism where all those involved in and benefiting from the maritime adventure share costs.⁵

It is respectfully suggested that the opponents of limitation have a stronger case than is often realised. The existence of limitation itself is not fair at all.⁶ Limited liability is only available to owners in special industries, such as international air carriers⁷ and nuclear

owner's control over vessels about their business was limited, and the industry lacked the technology to construct safe vessels. But all these have already been overcome nowadays. See Sweeney, J.C. *Panel Discussion of Collision Towage, Salvage, and Limitation of Liability*, (1999) 24 Tul. Mar. L.J. 405, 429; others argue that the radical departure from common law rules of liability cannot be justified today. Seward, R.C. *The Insurance Viewpoint, Limitation of Shipowners' Liability: The New Law* (1986), p.161 -162; similar criticism to limitation under the Warsaw system see Taylor, N.P. *Limitation of Liability of Aircarriers to Aircrash Victims - Has the Warsaw Convention Reached Its Retirement Age*, [1994] *Journal of Personal Injury Litigation* 113.

¹ *E.g.*, there were 128.9 accidents per 1000 merchant shipping vessel in 2005: see *MAIB Annual Report 2005*, available at http://www.maib.dft.gov.uk/publications/annual_reports/annual_report_2004.cfm

² For example, there was 25 collisions, 9 groundings, 62 machinery failures of marine accidents in 1994 but 37, 24,50 respectively in 2005, which shows little improvement in 10 years time. See *MAIB Annual Report 2005*, *ibid*; *MAIB Annual Report 2004*, available at http://www.maib.dft.gov.uk/publications/annual_reports/annual_report_1994.cfm

³ *E.g.*, the Titanic disaster raised personal claims of \$22 million which could even bankrupt a modern sea carrier. See *Ocean Steam Navigation Co v Mellor*, 209 F.501 (1913 - 2nd Cir), *aff'd*, 233 U.S. 718 (1914).

⁴ Buglass, L.J. *Limitation of Liability from a Marine Insurance Viewpoint* (1979) 53 Tul.L.Rev. 1364, 1364; Zhang Geng & Deng Hongguang, *Discussion of Limited Compensation Regime* [2002] *Modern Law Study* no.2,164.

⁵ "The right of shipowners to limit their liability is of long standing and generally accepted by the trading nations of the world. It is a right given to promote the general health of trade and is in truth no more than a way of distributing the insurance risk." *The Garden City (No.2)* [1984] 2 Lloyd's Rep. 37 *per* Griffiths L.J. at 44.

⁶ *E.g.*, in *El Greco (Australia) Pty Ltd and Another v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep. 537, Fed Ct (Aus) (Full Ct), 2000 packages of posters and prints worthy of Aus\$956,545 shipped in one 20 ft. general purpose container were lost. The shipowner compensated only Aus\$38,250 as limitation based on gross weight of damaged goods. Truly in practice, the total loss of cargo was born by the insurer. But bear in mind that in the end the insurer left with only Aus\$38,250 while the majority of loss was uncompensable, which favored the shipowner unjustifiably. Of course, the insurer will charge higher premium rate in order to cover these unrecoverable losses; the cargo owner therefore still needs to pay more than a fair price.

⁷ See the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention).

power plant operators.¹ The idea that the marine industry is of such a disastrous and dangerous nature that it deserves a special treatment is very suspicious. Also, if insurers can arrange sophisticated cover for disasters such as Hurricane Katrina in New Orleans² and the failure of the space shuttle,³ why cannot they provide insurance cover for marine accidents? Therefore any similar arguments should be dismissed as a sophistry.

However, on a more subtle level shipowners do have a point; there is one strong efficiency argument in favour of limitation. As mentioned already, if a party insures against liabilities that may be uncertain it is likely to be inefficient and expensive; if a party insures an individual cargo of known value, it is likely to be a good deal cheaper.⁴ Further, to abolish the regime is not feasible at the current time for practical reasons. Since limitation regimes have been generally accepted by a majority of countries and are seen as a subsidy to the maritime industry,⁵ unilateral abolition of limitation by any one would probably place domestic shipping at a competitive disadvantage in relation to the others. It will also lose the attraction for sophisticated international forum shoppers.⁶ Besides, since the regime has been in existence for hundreds of years, any change would cause unpredictable impact to all parties involved in the

¹ The Vienna Convention on Civil Liability for Nuclear Damage (1963) art.V.

² The insurance companies were expected to compensated over \$60bn (£32bn). See <http://news.bbc.co.uk/1/hi/business/5273974.stm>

³ Lloyd's Insurance compensated \$ 17,670 million after the Columbia shuttle disaster.

⁴ See Buglass, L.J. *Limitation of Liability from a Marine Insurance Viewpoint* (1979) 53 Tul.L.Rev. 1364, 1364; Zhang Geng & Deng Hongguang, *Discussion of Limited Compensation Regime* [2002] *Modern Law Study*, no.2,164; however there is also an opposite view holding that such a system is not efficient at all. That is, the involvement of more lawyers and insurers itself will increase the cost of disputes. The possibility of not receiving full recovery makes it necessary for cargo owners to seek insurance, while the possibility of breaking the limitation makes shipowner's insurance unavoidable. This double third-party insurer system might prolong the process and cost more as both insurers are dealing with strangers and have to prove the opponent's fault. The arguments on inefficiency of this third party insurance system can be seen in Atiyah, P.S. *The Damages Lottery* (1997), p.150-152; Cooter,R. *Hand Rule Damages for Incompensable Losses* (2003) 40 San Diego L. Rev. 1097, 1120.

⁵ See Eyer, W.W. *Shipowners' Limitation of Liability--New Directions for an Old Doctrine*, (1964) 16 Stan. L. Rev. 370. But it should be pointed that this is certainly so for the shipowner but not for the cargo interests. Whether or not carriers are allowed to limit, shippers ultimately pay for the protection anyway. The only question is whether they pay their own insurers directly for cover or whether they pay higher freight charges to cover the cost to the carriers of insuring against increased liability.

⁶ Allen, C.H. *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium* (2000) 31 J. Mar. L. & Com. 263, 263; cf. Sharpe, D.J. *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium* (2000) 31 J. Mar. L. & Com. 217.

marine market. The price of change might not be worth paying. In fact, the updated proposed convention, the CMI Final Draft Instrument on Issues of Transport Law still keeps the regime.¹

Thirdly, it can be unfair to subject a defendant to a liability disproportionate to his wrongdoing.² Save for the insurance argument above, the shipowner usually charges a relatively reasonable price for each shipment. Is it fair for him to compensate millions simply because of one mistake made by his staff? Fourthly, the thinking behind the limitation regime has something in common with other legal principles, especially the remoteness of damages. In the Chinese case *Switzerland Bern Insurance Co v Senator Lines GMBH and Tianjin Container Pier Co Ltd*,³ a banknote and securities printer was totally damaged and it was worth 17,190,000 RMB (about £1,227,857). Similar to the remoteness argument, the carrier should not be liable for any high cargo value beyond his reasonable contemplation unless the cargo owner has declared the true nature and value of the cargo. In all, the author is of the view that its abolition in the near future should not be necessary. The above reasons listed by the author seem to be sufficient enough to justify the maintenance. Altogether it is a policy in England to uphold the sustaining of the limitation regime. One of the strengths of the common law is that it moves with the times, but English courts have shown strong reluctance in forcing the shipowner to abandon his limitation defence, even if this will cause an obvious injustice.⁴ In stark contrast, Chinese courts are struggling with balancing

¹ See 6.7.1 of the CMI Final Draft Instrument on Issues of Transport Law.

² It is sometimes suggested in the US that a contractor's liability should be so limited. See s. 351 (3) of the Second Restatement of Contracts. "A Court may limit damages for foreseeable loss if the court otherwise concludes that in the circumstances justice so requires it, in order to avoid disproportionate compensation."; Kniffin, M.N. *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, (1988) 63 Notre Dame L. Rev. 247; Garvin, L.T. *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality* (1998) 59 Ohio St. L.J. 339.

³ Tianjin Maritime Court, 25th June 2002, settlement mediated by the court.

⁴ *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, in supporting the shipowner's right to limit his liability to a pathetic figure according to the then Merchant Shipping (Liability of Shipowners and Others) Act 1958, Lord Denning felt injustice of the rule "I do not think that is the right approach...I agree that there is not much room for justice in this rule." He nevertheless held "limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience." *Ibid* at 437; of course a shipowner can always waive his right to limit under the Hague/Visby Rules but this rarely happens in practice.

limitations expressed by the legislation and the need to make injured plaintiffs whole. The result is a large number of cases of breaking limitations.

7.3 Package Limitation

There are currently three major international conventions concerning package limitation: the Hague Rules, the Hague Visby Rules and the Hamburg Rules.¹ The Hague Rules have a limited application these days in both England and China,² while the Hague/Visby Rules are in their prime at present. They have the force of law in England by s 1 (2) of the COGSA 1971.³ In comparison, Chinese law is more complicated; it treats coastal carriage and international carriage separately. For coastal carriage *i.e.* from one Chinese port to another,⁴ the Regulations on Carriage of Goods by Water (RCGW) apply and carriers do not have the benefit of any package limitation.⁵ As for international carriage, carriers are entitled to it by ch 4 of the CMC, which is based on a combination of the Hague/Visby Rules and the Hamburg Rules and thus is a “hybrid regime”.⁶ As a matter of international law China has not ratified any of these three conventions yet. This is because as far as Chinese draftsmen are concerned, the Hague/Visby Rules are regarded as being outdated, but the Hamburg Rules in turn are too advanced. So they hand-pick the best from each convention,⁷ which is ironically

¹ There are other conventions on package limitation in multimodal transport. *E.g.*, the 1980 United Nations Convention on International Multimodal Transport of Goods, which is outside the purview of this chapter and will not be discussed here.

² It could be applied in the UK, for instance, where cargo is discharged in the UK and loaded in a State which is a signatory in the Hague Rules but not to the Hague/Visby Rules. (Art.X (b) of the Hague/Visby Rules read “the carriage is from a port in a Contracting State” without “to a port in a Contracting State.”) It could be applied in China if it is included in a non-negotiable documents *e.g.* waybill or when the applicable law of the case adopts the Hague Rules.

³ This is subject to a few conditions by s 1 (6), see *The European Enterprise* [1989] 2 Lloyd’s Rep. 185, at 188. When non-negotiable receipts incorporated the Hague/Visby Rules and collided with it, it will not have the force of law.

⁴ Note: the carriage between mainland to Hong Kong, Macao and Taiwan is treated as international carriage.

⁵ *Nanjing Shipping Co v Fujian Huian Liancheng Shipping Co*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 17.

⁶ For a discussion of the drafting and adoption of the China’s Maritime Code, see *Benedict on Admiralty 6: International Maritime Law Documents and Commentary* (7th edn 2000), p.173(a).

⁷ *E.g.*, art.47, 48 and 49 (carrier’s responsibilities) are copied from art.3 of the Hague

done in the name of “international uniformity”.¹ The Chinese rebellion, along with the proliferation of different interpretations of the Convention and diversity or depreciation of converting rate into national currency have resulted in there being no less than nine package and kilo limitation regimes in the world today,² something which has not surprisingly been seen as a failure by many scholars.³

7.3.1 Units of account

In the Hague/Visby Rules, limitation figure is fixed by reference to the special drawing rights (SDR), which is a variable figure calculated on the basis of a basket of currencies defined by the International Monetary Fund.⁴ Although SDR has no inherent ability to maintain real value and has been criticised as a unit of account,⁵ it is by far the most sensitive to the trends of inflation and it ensures that limits of liability will be identical in terms of value at any one point in time regardless of the currency of payment on time of conversion.⁶ Therefore it is accepted by both England and China.⁷

The value of SDR fluctuates, as with any other currency, on a daily basis.⁸ It is to be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the court in which the case is being heard.⁹ As far as the UK is concerned, s 1(5) of the COGSA 1971 empowers the Secretary of

Rules; art.51 (exoneration of shipowner’s liability) corresponds to art. 4 (2) of the Hague/Visby Rules; art.56 (package limitation) is copied from art. IV 5 (a) of the Hague/Visby Rules; art. 75 of CMC (the effect of “unknown” clause) is copied from art.16(1) of the Hamburg Rules; art. 42 (3) of the CMC (definition of shipper and carrier) corresponds to the Hamburg Rules art.1(2); art.42 (1)(2) equals to the Hamburg Rules art.1(1) (2).

¹ See Si Yuzhuo, *New Maritime Law Studies* (3rd edn 1999), p.33.

² Tetley, *Package and Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold*, (1995) 26 JMLC 188.

³ See Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* (2000) 31 VUWLR 355, in which the author says such hybrid regimes have detrimental effects on international uniformity and the coherence of maritime law.

⁴ Art. IV 5 (a) of the Hague/Visby Rules.

⁵ Tobolewski, A. *The Special Drawing Right in Liability Conventions: An Acceptable Solution?* (1979) 2 LMCLQ 169.

⁶ Ward, L. *The SDR in Transport Liability Conventions: Some Clarification* (1981) 13 J.M.L.C.1.

⁷ SDR is accepted by the UK as a result of s 2(4) of the MSA 1981; it is accepted in China according to CMC art.56 and art.277.

⁸ As a rough guide 1 SDR is approximately equivalent to 81 sterling pence, 1.47 Dollars and 12 Chinese RMB according to conversion rate on 16th July 2006.

⁹ Art. IV 5 (d) of the Hague/Visby Rules.

State periodically to specify the conversion amount in sterling by statutory instrument. There is a clear practice in the UK that ensures that the conversion is done at the date of judgment. It can be converted according to the conversion rate on that date.

Under Chinese law, the amount of the Chinese currency (RMB) in terms of the SDR is said to be computed on a rate published by the State Bureau of Foreign Exchange Administration (SBFEA) on the date of the judgment or the date mutually agreed upon by the parties.¹ However after a review of the practice, the author found that there is a significant gap between legislation and practice. CMC only introduces the method to convert SDR to RMB, failing to mention other currency, *e.g.* US Dollars, which is a common currency for maritime decisions. Besides, the article is not in line with the practice of SBFEA, which never publishes conversion rate of the SDR to RMB directly, but only SDR to other foreign currencies. In practice, if a decision is in US Dollars, a Chinese court will convert SDR to US Dollars at the rate published by IMF on the date of judgment.² If the award is in RMB, they will follow the above first and then convert from US Dollars to RMB on the rate published by the SBFEA on the date of decision.³ It is also worth noting that in an action for recovery, *e.g.*, the suit brought by insurers in subrogation against shipowners, Chinese courts tend to base the conversion rate on the date of suit, instead of date of judgment.⁴ Art.277 need to be exhaustive yet is too concise and only provides for a fraction of practice. It has failed to incorporate actual norms of everyday life. Hence art.277 is redundant and needs rewriting.

¹ Art.277 of the CMC.

² *Fujian Tingyi Food Co Ltd v COSCO Container Lines Co Ltd*, Guangzhou Maritime Court, 18 Jun 2003, (2003) GHFCZ 171; *Jinxi Machinery Industries Group v Rickmers Linie*, Tianjin Maritime Court, 20 May 2002, (2001) HSCZ 365; *China Silk Materials and Fabrics Imp & Exp Corp v Ensign Freight (China) Ltd and Pacific International Lines (Pte) Ltd*, Shanghai Maritime Court, (2002) HHFSCZ 124, 24 Jul 2002.

³ *Shenyang Mining Machinery (Group) Co. Ltd v Hyundai Merchant Marine Co Ltd and Wantong Logistics Ltd*, Dalian Maritime Court, 1st Feb 2002.

⁴ *AIU Insurance Shanghai Branch v Hong Kong Toho Line Shipping Ltd and others*, Shanghai Maritime Court, (2003) HHFSCZ 207, 22 Sep 2004.

7.3.2 Who to benefit? Servants, stevedores and the Himalaya clause

Servants and stevedores are treated differently in law. Package limitation is available for servants of the carrier, unless they are independent contractors.¹ But stevedores or dockers are not servants.² They are independent contractors. Previously, the carrier could only protect them by invoking a so-called Himalaya clause.³ However, since the enactment of the Contracts (Rights of Third Parties) Act 1999⁴ their protection is guaranteed.

Similarly, Chinese law only extends limitation to the carrier's servants but not stevedores (as independent contractors).⁵ However the question of stevedores is a complicated one.⁶ First, in CCL or CMC there is nothing regarding the concept of a contract for the benefit of a third party, which by contrast can be answered by the English Contracts (Rights of Third Parties) Act 1999. This leaves it open to question for the validity of contract for the benefit of a third party. On the other hand, the validity of the Himalaya clause has been subjected to arguments and frowned upon by many Chinese scholars.⁷ Chinese judges tend to sidestep determining the validity of the Himalaya clause to avoid being overruled by appeal court for a “lack of legislative support”. Thus there is a significant lacuna in the legislative framework on this point.

Five Chinese Maritime Courts have given three contradictory decisions. The Dalian Maritime Court and Guangzhou Maritime

¹ Art.IV bis 3 (3) of the Hague/Visby Rules.

² *Scruttons Ltd v Midland Silicones Ltd* [1961] 2 Lloyd's Rep. 365 (H.L.); cf. *Moyer Stainless & Alloy Co and Eisen und Metall AG v Canadian Overseas Shipping & Ceres Stevedoring Co*, [1973] 2 Lloyd's Rep. 420 (Sup Ct (Que)).

³ *The Eurymedon* [1974] 1 Lloyd's Rep. 534 (P.C.); *The New York Star* [1980] 2 Lloyd's Rep. 317 (P.C.); modern functions of Himalaya clause see Tetley, W. *The Himalaya Clause- Revisited*. (2003) 9 J.I.M.L.40; Liang, C. *Benefits and Burdens of Third Parties under Exception Clauses in Bills of Lading*, (1999) 24 Tul. Mar. L.J. 225, 227-8.

⁴ A clause in the contract between the shipper and carrier limiting stevedores' liability is effective. See s 1(1)(a) and 1(6) of the Act.

⁵ Art.58 of the CMC.

⁶ Otherwise known as “terminal operators” in China.

⁷ Si Yuzhuo, *A Study on the Development and Theoretical Basis of Himalaya Clause-- Review on the Maritime Performing Party under UNCITRAL Transport Law (Draft)*, [2004] Journal of Dalian Maritime University(Social Science Edition) no.3 1,10.

Court treat stevedores as servants of the carrier and grant them rights of package limitation.¹ In *Shenyang Mining Machinery (Group) Co. Ltd v Hyundai Merchant Marine Co Ltd and Wantong Logistics Ltd*,² stevedores caused a container to collide with the bridge of the vessel. The case was so vehemently defended by both parties on the issue of loss of limitation that it was remanded twice by appeal court and retried twice by the Dalian Maritime Court. In the end the court held that the stevedores were the “servants” of the carrier as much as a company for loading and discharging and accordingly entitled to limit. It demonstrates that this aspect of law is inefficient and ineffective as the law fails to clarify the rights and obligations between litigants. The uncertainty of law only invites disputes and increases the transaction costs as all these litigations are highly costly and time-consuming. Conversely, in *Bank of China Insurance Co Ltd v Shanghai JY Container Development Co Ltd*,³ the stevedores’ lorry collided with and damaged the container during discharging. After the plaintiff received compensation from the shipowner based on package limitation, he succeeded in claiming for the rest against the stevedores. The Shanghai Maritime Court did not give any explanations for its reasoning at all.⁴ Presumably the court did not see stevedores as servants of the carrier. Otherwise the decision would surely be the opposite. The third method was adopted by the Ningbo Maritime Court where it evaded the question and was the least persuasive.⁵ In that case, the cargo was damaged during storage by the stevedores. Though there was a Himalaya clause in the bill of lading, the court did not resort to its effect but held that the plaintiff should sue the carrier first in contract, and therefore dismissed the claims against the stevedores. This method, though effectively avoiding the liability of stevedores, was based on expediency but not as a matter of principle, as it wrongly deprived

¹ Si Yuzhuo, *Legal Status of Terminal Operators*, Xiamen University Seminar, 27 Oct 2005.

² Dalian Maritime Court, 1st Feb 2002, (2006) DHFSCZ 246.

³ Shanghai Maritime Court, 20th Apr 2003, (2002) HHFHCZ 34.

⁴ This is not uncommon as the Chinese judgment is more concise than the English judgment. It does fail to disclose key legal points from time to time.

⁵ *The Oriental Scientific Instruments Zhejiang I/E Corporation v Zim Israel Navigation Co Ltd and Ningbo Harbour Bureau Beilun Container Ltd*, Ningbo Maritime Court, 16th Jul 2001, (2000) YHSCZ 218.

the right of action against stevedores for no apparent reason. This should not stand as good law.

As has commented before, vague or conflicting provisions in Chinese law has led to arbitrary application of these rules in particular cases. Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent. There is no system to safeguard the consistency in application of law. The need for certainty backed by developed law can create a sense of risk-reduction, generate the security of expectations and ensure confidence in international transactions. Chinese law on this point is lacking the element of stability and predictability. Litigants will complain about the capacity and impartiality of the Chinese legal system. It increases the transaction costs, confuses litigants and is economically inefficient, therefore it constitutes real hindrances to economic activities and should be paid attention to by Chinese lawmakers.

The difficulty with the question of third parties relying on limitation is that the concept of carrier as it appears in the various international conventions has lost most of its traditional meaning. In practice many of what were previously regarded as traditional functions of ocean carriage, *i.e.* pre-loading storage, examination, weighing or measuring, packaging, loading, stowage on board, fumigation, documentation, unloading, and warehousing can be expected to be carried out, at least in part, by subcontractors of the carrier.¹ This in the author's view arguably justifies an extensive interpretation of the protection granted: the incidental question of who actually does the job should not drastically affect the degree of protection afforded. More importantly, to allow unlimited recovery from the third parties risks the integrity of package limitation, in so far as they are reimbursed by the carrier who would otherwise be entitled to limit. This issue has been addressed in recent years: for

¹ Sweeney, J.C. *Crossing the Himalayas: Exculpatory Clauses in Global Transport: Norfolk Southern Railway Co. V. James N. Kirby, Pty Ltd*, (2005) 36 JMLC 155.

example, the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade provides limitation to the terminal operator.¹ The same position is held in the CMI Draft Instrument on Transport Law,² where the carrier is responsible for the acts and omissions of all those who work under it.³ From this perspective, the second view by the Shanghai Maritime Court is, it is respectfully suggested, outdated and inappropriate. The third view is an erroneous application of law and is equally unacceptable. The proponents of the first view, the Dalian and Guangzhou Maritime Court, see stevedores as servants of the shipowner, which achieves a satisfactory result, but in sheer conflict with the clear wording “servant” of CMC and Hague/Visby Rules, on which it is based.⁴ This solution reflects the immediate interests and needs of stevedores, but it does not represent a lasting solution to problems and may even hamper future implementation of law. As almost all stevedores are in effect subcontractors of the carrier in practice instead of “servants” as phrased in the Hague/Visby Rules and CMC, it is only effective to revise the relevant article, ideally based on CMI Draft Instrument on Transport Law. In the light of the practical experiences in trial of cases of this type and on basis of absorbability of international conventions, the author trusts Chinese courts can try these cases justly and consistently. In view of the time consumed in revising a law, it will be more efficient for Chinese courts to accept the validity of the Himalaya clause. But to avoid the judge making a law, which is still frowned upon in Chinese courts, it is recommended that the Chinese Supreme Court confirm it either in an appeal decision or in the form of written directions.

¹ See art 6.

² The CMI Final Draft Instrument on Issues of Transport Law dated December 10, 2001 available at www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf; Zekos, G.I. *The Contractual Role of Documents Issued under the CMI Draft Instrument on Transport Law 2001*, (2004) 35 J. Mar. L. & Com. 99.

³ On condition that they act within the scope of their contracts of employment, or agency. See art.6.3.2.

⁴ Art. IV *bis* 3.

7.3.3 How to calculate the limitation figure

In the Hague/Visby Rules, the relevant package limitation is 667.67 SDR *per* package or unit and 2 SDR *per* kilogramme of gross weight, whichever is higher.¹ The CMC art.56 para.1 provides exactly the same figures.² The shipper can make other maximum amounts higher than the above by making an agreement with the carrier, master or agent of the carrier.³ If the shipper wants to obtain full cover for a particular cargo, he must declare the nature and value of such goods to the carrier before shipment and have this amount embodied on the bill of lading.⁴ In Chinese law the rules are the same.⁵ But even if the carrier agrees to this it will invariably result in an increase in the freight rate which might exceed the cost of insuring the balance, so in reality it is rarely invoked.⁶ Any contract clause that is intended to replace the package limitation with a less generous figure will be rendered null and void in both countries.⁷

However, Chinese limitation law is not exactly the same as that under the Hague/Visby Rules. One difference between the two countries is that for the pure economic loss arising from cargo delay, Chinese law provides for a separate limitation figure of an amount equivalent to the freight payable for the delayed cargo.⁸ But if the loss of or damage to the goods has occurred concurrently with the

¹ Art. IV 5 (a).

² It reads "The carrier's liability for the loss of or damage to the goods 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, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading, or where a higher amount than the amount of limitation of liability set out in this Article had been agreed upon between the carrier and the shipper." This is essentially the same as the Hague/Visby Rules.

³ Art. IV 5 (g) of the Hague/Visby Rules.

⁴ Lack of any of them will defeat his claim: see art.IV 4 (5)(a) of Hague/Visby Rules.

⁵ Art.56 para 2 of CMC. See *China Silk Materials and Fabrics Imp & Exp Corp v Ensign Freight (China) Ltd and Pacific International Lines (Pte) Ltd*, Shanghai Maritime Court, 24 Jul 2002, (2002) HHFSCZ 124, the claim for higher value was dismissed because such a declaration was not inserted into the bill of lading.

⁶ Wilson, J.F. *Carriage of Goods by Sea* (6th edn 2008), p.204.

⁷ Art.44 of CMC and art.III 8 of the Hague/Visby Rules.

⁸ Art.57 of CMC. This article is copied from art.6(1)(c) of the Hamburg Rules which provides an amount equivalent to two and a half times the freight payable for the goods delayed in respect of economic loss without physical loss or damage. But Chinese lawmakers apparently lowered the limitation figure. English law (the Hague/Visby Rules) simply does not have the equivalent and art. IV 5 (a) of the Hague/Visby Rules applies to all events.

delay, then the limitation is still the same as Hague/Visby Rules¹ and art.56 of CMC.

Another significant distinction between the two is in relation to the sanction for knowingly misstating the “nature and value” of the cargo. Under English law (that is, the Hague/Visby Rules), the misstating shipper ships the goods entirely at his own risk: the carrier will be free of any liability for loss or damage whatsoever.² The intention of the Hague/Visby Rules is to deter dishonesty. However, there is no empirical evidence proving this effect. More importantly, the punishment to the shipper is disproportionate to his wrong and thus is a serious penalty indeed.³ The breach of contractual obligation and the misrepresentation of the shipper are different matters. Even if the shipper has fault in providing the misstated information, the shipowner should not be exempted from responsibilities under the contract of carriage. In contrast, the CMC is not satisfied with such a harsh consequence. Instead it simply states that the shipper shall indemnify the carrier against any loss “resulting from inaccuracies in the information”.⁴ The shipowner still needs to compensate the shipper if the misstated cargo is damaged due to his negligence. Compared with Hague/Visby Rules and English law, this view accords with causal explanation and seems to be fairer.

7.3.4 Package or unit

The terms “package” and “unit” are not explicitly defined under the Hague Rules. Various forms of packing could all be potentially regarded as a unit under the Hague Rules, *e.g.*, crate, box, wrapper

¹ Art. IV 5 (a).

² Art. IV 5 (h) of the Hague Rules “Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.”

³ Suppose the shipper deliberately lies about the dangerous nature of the cargo in order to get a lower freight and the carrier provides an unseaworthy ship for which reason it later sinks on voyage. The shipowner cannot evade its liability for the cargo loss if it is caused by the unseaworthiness. See *The Fiona* [1994] 2 Lloyd's Rep. 506 (C.A.). By the same analogy, it's a bit odd that the law is harsher on someone who simply misrepresents value.

⁴ Art.66; Si Yuzhuo, *The Rights, Obligations and Liabilities of Consignor*, (2001) 12 Annual of China Maritime Law 20.

*etc.*¹, as could the shipping unit,² or the freight unit,³ *i.e.*, the unit of measurement used to calculate the freight. This problem remains acute in the USA, which retains the Hague Rules regime.⁴ It is, however, effectively solved by the Hague/Visby Rules and the CMC, both of which provide an appropriate container test. That is, if the number of goods packed within the container is given, each is a package: if not, the container itself is a package.⁵ Not unexpectedly, certain ambiguities remain. For example, the cargo is typically stowed in wheeled trailers in a roll on/roll off vessel; should the trailer or lorry counted as one pack as “similar article of transport... used to consolidate goods” when calculating package limitation? English and Chinese law both fail to give a specific answer.⁶ In the author’s view, trailers have the same function as containers, so in the absence of separate enumeration of their contents they should count as one package.

As to the treatment of the article of transport itself, the Hague/Visby Rules do not provide any guide. Suppose the container or the trailer provided by the cargo owner is damaged or lost in a marine accident; is it subject to package limitation, and how? It is expected to be an issue in English law. A logical solution is to consider it as one unit of cargo and therefore subject to the same calculation as cargo. Such is held by Chinese law⁷ and, it seems,

¹ Panesar, S. *Carriage of Goods by Sea: Limitation of Liability under the Hague Rules*, (1998) 6 International Insurance Law Review 50.

² *The River Gurara* [1998] 1 Lloyd's Rep. 225; *cf. Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*, [1973] 2 Lloyd's Rep. 469, (Sup Ct (Can)); Chinese case see *Fujian Tingyi Food Co Ltd v COSCO Container Lines Co Ltd*, Guangzhou Maritime Court, 18 Jun 2003, (2003) GHFCZ 171.

³ *The Pioneer Moon* [1975] 1 Lloyd's Rep 199.

⁴ The way the US COGSA 1936 art.4 (5) expresses the unit of measurement in the alternative as package or customary freight unit inevitably creates a need for a definition of package. The case law is not decisive on this point.

⁵ Art. IV 5 (c) of the Hague/Visby Rules. “Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.” Chinese law see art. 56 para.2 *supra*; any clauses in the bill of lading attempting to redefine package or unit would be of no effect by virtue of art 3.8 of the Hague/Visby Rules (CMC art.44). See *The River Gurara* [1998] 1 Lloyd's Rep. 225.

⁶ This makes courts in both countries adopt a so-called “I-know-it-when-I-see-it” approach. Vafidis, M.P. *Remedies for Breach of the Contract of Carriage*, (1991) 3 U.S.F. Mar. L.J. 77, 88.

⁷ Art.56 para.3 of CMC makes it clear that if the article of transport is not owned or provided by the carrier, the article itself will be equally regarded as one package or one

under the Hamburg Rules¹. Therefore if a container with 100 boxes of cargo is lost, the limitation of shipowner's liability for the cargo loss will be 100 x 666.67 SDR or weights of 100 boxes of cargo x 2 SDR, whichever is higher; over and above that there will be liability for loss of the container itself – the kilogram weight of the container x 2 SDR.²

7.3.5 Containerisation and the “unknown” clause.

In modern transport, a large number of containers are now stuffed and sealed by the shipper before delivery to the carrier. The shipowner has no knowledge of contents contained or even if he has, it is impossible or impractical to check due to the fast pace of transportation. In this circumstance the shipowner is justified in endorsing the bill of lading with an “unknown” clause, such as “weight/number unknown”, “said to contain” *etc.* So far as the evidentiary value of the B/L is concerned, if the bill of lading is so clausured, it does not have any evidential effect. Instead it is no more than a mere reiteration of information from the shipper.³ The art III 3 proviso of Hague/Visby Rules states that the carrier “shall [not] be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.” It is construed in English law to the effect that it will be valid under any circumstances, unless the shipper specifically demands a bill without the qualification under art. III, r. 3 of the Hague Rules.⁴ Thus the carriers might abuse such right even though such doubts do not exist or it is convenient to

shipping unit. See *Shanghai China Shipping Logistics Co Ltd v Shanghai Pinyuan Trading Co and Others*, Shanghai Maritime Court, 25 Nov 2002.

¹ Art.6(2)(b) “In cases where the Article of transport itself has been lost or damaged, that Article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.”

² This is certainly because a container that weighs less than 333 kg has not been invented, otherwise 666.67 SDR would apply.

³ See *Attorney-General of Ceylon v Scindia Steam Navigation Company Ltd*, [1961] 2 Lloyd's Rep. 173 (P.C.); *Craig Line Steamship Company Ltd v North British Storage & Transit Co and Others*. (1920) 5 Ll. L. Rep. 234; *Lebeau v. General Steam Navigation Co.* L. R. 8 C. P. 88; *R & W Paul Ltd v Pauline* (1920) 4 Ll. L. Rep. 221; *New Chinese Antimony Company, Ltd. v. Ocean Steamship Company, Ltd.* (1917) 2 K.B.D. 664.

⁴ *The Mata K* [1998] 2 Lloyd's Rep. 614.

check its authenticity.¹

A difficult problem follows: what is the number of packages for the purpose of limitation where the bill is so claused? In English law, Scrutton is of the view that the estimation will be a sufficient enumeration even though it is "said to contain" a certain number of packages.² But the existence of the "unknown" clause is pointless if this is the case. Carver, however, takes the opposite position.³ He holds that the liability will be limited to one package, unless shipowners receive some consideration, such as additional freight. In all, he is happy with the existence of the unknown clause and calls it "fair and reasonable". The problem with this view is its practicability. The proof of further consideration seems burdensome and difficult to find. A more fatal problem which is also noticed by Carver is that such devices are likely to be used to the shippers' detriment.⁴ Shipowners may exploit the chance to include such a clause on the bill of lading contract so that they can limit liability to 2000 SDR *per* tonne for the entire shipment, which may be grossly disproportionate to the overall damage. In *El Greco (Australia) Pty Ltd and Another v Mediterranean Shipping Co SA*,⁵ the goods had been made up into about 2000 packages which had then been packed into a single container. However, the column headed "No. of Pkgs" simply contained the number "1". The court held that if it was not clear from the face of the bill what number of packages or units were packed as such, there would only be one package or unit - the container or other article of transport. Since there was no enumeration for the purposes of art. 4, r. 5(c), it followed that the container itself was the only package or unit for limitation purposes and the relevant limitation amount, including interest, was Aus\$38,250. By the same

¹ See *The Atlas* [1996] 1 Lloyd's Rep. 642; *The Esmeralda 1* [1988] 1 Lloyd's Rep. 206, Sup Ct (NSW).

² Boyd, S.C. *Scrutton on Charterparties and Bills of Lading* (20th edn 1996), p.451, fn 60; *cf. The River Gurara* [1998] 1 Lloyd's Rep. 225, which dealt with the Hague Rules but the legal issues there were essentially the same. It was held that a bill of lading qualified with the words "weight, number and quantity unknown" was not even *prima facie* evidence that the cargo as detailed by the shipper had been shipped.

³ Colinaux, R. *Carver Carriage by Sea* (13th edn 1982), p.397.

⁴ *Ibid.*, p.397, fn14.

⁵ [2004] 2 Lloyd's Rep. 537, Fed Ct (Aus) (Full Ct); Reynolds, F.M.B. *The Package or Unit Limitation and the Visby Rules (El Greco v. Mediterranean Shipping)*. [2005] LMCLQ 1.

analogy, if the bill of lading is qualified by the “unknown clause”, again there would be one package because it would not be clear if the articles or pieces of cargo were packed in the container as such as described. This is obviously not satisfactory.

The views of Scrutton and Carver are contradictory. In Carver’s view, in an action against a shipowner for a short delivery, the plaintiff, as the holder of a qualified bill of lading, has the onus of proving the quantity listed had in fact been shipped; but by Scrutton’s view, the enumeration in bill of lading is *prima facie* accepted even though it could be incorrect. The author would like to venture to point out that Carver’s view is sound in theory¹ but it fails to stand up in modern shipping practice. Considering that most bills are drafted to contain such a clause,² his concern for its abuse has unfortunately become true.³ On the other hand, Scrutton’s view seems fair and conforms to modern shipping practice. But it is not theoretically sound to say a bill of lading qualified by a valid clause will not lose its evidential effect at all.

English law and the Hague/Visby Rules may arguably hold a laissez-faire attitude towards the “unknown” clause. By contrast, the Hamburg Rules do not, at least on the face of it. While the definition of “package” is effectively the same as in the Hague/Visby Rules,⁴ the Hamburg Rules specifically forbids reservations of the “number unknown” variety unless there are reasonable grounds for suspicion about the figures provided by the shipper, or there is at least an absence of any reasonable means of checking them.⁵ The Hamburg

¹ The view that claused bills of lading were not even *prima facie* evidence of the quantity of shipped cargo can be seen in *New Chinese Antimony Company v Ocean Steamship Company* [1917] 2 KB 664 (C.A.); *R & W Paul Ltd v Pauline* (1920) 4 Ll. L. Rep. 221 (obiter by Hill J.).

² See Congenbill 2000 cover page “numbers, quality, contents and value unknown”; China National Foreign Trade Transportation Corp B/L cover page “above particulars provided by shipper”.

³ Cf. *El Greco (Australia) Pty Ltd and Another v Mediterranean Shipping Co SA*, *supra*.

⁴ Art VI rule 2(a).

⁵ Art.16 (1) “If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a “shipped” bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation

Rules intended to eliminate the wide misuse of the unknown clause and to render the majority of them invalid. Interestingly, although art. 75 of the CMC was intended as a direct copy of the Hamburg Rules, it replaces “must” with a less assertive “may”, *i.e.*, by appearance the carrier “may” clause the B/L if he can't check. Even so, it has been held that an “unknown” clause is null and void unless the condition referred to in the CMC analogue to the proviso to Hague/Visby Rules art. III, r. 3 (*i.e.* a positive suspicion of misstatement) is satisfied. In *DSM Citric ACD (Wuxi) Co Ltd v Sparkle International Enterprises Ltd, Rui Cheng Shipping SA and Jui Pang Shipping SA*,¹ the court gave three reasons to rule out a printed “unknown” clause. The first was that the “unknown” clause was only valid on the condition that art.75 (The Hague/Visby Rules art. III, r. 3 proviso) was satisfied, whereas in that case the carrier was perfectly able to verify contents. Secondly, it contradicted the purpose of the bill of lading. Lastly, the bill of lading was a pre-made standard contract and subject to art. 40 of the CCL, under which any standard term that exempts a carrier from its liabilities or unfairly increases the burden on the other party will be ineffective. The only problem is that the law should be affirmative and authoritative. The confidence in law can only be reinforced by the enactment of logical and rational law. The CMC seems to be loosely drafted as the misleading “may” took place of the otherwise explicit word “must”, while lawmakers apparently did not intend to minimise the legal requirement. This should be seen a failed legal drafting. The degree of predictability furnished by “may” is lower than that offered by “must”. Therefore the latter is favourable for the sake of predictability and determinacy. In this sense, it is recommended that the word “must” should replace the misleading “may” in art.75 of CMC. As a conclusion, the Hamburg Rules’ position seems to be a more effective one. Any other interpretation would enable a shipowner to misuse the clause. Therefore the relevant part of

specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.”

¹ Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183.

English law is subject to further review.¹

7.3.6 Conduct barring limitation: England

Limitation will only be lost if the claimant can prove that damage was caused by “the carrier himself with intent to cause damage, or recklessly and with knowledge that damage would probably result.” Both Chinese law and English law use this exact phrase.² Ostensibly, this area of law has been successfully harmonised between the two. The reality is there is some significant difference in their interpretation and enforcement. The author will start with three conditions to break limitation under English law.

7.3.6.1 The position in England under the Hague/Visby Rules: the carrier himself, or his employees?

Firstly, as a matter of English law it must be the personal acts and omissions of the carrier himself; the acts of an employee, even an employee acting in the course of his employment, are not enough.³ In *The Saint Jacques II and Gudermes*⁴, it was the shipowner’s fault, not the captain’s fault that deprived the shipowner of limitation.⁵ Only such a narrow interpretation accords with the commercial purpose of the Convention.⁶ This is because once an ocean voyage has commenced the carrier has rather limited control over the acts and omissions of his servants and agents. Moreover, a shipowner should not be responsible for the fraud of his employee when he himself is not involved.

The physical person or persons of the shipowner must be the one who stands as the directing mind and will of the corporation. Thus

¹ As has been cautioned, containerisation justifies the setting up of new legal rules with the added problems. Mankabady, S. *Some Legal Aspects of the Carriage of Goods by Container* [1974] *The International and Comparative Law Quarterly* 317, 338.

² See art.59 of the CMC and art. IV (e) of the Hague/Visby Rules.

³ *The European Enterprise* [1989] 2 *Lloyd's Rep.* 185.

⁴ [2003] 1 *Lloyd's Rep.* 203.

⁵ *Cf. The Leerort* [2001] 2 *Lloyd's Rep.* 291.

⁶ Especially, the fact that the same wording in art.25 of the draft of Warsaw Convention contained “an act or omission of the carrier, his servants” and deleted “his servants” in the final convention reinforces this restrictive interpretation. See *ibid.*, p.192; *cf. The Lion* [1990] 2 *Lloyd's Rep.* 144.

the actions of this person must constitute part of the alter ego of the company, *e.g.*, if one person is in charge of the supervision of the safety of the navigation, then this person is the *carrier himself*.¹

On the other hand, the mere fact that an employee has been delegated responsibility to do certain things on his own initiative does not mean that he is the shipowner himself. In *The Star Sea*² the superintendent, technical manager, general manager and port captain each had a degree of autonomy to control the relevant aspect of the company's business, but none was involved in the full management and control of ships in relation to the acts or omissions in question. Thus they were excluded. In *The Saint Jacques II and Gudermes*³ the fact that the captain was sleeping in his cabin in the minutes leading up to a collision itself was not enough for an allegation of "any personal act or omission" on the part of the owner. However, in respect of the admittedly reckless navigation as a repeated practice, the court held that the failure of manager to correct this misconduct did give a real prospect of defeating the claimants' right to limit.

7.3.6.2 Deliberation and recklessness: English position under the Hague/Visby Rules.

Secondly, it must be done "with intent to cause damage, or recklessly". Such wording is commonly contained in other international transport conventions.⁴ But surprisingly none have

¹ In *The Marion* [1984] 2 Lloyd's Rep. 1 (H.L.) (a case concerned not with the modern rule of limitation, but with the old actual fault or privity rule. But the definition of "shipowner himself" stands), the director of the ship's management company had adequate degree of supervision of the captain, and his fault was held amount to actual fault of the owners; *cf. Lennard's Carrying Company v Asiatic Petroleum Company* [1915] A.C. 705 (H.L.), a case concerned with the fire statute but the analysis of "carrier himself" no doubt helps. It was "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation." *Ibid*, at 713 *per* Viscount Haldane L.C.

² [1995] 1 Lloyd's Rep. 651.

³ [2003] 1 Lloyd's Rep. 203.

⁴ Art. 25 of the 1929 Warsaw Convention; Article 13 (1) of the 1975 Athens Convention; Art.21 (1) of the 1980 UN Multimodal Convention; Art.21 (1) of the Convention on the Contract for the International Carriage of Goods by Road (CMR); Art.44 of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM) and so on.

come up with a detailed interpretation.¹ There are no English authorities on this issue as far as the Hague/Visby Rules are concerned.² However the decisions on these equivalent provisions governing the parallel aviation field and global limitation can provide a convincing clue as to what conduct the courts will regard as intentional or reckless for the purpose of applying art. IV 5 (2) of Hague/Visby Rules.³

1. Intentional acts

By the very nature of these cases, to prove a deliberate intention to cause a marine accident is notoriously difficult, as it is usually not possible for cargo interests to obtain any direct evidence that a cargo was deliberately dumped or a vessel was wilfully cast away by her owners. But maritime history has many instances of scuttling.⁴ If there is no alternative explanation or inference that proves innocence,⁵ the court is ready to consider all the relevant indirect or circumstantial evidence in reaching such a decision.⁶

2 Recklessness.

Recklessness means that there is an obvious risk of damage and the shipowner either goes on to take that risk consciously or with indifference to its existence.⁷ It requires proof by the claimant that the damage complained of is caused by something significantly more

¹ It might be left open deliberately by draftsmen in order to attract wider support. Negotiators arrive at international meetings with different instructions and are intent upon protecting different commercial, environmental and political interests. Therefore a convention cannot be too lengthy and complicated, and must be forged in general terms which can be interpreted with flexibility so that it will receive most support..

² There are some English cases related to the 1976 Convention though.

³ In terms of interpretation of the said article, it seems there is no difference among these conventions. Indeed many courts simply call it the "scheme of the Warsaw-Hague Convention." See *SS Pharmaceutical Co Ltd and Another v Qantas Airways Ltd* [1991] 1 Lloyd's Rep. 288.

⁴ *The Ikarian Reefer (No.1)* [1995] 1 Lloyd's Rep. 455, the vessel was deliberately run aground and deliberately set on fire. In that circumstance, the shipowner will certainly lose the gross limitation; cf. *The Ny-Eeasteyr* [1988] 1 Lloyd's Rep. 60.

⁵ *The Margareta* [1993] 2 Lloyd's Rep. 13, where there is an allegation of scuttling, the court held the judge should not draw from the evidence inferences adverse to the person suspected of a crime if there was an alternative explanation or inference consistent with innocence.

⁶ *The Milasan* [2000] 2 Lloyd's Rep. 458, the court concluded the vessel had been scuttled on the basis of the available indirect evidence.

⁷ *Cf. R. v. Cunningham*, [1967] 2 Q.B. 396 (a criminal case).

than negligence and carelessness.¹ In *The Saint Jacques II and Gudermes*², knowing reckless navigation as a repeated practice without correcting it constituted recklessness.³

Recklessness is obviously connected with danger. Suppose a carrier accepts a carriage of dangerous cargo which is unstable and liable to catch fire, and the vessel explodes during the voyage; is the acceptance of the cargo in the first place a reckless conduct? These days a great number of cargoes are dangerous in some way,⁴ so the acceptance of cargo itself will not be deemed as a reckless act, even if it is proven to be the wrong decision in hindsight. The answer remains the same if the cargo is notoriously dangerous and has been refused by other shipowners before the carriage. However the carrier should be particularly careful about its nature and take necessary measures to look after the cargo accordingly. Any failure to do so may indicate recklessness.

7.3.6.3 Actual knowledge: English position under the Hague/Visby Rules

Lastly, the requisite knowledge must be proved as well as recklessness.⁵ Knowledge in this context means actual knowledge instead of the mere means to know, or imputed knowledge.⁶ If the

¹ As Eveleigh L.J. put it in *Goldman v Thai Airways International Ltd*, [1983] 1 W.L.R. 1186, "when conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly, he acts in a manner which indicates that a decision to run the risk or a mental attitude of indifference to its existence."; cf. *SS Pharmaceutical Co Ltd and Another v Qantas Airways Ltd* [1991] 1 Lloyd's Rep. 288 at 302 *per* Kirby.

² [2003] 1 Lloyd's Rep. 203.

³ Cf. *Nugent v. Michael Goss Aviation Ltd*, [2000] 2 Lloyd's Rep. 222, a vessel navigating against the flow of traffic was held reckless as there was a "stupid risk" and a "reckless manoeuvre...by a non-suicidal mariner". "The greater the obviousness of the risk the more likely the tribunal is to infer recklessness and that the defendant in so doing, knew that he would probably cause damage." *per* Auld L.J. at 227; The court can also draw inferences to recklessness. In *SS Pharmaceutical Co Ltd and Another v Qantas Airways Ltd*, [1991] 1 Lloyd's Rep. 288, the claimant proved "deplorably bad handling" of cargo by the carrier. Then the carrier failed to call requisite evidence which could bring the case within exemption. The limitation was deprived from the carrier.

⁴ See the ISM Code, which classifies some fairly common commodities as dangerous cargos.

⁵ *Nugent and Killick v Michael Goss Aviation Ltd and Others* [2000] 2 Lloyd's Rep. 222 (C.A.), *per* Pill L.J. at p.230; cf. *Swiss Bank Corporation v. Air Canada*, [1981] 129 D.L.R. (3d) 85 (the Canadian Federal Court), p.100

⁶ In *Gurtner and Others v Beaton and Others*, [1993] 2 Lloyd's Rep. 369 (C.A.), the pilot knew as imputed knowledge that damage would probably result from flying too low. This was held by court to be not enough as only actual knowledge mattered. Because he

relevant person “turn[s] a blind eye”¹ to something he suspects or realises but does not make further enquiries, it will not be enough to break the limitation.² If the shipowner let go a vessel in which the cargo has been stowed in a way that is insufficient to stand an unusual storm but good enough for a more usual storm during the voyage, limitation will not be deprived. Now suppose the cargo is a new chemical product, the nature of which has not been fully acknowledged. The carrier adopts all measures required by the current standard which is later proved to be insufficient. In this case, he will still be free from the accusation of actual knowledge. On the other hand, if the explosion has happened before due to the exact same reason, actual knowledge may be established.

To conclude, the act or omission had to be done both “recklessly” and “with knowledge that danger would probably result” in order to deprive the carrier of his limitation.³ The two are not unconnected and “will often stand or fall together”.⁴ They must also be found in the shipowner himself. As a result, only in extreme cases can a claimant establish these requirements and there is of yet no successful English case law as such as far as package limitation is concerned.

wrongly thought that he was over low ground while he descended, the court held he did not possess any actual knowledge and therefore the company could rely on the limits in art. 25; in *Goldman v Thai Airways International Ltd* [1983] 1 W.L.R. 1186 (C.A.), the pilot disregarded standing orders that seatbelts should be fastened when there was a risk of turbulence and caused injuries. This was held not enough to preclude the right to limit because “if the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed.” *Ibid.*, Eveleigh L.J. at p.1194; cf. *The Pembroke* [1995] 2 Lloyd's Rep. 290 HC (NZ); *SS Pharmaceutical Co Ltd and Another v Qantas Airways Ltd* [1991] 1 Lloyd's Rep. 288, C.A. (NSW)

¹ *The Eurysthenes*, [1976] 2 Lloyd's Rep. 171.

² “It is not sufficient to show that, by reason of his training and experience, the pilot ought to have known that damage would probably result from his act or omission... I do not believe that those who drafted art. 25 intended that anything less than actual conscious knowledge would suffice.” *Nugent and Killick v Michael Goss Aviation Ltd* [2000] 2 Lloyd's Rep. 222 (C.A.), at 232, per Dyson J.; cf. in *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399 “shut-eye knowledge” was not actual knowledge and thus the claim was dismissed; cf. *The Star Sea* [1997] 1 Lloyd's Rep. 360, at 660 per Tuckey J.

³ *The Leerort* [2001] 2 Lloyd's Rep. 291; *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399 at 401.

⁴ As observed by Auld L.J. in *Nugent (sup.)*, at p. 227; cf. *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399 at 401 per Steel J.

7.3.7 Conduct barring limitation: China.

The CMC uses the same wording as the English law and the Hague/Visby Rules.¹ However, the convention is written in both French and English, and there are always formidable problems inherent in linguistic translation when the language of the subject of study differs from that of the lawmaker,² especially as the original languages above are syntactically, lexically, and semantically disparate from Chinese.³ In addition, legal jargon is usually developed from a unique legal culture and historical background, so a foreign legal word is either not possible to be located in one's native language; or even if it can, it fails to contain the connotation attached to the original.⁴ The phrase "an act or omission done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result" does not fit in with Chinese law. There is no legal framework corresponding to this alien conceptual paradigm in China.

A country has to resort to *travaux préparatoires*, all other documents and even foreign cases to track down the true meaning of these words.⁵ Otherwise, they will be in breach of their international law obligation of good faith in support of the Convention.⁶ Unfortunately, China is not a signatory even though it has implanted many provisions of Hague/Visby Rules into domestic law. Ostensibly Chinese judges are not under international obligation to interpret the

¹ Art.59 says "loss, damage or delay resulting from..." instead of "the damage resulting from..." but this difference is immaterial.

² This is the general problem a translator has to face. See Roger T. Bell, *Translation and Translating: Theory and Practice* (1991).

³ Grossfeld, B. (Trans by Weir, T.) *The Strength and Weakness of Comparative Law* (1990). It explores the importance of language in comparative law and the extent to which the law of a country is determined by the language in which it has to be expressed.

⁴ Ainsworth, J.E. *Categories and Culture: On the "Rectification of Names" in Comparative Law*, (1996) 82 Cornell L. Rev. 19, in which the author suggests a thorough "rectification of names" to comparatists.

⁵ The importance of language has long been emphasised in ancient China. When Tzu-lu asked how to administer the country, Confucius's first action is to correct language usage. "If language is incorrect, then what is said does not concord with what was meant; and if what is said does not concord with what was meant, what is to be done cannot be effected." See *The Analects of Confucius*, Chapter 13, Verse 3.

⁶ For principle of *pacta sunt servanda* in customary international law, see the Vienna Convention on the Law of Treaties, art 26; Morrison, R. *Efficient Breach of International Agreements* (1994) 23 Denv J Int L & Policy 183; Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* (2000) 31 VUWLR 355.

convention in its original context. Instead, confused by its true meaning, Chinese judges usually construe the phrase from their own legal background.¹ By contrast English courts interpret the convention in a way “unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance”.² This keeps English law consistent with the convention; whereas in China, there are severe misperceptions and dislocations in transporting the identical articles into China. The growing academic literature and cases in China has not surprisingly taken a mixed, if not on the whole, even hostile view to the limitation. The three conditions to break limitation are not followed in Chinese courts as it is under English law.

7.3.7.1 Gross negligence or recklessness?

There is one view that the concept of recklessness in Chinese law has the same meaning as it has in common law countries.³ But in the view of this author, this view is unsound. Recklessness had never been adopted as a term of art in Chinese law before the CMC 1992. Nor did it find its place in Chinese law after 1992. Its meaning has not been discussed in either textbooks or judicial decisions.⁴ Chinese judges and scholars, however, generally interpret it as gross negligence. A straightforward example is *Shenyang Mining Machinery (Group) Co. Ltd v Hyundai Merchant Marine Co Ltd and Wantong Logistics Ltd*,⁵ where a driver of a terminal operator carelessly caused a container to collide with a bridge and damaged the cargo inside. In the decision, the court did not explain the

¹ This corresponds to the conclusion by Markesinis. Judges are indeed influential in enforcing the convention. See Markesinis, B. *The Judge as Comparatist*, (2005) 80 Tul. L. Rev. 11, 12.

² *Stag Line Ltd. v Foscolo, Mango & Co. Ltd.* [1932] A.C. 328, per Lord Macmillan at 350; *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd.* [1978] A.C. 141, per Lord Wilberforce at 152E; even so, some scholars commented that English courts' approach towards foreign sources has been, to say the very least, extremely cautious and not completely satisfactory. See Debattista, C. *Carriage Conventions and Their Interpretation in English Courts*, [1997] J.B.L. Mar. 130, 137-141.

³ John, S.M. *Shipping Law in China* (1999), p.314.

⁴ For example, no relevant discussion of “recklessness” can be found in an authoritative maritime law book *New Maritime Law* (3rd edn 1999), Si Yuzhuo, Ch 15 Global limitation p.432-455. Instead gross negligence was discussed.

⁵ Dalian Maritime Court, 1st Feb 2002, (2006) DHFSCZ 246.

meaning of recklessness. Instead it deprived the stevedores of the right to limit purely on the grounds of *negligence* of the operator.¹ It suggested that they regarded recklessness as negligence.

An understanding of the Chinese legal background is needed here. Under general Chinese civil law, fault is required by law as a condition of liability.² It involves a certain mental attitude of the defendant towards the consequence of his act. This falls into two categories: intentional wrongdoing and negligence. Intentional wrongdoing refers to the situation where the defendant intended the consequences of his conduct,³ which is similar to the definition under English law.⁴ Negligence refers to the indifference or carelessness of the defendant producing a foreseeable result.⁵ Negligence and intentional wrongdoing are regarded as inconsistent and mutually exclusive states of mind. Under Chinese law, negligence includes gross negligence and general negligence.⁶ Does this *gross negligence* in Chinese law amount to *recklessness* in English law? Since deliberateness in both countries has the same meaning, we can answer the question by comparing the relationship between the deliberateness and gross negligence in Chinese law and that between deliberation and recklessness in English law. In the latter, recklessness signifies the defendant's inadvertence to the risk brought about by his act.⁷ It is therefore usually categorised as deliberateness.⁸ In comparison under Chinese law, even though gross negligence sometimes receives the same severity of treatment as those guilty of intentional misconduct, it is still a distinct conception

¹ *E.g.*, The decision reads "The negligence of the driver is not the negligence of the company itself as required by art.59, so ..."

² Liu Shiguo, *A Contemporary Study on Law of Damages for Tortious Act* (1998), p.78.

³ Wang Liming, *A Study on Fixation of Liability in Tort Law* (2nd edn 2004), p.306; Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p.319.

⁴ See *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd (No.1)* [1959] A.C. 20.

⁵ Wang Liming, *Liability for Breach of Contract* (2nd edn 2003), p.310; Yang Lixin, *General Discussion of Damages in Tort Law* (1999), p 320.

⁶ Han Shiyuan, *A Study on Damages for Breach of Contract*, p.321.

⁷ Recklessness under English law is more or less a criminal law terminology as intention is barely an essential factor in a civil case. (*E.g.*, Criminal Damage Act 1971 s.1, see *R v Caldwell* 1982 AC 341 (H.L.)); but it can be applied in civil law cases. See *Fowler v Lanning* [1959] 1 QB 426.

⁸ Dugdale, A (ed.), *Clerk & Lindsell on Torts* (19th edn 2006), p.34; Jones, M.A. *Textbooks on Torts* (8th edn 2002), p.9; "Reckless indifference to consequences is as blameworthy as deliberately seeking such consequences" *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1 (H.L.), *per* Lord Steyn at 192.

and thus is definitionally different from intentional wrongdoing.¹ In this sense recklessness under English law, where gross negligence on its own does not suffice, requires greater culpability than gross negligence under Chinese law, where the practice is to hold that it does. To establish gross negligence, one view holds that any intolerable disregard for the lives, property or interests of others will do.² Another view favours a subjective criterion, namely, if the act of the defendant does not correspond to what typically is to be expected from a member of the same profession, it is general negligence, whereas if he fails to foresee what anyone in the streets would have noticed, then it is gross negligence.³ Chinese courts adopt the first view more often.⁴ On the whole, it becomes almost a matter of law to break limitation in certain type of cases, including issuing advanced bill of lading,⁵ antedated bill of lading,⁶ and delivery without bill of lading,⁷ etc. This is, with respect, pretty clearly out of line with the general international understanding of the concept of recklessness under the Hague/Visby Rules, the Hamburg Rules and the 1976 Convention.⁸

7.3.7.2 Construing “with knowledge” under Chinese law

Apart from the question of what conduct bars limitation, a Chinese court must also examine the question of whose knowledge counts, and what kind of knowledge is necessary, perhaps distinguishing between actual and constructive knowledge (or

¹ Peng Wanlin, *Civil Law Studies*, (2nd edn Revised, 1999), p.612; Yang Lixin, *Application and Study of Civil Law Cases* (1994), p.23.

² Yang Lixin, *Damages in Tort* (1988), p.83; Guo Ruiming, *Civil Liabilities* (1991), p.74.

³ Wang Weiguo, *Doctrine of Presumptive Fault in Civil Liability*, (1982) 5 Law Studies 191.

⁴ So when defendants do not have qualification for sea carriage or the vessel is uncargoworthy, this will be regarded as a solid proof of gross negligence without further enquiring. *China Sinotrans Co Tanggu v COSCO Tianjin International Freight Co Ltd*, Tianjin Higher People’s Court, 14th Jul 1999, *Selected Cases of People’s Courts* (the Supreme Court ed. vol.1 2002). It is also said by scholars that if the carrier is involved in delivery without bill of lading etc, it will be deemed as gross negligence directly. Xu Xiaoxian, *The Identification and Effect of Invalid Bills of Lading Contract*, [1994] Ocean Transport no.1 34.

⁵ *The Efes*, *supra*.

⁶ *China Minmetals Steel Com Ltd v Far Eastern Shipping Company*, *supra*.

⁷ *China Guang’ao development Corp v Singapore LHS (private) Co Ltd*, *supra*.

⁸ Compared with English law, right of limitation will not be lost automatically in the case of a fundamental breach such as deviation or deck cargo carriage, provided that the Hague/Visby Rules apply by force of law. See *The Antares (Nos. 1 and 2)* [1987] 1 Lloyd’s Rep. 424 (C.A.).

subjective and objective knowledge). Both dimensions are construed differently in China.

1. The carrier himself and his employees are not distinguished from each other in many courts

Even though some employees *e.g.*, master, superintendent or managing agent, are not sufficiently high on the corporate ladder, the knowledge of them at or prior to the commencement of each voyage is imputed to the owner by Chinese courts, thus enlarging the test and flatly contradicting the approach elsewhere. In *Hebei Metals & Minerals Import & Export Co v Orient Overseas Container Line Ltd*,¹ on a carriage of several restrict-import cargoes, the master carelessly left the documents of manifest behind and the cargo was confiscated by customs officials for suspicion of smuggling. The court rushed to conclusion that the carrier itself processed such knowledge straightway after it determined the recklessness in the master. As a proper approach, the court should find a connection between the recklessness of the carrier itself and the recklessness of the captain.² The omission should be regarded as an error in application of law.

2. Actual knowledge or constructive knowledge

English cases reflect a focus on petitioning shipowner's subjective or actual knowledge of the causative fault; they clearly reject a constructive knowledge test.³ In comparison, Chinese courts have a tendency (wrongly, in the author's opinion) to apply the constructive knowledge test,⁴ which effectively regards unseaworthiness itself as an instance of "with knowledge". If the Chinese courts are right to say this, then "with knowledge" required

¹ Zhejiang Higher People's Court, 7 Dec 2001, (2001) ZJEZZ 109.

² *E.g.* the carrier should have supervised his employer closely so that he could have a better chance to find crewmen's misconduct and rectify it, or he has known the misconducts of the captain for quite a while but fails to correct them. *Cf.* English case *The Saint Jacques II and Gudermes* [2003] 1 Lloyd's Rep. 203.

³ See the above section.

⁴ "It (actual knowledge) refers to an irresponsible mentality of the carrier who should have or ought to have foreseen the consequence when carrying out an act or omitting act." John, S.M. *Shipping Law in China* (1999), p.314.

in both the convention and CMC adds nothing more to “recklessly.” As stated above, this also has something to do with the objective criterion of gross negligence. The courts regard it as analogous in some ways to the English doctrine *res ipsa loquitur*: the seriousness of the accident and the unseaworthiness in fact lead to an inference of knowledge. For example, in *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*,¹ the vessel’s engine broke down several times and the voyage was severely delayed. The court elaborated at length on the issue of unseaworthiness, did not examine the shipowner’s knowledge at all, and then rushed to deprive him of his limitation.²

7.3.7.3 Problems arising from the practice of the Supreme Court of China

The Chinese Supreme Court has not (if one may say so) excelled in eliminating inconsistencies and promoting a uniform application of the law. In *Yu Xiaohong v Goodhill Navigation SA (Panama)*,³ a bulwark ladder was crushed between a pilot vessel and the main vessel and broke. The first pilot on the ladder fell onto the plaintiff at a great height and caused permanent injury. Again *res ipsa loquitur* applied. The court held “the defendant failed to obey the obligation required by art.17 Ch.5 of SOLAS 1974, failed to exercise due diligence to guarantee the safety of the pilot, which caused rupture of the ladder and injury of the plaintiff. Therefore his limitation should be broken.” None of requirements of art.59 were scrutinised at all. The shipowner⁴ made strenuous efforts to apply to the Supreme Court for a retrial due to its obvious erroneous application of law. But because the case had already been widely publicised and boasted as a victory of human rights and a symbol of Chinese judicial

¹ Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46.

² The judgment reads “the liner company had knowledge that the vessel should not sail out with malfunction in main engine, failed to perform obligation of seaworthiness and reasonable dispatch and failed to make efforts to assure the vessel arrive at the destination in a reasonable time. Limitation should therefore be deprived.”.

³ Zhejiang Higher People’s Court, 31 Nov 2001, (2001) ZJEZZ 96.

⁴ Whose lawyer, incidentally, was the author.

justice by the press,¹ the Supreme Court judges managed to mediate the case in the exact limitation figure for fear that the formal judgment would embarrass the press and government.²

The result of the case might vindicate the individual justice, but its status as a sound application of legal principles is unimpressive. Mediation is an informal method without any judicial binding effect at all. *Yu Xiaohong* as bad law was not formally overruled and thus still largely cited as good law by academics.³ The Supreme Court's strategy should be motivated by a desire to stamp out improper practices in the lower courts. This case provided an ideal vehicle for the establishment of the right standards in the application of law. It would have signalled to the lower courts that the Supreme Court is prepared to exercise its rights of intervention. Nevertheless, the Supreme Court accepted the retrial yet flinched when faced with all intangible and unjustified interference. Here again the tensions between informal and formal processes are evident. In the author's view, informal mediation should never emerge as a preferred alternative to formalised litigation. The use of mediation in this crucial case set a lamentable precedent. The Supreme Court just lost a precious chance to give a formal judicial review on the concerned issue, correct the chaos and guide lower courts.

7.3.8 Conclusion

There seems to always be a pitfall in using native legal languages in studying alien conceptual paradigms. The methods in which Chinese judges construe their law lead to significant differences

¹ The case was reported on China Central TV approvingly; it was appraised as "a milestone in personal injury law in China" by Wu Xianjiang, *Personal Injuries in Yu Xiaohong v Goodhill Navigation SA (Panama), Maritime Law Judicial Theory and Practice* (Tang Nengzhong ed. 2002), p.313.

² Government would certainly demand for an explanation of the Supreme Court's decision if the one previously appraised by government has been overruled. Such a judgment would also make government "losing face" greatly. Not to forget, Chinese courts depend largely upon local government and Party authorities on such matters as appointment, removal, and promotion. Thus its independence is fragile.

³ See *Selected Cases of People's Courts* 2002 No.3 (2003), case 55; Lai Shangbin, *Application of Law in Trial of Cases concerning Personal Injury or Death Occurring in the Sea*, (2005) 16 Annual of China Maritime Law 286; Zhao Yuelin, *A Study on Personal Injuries Arising from Collisions*, CMLA News Letter (Issue 6, 2004).

between two countries. While English law provides no successful maritime cases of breaking package limitation,¹ there are abundant cases of such in China. In all Chinese cases examined by the author, only one case might have received the same decision if heard in England.² This area is one of the most problematic in Chinese law and is badly in need of attention from academics, the People's Congress and the Supreme Court.

7.4 Global Limitation

In addition to the package limitation, a global limitation has been set by statute to the total liability of a shipowner for loss or damage as a result of his operation of the vessel.

7.4.1 English and Chinese law: the background

England applies the 1976 Convention on Limitation of Liability for Maritime Claims (*i.e.* the 1976 convention) and its 1996 protocol, which is given the force of law by Sch.17-19 and Schs 4 and 5 to the Merchant Shipping Act 1979.³ In comparison, China has a more complicated regime provided by the CMC and the Regulations on the Limitation of Liability for Maritime Claims concerning Vessels not Exceeding 300 Tonnes and Vessels Engaged in Coastal Carriage and Coastal Operations (RLLMC).⁴ There are currently four tiers of limitation⁵: (1) seagoing vessels engaged in international carriage

¹ Such a difficulty can be clearly shown by the fact that there are equally few successful claims in parallel aviation field, even though art.25 of the Warsaw Convention provides a laxer condition as limitation can be deprived for an act or omission not only on the part of carrier's himself but also his servants or agents.

² *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997. The carrier as defendant provided rusted and broken container. The cargo was later found damaged by leak of water. It was found that the carrier "sent it to the plaintiff with clear knowledge that the container was broken and cargo could be damaged", so he lost his limitation.

³ Its provisions are now found in s185, Sch.7 of the Merchant Shipping Act 1995.

⁴ In general see Xu Zuyuan, *Limitation of Liability for Marine Claims*, [2004] Shipping Management no.1, 1; Yu Guoping, *Study on China System of Limitation of Liability for Maritime Claims*, [2006] Marine Technology no.3 37; Its problems see Guo Mingming, *Improvement on Limitation of Liability for Maritime Claims in China*, [2006] Shipping Management no.3 9; Zhu Moquan & Shen Xiaoping, *Perfecting Chinese Maritime Limitation Proceedings*, (2003) 14 Annual of China Maritime Law 19; Guan Zhengyi, *The Improvement of Constituting Limitation Fund for Maritime Claims Through Analysis to the Case Dainty River*, (2003) 14 Annual of China Maritime Law 20.

⁵ Similarly there are also four tiers of gross limitation of claims for loss of life or injuries to carriage of passengers by sea. One by the CMC and the other by the Regulations on the Limitation of Liability for Maritime Claims concerning Carriage of Passengers by Sea

weighting more than 300 tonnes in gross weight;¹ (2) seagoing vessels engaged in international carriage weighting less than 300 tonnes in gross weight;² (3) vessels engaged in coastal carriage and operation but weighing less than 300 tonnes;³ (4) vessels exceeding 300 tonnes engaged in coastal carriage and operation.⁴

China has not accepted the 1976 Convention (or its 1996 protocol), but Ch.11 (art.204 – 215) of the CMC which deals with global limitation is entirely based on it and there is no substantial difference between the two. The RLLMC provides the same regime and answer to almost all questions that could be raised, such as who can limit liability and what claims fall within it, *etc.*, except that it provides for a much lower amount for claims arising from coastal carriage, considering the financial status of coastal carriers. Thus the only difference among the four regimes is the limitation figure, all others points are essentially the same.

7.4.2 English and Chinese law: who can limit liability?

In the 1976 Convention and in English law the individuals who may limit liability include the owner,⁵ charterer,⁶ manager, or operator of a seagoing ship,⁷ any person for whose act, neglect or default the shipowner or salvor is responsible,⁸ as well as the vessel itself⁹ and the insurers of a seagoing ship.¹⁰ Art.204 of the CMC is very similar and it expressly provides that the vessel owner, charterer, vessel operator, salvor, insurer¹¹ and their employees and

between Chinese Ports.
¹ Ch.11 (art.204 – 215) of the CMC.
² Art.3 of the RLLMC.
³ Art.4 para 1 of RLLMC.
⁴ Art.4 para 2 of RLLMC.
⁵ Including demise charterer see *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399; *The Hopper No. 66* [1908] AC 126.
⁶ See *The Tychy* [1999] 2 Lloyd's Rep. 11 (C.A.); *CMA Djakarta* [2004] 1 Lloyd's Rep. 460 (C.A.); *The Aegean Sea* [1998] 2 Lloyd's Rep. 39.
⁷ Art.1 (2).
⁸ Art.1 (4).
⁹ Art.1 (5).
¹⁰ Art.1 (6).
¹¹ See art.206; but in *People's Insurance Co (Grangxi) v Shipping Company Ltd of Tianjin*, (1998) 37 Maritime Trial 26, the shipowner's petition for limitation was dismissed because of a "lack of support of law" at the first trial and "the carrier shall commence a separate legal action in order to resort to limitation" at the second trial. This case should not stand as good law as it is in sheer contradiction with art. 206 of the CMC.

agents¹ are entitled to rely on limitations. However two groups are notably left out. Firstly the CMC does not include the vessel itself.² This, however, is not significant because suit *in rem* is not recognised by Chinese law anyway. Secondly and more significantly, the Convention includes “manager and operator” while Chinese law only includes “operator”. Rather than specifically stating that a manager cannot limit, it simply does not mention it.³ This position is untenable as it seems unlikely a person can be classed as manager while not operator at the same time.⁴

With due respect, it seems that CMC borrows the concepts superficially and leaves their essences behind. The phrase “operator” appears only once in the whole of the CMC.⁵ Neither CMC nor any other laws and regulations⁶ come up with a detailed interpretation. The 1986 United Nations Convention on Conditions for Registration of Ships provides a fine definition,⁷ but China has yet to ratify it. It is understandable to attribute the oversight to the unfamiliarity with novelty of the corporate form of enterprise organization in plan market China, but Chinese lawmakers were no more enlightened when they invented another term into a new regulation, the Rules of Management and Operating of the Vessel, where a new phrase “Operating Manager” was introduced.⁸ At present there are no rules

¹ Art.205.

² Art.1.5 of the Convention.

³ See Huang Jianshe, *Limitations of Liability of Harbour Operators* [2000] Tianjin of Navigation no.2 14; Yang Yunfei, *Approach to Civil Liability of Port Operators*, [2004] Shipping Management no.5, 16.

⁴ A Supreme Court judge explained: When the CMC was enacted, many Chinese companies were still in old mode and “manager and operator” of vessels were never heard of. Lawmakers were not sure about their functions, so they tentatively chose one and left out a definition. Unfortunately, until today lawmakers have expended no effort in the legislation in providing guidance on what they intended by those terms. Liu Shoujie, *Gross Limitation and its Procedure, Guidance and Study on the Trial of Maritime and Commercial Cases concerning Foreign Interests*, (Wan E'xiang (ed.), 2003 No.3), p.225; Liu Shoujie, *Procedure for Global Limitation* [2004] People's Judicial no.1, 33.

⁵ *I.e.*, art.204.

⁶ Art.14 of the Regulations on Vessel Registration requires the shipowner registering his operator's name without clarifying its definition; the same happens in art.2, 17, 18, 20 of the Rules of Managing and Operating the Vessel.

⁷ Art.2 provides that it means “the owner or bareboat charterer, or any other natural or juridical person to whom the responsibilities of the owner or bareboat charterer have been formally assigned.”

⁸ Art.2 of the Rules of Management and Operating of the Vessel. It is “the person who provides managing service for shipowners, charterers and operators, including maintenance of vessel, management of the crew, selling, purchasing, leasing, operating the vessel and so on.”

to differentiate between operator, manager and operating manager co-existing in Chinese law. Over ten years have passed since the enactment of the CMC, but surprisingly no attempt has been made to clarify the confusion. Many Chinese courts exploit this opportunity to rule out the limitation. This is disappointing and should be changed.

For example, the term “operator” has been defined as time charterer by many courts.¹ Given the fact that the charterer has been specifically provided in art.204 para.2 of CMC, this interpretation must, with respect, be wrong. On the other hand, the operator in its true sense has been denied limitation. In *Zhoushan Tong Tu Construction Co Ltd v Dandong Jixiang Shipping Co Ltd and Dandong Marine Shipping Co*,² the court found that the first defendant was the shipowner and the second defendant was the operator of the vessel. As to the claims against operator, the court stated that the “operator is only mentioned in the CMC and Rules of Management and Operating of the Vessel, but none of Chinese laws or regulations provide any definitions...where there is ambiguity about the definition of operator, it is inappropriate to presume the operator should bear limited responsibility.”³ Thus the trial by lawmakers to implant the operator into Chinese law has become a complete failure.

The last problem is this: multimodal carriage is widespread these days owing to China’s enormous inland area, but multimodal carriers are not entitled to global limitation even if sea carriage is involved.⁴ In *Zhaoyuan Linglong Battery Co Ltd v Yantia Jiyang Container*

¹ In *Application for Setting up Limitation Fund by Samsum Shipping Corp*, Guangdong Higher People’s Court, 12 June 1999, the applicant submitted his application as the operator of the vessel. The court held “he provided the court his charterer party, the court therefore confirm it is the operator and is entitled to gross limitation.”

² Ningbo Maritime Court, 30th Jul 2002.

³ Cf. *PICC Zhejiang Branch v National Shipping Corp and CMA CGM SA*, Shanghai Maritime Court, 24 Dec 2001, (2001) HHFSCZ 286, where the cargo owner had contract with the first defendant, who then entrusted the second defendant to carry the cargo. The first defendant acted as an operator of the vessel as he was in charge of the operating. But the court disregarded the fact that the second defendant had set up limitation fund in France and awarded full damages against the operator (the first defendant).

⁴ This is the same to package limitation. A multimodal carrier might be subject to different rules with respect to liability, burden of proof, limit of liability, time bar and choice of law. See Crowley, M.F. *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem*, (2005) 79 Tul. L. Rev. 1461, 1478.

Freight Co Ltd,¹ the vessel owned by actual carrier sank during the voyage, however the claimant sued the contractual carrier instead in an attempt to circumvent the gross limitation. The case was referred to the Supreme Court for instruction and the Supreme Court in its reply² held that the defendant was a multimodal operator who was responsible for “door to door” carriage. Although the marine accident incurred at sea, he was neither a “shipowner” nor “operator” by definition of the CMC and therefore he was not entitled to the benefit of limitation. Once again, the decision provides a circumvention to avoid limitation as most carriers nowadays are providing “door to door” service to their customers;³ this threatens the integrity of the regime. The decision has little practical value because the contractual carrier can simply limit liability to the CMC figure in their contract. Even if the clause is struck down by the court, shipowners can still avoid it through corporate defences by either subdividing their fleets into single-vessel companies or separating its multimodal service to another company registered in countries of flag of convenience like Panama.⁴ In the end, it is just another legal game played by experienced lawyers.⁵

To conclude, from the history and upgrading of the Convention and its interpretation by English courts, the international tendency outside China is to extend the categories of defendants who can limit. This is because in modern shipping circles, more parties are involved and closely related to each other; full recovery without limitation from any one will eventually be indemnified by the

¹ Qingdao Maritime Court (the first trial), 26 Dec 2001, (2001) QHFHSCZ 49; Shandong Higher People’s Court (the second trial).

² *Reply to Petition for Instructions on Issues of Gross Limitation Application in Zhaoyuan Linglong Battery Co Ltd v Yantai Jiyang Container Freight Co Ltd*, the Supreme Court, 9 Jun 2003, (2002) MSTZ 38.

³ See *China Pacific Property Insurance (Shares) Hainan Co Ltd v Haikou Jinlun Freight Co and Ningbo Commercial Storage and Transport Co*, Guangdong Higher People’s Court, (2004) YGFMSZ 178, 15 Dec 2004.

⁴ See Gauci, G. *Limitation of Liability in Maritime Law: An Anachronism?* (1995) 19 *Marine Policy* 65, 68-69; Li Zhiwen, *Analysis on Legal Restriction and Legality of Shipping Enterprises Operating in the Form of Single-Vessel Company* [2003] *Journal of Dalian Maritime University (Social Science Edition)* no.1 14.

⁵ This question has been realised and solved by the 1980 UN Multimodal Convention (art 18) and the UNCITRAL / CMI Final Draft Instrument on Issues of Transport Law (art.6.3.1) dated December 10, 2001 available at www.comitemaritime.org/singapore2/singafter/issues/cmraft.pdf

shipowner, and as a result will compromise the integrity of the regime as a whole.¹ If this is right, the Chinese position is somewhat unsatisfactory. True, China is not a signatory of the 1976 convention and so is under no obligation derived from it when interpreting its own laws. Nevertheless, when the lawmakers implanted the 1976 convention into the CMC, it must have been their intention to harmonise its national law with the convention in practice. This can only be achieved if Chinese judges and academics acknowledge and respect the spirit of convention and construe Chinese law as such. Therefore the author will recommend that the CMC should inherit the convention's historical evolution, protect managers as well as operators of vessel and clarify their definitions.

7.4.3 English and Chinese law: what claims are covered by limitation?

Art.2 of the Convention lists six categories of claims subject to limitation, which have been notably incorporated into the CMC. The first is contained in art 2.1 (a), namely, "claims in respect of loss of life or personal injury, or loss of or damage to property occurring on board or in direct connection with the operation of the ship."² To avoid dispute, the Convention clearly states that it is applicable to consequential loss.³ The second category by art. 2 (1) (b) gives a right to limit for "claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage." Its necessity is more apparent than real because a claim of the same kind could be covered by art. 2(1)(a) as well.⁴ Further, claims within its scope are subject to limitation whatever the basis of liability.⁵ Therefore it

¹ It is said that courts should include vessel managers within the definition of "carriers" to the extent that their participation warrants such inclusion, or cargo interests will easily dodge limit of liability. Charest, D.H. *A Fresh Look at the Treatment of Vessel Managers Under COGSA*, (2004) 78 *Tulane Law Review* 885, 910. Though the suggestion is given to American law, it equally applies to Chinese law.

² Loss of life or injury to the passenger are now covered by the Athens Convention by virtue of Sch 6 to the MSA 1995.

³ In *The Breydon Merchant* [1992] 1 *Lloyd's Rep.* 373, a fire broke out on the vessel. Though there had been no physical loss or damage for his cargo, the cargo owner incurred additional costs for salvage services which was held to be restricted by limitation.

⁴ Griggs, P. *Limitation of Liability for Maritime Claims* (4th edn 2005), p.21.

⁵ Art.2.1 para. 1.

includes claims for damages arising out of negligence or the breach of the contract of carriage and the like, whatever its basis.¹ The above two categories are the most frequently invoked,² and effectively cover all claims concerned in this thesis. This policy of protecting the shipping industry apparently overrides the competing public policy of avoiding social waste, *i.e.* the requirement of mitigation,³ because even the expenses and further damages incurred in mitigation will be limitable⁴ according to the Convention,⁵ even though they would otherwise be fully recoverable according to the rule of mitigation.

The other four categories are dealt with by art.2.1 (c), (d), and (e), involving most claims a shipowner may encounter during carriage. The purposes of these provisions are to provide a wider definition of claims and to ensure that the right to limit liability is almost indisputable.⁶ Art. 207 of CMC is exactly the same as art.2 of the 1976 Convention. It even copies the words “avert or minimise loss”, though the Chinese mitigation principle does not require *minimising* the loss (it only requires not to increase the loss)⁷ and thus a narrower one compared with the convention.

7.4.4 The limitation amount

Under art.6 of the Convention a very complex calculation is required to quantify the limitation fund. The maximum liability is calculated on a sliding scale related to the gross tonnage of the ship.⁸

¹ Rix J. at the first instance of *Caspian Basin Specialised Emergency Salvage Administration v. Bouygues Offshore SA*, [1997] 2 Lloyd's Rep. 507, expressed the principle in these terms, “that language [‘whatever the basis of the liability may be’] enforces concentration on the nature of the claim for financial relief and away from the legal basis of that claim.”; *cf. The Breydon Merchant* [1992] 1 Lloyd's Rep. 373 *per* Sheen.J. at p. 375.

² Brice,G. *The Scope of the Limitation Action, Limitation of Shipowners' Liability: The New Law* (1986),p.24.

³ However, the shipowner and others cannot limit against his own contractor subject to art.2.2.

⁴ In *The Breydon Merchant* [1992] 1 Lloyd's Rep. 373, the costs in salvage service incurred in an attempt to minimise the loss, thus was limitable pursuant to the said article.

⁵ Art.2.1(f) “Claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.”

⁶ See *The Breydon Merchant* [1992] 1 Lloyd's Rep. 373, *per* Sheen J. at 376.

⁷ See chapter 5.

⁸ See 6.1 of the 1996 Protocol

This figure applies to the aggregate of all claims which may arise on any distinct occasion.¹ It will be distributed among the claimants in proportion to their established claims against the fund.² Under Chinese law gross limitation varies with the size and nature of the vessels involved. There are four tiers of gross limitation. Firstly, the CMC provides an identical regime as the 1976 Convention Without acceptance of its 1997 protocol, the global limitation in China will be less than under English law.³ It only applies to seagoing vessels engaged in international carriage weighting more than 300 tonnes in gross weight.⁴ The rest are regulated by the RLLMC. The second tier of limitation is for a vessel less than 300 tonnes which is engaged in international carriage.⁵ The third one is for vessels less than 300

The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:

(a) in respect of claims for loss of life or personal injury,
 (i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 800 Units of Account;
 for each ton from 30,001 to 70,000 tons, 600 Units of Account; and
 for each ton in excess of 70,000 tons, 400 Units of Account,

(b) in respect of any other claims,

(i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 400 Units of Account;
 for each ton from 30,001 to 70,000 tons, 300 Units of Account; and
 for each ton in excess of 70,000 tons, 200 Units of Account.

¹ Art.9 of the 1976 Convention.

² Art.12 (1) of the 1976 Convention.

³ In respect of claims other than loss of life and person injury, where the subject of this thesis falls into, the formula is as follows:

(1) 167,000 SDR for a ship of less 500 tons.

(2) For a ship of 501-30000 tons in gross weight, the figure is based on 167,000 SDR + 167 SDR x every ton exceeding 501 tons

(3) For a ship of 30001-70000 tons in gross weight, the formula is the figure calculated by (2) + 125 SDR x every ton exceeding 30000 tons

(4) For a ship over 70000 tons, the figure calculated by (3) + 83 SDR x every ton in excess of 70000 tons.

In respect of claims for loss of life or personal injury, it should be calculated as follows:

(1) It is 333,000 SDR for a ship of less 500 tons.

(2) For a ship of 501-3000 tons in gross weight, the figure is based on 333,000 SDR + 500 SDR x every ton exceeding 501 tons

(3) For a ship of 3001-30000 tons in gross weight, the formula is the figure calculated by (2) + 333 SDR x every ton exceeding 3000 tons

(4) For a ship of 3000-70000 tons, the figure calculated by (3) + 250 SDR x every ton in excess of 30000 tons.

(5) For a ship over 70001, the figure calculated by (4) tons + 167 SDR x every ton in excess of 70000 tons

⁴ International carriage includes the carriage between the mainland and Macau, Hong Kong or Taiwan. See *Application for Setting up Limitation Fund by Fujian Province Xiamen Shipping Corp*, Xiamen Maritime Court, 11 Nov 1996.

⁵ See art.3 It adopts 20 tons as the basic unit of calculation and the limitation for claims other than personal injuries is calculated as follows,

(1) For vessel under 20 tons, the maximum liability is set as 27,500 SDR; and

(2) For a vessel exceeding 21 tons, the maximum liability is 27,500 SDR + 500 SDR *per*

tonnes engaged in coastal carriage and operation: 50% of the above.¹ In the fourth place, the limitation for vessels exceeding 300 tonnes engaged in coastal carriage and operation is 50% of the amount calculated by the CMC.²

Lawmakers put forward this rather complicated system in order to forge a compromise between the requirement of international law and the financial affordability of coastal carriers. This regime was rather inventive in 1992 as most coastal carriers were small companies.³ But its existence is untenable at the present time. Suppose a vessel of 7000 tons involved in coastal carriage collides with another vessel of the same size engaged in international carriage. Is it really fair that the latter's limitation is 1,252,500 SDR, while the former is only half of that? Especially it is odd to see the policy behind different provisions in the same law is contradictory: the maintenance of the limitation figure is a protection for coastal carriers, but at the same time it has abolished another form of marine protection which had been in existence for years, *i.e.*, package limitation and exemption for negligence in coastal carriage. When enacting the legislation, legislators should examine it as a whole so as to meet the subjects' reasonable understandings and expectations. Without a clarified intention, these provisions will inevitably be replete with ambiguities. So it is time that Chinese lawmakers rethought the legal regime of coastal carriage. As said before, the author prefers a more uniform one.

7.4.5 Unit of account and their conversion

Both countries utilise the SDR as the unit of account for global limitation. Interestingly, although quite bizarrely, the global

ton in excess of 20.

In respect of claims for loss of life or personal injury, it is calculated as follows

(1) for vessel under 20 tons, the maximum liability is set as 54,000 SDR; and

(2) for a vessel exceeding 21 tons, the maximum liability is 54,500 SDR + 1000 SDR *per* ton in excess of 20

¹ Art.4 of RLLMC.

² *Application for Setting up Limitation Fund by Haikou Nanqing Container Liners Co Ltd*, Haikou Maritime Court, 15th Aug 2005, (2005)HXZ01.

³ Liu Shoujie, *A Study on Gross Limitation Procedures*, [2004] People's Judicature Issue 1, 33.

limitation for Chinese coastal carriage also adopts SDR, even though RMB is dominantly used by those litigants. The problems of Chinese law have been discussed above in package limitation and will not be repeated here.¹ In the 1976 Convention, the date of conversion is “the date the limitation fund shall have been constituted, payment is made, or security is given”.² While the CMC only states that “the date of the judgment by the court or the date of the award by the arbitration organization or the date mutually agreed upon by the parties.” But it cannot decide the currency of the fund. There are currently three methods adopted by different maritime courts in China to set up a fund

1. Using the US Dollar as the currency for the fund; conversion rate based on the date of the accident.³

2. Using the US Dollar as the currency for the fund; conversion rate based on the date that the fund is set up..⁴

3. Using the RMB as the currency for the fund; conversion rate based on date the fund is set up.⁵

In author’s opinion the CMC should revise the relevant provision specifying a particular method for setting up a limitation fund. The conversion date can be based on the date when the fund is set up so that the amount of the fund is more predictable. As to the currency of the fund, this would depend on the currency that best correlates to each particular case.⁶

¹ Wu Xianjiang, *Understanding and Enforcement of art.277 of the Chinese Maritime Code--- Comments on Application for Limitation Funds by Sekwang Shipping Company*, [2004] Application of Law (Nov) 48; Guan Zhengyi, *Procedure for Constitution of Limitation Fund for Maritime Claims*, (2002) 13 Annual of China Maritime Law 15.

² Art.8.1.

³ *Application for Setting up Limitation Fund by Sekwang Shipping Co Ltd*, Shanghai Higher People’s Court, 29 Nov 2002, (2002) HGMSHJZ 1, the fund was in USD.

⁴ *Application for Limitation by Korea Development Leasing Co Ltd*, Guangzhou Maritime Court, 5th Sep 1997, *Selected Cases of the People’s Court* (vol 23, 1998), p.266; Judgment by Ningbo Maritime Court, (1997) YHSZ 12(name and date not published).

⁵ Shanghai Maritime Court, (2002) HHFJ 6 (name and date not published); Guangzhou Maritime Court (1997) GHFS 76 (name and date not published); Xiamen Maritime Court (2003) XHFXZ 003 (name and date not published).

⁶ See chapter 8.

7.4.6 Conduct barring limitation: England¹

Under the 1976 Convention, the shipowner will only lose his right to limit if it can be proved that he deliberately or recklessly acted in a way that he knew was likely to result in the loss of or damage to the property of another.² Its interpretation is similar to that of the Hague/Visby Rules.³ The knowledge requires insight into the loss that actually occurs, not merely of the type of loss that occurs.⁴ In *The MSC Rosa M*⁵, the allegation that the shipowner ought to have known about the defects that would eventually endanger the vessel's stability was framed entirely by way of constructive knowledge and was therefore insufficient to defeat limitation for said purpose. Global limitation has been challenged in court a few times, and appears to be nearly always unbreakable under English law.⁶ It is equally difficult in the parallel aviation field.⁷ This extremely limited condition imposed by the Convention was in exchange for the establishment of a much higher limitation fund.⁸

7.4.6.1 ISM Code influence⁹

One difficulty in breaking limitation is examining the detailed running of ships and the extent to which the shipowner has

¹ This is very similar to the discussion on package limitation. But because the relevant Chinese law has provided abundant cases in global limitation, it is worth a separated discussion in brief.

² Art.4 of the Convention.

³ As said by Hobhouse J. "It was clearly important that there should be a consistent approach to the construction of similar Maritime Conventions using similar terms and expressing similar ideas." *The Lion* [1990] 2 Lloyd's Rep. 144, at p.149.

⁴ See *The Leerort* [2001] 2 Lloyd's Rep. 291 per Lord Phillips MR at p.295.

⁵ [2000] 2 Lloyd's Rep. 399.

⁶ It seems limitation was more likely to break under the previous limitation regime as the claimant was required to prove "fault or privity" of the shipowner, according to the Merchant Shipping Act, 1894, Sects. 503. See *The Truculent* [1951] 2 Lloyd's Rep. 308; *The Lady Gwendolen* [1964] 2 Lloyd's Rep. 99; *Standard Oil Company of New York v The Clan Line Steamers, Ltd.* (1923-24) 17 Ll. L. Rep. 120 (H.L.). But the new regime under the 1976 Convention was meant to be more difficult to break than the previous one as an exchange for the higher limitation amount. Hazelwood and Tettenborn, *Marsden on Collisions at Sea* (13th edn 2003), p.599.

⁷ Keep in mind that art.25 of the Warsaw Convention provides a laxer condition as limitation can be deprived for an act or omission on the part of carrier's agents as well as carrier himself.

⁸ Griggs, P. *Limitation of Liability for Maritime Claims* (4th edn 2005), p.3; *The Bowbelle* [1990] 1 Lloyd's Rep. 532 per Sheen J., at p.535.

⁹ See also Allen, C.H. *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium* (2000) 31 J. Mar. L. & Com. 263, 277-279.

delegated authority to the staff concerned with the operation.¹ In this respect, the IMO's International Safety Management Code (ISM Code) might be of some assistance.² The Code applies equally in the UK and China³ and makes it compulsory for every company to designate a person or persons ashore to have direct access to the highest level of management within the owning/operating company, as well as a reporting obligation to go with it.⁴ It provides an evidential paper trail⁵ and thus will give greater opportunities for challenging the right to limit.⁶ Nevertheless it is doubtful that the ISM Code can change the overall bleak picture completely.

7.4.6.2 Burden of proof

To challenge the right of limitation of a shipowner, the claimant has to plead and prove that the loss or damage was caused by a personal act by or omission of the shipowner and the personal acts or omissions are committed recklessly and with knowledge that such loss would probably result.⁷ The burden imposed by art. 4 is an "onerous one",⁸ which makes the limitation unbreakable.⁹

7.4.7 Conduct barring limitation: China

Chinese law has implanted an identical provision of the 1976 Convention into its CMC word for word. However, it represents a radical departure from the common law because of the different approach of interpreting the same article, which has been shown in

¹ Seward, R.C. *The Insurance Viewpoint, Limitation of Shipowners' Liability: The New Law* (1986), p.162.

² The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment. See art.1.2.1 of the Code.

³ It became mandatory under the International Convention for the Safety at Life at Sea (SOLAS) in 2002. Both countries are signatories of the SOLAS.

⁴ Art.4 of the ISM Code.

⁵ Thus the situation in *The Leerort* [2001] 2 Lloyd's Rep. 291 might to large extent be avoided. In the said case, the claimant spent a lot of money seeking for documents, but what he had obtained failed to provide any help in defeating the limitation.

⁶ Griggs, P. *Limitation of Liability for Maritime Claims* (4th edn 2005), p.34.

⁷ *The Bowbelle* [1990] 1 Lloyd's Rep. 532 per Sheen J., at 535.

⁸ *The MSC Rosa M* [2000] 2 Lloyd's Rep. 399.

⁹ Hazelwood and Tettenborn, *Marsden on Collisions at Sea* (13th edn 2003), p.600; in *The Breydon Merchant* [1992] 1 Lloyd's Rep. 373, at p.376 Sheen J. described it as "almost indisputable"; in *The Leerort*, *supra* at p.295 Lord Phillips marked that it was "virtually axiomatic" that limitation would not lose; with no realistic prospect of winning the case, the use of CPR Part 24 in limitation claim to speed the procedure is readily understandable. See *The Saint Jacques II and Gudermes* [2003] 1 Lloyd's Rep. 203.

package limitation. The condition has been so broadened as to defeat all but a few attempts at limitation. There have been prolific Chinese cases depriving gross limitation in the last 10 years;¹ by contrast, under English law only in the most extreme settings will a court deny limitation as a matter of law and no attempt has succeeded so far in 30 years. The large number of Chinese cases defeating global limitation deserve a detailed (repeated in some sense) discussion here.

7.4.7.1 Recklessness and gross negligence.

As said in package limitation, Chinese courts tend to regard gross negligence as recklessness, which directly conflicts with the Convention and its own law. In *Application for limitation by Guangzhou Authority for Ocean Shipping Administration*,² the court stated that “by art.209 of the CMC, the shipowner’s limitation will be deprived by deliberation and *gross negligence* [where art.209 says *recklessness*].”(emphasis added) Again in *Application for Setting up Limitation Fund by China Marine Bunkers (Petro China) Co Ltd Fujian*,³ “negligence” instead of “recklessness” was discussed and debated in the court to determine limitation. Moreover the courts regard gross negligence as analogous to the English doctrine *res ipsa loquitur*, which makes it much easier to break. In *SF Insurance Company v Yuan Ma Shipping Company*,⁴ a fire broke out in the vessel and the court defeated limitation for unseaworthiness without even disclosing what recklessness has been found on the shipowner.

¹ Though both Chinese and English law belong to the same Convention family, Chinese law surprisingly resembles closer to American law, who admittedly and deliberately disengages itself from the Convention. For example, between 1953 and 1996, there were 166 limitation cases pursued to judgment in the U.S. Limitation was granted in 63 of those cases and denied in the other 103, a ratio that some attribute to the courts’ hostility to the Act. See *the MLA Report*, MLA Doc. No. 729 (May 2, 1997), at 10487, 10527-36, cited by Allen, C.H. *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium* (2000) 31 J. Mar. L. & Com. 263, 263 fn 2; Jefferies, T.R. *Limiting Liability for Human Error: is American Jurisprudence Steering U.S. Shipowners into the Rocks?* (1995) 7 U.S.F. Mar. L.J. 271. Chinese maritime law review see Cui Yan, *The Brief Analysis of Defeating Limitation of Liability for Maritime Claims*, [2006] China Water Transport (10) 107.

² Qingdao Maritime Court, *Selected Cases of the People’s Court* (vol 6, 1994), p.141.

³ Guangzhou Maritime Court, 17 Feb 2000.

⁴ *Interpretation and Application of the Maritime Law and Analysis of Selected Cases* (1996), p.313.

7.4.7.2 Constructive knowledge instead of actual knowledge

English cases reflect a focus on the petitioning of a shipowner's subjective or actual knowledge of the causative fault and clearly reject a constructive knowledge test, while the opposite is true in Chinese courts. Chinese courts expand the knowledge inquiry to include an objective standard, by which the majority courts ask not only what the owner actually knew but also what the shipowner should have known. This in effect loosened the test. Implicit in the objective standard is that the knowledge will depend on seriousness of the accident. In *Application for Limitation by Korea Development Leasing Co Ltd*,¹ the court only stated that “the vessel sailed into port in violation of navigation rules and she was seriously unseaworthy, which satisfy the condition provided by art.209.” Thus the court defeated the limitation by skipping three crucial conditions. According to the Convention, any claim for damage arising from unseaworthiness will *prima facie* be subject to the limitation unless it is done by the recklessness of the shipowners with clear knowledge of its consequences.² The Convention would certainly have stated the opposite if its intention was to deprive limitation for unseaworthiness alone. The Chinese approach is completely wrong.

7.4.7.3 Who is the carrier himself

Legal tests are often uniformly written, but not uniformly applied by different nations. Is an ordinary employee in the managerial hierarchy equal to the carrier himself? Some Chinese courts certainly think so. In *Ding Genyou, Taizhou Shujiang Binhai Shipping Co Ltd and Shanghai Hai Hua Shipping Ltd*,³ the captain and first mate stowed 3 containers of dangerous cargo under deck as opposed to the requirement by the IMDG. The vessel subsequently exploded and sank. The concise decision did not point out who was the carrier

¹ Guangzhou Maritime Court, 5th Sep 1997, *Selected Cases of the People's Court* (vol 23, 1998), p.266.

² Allen, C.H. *The Future of Maritime Law in the Federal Courts: A Faculty Colloquium* (2000) 31 J. Mar. L. & Com. 263, 266.

³ Fujian Higher People's Court, 30th Nov 2005.

himself, but simply said that “Hai Hua [who is it? The manager, captain or first mate of the company?] knew this consequence would probably happen but still stowed the vessel in a way inconsistent with relevant regulations. Based on these reasons ...[the company] is not entitled to gross limitation.”¹ (emphasis added) In *Application for Setting up Limitation Fund by Samsun Shipping Corp*,² a loading supervisor appointed by the carrier failed to rectify the bad stowage, which later caused the vessel capsize at sea. This person, though not in a senior position at all, was deemed to be the carrier itself by the court.³ In *Application for Setting up Limitation Fund by Kaitone Shipping Co Ltd*,⁴ the court regarded the captain as the carrier himself and broke the limitation.⁵ These are all in sheer conflict with the Convention and CMC.

7.4.7.4 Sympathy towards the victim helps to defeat the limitation.

Chinese judges have some difficulty, it seems, in accepting that the limitation regime must exist at the expense of innocent victims. It is this, as often as not, that appears to prompt the judges into loosening the standard to break limitation, especially when some acts on the shipowner’s part are considered reprehensible. Therefore there is a better chance for the claimant to succeed when the court usually does sympathise with them. In *Cheng Fengying and Others v ICL Shipping (India) Co Ltd*,⁶ the vessel collided with a fishing boat and fled the scene, showing no regard for the lives of others, which caused 7 deaths. In that case, the court followed the CMC strictly but could not find any convincing evidence to break the limitation. As the case had been broadly reported and condemned by the media,

¹ Cf. the English case of *The Empire Jamaica* [1956] 2 Lloyd's Rep. 119 (H.L.), where it was held that the fact of absence of a sufficient number of certificated officers alone wasn't sufficient to break limitation.

² Guangdong Higher People's Court, 12 June 1999.

³ Cf. the English case of *The Lady Gwendolen* [1964] 2 Lloyd's Rep. 99. The assistant managing director failed to supervise the use of the radar which was contributory to the collision and he was alter ego of the company.

⁴ Guangzhou Maritime Court, 26 Mar 1998.

⁵ Cf. *Zhoushan Tong Tu Construction Co Ltd v Dandong Jixiang Shipping Co Ltd and Dandong Marine Shipping Co*, *supra*.

⁶ Tianjin Maritime Court, 14 Aug 2001, (2000) HSCZ 20-27.

the court managed to mediate between both parties and pressed the shipowner to accept an amicable agreement in an amount much higher than the limitation.

From an English judge's point of view, it is not beyond criticism when the judge is already in favour of one party before hearing a case. The issue is addressed here because the author intends to bring attention to those comparatists. Judicial decisions are not merely mechanical applications of general rules that dictate outcomes by deductive logic. Conversely, much depends on judges' subjective perception and interpretation of the facts of the case, and on judges' own hunches, value judgment, moral and political viewpoints, policy preferences, class background, personal bias, and prejudice. In a society where the law is infused with Confucian morality and is administered by judges who are educated in the Confucian classics, legal rules can always be manipulated to justify whatever decision the judge wants to reach. Chinese law provides an interesting example for comparatists to examine how local culture and ruling philosophical ideas influence the implementation of law.

7.4.8 Loophole in the Convention and CMC: carriage of hazardous and noxious substances by sea

With some activities, oil pollution damage and nuclear damage being an obvious one, there is room for limitation, but it should be at a much higher level, and be balanced by strict liability. Both China and England accept this and the 1976 Convention and the CMC is not applicable to claims for them.¹ However, the carriage of hazardous and noxious substances by sea,² is capable of causing damage as disastrous as the above,³ yet neither country has signed

¹ See CMC art.208 (2) (3) and art.3 of the Convention.

² Neither China nor England has ratified the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). For discussion of the convention see Pawlow, J.R. *Liability for Shipments by Sea of Hazardous and Noxious Substances*, (1985) 17 Law & Pol'y Int'l Bus. 455.

³ *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS)*, Submission by Poland, IMO Legal Comm., 62nd Sess., Agenda Item 4, at 1, IMO Doc. 62/4/5 (March 14, 1990); the carriage of HNS by sea is usually dealt with similarly to oil pollution. See

up to the HNS Convention. In theory shipowners' limitation of liability arising from an incident involving the carriage of HNS by sea is governed by the general rules of the 1976 Convention or the CMC in both countries. In the Chinese case of *Application for Setting up Limitation Fund by Sekwang Shipping Co Ltd*,¹ a chemical tanker collided with another vessel and caused the biggest leakage of toxic Styrene ever in the world. According to the CMC (the same if under the Convention), the shipowner was entitled to gross limitation and set up the fund of 417,333 SDR, where the damages were estimated to be \$800 million.² Since judges are equipped with inadequate law, it will lead to obvious injustice and provide other institutions with opportunities to impermissibly interfere with courts' adjudication. Both English and Chinese law are urgently calling for a change in this aspect.

7.5 The future of the limitation regime

The limitation regime is a realistic system which has been operating without too many problems for many years. However, the historical justification for limitation has gradually waned in modern shipping world. The concept apparently evolved as a means to encourage investment in maritime ventures by limiting any investor's personal liability. But these days corporate structures already provide limited liability to investors. Also, an owner's control over their vessels after departure is not a problem with modern

Anderson, C.B. *Liability of Charterers and Cargo Owners for Pollution from Ships*, (2001) 26 Tul. Mar. L.J. 1; Gauci, G. *Risk Allocation in the Charterparty Relationship: An Analysis of English Case Law Relating to Cargo and Trading Restrictions*, (1997) 28 J. Mar. L. & Com. 629. As a matter of fact dangerous chemicals pose a potentially greater risk. Oil is not the most noxious of marine pollutants because cleanup efforts can separate it from the sea and marine bacteria eventually break down its residue. HNS, on the other hand, does not biodegrade, and cannot be removed from the sea. See Schuda, B.S. *The International Maritime Organization and the Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea: An Update on Recent Activity*, (1992) 46 U. Miami L. Rev. 1009, 1017; Bederman, D.J. *Comment, Dead in the Water: International Law, Diplomacy, and Compensation for Chemical Pollution at Sea*, (1986) 26 Va. J. Int'l L. 485, 486.

¹ Shanghai Higher People's Court, 29 Nov 2002, (2002) HGMSHJZ 1.

² The P&I Club gave up the right of limitation and did provide a Letter of Guarantee worth \$800 million in the end. The Shanghai Maritime Bureau and the shipowner had an amicable settlement out of court in an amount far higher than the limitation required by law. Considering Chinese courts' habitual hostility, even if the case went to court, the shipowner stood no chance defending his limitation.

technology. For these reasons, the concept of limitation has been severely attacked by cargo interests¹ -- an attack which has received a good deal of scholarly support.² Courts have begun to regard sceptically limitation provisions, especially in China.³ However any hopes to replace it would not be realistic in the near future;⁴ not because shipowners are playing up its alleged justifications, but because of the disproportionate price to pay for changing a long-lasting regime. No nation wants to be the first to abandon shipowner limitation and expose its shipowners to the competitive disadvantages of unlimited liability, or to encourage sophisticated international forum shoppers.

At the moment, the main factor threatening its viability is how quickly inflation will erode the real values of the limits of established liability,⁵ whether a certain types of claims can cause too much damage,⁶ and most importantly, how far those careless national courts can depart from the regime in construing its articles which, in turn erodes its effect. Limitation works well at the present time,⁷ but no doubt at some point the limitation will require updating. Any agreed new limits must maintain a sufficiently high level to encourage the carrier to look after the cargo but also should be inflation proof.⁸ The importance of respecting the relevant

¹ "This two regimes (package limitation and gross limitation) become the most hollow principles in the whole CMC used for bullying the innocent victims." See Deng Ruiping, *The Plights and Solution of Compensation for Tortious Infringement by Vessels*, [1998] Modern Law Studies no.5 412; The continued privileged limitation is also challenged by Lord Mustill. See Lord Mustill, *Ships are Different--or are They?* [1993] LMCLQ 490.

² "[Limitation is a] relic of another time... the Limitation of Liability Act is today well past its prime. It served its purpose once, but now clutters the legal landscape." Stone, D.J. *The Limitation of Liability Act: Time to Abandon Ship?* (2001) 32 J. Mar. L. & Com. 317; it is described as an "injustice of subsidising a segment of the transportation industry at the expense of those killed or injured by its operations." Eyer, W.W. *Shipowners' Limitation of Liability--New Directions for an Old Doctrine*, (1964) 16 Stan. L. Rev. 370.

³ The same can be said of America. But the Chinese example is worth examining because it acknowledges the necessity of harmonisation in maritime law and the way it enacted its Maritime Code proves so, yet the result is still unexpected. America, on the other hand, usually takes idiosyncratic shipping law anyway disregarding international conventions.

⁴ Cf. Steel, D. *Ships are Different: The Case for Limitation of Liability* [1995] LMCLQ 77.

⁵ Selvig, E. *An Introduction to the 1976 Convention, Limitation of Shipowners' Liability: The New Law* (1986), p.17.

⁶ For example, it had been found necessary to establish a separate limit of liability for oil pollution claims (CLC1969) in order to ensure adequate levels of compensation.

⁷ For example in *Shanghai Container Port Ltd Co v Shanghai Vessel Construction Co*, Shanghai Maritime Court, 27 Sep 2002, (1999) HHFH CZ 33, the defendant's vessel collided with three vessels, the pier and a crane and caused massive amounts of damage. But the claims altogether were still lower than the gross limitation.

⁸ Wilson, J.F. *Carriage of Goods by Sea* (6th edn 2008), p.204.

conventions will be once again emphasised here. After all, the genuine efforts made by comparatists should not be squandered. They are beneficial to all those involved in international carriage because the harmonisation can give all who engage in maritime trade a uniform understanding of their rights and obligations, thereby reduce legal risks and transaction costs and increase the stability and predictability of processes and results.

7.6 Conclusion and recommendations

With the exception of a few dissonant voices,¹ the harmonisation and unification of trans-national commercial law is cherished by legal scholars.² The uniformity of maritime law existed in ancient times,³ and was revived in the nineteenth century, as many international organizations were dedicated to this aim,⁴ by primarily relying on the promulgation of international conventions.⁵ International conventions are always hailed for their usefulness in the harmonisation of laws and the delineation of international norms.⁶ The substantive law of most nations with respect to marine carriage has been largely unified in this way.⁷ For example, the Hague Rules have enjoyed widespread success and have been either ratified or

¹ See Boodman, M. *The Myth of Harmonization of Laws*, (1991) 39 Am J Comp L 699; Stephan, P.B. *The Futility of Unification and Harmonization in International Commercial Law* (1999) 39 Virg J Int L 743.

² Sturley, M.F. *Uniformity in the Law Governing the Carriage of Goods by Sea* (1995) 26 JMLC 553, 556-559; Clarke, M.A. *The Transport of Goods in Europe: Patterns and Problems of Uniform Law* [1999] LMCLQ 36, 39; Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* (2000) 31 VUWLR.

³ For example, Rhodian Sea Laws, as earliest maritime laws, were recognised in Mediterranean countries. Marseilles, Genoa, Peloponnesus, Venice, Constantine, and Arragon each had local variations engrafted upon it. See Radcliffe & Cross, *The English Legal System* (6th edn 1977); Ashburner, *The Rhodian Sea-Law* (1909); other examples are The Rules of Oleron (1266) and The Rules of Visby (1505), each of which were accepted by many countries. See Tetley, W. *Maritime Law as a Mixed Legal System*, (1999) 23 Mar. Law. 317.

⁴ For example IMO consists of 149 member States, including almost every maritime nation in the world.

⁵ Over 40 international conventions, 16 voluntary "codes" and over 500 recommendations have been developed under IMO's auspices. See Collins, D.M. *International Uniformity and the Carriage of Goods by Sea*, (1985) 60 Tul. L. Rev. 165; Henry, C. *The Carriage of Dangerous Goods by Sea: The Role of the International Maritime Organization in International Legislation* (1985), p.49.

⁶ Demleitner, N.V. *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, (1998) 46 Am. J. Comp. L. 647.

⁷ Paulsen, G.W. *An Historical Overview of the Development of Uniformity in International Maritime Law*, (1983) 57 Tul. L. Rev. 1065.

acceded to by over eighty countries.¹

However, the uniformity of law on paper will not necessarily guarantee the uniformity of law in action. Given the fractious process of enacting convention, there are good reasons not to be too optimistic about the harmonisation of law.² In the first place, negotiators arrive at international meetings with competing and conflicting interests. To achieve a common result of multilateral negotiations among as many as 150 countries, the convention itself must be the product of compromise.³ It cannot be too lengthy and complicated, and must be forged in general terms which can be interpreted with flexibility.⁴ Some scholars even note the correlation between the length and complexity of conventions and the level of support that they receive.⁵ Secondly, the fact that lawmakers occupy vast fields and then fail to keep them ploughed signifies role of judges and scholars in each nation. Many substantive interpretations to the convention depend on the political and judicial authorities of each state.⁶ But the lack of a regime rectifying the wrong application of conventions only invites a varied construction of conventions and their true force and effect, which in turn causes its impotence.⁷ This is a fatal blow for maritime law comparatists. In theory, the only hope

¹ Bear in mind the fact that some countries such as China and Russia have adopted domestic legislation substantially parallel to the Hague Rules without adopting the convention itself. See Chandler, *A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules*, (1984) 15 J. Mar. L. & Com. 233, 289-91.

² Because of various interpretations by different courts, it is suggested that "predictability in practice between parties in dispute may be a more realistic and desirable aim than uniformity between the courts applying conventions in different countries." DeBattista, C. *Carriage Conventions and Their Interpretation in English Courts*, [1997] J.B.L. Mar. 130, 142.

³ *E.g.*, Albert Lilar, president of the CMI from 1955 to 1974, described the 1924 Limitation Convention as being "the result of a laborious compromise." Lilar & Bosch, *Le Comité Maritime International 1897-1972* (1972), p.2.

⁴ See Yost, M.J. *International Maritime Law & The U.S. Admiralty Lawyer: A Current Assessment*, (1995) 7 U.S.F. Mar. L.J. 313.

⁵ *I.e.*, the longer and more complex the convention the less support it might receive. See Griggs, P.J.S. *Uniformity of Maritime Law - An International Perspective*, (1999) 73 Tul. L. Rev. 1551.

⁶ Different approaches in law in interpreting conventions by major shipping countries see Tetley, W. *Interpretation and Construction of the Hague, Hague/Visby and Hamburg Rules* (2004) 10 JIML 30.

⁷ Scholars were once lamenting for the 1957 Limitation Convention for the exact reason. "Interpretations of the convention will undoubtedly differ substantially from nation to nation, thereby eliminating any likelihood that meaningful uniformity will be achieved." Note, *Limitation of Shipowners' Liability--The Brussels Convention of 1957*, (1959) 68 Yale L.J. 1676, 1714. This only provides another evidence for the pessimist. See Reimann, M. *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, (2002) 50 Am. J. Comp. L. 671.

for complete uniformity is that most nations follow the interpretation of one country.¹ With the growth of legal nationalism and patriotism nowadays, this idea is not feasible in practice.

The comparison between China and England provides a vivid example of the difficulty in achieving harmonisation of law at an international level. In retrospect, the rationale for limitation is one of public policy in encouraging shipping and trade. It imposes a *prima facie* liability on the carrier, subject always to the limitation. This chapter has outlined the principal legal features of the limitation system as operated in England. The approach utilised by English law takes into account the international convention and thus reflects the true intention of the Convention. In theory, Chinese law requires a similar analysis to defeat limitation. But in stark contrast, the language in the CMC is construed in a manner not intended by the drafters. The issue of breaking limitation has been previously handled in widely divergent ways by Chinese maritime courts, adversely affecting the significance of this regime in China. The degree of the culpability of shipowners under Chinese law is significantly lower than it is under English law in defeating limitation. Unlimited liability is far more likely to be established in China.

Superficially, it is the result of the Chinese way to treat the contention, *i.e.*, to unilaterally adopt a convention without rectifying it. Chinese lawmakers were not happy with the full contents of conventions, and thus hand-picked relevant provisions and incorporated them into Ch 4 from each of the three conventions. But the entire Chapter 11 of the CMC is based on the 1976 Convention; there is no sensible reason not to rectify it.² As a consequence,

¹ As recommended by an American scholar Eyer, it should be either U.S. law or another leading maritime country. See Eyer, W.W. *Shipowners' Limitation of Liability--New Directions for an Old Doctrine*, (1964) 16 Stan. L. Rev. 370. The same view is held by Note. See Note, *Limitation of Shipowners' Liability--The Brussels Convention of 1957*, (1959) 68 Yale L.J. 1676, 1714-19. But in international maritime law, American maritime law is too idiosyncratic and should not be the choice in the author's view. The American indifference to maritime conventions see McCormack, H.M. *Uniformity of Maritime Law History and Perspective from the U.S. Point of View*, 73 Tul. L. Rev. 1481, 1483.

² This indifference to international conventions is blamed as the origin of uncertainty of

judges do not have an international obligation to interpret the convention in its original context; due to this some significant misperceptions and dislocations appear in transporting the identical articles into Chinese law. To summarise, even though this method (*i.e.* implant the legal regime but without ratifying the convention) is welcomed by some scholars,¹ the uniformity of the law of international carriage of goods by sea is seriously undermined by this method and therefore should be discouraged in the author's view.²

Alternatively, even though China is not a signatory of the 1976 Convention, when lawmakers incorporated the convention into domestic law it clearly was their intention to follow the spirit of convention.³ Unfortunately, the lawmaker's goodwill gesture towards harmonisation has been squandered by Chinese courts. The effect is similar to that produced by the cook who ventures to reproduce an ethnic dish from a recipe only to have his employers substitute various local foodstuffs for the authentic ethnic ingredients. The finished product may be recognisable as a good-faith attempt at the dish in question, but the subtle flavours are invariably all wrong.⁴ The impact of Chinese divergence from conventions is substantial. The legal collisions between legal systems will encourage forum shopping and may also be detrimental to Chinese shipowners. The author is obligated to point out that any English lawyer who represents the cargo insurer and/or cargo owner may choose China to arrest the vessel if they want to defeat limitation.

international maritime law. Tetley, W. *Uniformity of International Private Maritime Law--The Pros, Cons, and Alternatives to International Conventions--How to Adopt an International Convention*, (2000) 24 Tul. Mar. L.J. 775, 810.

¹ English scholar see Griggs, P.J.S. *Uniformity of Maritime Law - An International Perspective*, (1999) 73 Tul. L. Rev. 1551; Chinese literature see Si Yuzhuo, *New Maritime Law* (3rd edn 1999), p.445.

² Criticism on this approach can be seen Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* (2000) 31 VUWLR 355.

³ The harmonisation of maritime law is largely cherished by Chinese scholars. See Zhou Xiaoming, *Unification of Maritime Law-Status, Problem and Countermeasures*, [2004] World Shipping (4) 13; Fu Tingzhong, *Basic Principles and Approaches with Respect to the Amendment of the Maritime Code of the PRC*, [2006] Modern Law Science (5) 18.

⁴ The example is provided by Ainsworth, J.E. *Categories and Culture: On the "Rectification of Names" in Comparative Law*, (1996) 82 Cornell L. Rev. 19.

This illustration of the differences between Chinese law and English law on shipowner's limitation clearly shows the challenge faced by comparatists and Chinese lawmakers. International convention is justified as a tool for shaping or guiding domestic decision-making, particularly legislation;¹ at the same time it always runs the risk of misinterpreting legal phenomena because of judicial, linguistic and cultural departures.² It is recommended for Chinese scholars and judges to use meticulous care in their interpretation of the convention.³ It is within the courts' province to construe the convention in a manner that that could locate key concepts within its legal discourse that crystallise its sensibility, especially when national law is directly based on a convention. Even though there is not always a literal equivalent in the Chinese language for some concepts, the law must not try to communicate the sense of foreign legal terms in Chinese. Instead it must find its true meaning from the background of the convention, *travaux préparatoires*, and even foreign cases as English judges do.

Furthermore, the current Chinese regime is badly in need of attention by law drafters and the Supreme Court. The recommendation is, in order to conform to the international customs, the court must recognise the nature and extent of risks involved in modern shipping and remain faithful to the legislative policy in the pertinent conventions implanted into national law. As the written law tends to increase opportunities for doubt and confusion, the People's Congress is responsible for modifying and interpreting statutory language in order to show a healthy respect for conventions. The anomaly that it becomes too easy to defeat limitation should be corrected. This could be achieved either by rewriting the relevant

¹ For discussion, see Stein, *Uses, Misuses - And Nonuses of Comparative Law*, (1977) 72 Nw. U. L. Rev. 198; Kahn-Freund, *On Uses and Misuses of Comparative Law*, (1974) 37 Mod. L. Rev. 1; and Watson, *Legal Transplants and Law Reform* (1976) 92 L. Quart. Rev. 79.

² This is exactly the reason why some comparatists hold permissive views on harmonisation of law. See Pierre Legrand, *The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure*, (2001) 75 Tul. L. Rev. 1033, 1037.

³ For the role of judges in keeping harmonisation of international law see Fassberg, C.W. *Language and Style in a Mixed System*, (2003) 78 Tul. L. Rev. 151; Markesinis, B. *The Judge as Comparatist*, (2005) 80 Tul. L. Rev. 11.

articles in the CMC in a legal language which is more familiar to most judges or by scrutinising closely the limitation analyses by the Supreme Court. It might be more effective if the Chinese Supreme People's Court could issue provisions aimed at clarifying the concerned issue. The Supreme Court's strategy should be motivated by a desire to stamp out improper practices existing in lower courts when they hear shipping cases. Every attempt, therefore, should be made to increase the awareness of decision-makers and judges of the international tenor of existing and proposed laws in this area.¹

Other recommendations to revise relevant laws or conventions in this chapter include: the conversion of the SDR should be clarified (art.277 of CMC); “may” should be replaced with “must” (art.75); art.204 of CMC should protect managers as well as operators of vessel and clarify their definitions; CMC and the 1976 Convention is urgently calling for a change in respect of limitation for carriage of hazardous and noxious substances by sea; the effect of “unknown” clause in English law and Hague/Visby Rules should also be changed.

¹ Colella, U. *The Proper Role of Special Solitude in the General Maritime Law*, (1995) 70 Tul. L. Rev. 227.

Chapter 8 Interest and Foreign Currency¹

To give interest on judgments for damages or judgment debts is theoretically sound because the claimants have been deprived of money,² which would otherwise have been available to them if the breach had not occurred.³ On the other hand, if money has a stable value, then interest may be very low or even diminished, as a payment next year is as good as payment now. Also, if the plaintiff is not in fact borrowing and has not lent his money out at interest, in theory he suffers no loss from a late payment and therefore should not be given interest. The topic of interest is thus complicated, and spawns disagreement even among top world economists. For this reason, the award of interest is highly discretionary and rates and periods are unpredictable compared to other areas of law; therefore this part of law is, at first sight, arguably not as meritorious as other areas of English law. However, compared to the workings of the law of the PRC it seems, with respect, a model of clarity, because of its theoretical continuity, which Chinese law lacks.

8.1 Interest under English law.

1. The position at common law.

At common law there was until 2007 no right to interest on late payments of debts⁴ or damages.⁵ Unless the contract or instrument

¹ It has to be pointed out that although interest and foreign currency awards are both directly related to damages itself, they are rather different issues. The main reason that the author put them in this chapter together is because they both concern fluctuating money values and how far the law should take account of this.

² Strictly speaking, in the case of damages the claimant has often been deprived, not of money, but of a non-money asset: in this case giving interest is simply an approximation of his loss.

³ "If the money had been paid at the appropriate commercial time, the other side would have had the use of it." *Kemp v Tolland* [1956] 2 Lloyd's Rep. 681, at 691 *per* Devlin J.; "the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly." *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Lloyd's Rep. 15 (C.A.) *per* Lord Denning at p.26; *The Dona Mari* [1973] 2 Lloyd's Rep. 366, *per* Kerr J. at p. 376; *Jefford v Gee* [1970] 1 Lloyd's Rep. 107 (H.L.) (personal injuries and death).

⁴ *London Chatham and Dover Railway Co. v. South Eastern Railway Co* [1893] A.C. 429 (H.L.).

⁵ "There is no such thing as a cause of action in damages for late payment of damages." *The Lips* [1987] 1 Lloyd's Rep. 131, *per* Lord Brandon at 317.

creating the debt expressly or impliedly provided for payment of interest, a court had no jurisdiction to award it, however tardily the debt might be paid.¹ The only exception was that it could be awarded as special damages satisfying the principle of *Hadley v Baxendale*,² i.e. if the loss of interest suffered by the claimant is within the reasonable contemplation of the defendant, such interest is in principle recoverable as damages.³ After the long overdue *Sempra Metals Ltd v Inland Revenue*,⁴ the court now has a common law jurisdiction to award interest, both simple and compound, as damages on claims for the non-payment of debts as well as on other claims for breach of contract and in tort.

2. Interest under statute.

S. 35A of the Supreme Court Act 1981 allows the High Court, s.69 of the County Courts Act 1984 the county courts, and s.49 of the Arbitration Act 1996 arbitrators, to award interest on debts or damage awards. The theory is that a claimant kept out of his money should be regarded as having, to that extent, suffered a loss: thus, to determine the amount of interest awarded, “the enquiry does not focus ... on the profit to the defendant of the use of the money. It is directed to an estimation of the cost to the plaintiff of being deprived of the money which he should have had.”⁵ It should be noted that comparable simplification may be effected in commercial cases,⁶ where interest is more or less a notional figure for the value of the money he has not received.⁷ A significant feature of this area is that

¹ *De Havilland v Bowerbank* (1807) 1 Camp. 50; *Page v Newman* (1929) 9 B&C 378; *London Chatham and Dover Railway Co. v. South Eastern Railway Co* [1893] A.C. 429 (H.L.).

² *The World Symphony* [1991] 2 Lloyd's Rep. 251, where charterers delayed in paying sums due under charter.

³ Other exceptions (largely irrelevant to this thesis) see Tettenborn, *The Law of Damages*, p.206.

⁴ [2007] 3 W.L.R. 354 (H.L.).

⁵ *Banque Keyser Ullman S.A. v Skandia (UK) Insurance Co Ltd*, December 1987, QBD (Unreported), per Steyn J.

⁶ See *Halsbury's Law of England* (12) 1 (4th edn), p.308.

⁷ As commented, “it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or particular attribute) could borrow money as a guide to the appropriate interest rate.” *Tate & Lyle Food Distribution Ltd v Greater London Council* [1981] 3 All ER 716, per Forbes J. at 722. Thus it is usually irrelevant to show how much it cost *this* claimant to borrow. *F.M.C. (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep. 221, p.227,

English law gives a very broad discretion so that it can have sufficient flexibility to avoid injustices in specific instances. An English court needs only to comply with the principles of *restitutio in integrum* and reasonable foreseeability.¹ This aspect is given full discretion by statute,² not only to the recoverability of interest itself, but also to a wide range of questions, including those concerning rates,³ and for which part of the period *etc.*⁴ The court can even take different rates for different periods. It is worth mentioning that sometimes damages for the loss of use of the cargo or vessel are assessed by the interest or depreciation on the value of the property for a certain period.⁵ To avoid overlapping, interest will not be awarded on that part of damages.⁶

3. Note: interest in the Admiralty Court.

Though before *Sempra Metals Ltd v Inland Revenue*⁷, the common law did not award interest where the cargo was destroyed or damaged, the opposite was true in Admiralty Court.⁸ In *The Kong Magnus*⁹, the admiralty allowed interest from the date of collision for damages caused by collision with the defendants' vessel; this would have been denied by a common law court.¹⁰ However the inherent

where Donaldson J. commented that claimants usually had to pay more than awarded.

¹ Foreseeability is only relevant as regards the common law (as against the statutory) jurisdiction.

² "The question of rate of interest is not, to my mind, a question of law alone, to be decided in the same way in all cases. It is a question, in part at least, also of discretion, to be exercised in relation to the facts of each particular case." *The Mecca* [1968] 2 Lloyd's Rep. 17 *per* Brandon J., at p.27.

³ "There is no such thing as a correct rate of interest applicable to all cases. It is a matter for the discretion of the Court in each case..." *The Funabashi* [1972] 1 Lloyd's Rep. 371. *per* Dunn J. at p. 374.

⁴ S 35 A of the Supreme Court Act 1981, s.69 of the County Courts Act 1984.

⁵ See ch 6. The loss of vessel see *The Kong Magnus*, [1891] P. 223, *per* Sir Charles Butt; the loss of a dredge in *The Edison* (1933) 45 Ll. L. Rep. 123, *per* Lord Wright at p.132; the loss of use of cargo in *The British Columbia and Saw-Mill Co v Nettleship* (1867-68) L.R. 3 C.P. 499; *Dunn and Others v. Bucknall Brothers* [1902] 2 K.B. 614; *Sunley & Co Ltd v Cunard White Star Ltd* (1940) 66 Ll. L. Rep. 134 (C.A.).

⁶ Knott, J. *Loss of Profit Caused by the Total Loss of a Ship: Its Relationship to Value and Interest* [1993] LMCLQ 502.

⁷ [2007] 3 W.L.R. 354 (H.L.).

⁸ "The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex morâ* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto*." *The Northumbria* (1869-72) L.R. 3 A. & E. 6, Sir Robert Phillimore at 10; *cf. The Ben Gairn* [1979] 1 Lloyd's Rep.410.

⁹ [1891] P.223.

¹⁰ "It seems clear that a different rule exists in collision suits in the Admiralty Division, and ... in a Common Law Court as to including interest in the damages. A Court of Common Law does not include interest in the damages assessed, ... [but in this court] the plaintiffs

jurisdiction in Admiralty is largely irrelevant nowadays. It coexists with the provisions of the SCA 1981, s 35A, and the specific regime provided for by the Merchant Shipping Act 1995, Sch 7 (where a limitation fund has been set up), both of which provide a regime at least as generous to the claimant as the old rule was (and sometimes more so).¹ Particularly after the landmark *Sempra Metals Ltd v Inland Revenue*² there seems no need to resort to jurisdiction in Admiralty.

8.1.1 The period for which interest is given.

Interest can start accumulating from when the cause of action occurred (that is, when the plaintiff could first have sued),³ but not earlier. Generally, it starts to accrue from the date that the debt is due,⁴ or the loss is first suffered.⁵ It has been held to run from the date when the ship is totally lost in collision cases,⁶ or the date of rendering salvage services in claims for a salvage award.⁷ Interest upon demurrage commences from the time “when the demurrage was incurred, or... some period after that which allowed for the calculation and collection of the claim to demurrage.”⁸

However, the above is only the *prima facie* position. Though sometimes the incurring of a liability for compensation or payment itself amounts to a loss, it does not necessarily mean the claimant has “felt” the loss.⁹ As the power to give interest is discretionary, that interest may start running later, say the date when the loss is truly suffered.¹⁰ For this reason, in *Kaines (UK) Ltd v Osterreichische*

are entitled to recover this interest.” *Ibid*, at 234, per Sir Charles Butt P; *The Dundee* (1827) 2 Hagg. Adm. 137.

¹ Tettenborn, *The Law of Damages*, p.223.

² *Supra*.

³ The SCA 1981, s 35A; see also *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352.

⁴ *Myron v Tradax Export SA* [1970] 1 Q.B. 527, per Donaldson J. at p 536; *The Aldora* [1975] Q.B. 748.

⁵ *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1998] 1 All E.R. 305.

⁶ *The Berwickshire* [1950] P. 204; *The Leisbosch* [1933] A.C. 449, 468.

⁷ *The Aldora* [1975] Q.B. 748.

⁸ *The Ama Ulgen* [2001] 1 Lloyd's Rep. 512, per Rix L.J. in his *obiter* at p.518.

⁹ *Giles v Thompson* [1994] 1 A.C. 142 (H.L.).

¹⁰ “The basic principle is, however, that interest will be awarded from the date of loss.” *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 per Robert Goff J. at p.847; *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819, per 384

*Warrenhandelsgesellschaft*¹, the court held that interest on damages ran not from the date of breach but from the later time when the buyers were required to pay for the substitute goods.²

Interest is payable over the period for which the defendant has unreasonably withheld money,³ at least in a contract or commercial case. In a tort case, it may be different. In a case of destruction of a ship, for example, interest run from the date of the sinking, even though in practice the defendant was not expected to pay damages until some time later.⁴ It does not necessarily cover the whole period between the date when the cause of action arose and the date of payment or judgment. To quote Lord Wilberforce in *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd*,⁵ “in a commercial setting, it would be proper to take account of the manner in which and the time at which persons acting honestly and reasonably would pay.”⁶ If the insurers have reasonably had opportunity to decide whether or not to meet a claim, interest will start from this date.⁷ Regard is also given to the reasonableness of a claimant’s behaviour. A claimant may be deprived of interest if he has been unreasonably delayed in pursuing the action. Such a measure is made not with a purpose to penalise,⁸ but because the predominant cause of being kept out of the money is the failure to prosecute the claim.⁹

Lord Wilberforce at p.836; *The Berwickshire* [1950] P. 204 ; *The Liesbosch* [1933] A.C. 449.

¹ [1993] 2 Lloyd's Rep 1.

² See *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 A.C. 883 (H.L.), where interests did not run from the date of conversion but from the date of replacement as there was no immediately available market for mitigation. In *The Popi M*, [1985] 2 Lloyd's Rep. 1, the interest started from the date when the writ was issued.

³ *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 per Lord Wilberforce, at p.836.

⁴ *The Berwickshire* [1950] P. 204; *The Liesbosch* [1933] A.C. 449.

⁵ [1975] 1 WLR 819.

⁶ *Ibid*, at p.836.

⁷ *Knoller v Evans* (1936) 55 LL L Rep 40; *De Maurier v Bastion Ins. Co* [1967] 2 LL Rep 550.

⁸ To quote May L.J. in *The Popi M* [1984] 2 Lloyd's Rep. 555 (C.A.), at p.561, “the fundamental basis for exercising that discretion is to compensate a party for being kept out of the money which the Court has adjudged he should have been paid.; the award or refusal to award interest should not be used as a means of penalizing a party for instance in the way in which negotiations or litigation have been conducted on his behalf.”

⁹ *The Vergina (No. 3)* [2002] 1 Lloyd's Rep. 238. It was suggested in the renowned *McGregor on damages* (17th edn 2003), p.573, that there might be an exception to this rule where interest was claimed on demurrage. This conclusion is based on *The Ama Ulgen* [2001] 1 Lloyd's Rep. 512. Unfortunately this is arguable as the case did not deal with the concerned question. In that case the buyer delayed in collecting demurrage for the benefit of the seller and had to reimburse seller for his subsequent breach of sub-

8.1.2 Interest rate.

The basic principle followed in deciding what interest rate to award is *restitutio in integrum*, i.e. to restore the claimant to the position he would have been in had he not been denied his money. There is no fixed statutory rate of interest, so it is up to the discretion of the court. Interest rates are uncertain and constantly changing, according to the practice of the particular court and the circumstances of the particular case. At present there are two major types of interest rates,¹ the rate under the Judgments Act 1838 and the commercial rate. The former is a statutory rate² that is calculated from the date that judgment is given, unless the court orders otherwise.³ Technically the statute does not prescribe the rate of prejudgment interest, but it is sometimes applied by analogy in certain cases.⁴

The commercial rate is commonly used in commercial disputes⁵ and is adopted in the Commercial Court,⁶ the Admiralty Court⁷ and in commercial proceedings elsewhere.⁸ It usually adds 1 percent to the average bank rate calculated over the period in question,⁹ which represents complications over a long period.¹⁰ Because the claimant

contract. Therefore the author is of the view that there is no exception to demurrage.

¹ The special interest rate in cases of personal injury and wrongful death is outside the purview of this thesis. For this readers can read Mackay, C. *Guidelines for the Assessment of General Damages in Personal Injury Cases* (8th edn 2006), Anderson, R. *Damages for Personal Injury and Death* (2nd edn 1983).

² S.17 of the Judgments Act 1838.

³ See *The River Loddon* [1955] 1 Lloyd's Rep. 503 (HC (Aus)); *The Theems* (1938) 61 Ll. L. Rep. 177.

⁴ *Watts v Morrow* [1991] 4 ALL ER 937 concerning a claim for damages caused by professional negligence of surveyors.

⁵ *The Garden City (No.2)* [1984] 2 Lloyd's Rep. 37 per Kerr L.J. at p.51. "This remains the practice in that Court, and the practice of the Admiralty Court is now the same. In my view there is good reason for equating the rates of interest awarded in both these Courts, since both deal with commercial disputes, and much of the litigation in the Commercial Court is also concerned with shipping."

⁶ *Reed Executive plc v Reed Business Information Ltd* [2004] 4 All ER 942; *Zebrarise Ltd v de Nieffe* [2005] 2 All ER (Comm) 816; *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.

⁷ *The Funabashi* [1972] 1 Lloyd's Rep. 371; *The Abadesa* [1968] 1 Lloyd's Rep. 493; *The Mecca* [1968] 2 Lloyd's Rep. 17.

⁸ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (H.L.)

⁹ *The Dona Mari* [1973] 2 Lloyd's Rep. 366, per Kerr J. at p. 376; *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] Q.B. 489, 496; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All E.R. 925; *Shearson Lehman Hutton Inc v Maclaine Watson Ltd (No 2)* [1990] 3 All E.R. 723.

¹⁰ *F.M.C. (Meat) Ltd. v. Fairfield Cold Stores Ltd*, per Donaldson J. at p. 227; *The Dona Mari*

would either have to borrow from elsewhere at commercial rates or use his own funds and therefore lose their investment value¹, this bank rate could either be a short-term investment rate,² or the Bank of England minimum lending rate.³ In *Shearson Lehman Hutton Inc v Maclaine Watson & Co (No. 2)*,⁴ interest is based on the commercial borrowing rate plus one percent. In *Myron v Tradax Export SA*⁵ interest was given “at a rate one percent in excess of the Bank of England discount rate for the time being in force.”⁶

It is worth mentioning that the “base plus 1 percent” can be departed from.⁷ “It would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or particular attribute) could borrow money as a guide to the appropriate interest rate.”⁸ Thus 2 percent over base rate as interest was given in *Deeny v Gooda Walker Ltd (No 3)*⁹ as this was the rate the claimant was reasonably expected to pay for a loan. Similarly, 3 percent over base rate was awarded in *Jaura v Ahmed*.¹⁰

8.1.3 Problems in English law.

Although the broad discretion given to English courts concerning the award of interest allows them to do substantial justice while still following fairly predictable principles, the system is still not perfect. There remain a number of difficulties.

Firstly there is no rational distinction to be found between the

[1973] 2 Lloyd's Rep. 366, per Kerr J. at p. 376.

¹ *Metal Box Co Ltd v Currys Ltd* [1988] 1 W.L.R. 175, per McNeill J. p.183; cf. *The Abadesa* [1968] 1 Lloyd's Rep. 493.

² *The Funabashi*, supra.

³ *The Mecca* [1968] 2 Lloyd's Rep. 17 per Brandon J., at p.27; *The Dona Mari* [1973] 2 Lloyd's Rep. 366, per Kerr J. at p. 376.

⁴ [1990] 1 Lloyd's Rep. 441.

⁵ [1970] 1 Q.B. 527.

⁶ *Ibid*, per Donaldson J. at p 536.

⁷ *Shearson Lehman Hutton Inc v Maclaine Watson Ltd (No 2)* [1990] 3 All E.R. 723, 733.

⁸ *Tate & Lyle Food Distribution Ltd v Greater London Council* [1981] 3 All ER 716, per Forbes J. at 722.

⁹ [1996] Lloyd's RLR 168.

¹⁰ [2002] EWCA Civ 210. “The law should be prepared to recognise, as I suspect evidence might well reveal, that the borrowing costs generally incurred by them are well removed from the conventional rate of 1% above base (and sometimes even less) available to first class borrowers.” Rix L.J.

various rates in different cases. The interest may be chosen irrespective of proof of a loss to the claimant,¹ whether or not he could in fact borrow at that rate,² and even if he may in fact have suffered more.³ This uncertainty about which rate will be chosen in a particular case is disconcerting. On the other hand, this uncertainty is arguably unavoidable in the sense that the flexibility merited by English law will lead to variety. In fact, Lord Wilberforce preferred justice even at the cost of some uncertainty.⁴ Even so, it will be much better if the law of interest is not overly complicated and unpredictable. The inherent simplicity of a system, arguably will always guarantee its success for its convenience and predictability.

Secondly there are some omissions in the statutory scheme. For example, there continues to be no right to interest when payment is made late, but before the beginning of proceedings as a result of statutory interpretation.⁵ In such a case, the plaintiff is deprived of money for a certain period but is not compensated;⁶ this is not fair.⁷ This problem has been partly rectified by the Late Payments of Commercial Debts (Interest) Act 1998,⁸ which should be

¹ In *The Dona Mari* [1973] 2 Lloyd's Rep. 366, at p.376, the court awarded short-term investment interest as a convenient basis, even though it admitted at the same that such interest may not be a reliable guide to the appropriate rate in the concerned case in which interest falls to be awarded over a lengthy past period.

² *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 (H.L.). This point is arguable as the fact that claimant has suffered more loss might be seen a matter of unforeseeable loss, and hence unrecoverable by an analogy to *Hadley v Baxendale*.

³ *Tate and Lyle Food and Distribution* [1982] 1 WLR 149, at p.155; *F.M.C. (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep. 221, p.227, Donaldson J. commented that they usually has to pay more than awarded.

⁴ "To say that this produces a measure of uncertainty may be true, but this is an uncertainty which arises in the nature of things from the variety of human experience" see *The Despina R* [1979] AC 685, at p.698-699.

⁵ Such is called case 1 (a debt paid late but before proceedings for its recovery have been begun, see *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429). The parliament neither accepted the Law Commission's recommended solution to case 1 nor provided any substitute solution of its own. As a result the injustice still remains.

⁶ The court was unprepared to allow such recovery in *The World Symphony* [1991] 2 Lloyd's Rep. 25.

⁷ "The present state of the law in relation to cases where a debt is paid late but before any proceedings for its recovery have begun places the small creditor at grave disadvantage vis-à-vis his substantial and influential debtor and it is to be hoped that a solution will be found promptly and the remaining injustice in this branch of the law finally removed." *The La Pintada* [1985] A.C. 104 (H.L.) Per Lord Scarman and Lord Roskill, at 111D-E, 112B-D.

⁸ S 4 of the Act. But the act has limited application. It only applies to any contract between businesses or public authorities for the sale or hire of goods or the provision of any service. See s 2(2), s 2(3) of the Act.

recommended to the other part.

8.2 Interest under Chinese law.

8.2.1 The Chinese position in practice.

Chinese law is at first sight rather similar to English law. Although there is no general provision on interest in either basic civil law (GPCCL) or CMC,¹ Chinese courts in effect exercise a wide discretion to give interest in the name of *restitutio in integrum*. Case law shows that it can be given in respect of a debt or part of it², or as an award of damages³, and it may be awarded at any rate the court sees fit,⁴ whether arising from breach of contract or tortious act.⁵ There are some exceptions in which interest will not be allowed. If the contract has a liquidated damages clause that provides an equivalent of interest, then interest will not be awarded.⁶ Secondly, if

¹ Interest has been given as a practice but there is still no written law confirming this apart from a few regulations. For example, both GPCCL and CCL lack a specific provision on interest. In CMC there are only two provisions on interest, one concerns general average and another limitation fund. But a general one does not exist. See art.201 "Interest shall be allowed on general average sacrifice and general average expenses paid on account." Art.203 "The (limitation) fund shall be constituted in the sum of such an amount set out respectively in Articles 210 and 211, together with the interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund."

² *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248; *Heshan Water Carriage Co Ltd v Jiangmen Jiangning Shipping Ltd Co*, Guangzhou Maritime Court, (2003) GHFCZ 470, 29 Dec 2003; *Guangdong barge Carriage v Guangdong Sihui Port Group Corp.*, Guangzhou Maritime Court, 21 Jan 2002, (2001) GHFCZ 259.

³ As a matter of legal theory, damages are seen one of categories of debt. Therefore, there should not be any difference on the law applicable to them.

⁴ *Shekou Container Port Co Ltd v Guangdong Dongguan Water Carriage Group Co*, Guangzhou Maritime Court, 22 Aug 2002, (2002) GHFCZ 127; *Chongqing Shipping Co Ltd v Kaiyou Corporation*, Shanghai Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cid=740>

⁵ Claims for debt: *He Xia'er v Chen Chunyu, Lichang and Huang Ren*, Guangzhou Maritime Court, 15 Dec 2000, (2000) GHFZZ 37, (2000) GHFZZ 44; *Shenzhen Shenyue Shipping Co Ltd v Liu Min and Zhai Guangjun*, Guangzhou Maritime Court, (2003) GHFCZ 91, 30 Apr 2003; *Chen Hegao v Winko Management Services Limited*, Guangzhou Maritime Court, 28th Jun 2001, (2000) GHFSZ 138; *Haikou Port Shipping Co Ltd v Qingdao Huaxing Shipping Co Ltd*, Haikou Maritime Court, 30 Nov 2000, (2000) HSCZ 11; Damages arising from tort: *Jingzhou Shashi Wangjia Port Service Co Ltd and Wang Shiyu v Songzi Songbao Passenger Co Ltd*, Wuhan maritime Court, 15 Jul 2002, (2001) WHFSZ 17; *Tan Guokun v Tianyang County Shipping Co Ltd*, Beihai Maritime Court, 6 Sep 2004, (2004) HSCZ 006; *Meridian Success International Ltd v Aslan Transmarine Shipping Trading and Industry Co (The Hira-III)*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases (1998)*, case 42; *Yangpu Zhonggu Xinliang Shipping Co Ltd v Guangzhou Yuening Freight Co*, Guangzhou Maritime Court, 13 Oct 2003, (2004) GHFCZ 127; Damages arising from the breach of contract: *Foshan Shunde Dafeng Enterprise Development Co v Tangshan Ruide Shipping Co Ltd and others*, Guangzhou Maritime Court, 14 Oct 2003, (2003) GHFCZ 285.

⁶ *Shanghai Xinlv Multimodal Shipping Co v Fujian Pingtan Pacific Shipping Co Ltd*, Shanghai Higher People's Court, 13 Sep 2002, (2002) HGMSHZ 75.

the claimant does not specifically plead a claim for interest, Chinese courts will generally disregard it (as will English courts).¹

In both countries, the selection of an appropriate interest rate is, according to the strict wording of the appropriate legislation (English law)² or a habitual practice (Chinese law), a matter of discretion. Of course the predictability of interest awards depends on how well-structured the courts' application of the discretion is in practice. The English law of interest may seem variable, but compared to the Chinese law part, it seems, with respect, a model of clarity. Under English law at least all judgments are given with a unanimously accepted purpose, *restitutio in integrum*. To quote May LJ in *The Popi M*,³ "the fundamental basis for exercising that discretion is to compensate a party for being kept out of the money..." This principled foundation is what is lacking in Chinese cases. In achieving the brevity, Chinese law treats interest in a way that is too concise and renders the provisions without a clear order. Legal rules can sometimes be manipulated to justify whatever decision the judge wants to reach. This has exposed many problems within the Chinese legal system. Vague provisions and the wide discretionary power given to Chinese judges have led to arbitrary application in particular cases. Chinese judgments on interest are arbitrary and capricious, which is calling for a reform.

In *China Pacific Property Insurance (Shares) Ltd Co (Chengdu) v F.H.Bertling Ltd*,⁴ the court rejected the date of casualty as the starting point for interest on compensation for cargo damage but chose the date when the action was brought instead. "This is because the claimant fails to prove he has complained to the

¹ *Shekou Container Port Co Ltd v Guangdong Dongguan Water Carriage Group Co*, Guangzhou Maritime Court, 22 Aug 2002, (2002) GHFCZ 127; with the exception of only one case out of 500 shipping cases, in which the court gave interest despite the fact that it wasn't pleaded by the claimant. See *Fujian Shipping Company v Yantai Shide Minerals Ltd*, Shanghai Higher People's Court, 17th Apr 2002, 2001 HGJZZ 442.

² S 35 A of the SCA 1981.

³ [1984] 2 Lloyd's Rep. 555 (C.A.), at p.561.

⁴ Shanghai Maritime Court, 18 Aug 2004, (2004) HHFSCZ 36; see also *Shenzhen Sinocean Shipping Co Ltd v Nanjing Hengfeng Shipping Co Ltd*, Guangzhou Maritime Court, 26th Apr 2001, (2001) GHFSZ 9.

defendant before the action.” This is most obviously a problematic decision. As far as ordinary interest is concerned, it should be the claimant’s loss, not the defendant’s knowledge, that matters. The overall picture of the Chinese law of interest is simply unstructured. Not every judge views the award of interest as compensatory. For example, in *Shandong Changdao County Bei Changshan Town Dianzi Village Committee v Toxon Navigation Co. S.A. Panama*,¹ interest for damages was rejected because the claimant failed to pay a prepaid court cost.² Court cost is an administrative debt between the claimant and the court and is unrelated to damages. It is peculiar to secure court costs in this way and this would not happen in an English court. “The award or refusal to award interest should not be used as a means of penalising a party for instance in the way in which negotiations or litigation have been conducted on his behalf.”³

Chinese judges have produced a number of decisions contradictory to what the justice of the case dictates. A few examples will suffice to illustrate this. To begin with, interest does not seem to be given in respect of unjust enrichment claims, while it is available in respect of claims for damages in the same case.⁴ In *Guangxi Beihai City I/E Trading Co v Sukissed Marine Co Ltd and Michael Kritikakis Group Salvage Towage*,⁵ damages for delay of cargo were deemed eligible for interest while the refund of a general average guarantee was not. Interest was given to damages but not simultaneously to debts in several cases.⁶ In *Hao Hui Co Ltd and Hai Yue Shipping Co v Wuchuan I & E Trade Co*,⁷ interest was given on

¹ Tianjin Maritime Court, 10 Oct 2000, (1999) JHFSCZ 367-375.

² It reads “because nine plaintiffs did not pay court costs, the court will not consider their claim for interest (0.04 per cent of damages per day).”

³ *The Popi M* [1984] 2 Lloyd’s Rep. 555, per May L.J. at p.561.

⁴ In *Shenzhen Bao’an Dalong Trading Co v Guangzhou Kaida Shipping Co and others*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 10, the shipowner repudiated the contract. Interest was given on claims for loss caused by the breach but not for refund of prepaid demurrage and over-paid freight. There was no interest for refund of insurance payment in *Xishuangbanna Jinshui Logistics Co Ltd v Yang Guangming, Niezhong and Others*, Beihai Maritime Court, 12 May 2005, (2005) HSCZ 001.

⁵ Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), Case 47.

⁶ *Vinmar International Ltd v Zhejiang Overseas Trade and Development Co*, The Supreme Court, 21st Feb 2001, 2000 JZZ 1; *Hong Kong Dazhong Shipping Co Ltd v Zhuhai Pharmaceutical I&E Co Ltd and Others*, Guangdong Higher People’s Court.

⁷ Guangzhou Maritime Court, 11th Dec 2001, (2001) GHFCZ 158.

miscellaneous notarisation, appraisal and translation fees as opposed to damages. In conclusion, there seems to be no constant principles behind these unusual judgments.¹ There is "no law to follow". Chinese law on interest is open-ended enough to allow judges to exercise discretion in a subjective and personal way, which increases the potential for abuse or mistake. All of these inconsistencies decrease the damages to which the claimants are entitled. The unpredictability also gives rise to difficulties in calculating a claimant's prospects of a successful recovery in Chinese courts. Therefore the law on interest should be reviewed and corrected in the future amendment.

8.2.2 China: when does interest start to run?

Interest in Chinese law, when awarded, usually commences from the date when the debt is due.² As to claims for damages, in principle it starts from the date when the loss is suffered. As Chinese judges prefer certainty over flexibility because it allegedly serves better justice, the date of breach and tort is usually chosen as the starting point. For example, interest was held running from the date of the grounding,³ or the date when the refrigerated container was unplugged, thus causing meat to spoil.⁴ If the cargo is damaged, but the date is not ascertainable, then the date of arrival of the vessel⁵ or date of discharge of cargo will be selected instead for interests.⁶

These are all theoretically sound. In one case there is a specific provision. The Regulations on Property Damage arising from a

¹ *Lhsu Lian Huat Shipping Co (Pte) v China Guang'ao Development Principal Co*, Dalian Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases (1998)*, case 49.

² *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248; *Heshan Water Carriage Co Ltd v Jiangmen Jiangning Shipping Ltd Co*, Guangzhou Maritime Court, (2003) GHFCZ 470, 29 Dec 2003.

³ *Xishuangbanna Jinshui Logistics Co Ltd v Yang Guangming, Niezhong and Others*, Beihai Maritime Court, 12 May 2005, (2005) HSCZ 001.

⁴ *Beijing Fu Yang Hang v Sea Trade International Inc*, Xiamen Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cid=4559>.

⁵ *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997.

⁶ *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

Collision between Vessels or Vessel and Structure reads “calculation of loss of interest: loss of interest for the value of vessel shall start from when loss of operating stops, till the due date determined by the judgment or mediation; as to loss of interest for other heads of damage, it shall start from the date of accident or the date when it incurs, till the due date determined by the judgment or mediation...”¹ The provision only applies to loss and damage arising from collision,² and does not apply to other maritime claims *e.g.* damage to cargos occurred in other accidents.

Other than collision cases the starting point of interest is largely unregulated by written law and as a result the true picture is incoherent. In most cases the decision concerning when interest starts to run is so random that it seems like pure guesswork by the courts. In cases related to cargo damage, even though theoretically the due date is that of the casualty, peculiar starting points have included the date when the defendant received the copy of the bill of complaint,³ when the court gave order to detain the vessel,⁴ and 10 days after the discharge of the cargo.⁵ As far as releasing cargo without bills of lading is concerned, it is sensible to choose the date of the wrong delivery as the starting point.⁶ But in *China State Construction Engrg Corp v China Lianyungang Foreign Vessel Agency Co*,⁷ interest started from the date when the issuing bank paid the money, despite the fact that the same submission was

¹ Art.13.

² *Maoming Maonan Xinghua Petroleum & Chemical Co Ltd v Hainan Orient Shipping Co Ltd*, Guangzhou Maritime Court, 20 June 2003, (2004) GHFCZ 139; *Ningbo Qinning Shipping Agency Co Ltd v Nantong Topshare Shipping Ltd and Others*, Guangzhou Maritime Court, 6 May 2003, (2001) GHFCZ 154; *Xia Licheng v Zengcheng Xintang Shipping Co Ltd and Hu Jincheng*, Guangzhou Maritime Court, 21 Aug 2003, (2003) GHFCZ 95.

³ *DSM Citric Acid (Wuxi) Co Ltd v Sparkle International Enterprises Ltd, Rueli Cheng Shipping SA and Jui Pang Shipping SA*, Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183.

⁴ *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Maritime Court, 18 Jul 2001, (2000) HSCZ 416.

⁵ *Shenzhen Bao'an Dalong Trading Co v Guangzhou Kaida Shipping Co and others*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 10.

⁶ *China North Industries Qingdao Corp v Maersk (China) A/S*, Qingdao Maritime Court, 29th Oct 1999; *Kolon International Corp v Zhanjiang Harbour Bureau*, Guangzhou Maritime Court, 28 Dec 2000, (1998) GHFSZ 11; *Japan-China Trading Co Ltd v Eastern Car Liner Ltd*, Qingdao Maritime Court, 17th Oct 2000.

⁷ Shanghai Maritime Court, 25th Feb 2003, 2002 HHFCCZ 93.

rejected in another identical case.¹ Interest was also seen starting from the date of bringing up litigation,² or the date of the detention of carrying vessel in cases of the same nature.³ To make matters worse, Chinese courts generally do not disclose the reason for their selection.⁴ Compared with English judgments, the majority of Chinese judgments present only a brief introduction of facts, parties' arguments and the final decision. They are written in a more formalistic style than common law judgments. They often provide obscure texts to explain the reasoning behind their decision. This problem is also seen in cases heard by the Supreme Court.⁵ This slack attitude about details makes it very difficult to understand their reasoning, plagues legal research and certainly makes the point difficult to appeal. Litigants cannot evaluate the likely outcome of litigations and settle the case without legal principles being clearly stated. These judgments fall short of the basic requirements which people come to expect and are open to criticism. The judgment can only acquire authority through convincing explanation, fairness, correctness and predictability. The Chinese approach is alarming and should be paid more attention by law-makers.

Furthermore there is a tendency, even when there are several different types of claims in issue, to insist on a single date for interest to start to run. This happened in *Hanjin Shipping Company Ltd v AT Container Line Ltd and Others*.⁶ In this case the court arbitrarily ordered interest to run on the entire claim from the time of the production of the General Average Statement, even though

¹ Date of bringing up action. *China Sanli Native Product, Animal By-Products and Natural Foodstuff Ltd Co v Shenzhen Foreign Forwarding International Freight Co Ltd and Others*, Guangzhou Maritime Court, 16 Sep 2003, (2003) GHFCZ 112.

² *Lian Yungang Long River Agriculture Development Co Ltd v Qingdao Yifeng Freight Co and Legend Pacific Corp*, Qingdao Maritime Court, 30 May 2000; *Eternal Resources Limited v Honour Link International Development Limited*, Guangzhou Maritime Court, 1 Sep 2000, (2000) GHFSZ 54; *SVA-DAV Electronics Co Ltd v Cheng Lie Navigation*, Shanghai Maritime Court, 23 Apr 2004, (2003) HHFSCZ 415.

³ *Shenzhen Moscow Industry and Trade Co. Ltd v Baltic Shipping Company*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 41.

⁴ *Chongqing Lifan Industry (Group) I/E Co Ltd and others v Yongbang Trading International Freight Forwarder Ltd, Maosen Yuntong (Hong Kong) Ltd and others*, Guangzhou Maritime Court, 20th May 2004, 2004 GHFCZ 10.

⁵ *China Sinotrans Co Tanggu v Cosco Tianjin International Freight Co Ltd*, Tianjin Higher People's Court, 14th Jul 1999, *People's Court Selected Cases* (the Supreme Court ed.), 2002 Vol.1.

⁶ Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140.

most of damages or debts claimed had been incurred much earlier than this date, for reasons of nothing more than administrative convenience (“otherwise it would be too difficult to calculate”). The same happened in *Nantong Topshare Shipping Ltd v Yangzhou Yuyang Shipping Co Ltd and Tianjin/Kobe Shipping Ltd*.¹ Various heads of damages arising from collision arose entirely separately, but “for the simplicity of calculation”, a uniform interest was applied, starting from 2 months after the collision, a point that all losses had already been suffered for some time.

8.2.3 When does interest stop?

There is one regulation providing the end time for the calculation of interest in collision cases. “The due date [is] determined by the judgment or mediation.”² In other situations, Chinese judgments have varied between five different solutions. Interest can stop at “the date when the judgment comes into effect”;³ within 10 days,⁴ 15 days⁵ or 30 days⁶ after the judgment comes into effect; and lastly, it may continue until the defendants pay off the whole amount.⁷ This uncertainty about the period over which interest is given inhibits uniformity in interest, confuse litigants and expose judges to the likely external influence. Therefore it should be rectified.

¹ Guangzhou Maritime Court, 24th Jul 2002, (2001) GHFCZ 109.

² Art.13 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure.

³ *China Pacific Property Insurance (Shares) Ltd Co (Chengdu) v F.H.Bertling Ltd*, Shanghai Maritime Court, 18 Aug 2004, (2004) HHFSCZ 36; *Eternal Resources Limited v Honour Link International Development Limited*, Guangzhou Maritime Court, 1 Sep 2000, (2000) GHFSZ 54.

⁴ *Deqing County Xinshi Oil Factory v. Dynamic Care S.A. Panama*, Shanghai Maritime Court, 12th Jun 2001, 2000 HHFSC 407; *Xiamen Yicheng Shipping Co Ltd v Centrants International Freight Co (Dalian)*, Guangzhou Maritime Court, 26 Dec 2002, (2002) GHFCZ 453; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

⁵ *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Maritime Court, 18 Jul 2001, (2000) HSCZ 416; *Heshan Supply and Marketing Group Means of Production Co v Zengcheng Licheng Shipping First Co and Zengcheng Shipping (Group) Co*, Guangzhou Maritime Court, 19th Jul 2002, (2002) GHFCZ 220.

⁶ *Vinmar International Ltd v Zhejiang Overseas Trade and Development Co*, The Supreme Court, 21st Feb 2001, 2000 JZZ 1.

⁷ *Lian Yungang Long River Agriculture Development Co Ltd v Qingdao Yifeng Freight Co and Legend Pacific Corp*, Qingdao Maritime Court, 30 May 2000; *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248; *Nipponkoa Insurance Co Ltd v Shanghai Puxin International Carriage & Storage Co Ltd*, Shanghai Maritime Court, 12 Jul 2004, (2003) HHFSCZ 473; *Sino-Add (Singapore) Pte Ltd v Karawasha Resources Ltd*, Beihai Maritime Court, 5 Mar 2002, (2001) HSCZ 119.

8.2.4 Punitive post-judgment interest: an entirely Chinese institution

8.2.4.1 Introduction

Chinese law has the interesting feature, absent in English law, of awarding punitive interest for late payments of judgment debts. Art.232 of the Chinese Civil Procedure Law reads, “if the defendant fails to fulfil his obligations with respect to pecuniary payment within the period specified by a judgment, written order or any other legal documents, he shall pay double interest for the belated payment. If the enforcee fails to fulfil his other obligations within the period specified in the judgment, written order or any other legal documents, he shall pay a charge for that delay.” Double interest means twice the highest loan interest of the bank¹ for the same period,² starting from the last day of the deadline prescribed in judgment, order or other legal documents.³ This article is usually contained in the last paragraph of judgments to emphasise its deterrence.⁴ In addition, sometimes pre-judgment interest for damages and debt runs until the payee receives all money.⁵ If the defendant pays it off after the judgment has come into effect, he has to pay both the pre-judgment interest for damages and the punitive interest for the deferred judgment debt, which is triple interest in essence, an obvious deterrence indeed.

¹ Although without specifying, this should be the loan rate promulgated by the Bank of China.

² Art.294 of the Provisions on Several Issues relating to Application of Chinese Civil Procedure Law, promulgated by the Chinese Supreme Court.

³ Art.293, *ibid*.

⁴ *Orient Overseas Container Line Inc v Sinochem Corp Shandong Yantai I&E Co and Yantai Tuhsu Tea Import and Export Co Ltd*, Shanghai Maritime Court, 20 Nov 2002, (1998) HHFSCZ 419; *Jinshi Trading Co v Lianyungang Shipping Co Ltd*, Tianjin Maritime Court, 18th Apr 2005, (2005) JHFSCZ 37; *Hanjin Shipping Company Ltd v AT Container Line Ltd and Others*, Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140; *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

⁵ *PICC Property and Casualty Co Ltd v Cyprus Maritime Co.,Ltd and Santa Cruz Shipping Company Limited*, Guangzhou Maritime Court, 29 Dec 2000, (2000) GHFSZ 79; *Lian Yungang Long River Agriculture Development Co Ltd v Qingdao Yifeng Freight Co and Legend Pacific Corp*, Qingdao Maritime Court, 30 May 2000; *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248.

Meanwhile the Supreme Court made a Reply¹ on liquidated damages for deferred payment of debt. It reads “when the parties do not have an agreement on the liquidated damages for deferred payment, the people’s court shall refer to interests of overdue loans applied to financial institutions promulgated by the People’s Bank of China.”² These statutory liquidated damages are in fact interests. According to the Notice on Some Issues concerning RMB Loan Interest Rates, interest for an overdue loan is 0.3% to 0.5 % in addition to the interest rate stated in the contract of loan. It is compound interest, as it applies to outstanding interest as well.³ One slight reservation is that it was once held that such a regulation is limited to the contract of a loan.⁴ However it has also been applied in other situations, such as for deterred rent for the time charterparty⁵ or for late demurrage.⁶ Though the article itself is quite ambiguous as to the scope of application, the Supreme Court’s purpose was to solve a problem found in a contract of loan.⁷ For this reason it should be interpreted narrowly and be limited to the contract of a loan in the author’s opinion. Otherwise, there will be two parallel punitive interests.

8.2.4.2 Necessity

Punitive interest for judgment debts is unknown in England. Though there is a small penal provision in the Late Payment of Commercial Debts (Interests) Act 1998,⁸ the fundamental basis for

¹ Note: Judges in the lower courts can refer difficult problems on points of law to the Supreme Court for clarification; the Supreme Court will then publish its answer in the form of Reply and it is binding.

² The Reply to How to Calculate Liquidated Damages for Deferred Payment, by Chinese Supreme Court, 11 Feb 1999.

³ Art.3.

⁴ *China Industrial and Commercial Bank Guigang Branch v Guangxi Guigang Fu’an Carriage Co Ltd and Others*, Guangxi Higher People’s Court, 25 Oct 2004, (2004) GMSZZ 17.

⁵ *Chongqing Shipping Co Ltd v Kaiyou Corporation*, Shanghai Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cid=740>

⁶ *Nanjing Huahai Shipping Co Ltd v Nanjing Haosheng Shipping Co Ltd*, Guangzhou Maritime Court, 9 Aug 2001, (2001) GHFSZ 3.

⁷ The broad explanation was adopted in the first instance but overruled in the second instance of *DSR-Senator Lines v Hero (Tianjin) International Trade Co Ltd*, Tianjin Higher People’s Court, 30 Jan 2002, (2001) GJZ 229.

⁸ Art.6(2)(b).

interest is compensatory here.¹

The Chinese provision, however, is a matter of practical necessity rather than of strict justice. It has to be viewed in the light of Chinese commercial reality, where enforcement of judgments has been a serious problem for many years.² An English reader might well be surprised at the magnitude of the difficulty. Statistics show that 70% of outstanding judgments and orders need to be compulsorily enforced by the court in 1996.³ Only 7% of cases were successfully enforced in Shandong Province before 2000. Before Jun 1999, Chinese courts failed to enforce 8,500,000 cases, worth some RMB 259 billion altogether. In 2005 alone, there were 2,052,835 new cases waiting to be compulsorily enforced and another 360,445 cases left un-enforced from the previous year.⁴ Even after the reform to the Enforcement Division in courts in Shanxi Province, lamentably only 38.3 % of cases were successfully enforced by May 2006.⁵ Desperate Chinese judges resort to unconventional measures to tackle this problem, including sending mobile messages naming obstinate enforcers to every citizen,⁶ publishing names and addresses of enforcers in the local newspaper (most Chinese people find this to be rather humiliating),⁷ and providing a public reward for finding their properties.⁸ The problem also received attention from the Chinese Criminal Law, where, in the worst scenario, failure to enforce will

¹ To quote Lord Salmon in *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd*, [1975] 1 WLR 819 at p.841 "Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment."

² He Qinhua, *It is Important to Raise the Professional Standards of Law Enforcement Personnel*, [1996] L. Sci. no.3 14.

³ Note: 1996 is the latest statistics available. By contrast, 70% of judgments and orders are voluntarily performed by enforcers in 1986.

⁴ *The Chinese Supreme Court Report*, 2005; the president of the Supreme Court Xiaoyang admitted in his report to the Standing Committee of the People's Congress that "[We] failed to straighten out the non-enforcement discontented by the public. After one year's centralised rectification, there remain about 800,000 judgments or orders yet to be enforced." *The Report by the Supreme Court*, addressed to the Standing Committee of the People's Congress on 30 Oct 2006.

⁵ As cited by Yang Jun, *Let Justice be Justice*, *Southern Wind Windows* (22 Jul 2006).

⁶ Adopted by courts in City of Mengzhou, Henan Province. *Mengzhou Evening* (13 Jun 2006).

⁷ Adopted by courts in City of Shenzhen, see *Shenzhen Daily* (10 Oct 2006).

⁸ The Second Beijing Intermediate People's Court provided as high as 1.15 million as reward on 17th May 2006 for 5 unenforced cases; Chongqing Higher People's Court promised that they will give 1% to 10% of enforced value of property as reward to any informer.

result in a three year jail sentence.¹

It is of no use having a first class claim on merits if it cannot be readily enforced against the defendant's assets. Therefore, the introduction of this system acts as a deterrent. Also, the black market interest rate is generally higher than the interest published by the People's Bank of China. So it is necessary to ensure that the delaying tactics would bring about no financial advantage. To summarise, although it is of no use in English law, it is currently functional in China and should be maintained.

8.2.5 China: the rate of interest awarded

As Chinese courts have yet to develop a general theory on the nature of interest and the grounds for its award, the setting of the interest rate to be applied is also, to say the least, unpredictable. In *China State Construction ENGRG Corp v China Lianyungang Foreign Vessel Agency Co*,² the claimant financed his contract of sale through a loan from an issuing bank at a normal interest rate. He failed to receive the payment because the defendant delivered the cargo without bills of lading. By the principle of *restitutio in integrum*, this would have been recoverable under English law.³ However, the Chinese court insisted that the claimant should provide evidence of its contract of loan with the bank and prove the causal connection between the two. In the end, the court only gave the current deposit interest rate instead of "the borrowing rate" for lack of causal nexus.⁴ So the current deposit interest rate was accepted despite not incurred; interest of loan, though indeed incurred, was irrecoverable for lack of causation. Compared with English law where the interest rate can be recoverable irrespective of any proof of loss, this view is

¹ The Chinese Criminal Law art. 313 reads "For anyone who has the ability to fulfil the judgment or order made by a People's Court but refuses to do so; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of no more than three years, criminal detention or be fined."

² Shanghai Maritime Court, 25th Feb 2003, 2002 HHFCCZ 93.

³ *Sempre Metals Ltd v Inland Revenue* [2007] 3 W.L.R. 354 (H.L.).

⁴ See also *China Chemicals Jiangsu Lianyungang Co v Jiangsu Global International Shipping Co (Shanghai), CMA CGM S.A. and Brilliant Logistics Group Inc*, Shanghai Maritime Court, 19th Mar 2002, 2000 HHFSCZ 45.

curious. It clearly demonstrates the unwelcome stubbornness of Chinese law based on an unattractive argument of form over substance, which has also been shown in other parts of this thesis. English judges focus on details. They make in-depth analysis of similar but not identical facts in each particular case and apply legal rules accordingly. By contrast, Chinese judges focus rather on legal principles. They are often incapable of finding exceptional aspects and subtle differences among all similar cases. Consequently, a fairer justice is more likely to be achieved by the English court. This phenomenon should be closely observed by Chinese scholars.

The rate that will be chosen in a particular case is less predictable than in English law. The selection of an appropriate interest rate is a matter of discretion in both countries. However it is not an entirely open-textured discretion under English law. Restitution, reasonableness and remoteness will be taken into account. By contrast, Chinese judges have the ultimate discretion on the issue as no rules are laid down for their reference. There are at least 7 published interest rates with no coherent principle of choice among them, including *fixed deposit interest rate for enterprise for the same term*,¹ *current deposit interest rate for enterprise*,² *interest rate of working capital loans for the same term*,³ *monthly rate of*

¹ *China Pacific Property Insurance (Shares) Ltd Co (Chengdu) v F.H.Bertling Ltd*, Shanghai Maritime Court, 18 Aug 2004, (2004) HHFSCZ 36; *Shangdong Dezhou I&E Co v. Guangdong Shipping Co., Ltd*, Shandong Higher People's Court, <http://www.ccmf.org.cn/hs/news/show.php?cid=1324>; *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*, Tianjin Maritime Court, 18 Jul 2001, (2000) HSCZ 416; *China Sinotrans Co Tanggu v Cosco Tianjin International Freight Co Ltd*, Tianjin Higher People's Court, 14th Jul 1999, *People's Court Selected Cases* (the Supreme Court ed.), 2002 Vol.1.

² *Xishuangbanna Jinshui Logistics Co Ltd v Yang Guangming, Niezhong and Others*, Beihai Maritime Court, 12 May 2005, (2005) HSCZ 001; *China Pacific Property Insurance (Shares) Hainan Co Ltd (Shanghai) v Shenzhen Wangpeng Shipping Co Ltd*, Shanghai Maritime Court, 10 Sep 2002, (2001) HHFHCZ 12.

³ *Guangzhou Wuhang Shipping Co v Guiping Baisha Waterway Carriage Co*, Guangzhou Maritime Court, 20 Dec 2000, (2000) GHFSZ 115; *Chongqing Lifan Industry (Group) I/E Co Ltd and others v Yongbang Trading International Freight Forwarder Ltd, Maosen Yuntong (Hong Kong) Ltd and others*, Guangzhou Maritime Court, 20th May 2004, 2004 GHFCZ 10; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266; *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248; *Xiamen Yicheng Shipping Co Ltd v Centrans International Freight Co (Dalian)*, Guangzhou Maritime Court, 26 Dec 2002, (2002) GHFCZ 453; *Chaoyang Industrial Trading Co Ltd v Xiamen Dongming Shipping Co and Tianjin Tianwei International Freight Co*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 87.

working capital loans,¹ interest rate of loans for the same term,² yearly interest rate of current deposit,³ and punitive interest for overdue loans.⁴ They are chosen randomly and haphazardly by Chinese judges. For example, some courts reject the claim for fixed deposit interest rate for enterprise and chose current deposit interest instead simply because of “lack of factual and legal support”⁵ or “lack of sufficient evidence”⁶. Interest rate of working capital loans for the same term⁷ is more common than others. The reason for this may be that art.13 of the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure (a regulation on loss or damage arising from collision)⁸ provides a similar provision.⁹ This rate was even wrongly applied in a

¹ *Shenzhen Bao'an Dalong Trading Co v Guangzhou Kaida Shipping Co and others*, Guangzhou Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 10.

² *PICC Property and Casualty Co Ltd Zhanjiang Branch v Cross Seas Shipping Corp, Croatia Line and Lucky Seaway Services Pte Ltd*, Guangzhou Maritime Court, 29 Dec 2000, (1999) GHFZZ 47; *Raw Coal Department of Mining Company of Dianjiang, Chongqing v. Changjiang Ship Company of Chongqing, Changshou Gangbu Company of Chongqing Port*, Hubei Higher People's Court, 24 Oct 2001, 2001 EJZZ 41; *Heshan Water Carriage Co Ltd v Jiangmen Jiangning Shipping Ltd Co*, Guangzhou Maritime Court, (2003) GHFCZ 470, 29 Dec 2003; *Guangzhou Etdz construction I&E Trading Co v Sun Hing Shipping Co Ltd and Guangzhou Branch*, Guangdong Higher People's Court, 28th Oct 1997; *Hanjin Shipping Company Ltd v AT Container Line Ltd and Others*, Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140.

³ *Chinese Woods East China Co v Milena Ship Management Co Ltd and Charter Harvest Shipping Ltd*, Shanghai Higher People's Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=653>

⁴ *Nanjing Huahai Shipping Co Ltd v Nanjing Haosheng Shipping Co Ltd*, Guangzhou Maritime Court, 9 Aug 2001, (2001) GHFSZ 3; *Chongqing Shipping Co Ltd v Kaiyou Corporation*, Shanghai Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=740>; *China Chemicals Jiangsu Lianyungang Co v Jiangsu Global International Shipping Co (Shanghai), CMA CGM S.A. and Brilliant Logistics Group Inc*, Shanghai Maritime Court, 19th Mar 2002, 2000 HHFSCZ 45.

⁵ *Jiahong International Shipping Agency Co Ltd v Orient Overseas Container Line Ltd*, Shanghai Maritime Court, 25 Aug 2003, (2003) HHFSCZ 210.

⁶ *PICC Beijing Branch v Mitsui OSK Lines Ltd*, Shanghai Maritime Court, 21 Apr 2004, (2004) HHFSCZ 162.

⁷ *Guangzhou Wuhang Shipping Co v Guiping Baisha Waterway Carriage Co*, Guangzhou Maritime Court, 20 Dec 2000, (2000) GHFSZ 115; *Chongqing Lifan Industry (Group) I/E Co Ltd and others v Yongbang Trading International Freight Forwarder Ltd, Maosen Yuntong (Hong Kong) Ltd and others*, Guangzhou Maritime Court, 20th May 2004, 2004 GHFCZ 10; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266; *Yongwei International Freight Co Ltd v Guangdong Sihui Port Company*, Guangzhou Maritime Court, 21 Jan 2002, (2001)GHFCZ 248; *Xiamen Yicheng Shipping Co Ltd v Centrans International Freight Co (Dalian)*, Guangzhou Maritime Court, 26 Dec 2002, (2002) GHFCZ 453; *Chaoyang Industrial Trading Co Ltd v Xiamen Dongming Shipping Co and Tianjin Tianwei International Freight Co*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 87.

⁸ Art.13 "... interest shall refer to the one of the same nature as principal for the same term."

⁹ *Sanya Huasheng Economic Development Co v Ningbo Qinning Shipping Agency Co Ltd and Others*, Guangzhou Maritime Court, 6 May 2003, (2001) GHFCZ 107.

decision in which the currency was US dollars.¹ It is regrettably obvious that courts on occasion simply award interest *ad arbitrium*. In two similar cases heard in 2002, one was given 4%² while the other 10.8%³. Even the Supreme Court does not pay much attention to interest. In *China Daheng (Group) Co Ltd v Jielong Shipping (St. Vincent) Co Ltd*,⁴ the judgment read *interest for the same term*, which did not clarify whether it meant deposit or loan, individual or enterprise, or working capital rates. This is just another example of the indifference to details by Chinese judges compared with common law judges.

On the other hand, Chinese courts can be very wary about particularly high interest rates and usually reject claims for them on causal or evidential grounds.⁵ In *China Chemicals Jiangsu Lianyungang Co v Jiangsu Global International Shipping Co (Shanghai), CMA CGM S.A. and Brilliant Logistics Group Inc*,⁶ the shipowner delivered the cargo without bills of lading. The cargo owner had financed his deal through a bank and this particular high interest rate was held “without causal connection with the breach of the shipowner”, and was therefore not recoverable. In *Qiu Jinbiao and Guangxi Yaohui Shipping Co Ltd v Zhanjiang Huayang Shihua Ltd Co*,⁷ the defendant wrongfully detained the claimant’s property and requested through the court a guarantee of RMB 500,000 before the hearing. The plaintiff was compelled to borrow at usurious rates on the black market. The requested guarantee was later found to be unreasonable as the court only awarded some RMB 100,000 as damages. In a subsequent claim for damages for the wrongful detention, the court rejected the usurious interest as a head of damage on the grounds that there was no causal nexus between it

¹ *Sino-Add (Singapore) Pte Ltd v Karawasha Resources Ltd*, Beihai Maritime Court, 5 Mar 2002, (2001) HSCZ 119.

² *Shekou Container Port Co Ltd v Guangdong Dongguan Water Carriage Group Co*, Guangzhou Maritime Court, 22 Aug 2002, (2002) GHFCZ 127.

³ *Guangzhou Shipping (Group) Co Ltd v Wuhu Changjiang Shipping Co and Wanjiang Steamer Co*, the Supreme Court, (2001) MSTZ 3, 17th Jul 2002.

⁴ Chinese Supreme Court, 13 Nov 2003, (2001) MSTZ 6.

⁵ Except for the penal jurisdiction mentioned above.

⁶ Shanghai Maritime Court, 19th Mar 2002, 2000 HHFSCZ 45.

⁷ Guangzhou Maritime Court, 8 Oct 2002, (2002) GHFCZ 15.

and the excessive demand.

Similarly, when a claimant has to pay interest to a third party as damages arising from the breach, Chinese courts will usually deny this interest if it was compound or particularly high. In *Shanghai Export Basement Construction Golden Bridge Co v Shanghai Chuyun Co and Others*,¹ the claimant financed his contract of sale with a loan from the bank. Because of the breach by the shipowner, he failed to collect money from his sub-buyer and consequently failed to repay the loan. The bank charged him overdue punitive compound interest. The claim for this particular high interest was rejected because “he [claimant] cannot prove that this lending was specified for the contract of sale.” In another similar case, it was rejected for lack of evidence.² The result would probably be the same if heard by English courts on the grounds of unforeseeability. As mentioned in ch.3 and ch.4, causation is not convincing in relation to these claims, whereas remoteness is more appropriate. Relying on causation has caused many problems and remoteness will be recommended to Chinese judges.

8.2.6 Compound interest

For disputes arising from a contract of loan, a regulation expressly provides that “if both principal and its interest are outstanding, the [lender] may charge compound interest...”³ In *China Industrial and Commercial Bank Guigang Branch v Guangxi Guigang Fu’an Carriage Co Ltd and Others*,⁴ compound interest was given in favour of the bank. It was also given in two shipping cases,⁵ wrongly as pointed out by the author previously, because the provision does

¹ Shanghai Maritime Court, 30th Nov 1999, (1996) HHFSZ 335.

² *Zhejiang Lishui Industrial Supply and Marketing Co. v China Railway the 19th Bureau the 2nd Section Logistics Corp and Dalian Harbour Wan Tong Shipping Holdings Co Ltd*, Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 12.

³ Art.3 of the Notice on Some Issues concerning Renminbi Loan Interest Rates, 10 Dec 2003, Yin Fa (2003) No.251.

⁴ Guangxi Higher People’s Court, 25 Oct 2004, (2004) GMSZZ 17.

⁵ *Chongqing Shipping Co Ltd v Kaiyou Corporation*, Shanghai Maritime Court, <http://www.ccmr.org.cn/hs/news/show.php?cid=740>; *Nanjing Huahai Shipping Co Ltd v Nanjing Haosheng Shipping Co Ltd*, Guangzhou Maritime Court, 9 Aug 2001, (2001) GHFSZ 3.

not apply to disputes other than those based on a contract to lend money. Apart from the application of this legislation, compound interest was awarded only once in *The Efes*,¹ where the claimant failed to repay a bank loan after the shipowner backdated the bill of lading and incurred compound punitive interest. The loss of compound interest as damages was given by the court without much exposition. It only implied that the fraud was possibly the crucial factor in attracting heavy punishment. Notably, however, Chinese law (like English law) does not generally allow compound interest, except in loan contracts. Even though post-judgment interest is penal and intended to deter late payment, it cannot be compounded. In practice courts always find excuses, such as the lack of a causal link or lack of evidence², to refuse such an award.

In comparison, the same used to be true in England, where interest was limited to simple interest³ (apart from the Arbitration Act 1996⁴) even though it was almost universal that the claimant who was compelled to borrow had to pay compound interest.⁵ In *Sempra Metals Ltd v Inland Revenue*⁶ it was finally held that the court had a common law jurisdiction to award interest, simple and compound. This trial and error of English law should be closely observed by Chinese academics. It seems that compound interest accords with the principle of *restitutio in integrum* and is therefore preferable for China as well.

8.2.7 Comparison and conclusion

In both countries the selection of an appropriate interest rate is highly discretionary. Unavoidably this makes the law look awkward

¹ Guangdong Higher People's Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 48.

² *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*, Guangdong Higher People's Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46.

³ Sub-section 1 of the Supreme Court Act 1981.

⁴ S.49(3).

⁵ "Our law of interest has developed in a fragmentary and unsatisfactory manner, and in consequence insufficient attention has been given to the jurisdiction to award compound interest." *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669 (H.L.) *per* Lord Goff, at p.682.

⁶ [2007] 3 W.L.R. 354 (H.L.).

and illogical, without adequately ensuring that desirable results are reached in all situations. For this reason, the English law of interest seems to be developed in an unsatisfactory manner. But arguably, there is no particular merit in stabilisation of interest rates.¹ Therefore a slight uncertainty seems unavoidable in this field.

The primary difference between Chinese and English law is that English judges do not have entirely open-textured discretion and have to follow basic principles, while the opposite is true for Chinese judges. In English courts, the discretion must be exercised judicially.² In ascertaining which interest rate is appropriate, an English court will ask what interest will compensate as nearly as possible the plaintiff in accordance with the principles of *restitutio in integrum*, reasonableness and foreseeability³. Though it sometimes cannot prevent but actually invite disputes, it is still a commendable approach.

By contrast there is no law to follow in China. Chinese judges seem to have the ultimate discretion and there are not even the broadest guidelines. Regard is not given to the principle of *restitutio in integrum* or reasonableness. In many cases the judgment is given in such a confusing manner that its results are completely unpredictable. There is no rational distinction behind the various rates, and this tendency should be closely watched and redressed. Litigants cannot settle cases and predict the amount of award without legal principles being clearly stated. Given the Chinese judges' inclination to follow written directions, it is recommended that a moderate legislative assistance should be introduced giving some broad directions whilst allowing courts to rely on their discretion at the same time.

Another difference lies in the fact that Chinese law invents contrasting punitive interest for post-judgment in order to fight

¹ *The Funabashi* [1972] 1 Lloyd's Rep. 371 per Dunn, J. at p 374.

² *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 per Lord Wilberforce, at p.836.

³ Particularly in common law jurisdiction.

against the rampant defiance of law by enforcees. There is no equivalent in English law, under which the fundamental basis for interest is to compensate a party for being kept out of money. The Chinese regime distances itself from compensatory purpose of interest but is functional and should be maintained at the moment. Lastly, it is nearly universal that the claimant who is compelled to borrow has to pay compound interest. Chinese law is recommended to recognise this by reference to English law, which only recently moved on and approved so.

8.3 Foreign currency under English law

Theoretically a judgment can always be given in the court's own currency plus interest. In modern commercial law, there is as often as not little or no connection between the currency of a transaction and the jurisdiction in which disputes arising out of it are litigated: for example, US dollars and Euros are widely used in transactions with no connection to the United States or the European Union. Nowadays courts in both countries can also make an award in a foreign currency. This is particularly common in shipping cases and will certainly affect the amount of damages the claimant receives.

8.3.1 Judgment in a foreign currency

As far as the English courts are concerned, when a judgment in a foreign currency occurs there is no serious problem.¹ Any court² or arbitral tribunal³ can give a judgment in foreign currency, whatever law governs the underlying transaction,⁴ and whether the plaintiff's claim is for payment of a debt,⁵ or for damages for breach of

¹ This development dated from *Miliangos* in 1976. See Knott, J. *Marine Collisions and Foreign Currency* (1978) 122 SJ 443; Powles, D.G. *Foreign Currency Judgments* [1979] 4 LMCLQ 485.

² Dollars in *The Lash Atlantico* [1987] 2 Lloyd's Rep. 114; Italian lire in *The Transoceanica Francesca and Nicos v* [1987] 2 Lloyd's Rep. 155.

³ *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 2 Lloyd's Rep. 1 (C.A.).

⁴ See Tettenborn, *The Law of Damages*, p.200; *McGregor on Damages*, p.605; Howard, M.N. *Foreign Currency Judgments in Contractual Claims, Consensus ad Idem: Essays on the Law of Contract in Honour of Guenter Treitel* (Rose ed. 1996), p.56-73; Knott, J. *Foreign Currency Judgments in Tort: An Illustration of the Wealth-Time Continuum* (1980) 43 MLR 18.

⁵ *Miliangos v George Frank (Textiles) Ltd*, [1976] A.C. 443 (H.L.).

contract,¹ or tort.² The basis of this rule is the vital decision in *Miliangos v George Frank (Textiles) Ltd*,³ in which a Swiss claimant sold goods to an English buyer at a price payable in Swiss francs to a Swiss bank. The judgment was given in Swiss francs. Such a position remains the same whether or not English law is the proper law of the contract.⁴

As far as damages (not debts) are concerned, the principles used to ascertain the currency are those of *restitutio in integrum* and reasonable foreseeability.⁵ The choice of currency should be the one that most truly expresses the loss.⁶ In *The Despina R*,⁷ the claimant's vessel collided with the defendant's. The expense of repair was incurred in several currencies, but in every case the claimant, who conducted its business in dollars, purchased those currencies with dollars. Because it was reasonably foreseeable that it would use that currency to purchase the necessary currency to meet the immediate and direct expenditure, it recovered damages in US dollars.⁸ In *The Federal Huron*,⁹ the cargo receiver claimed for cargo damage. They paid in dollars to buy the cargo, treated the cargo as a dollar commodity and always used the dollar as the money of account. Once

¹ *The Folias* [1979] QB 491, at 499, per Robert Goff J. "It would be most undesirable if the award in respect of the claim in debt could be made in a foreign currency, whereas in respect of the claim in damages the award could only be made in sterling"; cf. *The Maratha Envoy* [1977] QB 324 (C.A.) per Lord Denning at p. 342.

² Tettenborn, *The Law of Damages*, p.200; McGregor on Damages, p.605.

³ [1976] A.C. 443 (H.L.).

⁴ *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, proper law of contract was English law, the decision was given in US dollars; The same in *The Maratha Envoy* [1977] QB 324 (C.A.); cf. *The Despina R* [1979] A.C. 685, (H.L.) per Lord Wilberforce at p.700.

⁵ *The Despina R* [1979] AC 685 (H.L.), per Lord Wilberforce at 702; *Metaalhandel JA Magnus v Ardfields Transport Ltd and Eastfell Ltd* [1988] 1 Lloyd's Rep. 197 per Gatehouse J.; *The Kefalonia Wind* [1986] 1 Lloyd's Rep. 273, per Bingham J. at p.292; *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 (H.L.) per Lord Goff at p.478.

⁶ See Knott, J. *The Currency of Damages in Contract* [1994] LMCLQ 311; Knott, J. *Currency Erosion in Contract Damages* [1994] IML 88; Knott, J. *Currency of Damages for Breach of Contract: Further Adventures in the Wealth-Time Continuum* [1996] LMAA Law Review, 41; "it appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency." *The Despina R* [1979] AC 685 (H.L.), per Lord Wilberforce at 700; cf. *Metaalhandel JA Magnus v Ardfields Transport Ltd and Eastfell Ltd* [1988] 1 Lloyd's Rep. 197 per Gatehouse J.

⁷ [1979] A.C. 685 (H.L.).

⁸ Cf. *The Lash Atlantico*, [1987] 2 Lloyd's Rep. 114.

⁹ [1985] 2 Lloyd's Rep. 189.

again, and predictably, they recovered damages in dollars.¹ But if the charterparty provides that payment should be made in one currency, it does not necessarily mean that damages arising out of its breach are to be made in that currency.² Plaintiffs have the burden to prove their loss as well as what currency should be used.³

8.3.2 Conversion date

The date of conversion is important because an award in a foreign currency may have to be enforced in England in sterling. It has now been determined that the conversion into sterling is the date of judgment,⁴ or the date on which the final settlement agreement is made.⁵ Thus the risk of fluctuations in the value of money between the date of breach and of judgment is borne by the claimant (who also gets the benefit of a revaluation).⁶ If the change in the relative value of currencies occur on or before date of judgment, they will be irrelevant, either because the loss flowing from the revaluation has no causal connection with the breach of contract, or because such a loss is not within the assumed contemplation of the parties.⁷

8.3.3 Interest on foreign currency awards

When the currency of the loss and the currency of damages are in a foreign currency, the court will consider the cost of borrowing

¹ Very similarly in *The Dione* [1980] 2 Lloyd's Rep. 577, though the shipowners paid the stevedores in pesos, they remitted dollar funds to make the payment. The award was given in dollars but not pesos.

² *Ibid.*

³ *Halsbury's Law of England* (4th edn), vol 35, p.545.

⁴ When giving such a decision Lord Fraser noticed that "theoretically, it should, in my opinion, be the date of actual payment of the debt" which would give exactly the cost in sterling of buying the foreign currency. "But theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement," therefore it should be the date of judgment. *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 (H.L.), per Lord Fraser at p.502; cf. the same measure and the date of the award were adopted in the arbitration case. *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 2 Lloyd's Rep. 1 (C.A.).

⁵ *The Transoceanica Francesca and Nicos v* [1987] 2 Lloyd's Rep. 155; *The Botany Triad and Lu Shan* [1993] 2 Lloyd's Rep. 259.

⁶ For examples of foreign currency damages being bad for the plaintiff see *The Texaco Melbourne*, [1994] 1 Lloyd's Rep. 473 (H.L.), Cedis incurred dramatic devaluation to Dollar just before the decision was given. Due to the said rule, the award was given in Cedis, so the claimant unfortunately had to bear some significant loss. Cf. *The Teh Hu* [1969] 2 Lloyd's Rep. 7, sterling was devalued significantly after the date of the breach.

⁷ *Aruna Mills, Ltd. v. Dhanrajmal Gobindram* [1968] 1 Lloyd's Rep. 304.

such a currency from banks that deal in it.¹ As for the US dollar, which is commonly used in shipping circles, the cost of borrowing is based on the US prime rate.² But this varies according to the status of the claimant. The better the personal covenant of the borrower the lower the rate is likely to be.³ Prime rate is for the most creditworthy borrowers.⁴ For less creditworthy borrowers, they will have to pay more, so the interest rate for them will generally be based on US prime rate plus 1%.⁵ There is a view stating that English law needs to be more flexible so that it can best compensate the claimant.⁶ However it is a delicate area where the balance between flexibility and certainty, and between substantive justice and procedural justice needs to be fine-tuned. From reviewed cases, there are solid grounds and inherent legal principles behind each decision. This is recommendable and worth learning for the Chinese.

8.4 Foreign currency under Chinese law.

8.4.1 Background

From 1994 until 2005 the monetary policy of China was based on the concept of a “single managed floating exchange rate system”; that is, the RMB was effectively pegged to the US dollar.⁷ Foreign exchange was strictly controlled by the government, with no free market in foreign currency.⁸ The conversion rate between RMB and

¹ *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2462, per Aikens J; *Colin Baker v Black Sea* [1995] LRLR 287n, per Potter J.; [1997] LRLR 353 per Staughton L.J. at 360, per Otton L.J. at p.364.

² Which is the rate that commercial banks charge their most creditworthy customers if they are borrowing for a short term. It is roughly equivalent to LIBOR + 1% in England.

³ *Banque Keyser Ullman S.A. v Skandia (UK) Insurance Co Ltd*, QBD December 1987 (Unreported), per Steyn J.

⁴ As was awarded in *Kuwait Airways Corp v Kuwait Insurance Co (No.3)* [2000] 1 All E.R. (Comm) 972; *The Mosconici* [2001] 2 Lloyd's Rep. 313.

⁵ *The Guiseppe di Vittorio* (No.2) [1998] 1 Lloyd's Rep. 661 at 672 per Clarke J. (US prime rate plus 1%).

⁶ “A lack of flexibility in the treatment of disputes is negating some of the benefit which the new guidelines were intended to bring.” Knott, J. *A Quarter of a Century of Foreign Currency Judgments: The Wealth-time Continuum in Perspective* [2004] LMCLQ 325.

⁷ Art.1 of the Notice on Further Reforming Foreign Exchange Control Regimes.

⁸ See art. 27 of the Regulations on the Foreign Exchange Regime of the People's Republic of China, promulgated by the State Council on April 4, 1996, revised on January 14, 1997 “Financial institutions shall have the approval of the Exchange Administration Agencies before conducting foreign exchange transactions, a license for such operations is also required. No entities or individuals are allowed to undertake foreign exchange operations without the approval of the exchange administration agencies. Financial institutions authorized for foreign exchange operations shall not operate beyond the approved

US dollars varied between 1:8.27 and 1: 8.28 during this period, and as a result there was no appreciable fluctuation between the two currencies.¹ Because of this stability,² the question of foreign currency effectively never arose.³ Chinese judges were happy to award judgments in dollars or RMB, or even in both at the same time. Thus in *China Shipping Development Co Ltd v Casper Marine Inc*,⁴ the court gave both US dollars and its equivalent RMB for the same damages. “The defendant shall compensate 200,000 US dollars, or its equivalent RMB...to the claimant.” This parallel solution appeared several times,⁵ with both parties ultimately indifferent as to the eventual form of payment.⁶

However, it is changed after a reform in 2005 when a new “managed floating exchange rate system”⁷ was introduced. Now the exchange rate is adjusted on the foundation of the open market value of the RMB with reference to a basket of currencies including the euro, the US dollar, the pound sterling, the Japanese yen and so on.⁸ Free fluctuation is allowed, provided it does not exceed 0.3% daily.⁹ Even so, the day-to-day fluctuations in the RMB exchange rate against other currencies have not been very large. Take US dollars for instance, where the largest daily movement seen so far is 0.07% on 11 August 2005.¹⁰ Therefore, the question of the currency of any award is still not a significant issue at present.

business scope.”

¹ Yu Yongding, *A Historical Step in the Reform of RMB Exchange Regime*, (2005) 10 *World Economy and Politics* 12.

² *E.g.*, the convert rate between RMB and US dollars was 1: 8.2834 on 18 Mar 1997, 1: 8.2768 on 30 May 2000, 1: 8.2799 on 18 Aug 2000 and 1: 8.28 on Oct 13 2004.

³ Other currencies such as euro or sterling weren't pegged to the RMB but it seems us dollar is mostly used in shipping world.

⁴ Tianjin Maritime Court, 18 May 2005, (2004) JHFSCZ 19.

⁵ *Shenzhen Sinotrans Co Ltd v Jite Industrial (Shenzhen) Corp*, Guangzhou Maritime Court, 13 Oct 2004, (2004) GHFCZ 275; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

⁶ Of course this could only ever be done where the defendant was non-Chinese, since a Chinese citizen wouldn't be able to get dollars anyway.

⁷ Art.1 of the Announcement on Advancing the Reform of RMB Exchange Rate.

⁸ Williamson, *A Currency Basket for East Asia, Not Just China*, *Policy Briefing*, Institute for International Economics (August 2005).

⁹ Art.4 of the Announcement on Advancing the Reform of RMB Exchange Rate.

¹⁰ Yu Yongding, *A Historical Step in the Reform of RMB Exchange Regime* (2005) 10 *World Economy and Politics* 12.

8.4.2 Basic principles

Even though foreign currency awards have not hitherto been a serious issue in Chinese courts and the CMC and other laws (*e.g.* GPCCL) fail to mention the subject at all,¹ it is clear that there is no legal obstacle to them.² The Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure provide an article concerning foreign currencies. Its art.14 reads “the currency of damages shall be decided by the agreement, if any; without such an agreement, it shall be determined by the currency used in operation, manufacture or management;³ for the imported and exported cargo carried on board, it shall be determined by the contract of sale or the currency stated in bills of lading or waybills;...” Various currencies can be recovered in the same decision.⁴

The above regulation, however, only applies to collision cases. For other shipping claims, there is no legislation. Unlike in English law, Chinese courts do not profess to follow any overarching principle, such as asking if a particular currency loss is within the reasonable contemplation of parties, or whether or not a certain currency best reflects the recoverable loss. Even so, in most cases there seems to be no practical difference between the two countries in awarding judgments in foreign currency. Interestingly enough in the Chinese context, if foreign currency is used in the operation of the claimant’s business, then it will be given even if both claimant and defendant are Chinese companies.⁵ Again, when the carrier

¹ None of articles in CMC deal with it in particular. Considering the fact that limitation fund shall be established in SDR, it should not be a problem to make award in foreign currency by analogy. Case law also proves so. See *infra*.

² Even costs of court were paid in US dollars in the following cases. *Eternal Resources Limited v Honour Link International Development Limited*, Guangzhou Maritime Court, 1 Sep 2000, (2000) GHFSZ 54; *Kolon International Corp v Zhanjiang Harbour Bureau*, Guangzhou Maritime Court, 28 Dec 2000, (1998) GHFSZ 11; *Universal Chartering Inc v Qinzhou China Ocean Shipping Agency*, Beihai Maritime Court, 28 Mar 2002, (2001) HSCZ 001.

³ More accurately, the operation, manufacture or management of the claimant.

⁴ *The Efes*, Guangdong Higher People’s Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 48; *Lhsu Lian Huat Shipping Co (Pte) v China Guang’Ao Development Principal Co*, Dalian Maritime Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 49.

⁵ *Hebei Huaye I&E Co Ltd v Yicheng Shipping Co*, Tianjin Higher People’s Court, 20 Apr 411

delivers the cargo without bills of lading, an award will often be upheld in the currency that the claimant used to pay for the goods and hence is not unlikely to represent his loss.¹ If the vessel incurs damage and is under repair, the currency of the reparation will be allowed.² Any refund should use the same currency as the payment.³ If the claimant buys short-landed cargo in a foreign currency, that currency will be given.⁴ Regard must be paid, however, to the circumstances of each case. The currency must have the closest and most realistic connection to the case. In *The Efes*,⁵ the claimant borrowed money in US dollars and purchased the cargo with it, then resold it in RMB. Because the vessel and cargo was arrested in China and the guarantee was given in RMB, the judgment was given in RMB. It seems if the English case *The Despina R*⁶ was heard in China, *i.e.* payment made in various currencies yet all brought with dollars, US dollars would be upheld as well. On the other hand it should be noted that in none of the reviewed cases has the choice of currency submitted by claimants ever been challenged by defendants (nor by the courts, which do not do this), even when another currency is more appropriate and best suits to a just result. In *Grain & Oil (Group) General Co v Asil Gida Kimya Sanayi Ve Ticaret AS*,⁷ the claimant purchased US dollars with RMB in order to perform his contract of sale. He also spent RMB in mitigation. Without protest from the defendant, the court gave a judgment in US dollars, even though RMB seems more appropriate and might be given in English

2001, (2001) GJZZ 275.

¹ *Xiamen Luocheng Industrial and Trading I & E Co Ltd v ASTG Kase International (China) Ltd*, Xiamen Maritime Court, 17 Oct 2000, (2000) XHFSCZ 048; *Minmetals Inc (U.S.A.) v Shanghai United Timber Co Ltd*, Shanghai Higher People's Court, 9 Mar 2004, (2003) HGMZHZZ 81; *DSR-Senator Lines v Hero (Tianjin) International Trade Co Ltd*, Tianjin Higher People's Court, 30 Jan 2002, (2001) GJZ 229.

² *Shenzhen Xunlong Shipping Co Ltd v Fangcheng Jinwan Trading Co Ltd and Guangxi Ocean Carriage Co Ltd*, Beihai Maritime Court, 19 Dec 2001, (2001) HSCZ 002.

³ *Hanjin Shipping Company Ltd v AT Container Line Ltd and others*, Qingdao Maritime Court, 3 Aug 2003, (2001) QHFHSCZ 140; *Shantou Hangxing Freight Co Ltd v Tianjin Qingfeng Freight Co Ltd*, Guangzhou Maritime Court, 7th Dec 2000, 2000 GHFSZ 65.

⁴ *DSM Citric Acid (Wuxi) Co Ltd v Sparkle International Enterprises Ltd, Rueli Cheng Shipping SA and Jui Pang Shipping SA*, Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183.

⁵ Guangdong Higher People's Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 48.

⁶ [1979] A.C. 685 (H.L.).

⁷ Tianjin Maritime Court, 18 Jul 2001, (2000) HSCZ 416.

courts.¹ In this sense the currency has been effectively chosen by the claimant.

8.4.3 Conversion date and rate

Not everyone has access to foreign currency in China, and this may affect questions of enforcement and conversion dates. There is no obstacle to enforcing a judgment in a foreign currency if the defendant has a foreign currency account in China. If not, and his only account is in RMB, it is only feasible to enforce the judgment in RMB.

As for the conversion date, there are two ways under Chinese law to treat the problem.² The conventional one is to award in the foreign currency directly and leave the question of the conversion date and rate to enforcement judges. There is little guidance as to the practicalities of this approach, so the judgment is rather unpredictable and consequently up to the judges. Alternatively a Chinese court may award foreign currency only nominally and having made the award immediately convert it into RMB.³ The date of conversion is usually by reference to the time of initiating the actions,⁴ but not to the date of judgment as in England. The reason for this may be that the former is arguably more simple and certain in the sense that the date of initiating the actions is decided by the claimant while the date of judgment is not. It must be said that the passage of time in China is not taken as critically as it is in other countries, and that perhaps for this reason the relevant time for the

¹ In *Adlian SA Corp Ltd v P&O Nedlloyd BV and P&O Nedlloyd BV China Shipping Company Ltd*, Shandong Higher People's Court, 27 Nov 2001, 2001 LJZZ 39, the claimant lost payment in US dollars for cargo due to carrier's delivery without bill of lading. Even so, the claimant claimed for RMB and the court agreed so in front of silent defendants.

² Cf. the English way mentioned above.

³ *Sino-Add (Singapore) Pte Ltd v Karawasha Resources Ltd*, Beihai Maritime Court, 5 Mar 2002, (2001) HSCZ 119; *Shenzhen Sinotrans Co Ltd v Jite Industrial (Shenzhen) Corp*, Guangzhou Maritime Court, 13 Oct 2004, (2004) GHFCZ 275; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

⁴ *Shenzhen Sinotrans Co Ltd v Jite Industrial (Shenzhen) Corp*, *supra*; *Lian Yungang Long River Agriculture Development Co Ltd v Qingdao Yifeng Freight Co and Legend Pacific Corp*, Qingdao Maritime Court, 30 May 2000; *Sinochem Guangdong I&E Co Ltd v Asahe Shipping Co Ltd and Others*, Guangzhou Maritime Court, 29th Dec 2003, (2003) GHFCZ 266.

conversion of foreign currency into the domestic one has not been highlighted as of yet. In view of increasing monetary fluctuations after the introduction of new RMB policy on the one hand, and lengthening enforcement proceedings on the other, the question for the conversion will sooner or later have to be settled. Take the second approach for example; it is expected that defendants will argue in favour of a later time (*e.g.* the date of judgment) if RMB is devalued dramatically after the suit starts. No doubt the way English courts treat this problem will shed some light on it.

8.4.4 Interest on foreign currency awards

Interest is recoverable in respect of foreign currency awards as it is for awards in RMB.¹ Again, apart from the Regulations on Property Damage arising from Collision between Vessels or Vessel and Structure² there are no specific provisions in GPCCL or CMC dealing with it. The same problem in the first section stays: on what principles and at what rates? Chinese law is unpredictable and lacks logical rules. In respect of any major foreign currency there are at least 20 different types of rates officially published by the Bank of China,³ with a wide discrepancy between each other.⁴ At least 7 types of rates published by the Bank of China are accepted by Chinese courts, which accords much with the RMB interest rates. The most common one is *interest rate of working capital loans for the same*

¹ See the following cases.

² Art.13 *supra*.

³ See art.8 and art.9 of the Measures for the Administration of Interest Rate of Foreign Currency.

⁴ Take an example of British sterling, Current Deposit Rate is 0.3% while one-year Deposit Rate is 3.0625 % on 28 Dec 2005.

term.¹ Others include *current deposit interest rate*,² *interest rate of working capital loans for a year's term*,³ *interest rate of loans for enterprise*,⁴ and *deposit interest rate of the same foreign currency for the same term*.⁵

In practice there seems to be few, if any, principles behind those decisions that have dealt with interest on foreign currency awards. In *Vinmar International Ltd v Zhejiang Overseas Trade and Development Co*,⁶ the claimant was an American company claiming a judgment in US dollars. It argued that the interest rate should be based on the US prime rate (as would be upheld in English courts). The court disagreed, holding that in a tort case (which this was) interest should be determined by *lex loci delicti commissi*.⁷ Therefore the court insisted on applying the dollar rate of the People's Bank of China. Then even worse it applied the deposit rate, which is odd

¹ *Guangdong Xinxing County Three A Stainless Steel Products Grouping Co Ltd v Jet Dispatch (H.K.) Limited*, Guangzhou Maritime Court, 14 Aug 2001, (2000) GHFSZ 198; *Hainan Taiye Trading Co Ltd and Hainan Jingang Industrial Co Ltd v Far Eastern Shipping Company, Yuli Shipping Co Ltd*, Guangzhou Maritime Court, 3 Apr 2001, (2000) GHFSZ 145; *China Sanli Native Product, Animal By-Products and Natural Foodstuff Ltd Co v Shenzhen Foreign Forwarding International Freight Co Ltd and Others*, Guangzhou Maritime Court, 16 Sep 2003, (2003) GHFCZ 112; *Minmetals Eastern Trading I&E Co v Crescent Commercial and Maritime (Cyprus) Ltd*, Guangdong Higher People's Court, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 46; *Shantou Hangxing Freight Co Ltd v Tianjin Qingfeng Freight Co Ltd*, Guangzhou Maritime Court, 7th Dec 2000, 2000 GHFSZ 65; *Eternal Resources Limited v Honour Link International Development Limited*, Guangzhou Maritime Court, 1 Sep 2000, (2000) GHFSZ 54.

² *Nipponkoa Insurance Co Ltd v Shanghai Puxin International Carriage & Storage Co Ltd*, Shanghai Maritime Court, 12 Jul 2004, (2003) HHFSCZ 473.

³ *Xiamen Luo Cheng Industrial and Trading I & E Co Ltd v ASTG Kase International (China) Ltd*, Xiamen Maritime Court, 17 Oct 2000, (2000) XHFSCZ 048; *Beijing Fu Yang Hang v Sea Trade International Inc*, Xiamen Maritime Court, <http://www.ccmt.org.cn/hs/news/show.php?cid=4559>

⁴ *DSM Citric Acid (Wuxi) Co Ltd v Sparkle International Enterprises Ltd, Rueli Cheng Shipping SA and Jui Pang Shipping SA*, Wuhan Maritime Court, 31 Oct 2005, (2005) WHFSZ 183; *PICC Guangdong v Cyprus Maritime Co Ltd and Santa Cruz Shipping Company Limited*, Guangzhou Maritime Court, 29th Dec 2000, (2000) GHFSZ 79; *Shenzhen Moscow Industry and Trade Co. Ltd v Baltic Shipping Company*, as quoted by Jin Zhengjia, *Analysis and Comments on Typical Maritime Cases* (1998), case 41; *PICC Property and Casualty Co Ltd v Cyprus Maritime Co., Ltd and Santa Cruz Shipping Company Limited*, Guangzhou Maritime Court, 29 Dec 2000, (2000) GHFSZ 79.

⁵ *China Chemicals Jiangsu Lianyungang Co v Jiangsu Global International Shipping Co (Shanghai), CMA CGM S.A. and Brilliant Logistics Group Inc*, Shanghai Maritime Court, 19th Mar 2002, 2000 HHFSCZ 45; *PICC Zhejiang Branch v NSCSA National Shipping Corp and CMA CGM SA*, Shanghai Maritime Court, 24 Dec 2001, (2001) HHFSCZ 286; *China North Industries Qingdao Corp v Maersk (China) A/S*, Qingdao Maritime Court, 29th Oct 1999.

⁶ The Supreme Court, 21st Feb 2001, 2000 JZZ 1.

⁷ *Cf.* the English case of *The Funabashi* [1972] 1 Lloyd's Rep. 371 where it was held that interest was governed by the *lex fori* and it was in any event impracticable for the court to consider different rates in the countries of the domicile of the parties. English rates of interest were appropriate.

indeed; if anything approximated to the loss suffered by the plaintiff it was the rate applicable to loans. On the other hand, in *Gang Ao International Co. Ltd v Hanjin Shipping Co. Ltd, T-tanker Private Co. Ltd and M.T.M Ship Management Private Ltd*,¹ a virtually identical claim for the US Prime Rate by a Chinese company was, in sheer contrast upheld. In that case, the claimant paid US dollars to a bank in Hong Kong. Because interest in that Hong Kong bank was the same as the U.S. prime rate, the U.S. prime rate was accepted by the court. In *SVA-DAV Electronics Co Ltd v Cheng Lie Navigation*,² the prime rate was rejected for a lack of evidence of such interest. Instead the *RMB Current Deposit Interest Rate for enterprise* was given for damages in US dollar. This is simply perverse: the interest rate in a foreign currency must be the prevailing rate in that currency, not that of the forum. All these cases illustrate how unstructured this area of law is. Apparently they fail to demonstrate any fair legal principles, instead are merely the result of random discretion. As said before, this uncertainty in law is very unhealthy. The generality of legal rules and the predictability of their application is indispensable in maritime trade. Otherwise, the law will only increase the cost of doing business and inhibit economic activities. It is recommended that all Chinese judges comply with the principle of *restitutio in integrum* so that they can give predictable and fair judgments and compensate the claimant as fully as possible.

8.4.5 Comparison and conclusion

With respect to the foreign currency, there is still a view that English law needs to be more flexible so that it can best compensate the claimant.³ But too much flexibility also gives the law an inelegant and illogical appearance. At present, the English view of foreign currency is rather mature. There are some fairly constant principles observed in the discretion to award interest. In comparison, the

¹ Guangxi Higher People's Court, 28th Dec 2004, 2004 GMSZZ 10.

² Shanghai Maritime Court, 23 Apr 2004, (2003) HHFSCZ 415.

³ "A lack of flexibility in the treatment of disputes is negating some of the benefit which the new guidelines were intended to bring." Knott, J. *A Quarter of a Century of Foreign Currency Judgments: The Wealth-time Continuum in Perspective* [2004] LMCLQ 325.

problem of foreign currency and particularly its exchange rate are not usually raised in Chinese courts, with minimum risk of wild devaluation. Fluctuation of RMB value in terms of US dollars can be ignored most of the time because the only fluctuation that RMB was allowed prior to 2005 was between 8.28 and 8.27; also the RMB is still relatively stable even after its 2005 reform. As a result Chinese judges and litigants are rather indifferent. There are no strict rules governing this matter and it is completely up to the individual judge.

As the Chinese economy integrates with that of the rest of the world, under the influence of continuing reform, the liberalisation of monetary system and globalisation, it is expected that a “real effective exchange rate” of the RMB will appreciate over time.¹ There is a lurking possibility of a dramatic fluctuation between the RMB and other foreign currencies.² When it happens,³ it will present Chinese judges with real challenges in choosing the right currency, its interest and exchange rate. The way English courts deal with this problem provides a valuable reference for the Chinese courts. Also, the question concerning the relevant time for the conversion of foreign currency into the domestic one has not been raised and the courts are expected to find divergent solutions in practice. Attention should be paid to this by the Chinese lawmakers before it is too late.

¹ Williamson, *The Choice of Exchange Rate Regime: The Relevance of International Experience to China's Decision* (2003) 13 (3) *China & World Economy* p.17-33.

² McKinnon, Ronald and Gunther, *The East Asian Dollar Standard, Fear of Floating and Original Sin*, (2004) 8 *Review of Development Economics*, p.331-360.

³ In the words of Knott, J. *Foreign Currency Judgments in Tort: An Illustration of the Wealth-time Continuum* (1980) 43 *MLR* 18 “Chinese housewife will find the purchasing power of the money in her purse does not stabilise her grocery bill and litigants will find that Chinese law cannot secure for them effective financial compensation for legal wrongs.”

Chapter 9 Conclusion

China is one of the biggest economic powerhouses in the world,¹ and trade between China and Britain (and elsewhere) is rapidly growing.² The future holds vast trading and investment opportunities.³ Shipping law plays an important role in facilitating economic activity and in strengthening trading links. Although England and China are two of the most influential shipping nations in the world, their respective shipping laws remain remarkably different and mutually mysterious. The thesis has sought to alleviate this problem in one area – namely, damages in cases of carriage of goods by sea – by comparing aspects of the English and Chinese approaches for the benefit of both academics and practitioners. In particular, the aim has been to introduce a discussion of some notable unsolved practical and legal problems in the relevant part of Chinese law, to investigate the principled explanations for some of the key features of English damages law, and in the end to provide a valuable chance for Chinese jurists to review their own law from a different perspective and to examine its strengths and deficiencies.

9.1 General comparison and reflections on Chinese law

9.1.1 Conceptualism versus pragmatism

Chinese jurists view law as a system, complete and intellectually coherent. They try, in the manner of civilian systems, to systematise the law with the help of definitions and distinctions. Chinese codes

¹ China is one of the world's most rapidly growing economies, with GDP growth figures of around 9 percent *per annum* since the mid-nineties. As a conclusion of a report conducted by the Foreign Affairs Committee (FAC) of the House of Commons, "we conclude that the growth of China's trade will continue to have an enormous impact on the world economy." See Foreign Affairs - Seventh Report, 19 July 2006, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaaff/860/86002.htm>.

² Trade and economic cooperation between China and Britain has experienced rapid development in recent years. In 2004, bilateral trade reached US\$19.7 billion, an increase of 37 percent over the previous year. Britain, China Expected to Expand Trade Relations, *China Daily* (November 9, 2005), available at <http://www.china.org.cn/english/BAT/148113.htm>.

³ "We conclude that the United Kingdom's market share in China is lagging behind its competitors, and that the Government must do more to support British business in China." Paragraph 68 in Foreign Affairs - Seventh Report, *supra*.

provide the core of the law. Presumably general principles are systematically and exhaustively exposed in codes.¹ The purpose of this system is to ensure that judges exercise their powers in accordance with laws, facilitate the establishment of a clean court system, and safeguard judicial fairness. Chinese case-law moves theoretically by deductive reasoning, basing judgments on abstract principles. But the side effect is that because of the short history of legal system building and hence lack of experience and tradition, low quality in legal education and their limited understanding of the law, Chinese judges are inexperienced in exercising their own discretion compared with English judges.² By contrast, English law is pragmatic and concrete. English law tends to build up a very detailed, but rather fragmentary body of knowledge. Whether these separate blocks of knowledge link together to form a greater whole is not a primary concern. It tolerates a certain amount of confusion. It prefers precedents as basis for judgments, and moves empirically from case to case, from one reality to another. The case law contains the core of the law expressed through specific rules applying to specific facts. The difference in judicial style can be strongly felt in this thesis.

Take causation, for an example. English courts have treated the legal notion of causation in a broad way, openly discounting the use of strict expressions or formulae.³ The approach is a robust, pragmatic one, in the end turning to “common sense” rather than philosophical niceties, for fear that “the court [will be] ... in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.”⁴ By contrast, Chinese scholars do not share this empirical outlook and view causation against the background of systematic philosophy. They have not hesitated to develop and expound a comprehensive system of interpretations of theories on causation. The primary enquiry about

¹ See 1.3.

² See 3.6.3.

³ *Athel Line Ltd v Liverpool and London War Risks Insurance Association Ltd* (1946) 79 Ll. L. Rep. 18, *per* Lord Greene at 21; see generally Chapter 3 Causation.

⁴ *The Wagon Mound* [1961] 1 Lloyd’s Rep 1 (P.C.), *per* Viscount Simonds at p.8.

causation is to ask whether it accords with the “adequate theory”. But whether this single scholastic theory is able to satisfy what justice requires in each case is not a particular matter of concern.¹ They prefer form over substance. This formalism has caused many problems, as reviewed in this thesis. Thus in the author’s view, even though it might be essential in China to adopt precise legal theories for a better understanding of legal science, a certain discretion to judges and exceptions of the strict formula is necessary to achieve better results in certain cases, and therefore should be allowed and practiced. Chinese theorists should pay attention to the downside of preoccupation on scholastic theories.² Further, the scholastic theory often contains little empirical content and causal questions depend on judges’ discretion to a great extent. This is a feature that many Chinese judges are not used to because of their incompetency and little experience. Whenever Chinese judges have excessive discretionary powers, it will inevitably increase the potential for mistakes or even abuse. Hampered by their structure, their management, and the quality of judges, courts seem to be unable to adapt to those requirements of impartiality, consistency and predictability. The operation of law is indeed indeterminate and unpredictable when Chinese judges exercise discretion. Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent. Therefore there is an absence of conformity throughout the Chinese court system. The author suggests³ China should bolster the competency of judges by providing more training to existing judges and provides a stronger legal basis for accurate application of law by revising their defective laws. The acceptance of doctrine of precedent should also be open for discussion for its obvious benefits of eliminating inconsistency. Chinese judges can also learn greatly from their English counterparts on how they exercise their discretion.

Chinese law can be, it is respectfully suggested, excessively

¹ See 3.6.

² See 3.6.3.

³ See 4.4 and 6.3.

conceptual and formalist.¹ Conceptualism and formalism can cause injustice in particular cases. Art.50 of the CMC is such an example.² It reads “Delay in delivery occurs when the goods have not been delivered at the designated port of discharge *within the time expressly agreed upon...*” In a rather wooden reading of this provision, the existence of an expressly pre-agreed time of arrival has been regarded as being essential to delay claims: in its absence the carrier will not be liable for delay regardless of how long the journey has been postponed, and the obvious step of implying an obligation to deliver the cargo in a reasonable time has never been taken. On a particular level, the article itself should be revised accordingly to consider the question of “reasonable time” more generally, theorists should be more aware of the formalism and conceptualism that is rampant in certain parts of Chinese law and the problems that they can cause.

9.1.2 Flexibility, certainty and better justice

Flexibility and certainty are believed to be two of the hallmarks of good decision-making processes. However, there are always tensions in law between the virtues of flexibility and predictability on the one hand, and their like vices of uncertainty and rigidity on the other. There are many awkward areas in law where it is hard to achieve mathematical accuracy and a certain flexibility is necessary.

Chinese law, while sometimes failing to properly structure discretion and being too flexible (*e.g.* interest³), in general controls the exercise of judicial discretion excessively in pursuance of certainty and simplicity, and thus is not flexible enough.⁴ A typical example is art.55 of CMC, which provides that damages for lost cargo should be based on the concrete value at the time of shipment plus insurance and freight, while English position holds for the abstract market price of goods at the destination. Arguably, it may be

¹ For example see 5.4.3, 5.9.5, 6.6.2 and others.

² See 4.11.5.

³ See below.

⁴ See 4.4, 5.8.2, 5.10 and others.

difficult to reconstruct the market price at the port of discharge, and the Chinese position provides an immediate figure for cargo value. However, the Chinese shipping law rules out a fair margin of profit by rigidly limiting the damages to the value before carriage hence in most events under-compensates cargo owners and unjustifiably favours carriers.¹ The Chinese law has sacrificed the fairness in achieving the simplicity of law. This is oddly inconsistent with the solicitude generally shown in Chinese law for *restitutio in integrum*.

English jurists, it is fair to say, are given more discretion and thus are far more ingenious in their decision-making compared with their restrained Chinese counterparts.² Their rules need not be concise, because they cover only the specific part of the law to be reformed, but must be precise, because English courts restrict rules to the specific facts they are intended to cover. Compared with Chinese judges, English judges focus on fact patterns. They analyse cases presenting similar but not identical facts, extracting from the specific rules, and then, through deduction, determine the often very narrow scope of each rule, and sometimes propose new rules to cover facts that have not yet presented themselves. By contrast, Chinese judges focus rather on legal principles. They identify their function, determine their domain of application, and explain their effects in terms of rights and obligations. At this stage, general effects are deduced. Yet exceptional aspects are difficult to generate. They are not capable of taking into account subtle differences or fine-tuning the legal principle in each case. Chinese legal principles, frozen into codes and often rigid doctrine, are imposed on courts. In contrast, most common law rules can be changed from time to time, subject to the doctrine of *stare decisis*. The realities of modern life can be addressed in a more timely fashion through the common law. Consequentially, Chinese law are "closed", in the sense that every possible situation is governed by a limited number of general principles, while English law are "open", in the sense that new rules

¹ See 4.4 and 6.2.

² See 3.5, 4.2, 5.8.1, 5.10 and others.

may be created or imported for new facts.¹ Therefore it seems as if a fairer justice is more likely to be achieved by the English court.²

Many differences in small aspects of law are linked to the difference in their preference. This is very obvious in respect of the “new for old”.³ Under English law if the plaintiff achieves some benefit from a new replacement for something partly used in mitigation, his damages will not be deductible. In contrast, bent on a legal policy *restitutio in integrum*, Chinese judges deduct this betterment in all events. As the betterment is usually compelled by the wrong and cannot be reflected in cash flow, this approach often under-compensates the plaintiff and is unfair. The fact that Chinese law is sometimes too flexible, while sometimes not flexible enough should be paid more attention by Chinese jurists. Those problematic aspects of Chinese law have been pointed out by this thesis. They should be corrected accordingly.

9.1.3 Philosophy, morality and law

This comparative research does of course aim to provide a chance to satisfy lawyers' curiosity; but at times the points it makes can go deeper and tell us something about legal culture, philosophical ideas and their underlining connections with law.

Ruled by Confucianism for almost two thousand years,⁴ Chinese society's investment in imbuing moral rules is more substantial when compared with England.⁵ There are more inbuilt pressures to improve the law morally in China. A consistent thread runs through Confucianism to the effect that promises are morally binding. The breach of contract, especially for gains, is not to be tolerated. This view is deeply ingrained in legal scholars,⁶ and it is suggested that it influences the design of damages law. One of the functions of

¹ David, R and Brierley, J.E.C. *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn 1978), p.360.

² For example see 5.8.3, 5.10, 6.6 and others.

³ See 5.8.3.

⁴ See 2.5 and 5.4.

⁵ See generally Chapter 2.

⁶ See 5.4.

remedies is said to be deterring breaches from happening. In recent years a body of literature has appeared advocating the adoption of specific performance as the normal remedy for the breach of contract.¹ The aim of awarding damages, *restitutio in integrum*, is found to be not strictly obeyed when it conflicts with morality in traditional sense. Legal rules such as causation, remoteness and mitigation are all adjusted to accommodate the general idea of morality and justice. Typically, as was seen in ch.5, the development of Chinese mitigation rule has been stunted in comparison with the position in English law.² The aggrieved party is not required by law to minimise the loss but only to prevent it from increasing. This rule clearly reflects a deliberate legal policy to deter any breach and to not lend any sympathy to the defaulting party – or, to put it another way, a belief that to ask an aggrieved party to minimise his losses for the benefit of a wrongdoer is morally indefensible.

In comparison, while English courts have on occasion stressed the sanctity of promises in damages cases,³ English law as a whole is not nearly as bound up with morality. It has a broader approach of contract law compared to the Chinese one. The breach of contract will not generally be deterred provided that the aggrieved party receives full compensation. The design of contract law is not to deter a breach but to allow it if it is more economically efficient (efficient breach).⁴ From this view, remoteness provides an incentive to encourage the exchange of information; limitation regime in shipping law splits up the risks among all persons involved, thus both can promote economic efficiency.⁵ In terms of mitigation, the innocent party must act with the defendant's as well as his own interests in mind. It is not morally indefensible to ask him to minimise the loss, which provides an incentive for the other party to breach and thus is central to the theory.

¹ See 2.5.1.3.

² See 5.3.

³ Recent examples of "pacta sunt servanda" see: *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1996] A.C. 344, *per* Lord Mustill at 360; *Radford v De Froberville* [1977] 1 WLR 1262, *per* Oliver J. at 1270.

⁴ See 2.5.2.

⁵ See Ch4 and Ch 7.

Having said this, perhaps the effect of differing philosophies should not be overestimated. Even in China Confucianism has not necessarily been followed through into law. Thus, for example, Chinese written law does not have any general rule deterring the opportunistic breach (though one might expect it to and many Chinese judges indeed frown upon such breaches). Whatever the morality of the matter, it no doubt recognises the fact that breaches of this sort are commercially harmless in that they lead to one party gaining and no parties losing. In that sense, the moral element can be eliminated from law on paper. This is the first problem in Chinese law. Secondly in the author's view, law should be more or less independent of morality in that it may be counter-productive in unduly disabling some trading activity. Chinese mitigation rule obstructs the requirement to enter into a cover transaction as mitigation. The market value rule similar to the English one could not be established either. This is simply impractical and will only constitute a hindrance to the normal economic activities. English law is more practical than Chinese law. It is reasonable to ask the aggrieved party to enter into the market buying a substitute, instead of increasing the loss by staying idle which could be avoided without making too strenuous efforts. Market-centred economy requires an increasing need for formal legal rules that facilitate transactions, provide incentives to engage in transactions and lower transaction costs. The author contends that the current position result in high costs of transacting and inefficiency and is untenable. The author prefers a non-moral pro-business view to the more ethic approach in commercial law.¹ The existing mitigation rule should be amended to facilitate international trade in favor of a realistic, practical and efficient economic order.²

On the other hand, the economic analysis in English law is lacking an obvious moral factor. It seems incompatible for judges to respect the integrity, impartiality and fairness of the laws they have

¹ See 2.5.3 and 5.4.3.

² See 2.5.4.

sworn to implement, while simultaneously recognising and glorifying efficient breach. Thus English judges have not openly embraced this theory and they often write in terms of equity instead of economic terms. Another problem in the theory of efficient breach lies in its practical inability, *i.e.* on many occasions the victim cannot be fully compensated as presumed. So the theory, for the time being, remains an analytical exercise of legal theory rather than a judicially adopted fact.¹

Therefore ways to make law both morally principled and feasible in practice will continue to occupy the attention of philosophers and legal scholars in both countries. The author has also shown how historically evolved morality or philosophy shapes a country's law and has encouraged other comparatists to decipher and compare law in this way. This thesis has provided proof that today's diversity is anything but a coincidence, which will no doubt promote mutual understanding.²

9.1.4 The style of reported judgments and exercise of discretion

The difference in style of judgments may also reflect more fundamental differences of approach to law between the two countries. Common law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, provide detailed definitions, decide (if not create) the specific legal rule relevant to the present facts and set out lengthy enumerations of specific applications. English judges are experienced in exercising their discretion. The process of ratiocination is more obvious in a common law judgment than in a concise Chinese one. Chinese decisions are indeed shorter than common law decisions. The majority of judgments present only a brief introduction of facts, parties' arguments and the final decision. Chinese judges are not used to exercising discretion and are not confident enough to write it

¹ See 2.5.3.

² See 2.5.4.

down in judgments. When Chinese judges have excessive discretionary powers, it will inevitably increase the potential for mistakes or even abuse because of the short history of legal system building and hence lack of experience and tradition of judges. Chinese judgments are written in a more formalistic style than common law judgments. As regards how judges or collegial panels reach the conclusion, that is, how every piece of evidence is examined and weighed, which fact forms the basis, which legal provision or judicial interpretation is applicable, *etc*, they do not provide any details. Thus the detailed explication concerning legal doctrines, such as the remoteness rule that people would expect from an English judgment is often not available in China, where judgments tend to take a more mechanical, mass-produced form and lack comprehensive argument in favour of the conclusion reached. Decisions of this sort thus make little contribution to the understanding of legal knowledge, especially compared to their discursive English counterparts.¹ Another problem is that the brevity of judgments also intensifies the mystery surrounding adjudication, and judgments can seem arbitrary and capricious in the litigants' eyes. Lack of transparency will not help to restore the authority of the law that is lacking in China. Judicial decisions are not mechanical applications of general rules, and there must be inherent logic between the outcome and interpretation of the facts of the case. The fact that Chinese decisions often contain the obscure text suggests that it seriously falls short of the requirements of transparency and fairness. This should be acknowledged and corrected.²

Take an example of remoteness, English law provides ample cases with expatiations on every aspect of the remoteness rule, such as: whose contemplation matters, the requisite degree of the probability, and the required specificity of the knowledge *etc*. In comparison, all these questions are in theory to be answered by art.113 of CCL (only 109 words). The rudimentary nature or

¹ For example see 4.2 and 4.3.

² See 3.6.3 and 9.1.4.

defective quality of much legislation means that it is common for significant lacunae to exist in the legislative framework, which signifies the role of judges in applying their discretion. The fact that Chinese judges have excessive discretionary powers yet are lacking in experience in applying it only increases the potential for abuse or mistake. Not to mention, causation as a highly discretionary rule is more likely to be relied on by Chinese judges. As a result the outcome of litigation is in fact highly unpredictable.¹ The generality of legal rules and the predictability of their application can generate the security of expectations that is essential in the operation of market capitalism. Without such predictability, it will only increase transaction costs and hinder the normal trading. Thus the accurate application of discretion and the predictability of judgments are particularly crucial in generating the trust and confidence in judicial decisions. Chinese judges should exhibit professionalism and responsibility by desisting from relying on causation as the most convenient way in the measure of damages and making in-depth analysis on other appropriate legal doctrines according to the legal merits of the case.² They should also refer to their English counterparts to learn from their experience in applying discretion. The quality of judicial decisions and the public trust can only improve in this way.

9.2 International maritime conventions and national law

The harmonisation of maritime law is extremely important in today's world.³ The substantive law of most maritime nations – including England and China – with respect to the carriage of goods by sea has been largely unified.⁴ However, uniformity of law on paper will not necessarily guarantee uniformity of law in action. International conventions always run the risk of disuniformity and misinterpretation in given jurisdictions because of judicial, linguistic

¹ See 3.6 and 4.4.

² See 3.6 and 4.4.

³ See 1.5.1.

⁴ At times China has not adopted the same conventions as others, e.g. its carriage by sea law is partly Hague/Visby Rules, partly Hamburg Rules.

and cultural differences -- a matter which largely detracts from their usefulness.¹

Typical of this is the law regarding breaking limitation.² Chinese law has implanted the identical provisions of the Hague/Visby Rules and the 1976 Convention into its CMC word for word (thus identical to English law);³ yet the law as applied still represents a radical departure from the way other legal systems deal with the issues. The approach utilised by English law takes into account the international convention and thus reflects the true intention of the Convention. In theory, Chinese law requires a similar analysis to defeat limitation. But in stark contrast, the language in the CMC is construed in a manner not intended by the drafters. It has been handled in a widely divergent way which is adversely affecting the significance of this regime in China. The three conditions to break limitation are not followed in Chinese courts as they are under English law (or almost any other system). Under English law only in the most extreme settings will a court deny limitation as a matter of law, whilst in the last ten years there have been prolific Chinese cases depriving defendants of limitation. The degree of the culpability of shipowners under Chinese law is significantly lower than it is under English law in defeating limitation. Unlimited liability is far more likely to be established in China. Referring to English law, which usually represents international maritime practice and consensus, the author has urged Chinese law to adopt a more conservative view of limitation, one that would inure to the good of all of the relevant interests.⁴

It has been suggested⁵ in this thesis that Chinese scholars and judges should be much more assiduous in their interpretation of the convention. On one hand, it is within the courts' province to construe the convention or its national equivalent in a manner that could

¹ See ch.7.

² See 7.3.6, 7.3.7, 7.4.6 and 7.4.7.

³ See 7.4.6 and 7.4.7.

⁴ See 7.3.8 and 7.4.7.

⁵ See 7.6.

locate key concepts within its legal discourse that crystallise its sensibility. On the other hand, although there will probably not be a tidy Chinese language equivalent for certain concepts, jurists must not try to communicate the sense of foreign legal terms in Chinese. Instead they must find its true meaning from the background of the convention, *travaux pr paratoires* and even foreign cases. As the written law on limitation serves to increase opportunities for doubt and confusion, the People's Congress is responsible for modifying and interpreting statutory language in order to show a healthy respect for pertinent conventions. It should be rewritten in a legal language which is more familiar to Chinese judges. The Supreme Court should closely scrutinise the analyses in limitation cases exercised by lower courts. It may be quicker and more effective if the Supreme Court could publish written directions on the concerned issue. All in all, every attempt should be made to increase the awareness of decision-makers and judges of the international tenor of existing laws.

There is also room for criticism of the Chinese custom of incorporating international conventions, *i.e.* adopting a domestic legislation parallel to the convention without actually enacting the convention itself.¹ This unilateral approach undermines the uniformity of maritime law in that judges do not have, or accept, the obligation to interpret the convention in its original international context. The result has been that some significant misperceptions and dislocations appear in transporting the identical articles into Chinese law. These legal collisions between the two will encourage forum shopping. Going back to the subject of limitation, a cynic might say that any English lawyer who represents cargo interests should always arrest in China if possible if he wants to defeat a possible limitation of liability. This is detrimental to shipowners. As a conclusion, the Chinese approach to international conventions has its obvious defects and should be discouraged.

¹ See 7.6.

9.3 Other specific problems and proposed solutions

9.3.1 Inconsistency in laws on the carriage of goods by sea

China has a very confusing system with no less than three different statutes all operating concurrently in Chinese shipping laws, the Chinese Maritime Code, the Chinese Contract Law and two regulations, the Rules of the PRC on the Carriage of Goods by Water (hereafter Rules) and two sets of regulations (the Rules on the Carriage of Goods by Water, Detailed Rules of Implementation of Contract of Carriage of Goods by Water). These rules are by no means the same, something that can only breed uncertainty and inhibit uniformity. Whether there is any justification for the existence of three different sets of rules is doubtful. As clearly manifested, those solutions and compromises have scarified legal consistency and legal certainty. It leads to chaos, overlapping and outright contradictions. It could be argued that this causes more confusion and fragmentation than clarification and harmonisation. The imminent task is to seek the harmonisation of existing overlapping legal rules and the establishment of a unified legal framework which are still operating on three parallel tracks.¹

9.3.2 Basic concept of damages law

The aim of awarding damages on the basis of *restitutio in integrum* would seem fundamental to any coherent system of damages law. Oddly enough, in Chinese law it has not been firmly adhered to in practice. It was intentionally limited in the Chinese State Compensation Law.² It can also be departed from where defendants are cash-strapped.³ It is suggested that departures from principle of this sort serve no purpose apart from creating confusion and inconsistency, and that Chinese jurists should adopt the restitutionary object uncompromisingly.⁴

¹ See 4.4.

² See 2.3.

³ See Ch 2 and Ch 5.

⁴ See 2.3.

There are similar problems with the categorisation of loss. The concept of loss is not elaborated on expressly in any legislation, though there is an academic tradition of classifying losses into three types: actual loss, direct loss and indirect loss. But these have no real equivalent in English law: nor do they necessarily do much to aid proper analysis. In particular, for example, the view that indirect loss is irrecoverable in law should be obsolete. In the name of *restitutio in integrum*, all should be recoverable in principle. It is time Chinese law discard such a confusing classification.¹

Indeed there may be room for a considerable rejigging of the Chinese analysis of loss.² For instance, as to the familiar common law concepts of expectation and reliance losses, Chinese scholars have not hitherto paid them much attention. The author suggests that there might be some advantage in implanting these concepts into Chinese legal studies, as they help to make more sense of damages law.³ The analysis of Chinese law by analogy with English concepts shows, for example, that there is always a risk of protecting one interest while omitting others, especially as expectation losses are less likely to be recovered when the aggrieved party puts an end to the contract. Judges would also do well not to misuse reliance interests or over-emphasise restitution damages upon the termination of contract when citing art.56 and art.97 of the CCL. Expectation loss should be awarded additionally in this situation. There is also a certain ambiguity as to whether an aggrieved party claiming reliance damages can be put into a better position than expected. Chinese scholars approve of this whereas English law disagrees. The Chinese view, it has been argued here, is unjustifiable.⁴

It should be emphasised, however, that the possibilities for instruction in this area are not all one way. There are some areas

¹ See 2.4.2.2.

² See generally Ch 2.

³ See 2.4.2.3.

⁴ See 2.4.2.

where English lawyers can learn from China. Under English law, a term providing for liquidated damages will be unenforceable if it is seen a penalty.¹ But this is an all-or-nothing jurisdiction: the clause must either be struck down entirely or enforced entirely. In contrast, art.114 para. 2 of the Chinese Contract Law provides a moderate position. Instead of being struck down on the whole, such a liquidated damages clause could possibly be changed by the court. It does, in effect, afford a more equitable solution compared to the English one.

9.3.3 Deliberate wrongdoing

There is a fatal omission in Chinese law in the respect of liability for deliberate wrongdoing: there are no special remedies relating to fraudulent conducts and no such requirements to impose a harsh liability to deter it. In theory the rules of remoteness or causation are applied in the like manner in deliberate wrongdoing. Absent explicit provisions, many Chinese courts hold a surprisingly lenient view of fraudsters, in particular in not treating them any differently from unintentional tortfeasors. When there is mutual negligence, claimants have to bear some loss for their slight negligence, while in English courts² the fraudsters would be held responsible for all.³

The inadequacy of laws has become a major source of injustice as it fails to punish this activity. Businessmen need the predictability and calculability of the consequences of entering into transactions and they need to forecast the likelihood of malfeasance and particularly its legal consequence when such a likelihood indeed materialises. Fraud in China is not in the least unusual, so foreign companies doing business with Chinese entities are understandably concerned about the ability of China's judiciary to protect their legitimate business interests in China. So it is recommended the laws on fraud should be tightened up as a matter of priority. Chinese law

¹ See 2.1.

² It is worth noting that that, while English law is hard on fraudsters in tort, it has no special rules for deliberate contract-breakers.

³ See 3.13.

should impose more stringent rules on intentional wrongdoers as deterrence. The fraudster should pay the whole of the loss he has caused, foreseeable or not, intervened by other events or not.¹

9.3.4 Limitation of damages, mutual negligence and causation

English law has other techniques to limit damages such as remoteness, mitigation, causation *etc*, and it uses these to the full. This, if one may say so, shows up one of the more glaring lacunas in Chinese law. The whole topic of mitigation and remoteness is not well developed in Chinese law: indeed, hitherto the doctrines have been confined to contract, and have not been (officially) accepted at all in tort law. Causation acts as the principal method in limiting damages in Chinese law as disclosed in the thesis.² The author has shown that causation alone is insufficient as a concept in dealing with recoverability of certain types of damages and putting a ceiling on recovery, while either remoteness or mitigation would do a far better job.³ For example, Chinese maritime courts usually ask whether a defaulting carrier who delivers the cargo late has *caused* the claimant to pay compensation to the third party. On a causal analysis, it is recoverable as the causal nexus clearly exists, although in a weak sense. In order to reject such a claim (as it would be in most legal systems), Chinese judges have to deny this causal nexus arbitrarily, which is hardly conclusive and somewhat sophistic. China has encountered immense problems concerning the authority of the law before. Failing to provide convincing explanations, judgments can seem arbitrary and capricious in the litigants' eyes. When the case is decided in an ad hoc and discretionary manner on the basis of the peculiar circumstances of each case and without reference to and reliance on appropriate rules, in the sense that the court rejects these claims on causation while causal nexus clearly exists in common sense, it raises doubts about the quality of judges' work and

¹ See 3.13. and 4.14.

² See Ch 3-6.

³ See Ch 3-6.

litigants might have negative impressions of Chinese justice system. Therefore the accurate application of law and their predictability are particularly crucial in generating the trust and confidence in judicial decisions. The problems existing in Chinese decisions cannot be overlooked. Chinese judges should not rely on causation in measurement of damages all the time and should make efforts in locating and applying the appropriate legal rules. By contrast, these claims will be easily dismissed as being “too remote” under English law, the *ratio decidendi* of which is far more convincing in this aspect.

This criticism is reinforced by a patient study of the cases where on identical facts courts have arrived at divergent conclusions on the issue of proximate cause. The compensation to the third party as a result of the shipowner’s breach was generally rejected but was also found to be recoverable in a few cases on the same footing. When Chinese judges have excessive discretionary powers, it will inevitably increase the potential for mistakes or even abuse because of the short history of legal system building and hence lack of experience and tradition of judges. The generality of legal rules and the predictability of their application can generate the security of expectations that is essential in the operation of market capitalism. Without such predictability, it will only increase the cost of doing business and inhibit economic activities. Chinese courts, however, proved ill prepared for safeguarding this certainty. The outcome of litigation in the courts is in fact highly unpredictable. Different courts will make different decisions on the same facts because of an absence of conformity throughout the Chinese court system. It is advocated that the Supreme Court and appeal courts should take initiatives to eliminate the discrepancy and enhance the certainty and uniformity of justice in China.¹

As for the questions of contributory negligence and apportionment of damages, England could learn a lot from China.

¹ See 3.6, 4.4 and 6.2.6.

Both countries accept contributory negligence (or its equivalent), but the Law Reform (Contributory Negligence) Act 1945 only applies to tort unless the breach of contract will give rise to a duty of care in tort independent of the existence of the contract. This leads to “all or nothing” injustice in contractual default, which is particularly acute in the carriage of goods by sea, and thus is subject to criticism. As shown,¹ the justification for the English rule is not clearly stated and it has been shown to be an unsatisfactory solution. In its eventual reform it should be extended to contractual claims as well. There should be a mid-position in claims for breach of contract where the plaintiff’s negligence could result in a reduction of damages; therefore the principle of apportionment of damages is recommended.² In Chinese courts, by contrast, contributory negligence does not impair the claim altogether in contract cases but simply causes a reduction in the damages payable. But there is one problem in Chinese law, *viz.* there is no general provision in the civil code expressing the doctrine of mutual fault as a whole. Drafters should include this into the civil law in the near future.³

Under English shipping law, the obligation of seaworthiness is said to be an “overriding” obligation. It is highly likely that shipowners will be responsible for the whole loss provided his breach is an effective cause of the loss, even though it may not be the dominant cause, *e.g.*, when the act of god also contributes to the loss. The author believes this “overriding” obligation is over-emphasised. This misunderstanding is probably caused by the redundant and misleading qualifying words in art.3 (2) of Hague/Visby Rules: “subject to the provisions of Article IV...” (It also has something to do with the “all or nothing” position) In fact, other legislations such as art.47 and 48 of CMC have deleted it. There is no clear policy supporting the English view and it is open to question.⁴ But the Chinese rule needs to change regarding the situation when

¹ See Ch 3.

² See 3.8.3.

³ See 3.8.2.

⁴ See 3.9.6.

the shipowner fails to discharge the burden of proof on proportion of his contribution. Here the recommendation by the author is that when such a proof is unavailable, the carrier should be liable for no more than 50% of the damages, instead of 100% which is the present position of Chinese law.¹

9.3.5 Remoteness

The Chinese remoteness rule provided by the CCL mirrors the English one, although it is greatly underused in practice. Chinese judges are accustomed to relying on causation most of the time, even when the question more naturally falls into the domain of remoteness or some similar legal principle. This tendency has been criticised in the thesis.² Even when Chinese judges have come across a clear remoteness problem and applied the remoteness rule, which they on occasion have done, they have as often as not got it wrong.

More problematically, application of the remoteness rule in carriage of goods by sea cases is inconsistent, arbitrary and dependent upon the applicable law and personal view of judges. While on the whole the CCL resembles English law, its application is rather limited in the carriage of goods by sea, where the rather different CMC is the major legislation. Though art.55 of CMC does not specifically indicate that it has ruled out the consideration of remoteness, it has been interpreted in a large number of decisions as a limitation, by which view remoteness has been *de facto* excluded. Even in other maritime courts that do not interpret art.55 likewise, authority is often sparse because cases that could have been decided on remoteness are often determined on grounds of causation instead. Either way, remoteness is largely irrelevant when the CMC applies. The author has shown the defects in solely relying on causation and suggested the remoteness rule should be equally applied in shipping law, and that the anomaly created by art.55 should be corrected.³

¹ See 3.9.6.

² See 3.6.3 and 4.4.

³ See 6.2.

Hopefully Chinese theorists and judges will find the expatiation on English remoteness rule provided in this thesis insightful.

Another problem, already mentioned, is that the remoteness rule has not been officially accepted in Chinese tort law. It has been moulded by the court in a fashion more appropriate to a contractual context. The question of whether particular damages are recoverable in tort depends only on whether or not they are the direct consequences of the act.¹ This is not a satisfactory criterion, and as a result of its application damages in tort law are rather unpredictable. China's maritime courts intend to try shipping cases justly and efficiently. The outcome of litigation in the courts should be predicable and reliable. The generality of rules, the predictability of their application and certainty of measure of damages in marine claims can generate the security of expectations that is essential in the maritime trade. However, if the measure of damages is different in similar cases depending on the applicable law, Chinese law has failed to achieve its primary purpose. This will confuse litigants and increase the costs of doing business. Therefore it is necessary to seek the harmonisation of existing overlapping legal rules and to establish a unified legal framework for measure of damages. For this reason, the author suggests that the law of tort would be a good deal more rational if it adopted a similar foreseeability test and other legal principle (mitigation) in order to ensure a reliable and predictable application of damages law.²

9.3.6 Mitigation and market value rule

As mentioned before, the mitigation rule under Chinese law concentrates on only part of the problem: that is, the aggrieved party must not increase the loss after the breach, but (in contrast to English law) need not take active actions to minimise it. This is not in conformance with the *bona fide* doctrine and it has a bad impact on

¹ See 4.14.3.

² See 3.6, 4.4 and 6.2.

social waste.¹ More importantly, it is not feasible to distinguish to “reduce” from “not to increase” in practice. As a result, Chinese law does not appear to recognise any general obligation to buy in a substitute as mitigation as English law does. This is simply impractical and will only constitute a hindrance to the normal economic activities. English law is more practical than Chinese law. It is reasonable to ask the aggrieved party to enter into the market buying a substitute, instead of increasing the loss by staying idle which could be avoided without making too strenuous efforts. Although many Chinese commercial laws bearing a close resemblance to Western laws have been passed, the warning signs have always been there. They can be found in the wording of the laws themselves, drafted by conservative lawmakers. Here is a typical example. The Chinese law position is open to considerable criticism. Market-centred economy requires an increasing need for formal legal rules that facilitate transactions, provide incentives to engage in transactions and lower transaction costs. The author contends that the current position result in high transaction costs and inefficiency and is therefore untenable. The existing mitigation rule should be amended to facilitate international trade in favour of a realistic, practical and efficient economic order. Chinese mitigation should require the innocent party to minimise the loss as they are under English law.² The cargo owner should enter into the market buying a substitute if the cargo is lost by shipowners.

The Chinese mitigation rule is not a general limitation method for all monetary claims; it is only restricted to contract law. The improper manner of an aggrieved party in mitigation is regarded as a fault in tort and the damages will be deducted to reflect a proportion of his responsibility. Similar to the contract law view, the aggrieved party is only required to avoid augmenting the loss in tort law. As discussed in ch.5, it is too complicated to apportion damages to the degree of the aggrieved party’s fault. There is no logical ground for

¹ See 5.4.3.

² See 5.4.

the mitigation rule not to apply in tort law. This arrangement should be subject to further review and a unified rule is recommended.¹

Chinese law fails to mention the starting point of mitigation; it should be the time when the innocent party chooses to terminate the contract. In the face of a repudiatory breach, the innocent party is not bound to accept that repudiation and thus no requirement for mitigation arises. This is true in both countries. However, this rule is subject to a condition in English law, *i.e.*, it is not applicable where the plaintiff has no legitimate interest, financial or likewise, in performing the contract rather than accepting the repudiation and claiming damages. The Chinese position on this point is ambiguous. By reference to English law, it is recommended that Chinese law should discourage unreasonable persistence of performance in this situation.²

If the plaintiff is unable to mitigate due to lack of funds, damages will still be deducted under Chinese law. This tactic has already been overruled under English law. Chinese law is partial as it singles out the cash-strapped and is in nature discriminatory. When the plaintiff's impecuniosity is reasonably foreseeable, there is no merit in trying to force a plaintiff to do what he cannot afford to do. It is about time that Chinese law changed this position.³ The same can be said to the new for old position mentioned above.

9.3.7 Limitation

Limitation regimes have been recently attacked vehemently. Nevertheless, the author has argued⁴ that there are still some justifications for their existence, at least for the time being. Nevertheless, some problems remain.

In the 1976 Convention the persons who may limit liability

¹ See 5.3.2.

² See 5.5.3.

³ See 5.10.

⁴ See 7.2.

include the owner, charterer, manager, *etc.* Its counterpart in art.204 of the CMC is almost the same except that it leaves off the “manager” and only mentions “operator”, without any definitions. The third term “operating manager” also appears in another Chinese regulation. These terms are in many ways more of a hindrance than a help because their very familiarity has blunted any precision of meaning. Many Chinese courts exploit the opportunity to rule out the limitation. From the history and upgrading of the Convention and its interpretation by English courts, there is a tendency to extend the persons that are qualified for limitation. The author’s recommendation is that the CMC should inherit the conventions’ historical evolution, protect managers as well as operators of vessels, and clarify their definitions.¹

However desirable it may be to extend limitation to third parties, if necessary by contract, the clear possibility of doing this in English law is not mirrored in Chinese law, because there is nothing in Chinese law about the validity of contracts for the benefit of third parties, and Chinese courts have hitherto refused to validate the Himalaya clause.² Vague provisions in Chinese law have led to uncertainty. The need for certainty backed by developed law can create a sense of risk-reduction, generate the security of expectations and ensure commercial confidence in international trade transactions. Yet there is divergence of opinion amongst Chinese maritime courts about stevedores’ limitation. It is recommended that CMC art.58 be revised, ideally based on the CMI Draft Instrument on Transport Law so that third parties involved in carriage may be entitled to limitation.³ But meanwhile, in view of the time consumed in revising a law, it might be more efficient to validate the Himalaya clause. The Chinese Supreme Court can confirm this in the form of written directions.

Chinese shipping law has absorbed some rules from the

¹ See 7.3.2.

² See 7.3.2.

³ See 7.3.8.

Hamburg Rules. It provides for a separate limitation figure for pure economic loss arising from cargo delay, whereas English law does not have an equivalent. Another distinction between the two lies in the sanction for knowingly misstating the nature and value of the cargo in a bill of lading. Under English law and the Hague Rules, a carrier will be free of any liability for loss or damage arising from such. This punishment to the shipper is disproportionate to his wrong and thus is a penalty indeed. The breach of contractual obligation and the misrepresentation of the shipper are different matters. Even if the shipper has fault in providing misstated information, the shipowner should not be exempted from responsibilities under the contract of carriage. In contrast, the CMC is not satisfied with such a harsh consequence. It simply states that the shipper shall indemnify the carrier against any loss “resulting from inaccuracies in the information”. The shipowner still needs to compensate the shipper if the misstated cargo is damaged due to his negligence. Compared with Hague/Visby Rules and English law, this view accords with causal explanation and thus seems to be fairer.¹

Certain ambiguities remain about the treatment of the article of transport itself. The Hague/Visby Rules do not provide any guide. It is expected to be an issue in English law as to the compensation for lost or damaged containers provided by cargo owners. A logical solution is to consider the containers as one unit of cargo and therefore it would be subject to the same calculations as cargo, as is held by Chinese law and the Hamburg Rules.²

The shipowner is justified in endorsing bills of lading containing an “unknown” clause if it is impossible or impractical to check the contents according to the art III(3) proviso of the Hague/Visby Rules. But it is construed in English law to the effect that it will be valid anyway, even if the conditions required by the article have not been satisfied, unless the shipper specially demands a bill without the

¹ See 7.3.5.

² See 7.3.4.

qualification under the said article. When the bill is so claused, the number of packages for the purpose of limitation is problematic. Scrutton is of the view that it will be a sufficient enumeration. But such a view contradicts with the intention of the “unknown” clause. Carver favours the opposite view.¹ It is sound in theory and was accepted by courts but fails to stand in modern shipping practice. Considering that most bills are drafted to contain such a clause, such devices are only used to the shippers’ detriment. This result is caused by the *laissez-faire* attitude towards the “unknown” clause under English law and the Hague/Visby Rules. By contrast, the Hamburg Rules requires that a reservation specifying these inaccuracies can only be inserted in the bill of lading if there are reasonable grounds for suspicion or the absence of reasonable means of checking, which is a better solution.² The CMC seems to be loosely drafted as the misleading “may” took place of the otherwise explicit word “must”. This should be seen a failed legal drafting. Legislation should be affirmative and authoritative. The degree of predictability furnished by “may” is lower than that offered by “must”. Therefore the latter is favourable for the sake of predictability and determinacy. In this sense, it is recommended that “must” should replace “may” in the CMC’s future amendment to avoid contradictory interpretation.³

Both the CMC and the Convention have a loophole in claims for damages arising out of the carriage of hazardous and noxious substances by sea; they are both subject to the global limitation. Such claims should be limited by a separate fund due to its huge amount of claims. It is recommended that China and England join the HNS. Such claims should be excluded from art.208 of CMC.⁴

The SDR is used in calculating package and global limitations according to art.277 of the CMC. However this article is faulty.

¹ He holds the liability will be limited to one package, unless shipowners receive some consideration.

² See 7.3.5.

³ *Ibid.*

⁴ See 7.4.8.

Firstly, it only introduces the method to convert SDR to RMB but fails to mention other currencies, *e.g.* the popular US dollar. Secondly, it is not in line with the practices of the State Bureau of Foreign Exchange Administration, which never publishes conversion rate of the SDR to RMB directly, but only SDR to other foreign currencies. Thirdly the date of conversion for the global limitation fund is unclear. Art.277 need to be exhaustive yet is too concise and only provides for a fraction of practice. It has failed to incorporate actual norms of everyday life. Hence art.277 is redundant and needs rewriting. It should specify the method to convert SDR to other currencies and the date of conversion for limitation fund should be based on the date of setting up the fund so that the amount of the fund is more predictable.¹

9.3.8 Other issues on the measure of damages

The measure of damages is, of course, much affected by considerations of causation, mitigation and remoteness. Nevertheless, in England the bedrock principles are clear in the case of non-delivery, delay, damage to or loss of the cargo in the carriage of goods by sea context. The claimant recovers the value of the goods at the time when, and the place where, they should have been delivered.² Under Chinese law, by contrast, the substratum of principle is not there. As a result, the measure of damages has developed in a fragmentary and unsatisfactory manner. A primary rule similar to the English law position has not been established in the basic civil law, though it does appear in a curiously sporadic fashion.³

Thus a rule similar to the English market value rule does appear in Ch 17 of the CCL (referring to the contract of carriage),⁴ which governs internal carriage between two Chinese ports. But it does not appear in the CMC, which governs international carriage: this

¹ See 7.3.1.

² See 6.1.

³ See 6.2.

⁴ See 6.2.2.

instead allows recovery of the value before shipment plus insurance and freight.¹ The CMC approach is, if one may say so, entirely unsatisfactory. It effectively rules out a fair margin of shipper's profit, thus under-compensating cargo owners. At other times, however, it may actually over-compensate them (*i.e.* by helping them escape from an unsuccessful deal when the price at the destination is lower than the one in the port of loading). Not only do courts have difficulty applying these conflicting rules, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law, which creates a considerable confusion of both policy and law. The absence of a uniform legal system, the fragmented law of damages and the consequential unpredictable nature of the decisions of maritime courts will lead to criticism from litigants. The relevant provisions among different laws are mired in conflicting layers of policy, fail to achieve its primary purpose of certainty, clarity and consistency, which calls for a change in order to ensure the determinate and consistent operation of law. Therefore Chinese courts should transform its law of damages into a predictable and coherent system with the consolidation of existing consistent practices and the application of uniform practices.²

There is a further problem with art.55 of the CMC. Though it was intended as a *prima facie* measure of loss, a large number of Chinese courts have chosen instead to interpret it as a rigid limitation on damages.³ Art.55 is as often as not an excuse to refuse recovery of some types of consequential loss which ought in principle to be recoverable. It effectively turns art.55 into a limitation provision operating in tandem with package and global limitation. It also sits ill with the provision covering cargo delay (art.50) in the same law, which does allow claims for consequential economic losses caused by the delay. Under English law, there is no rule of policy excluding or restricting the recovery of consequential loss. In comparison, Chinese shipping law is inconsistent. The authorities on recovery of

¹ See 6.2.2.

² See 6.2.6.

³ See 4.4, 6.2.4 and 6.2.6.

certain heads of damages are not quick to reconcile, depending largely on the applicable law, type of marine accidents and the view of individual judges. If the CMC applies, most consequential losses, especially the loss of profit through resale or use will be definitely excluded in respect of cargo loss; but it may be recoverable as regards cargo damage depending on individual judges; in theory it is recoverable for the cargo delay if the court establishes a causal link. If the CCL applies, it brings Chinese law closer to English position and consequential loss is in principle recoverable, assuming it is not too remote. It was suggested above that this is simply illogical. Not only do courts have difficulty applying these conflicting rules, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law. Since damages law in the carriage of goods by sea are mired in conflicting layers of policy, fail to achieve its primary purpose of certainty, clarity and consistency, it calls for a change in order to ensure the determinate and consistent operation of law.

By comparing and referring to provisions in other relevant laws, the author has put forward some concrete proposals on the revision of art.55 of CMC.¹ It should refer the value of cargo as the one at the place of destination. The discrepancy between different laws should be eliminated. Any interpretation of this article as a limitation on damages should be overruled by the appeal court. Chinese law should also acknowledge remoteness, expand the mitigation rule and pay more attention to the latter two when limiting damages.

Another significant difference concerns how goods are valued for the purpose of assessing damages. English law favours an abstract assessment to ascertain the objective monetary value of the goods in a hypothetical open market.² Chinese practice, by contrast, is generally to equate the value to the concrete price, *i.e.*, the price at which an exporter actually sells the same goods to a third party, or at which an importer buys them from his suppliers, unless there has

¹ See 6.2.

² See 6.1.

been no sale and the claimant is simply moving his own cargo. The preference for concrete measurement is because it is relatively easier to prove with solid evidence such as the sale contract, while abstract market price, on the other hand, is too uncertain for the Chinese courts. The downside of concrete assessment is that the loss resulting from a fluctuation in the market is not relevant in claims for damages arising from cargo loss or damage, whatever the applicable law, as the court usually assigns cargo value a concrete price. In contrast English law takes market movements into account by adopting the abstract method. This is more favourable as it is clearly foreseeable and caused by the shipowner's breach by common sense.¹

9.3.9 Normal transit losses

The quantum of damages may be adjusted slightly if there are normal transit losses during the carriage due to cargo's nature or an imprecise measurement of goods. This thesis has indicated that Chinese maritime courts are more stringent in deducting wastage loss compared with English courts. This is another typical example of Chinese judgments style. To Chinese judges, an arbitrary figure provided by an outdated regulation is even more persuasive and admissible than a fair amount proven by experts. Here the judges do not ask what is the fair result considering all facts of a case, instead he is only concerned with what law can be relied on. It is hoped this thesis can prompt Chinese judges to think of this problem in their decision-making and rectify it.² A useful suggestion for carriers is to include a clause on wastage allowance in their contracts when operating in China.

9.3.10 Interest

In both countries the selection of an appropriate interest rate is highly discretionary, which gives the law an inelegant and illogical

¹ See 6.2.3.

² See 6.6.

appearance. Arguably, there is no particular merit in the stabilisation of interest rates and the use of different rates seems unavoidable in this field. The primary difference between the two is that English judges do not have the entirely open-textured discretion and have to follow basic principles, while the opposite is true for Chinese judges. English courts will ask what interest will compensate the plaintiff mostly in accordance with the principle of *restitutio in integrum* and whether the parties have reasonably had this in contemplation. Though it cannot prevent, and indeed sometimes invites disputes, it is still a commendable approach.¹

In comparison, Chinese judges have the ultimate discretion and there are not even the broadest guidelines. Regard is not given to the principle of *restitutio in integrum* or reasonable contemplation of the parties. Chinese law on interest is open-ended enough to allow judges to exercise discretion in a subjective and personal way. The wide discretionary power given to Chinese judges in matters of interest has increased the potential for abuse or mistake. Chinese judgments on interest can seem arbitrary and capricious. In many cases the judgment is given in such a confusing manner that its results are completely unpredictable. There is no rational distinction behind the various rates awarded. Litigants cannot settle cases and predict the amount of any liability without legal principles being clearly stated. These judgments fall short of the basic requirements which people come to expect and are open to criticism. Therefore the law on interest should be reviewed and corrected in the future amendment.² Considering the Chinese judges' inclination to follow written directions, it is recommended that a moderate legislative assistance should be laid down giving some broad directions. Another difference lies in the fact that Chinese law invents punitive interest for judgment debts to fight against the rampant defiance of effective legal judgments. It is distant from the compensatory purpose of interest but is functional and should be maintained at the

¹ See 8.1.

² See 8.2.7.

moment. Lastly, it is nearly universal that the claimant who is compelled to borrow had to pay compound interest. Chinese law is advised to recognise this by reference to English law, which only recently approved this.

9.3.11 Foreign currency and conversion rate

Foreign currency can be awarded in both countries. The English view of conversion is directed at fixing an exchange date which best achieves justice and the principle of *restitutio in integrum*. In comparison, the issue of exchange rate is not usually raised in Chinese courts largely because the RMB is still relatively stable in value. No strict rule is made for this matter and it is completely up to the individual judge. However, the Chinese economy is integrating with that of the rest of the world, and under the influence of continuing reform, the liberalisation of the monetary system and globalisation, it is expected that a “real effective exchange rate” of the RMB will appreciate over time. Then there could be dramatic fluctuations between RMB and other foreign currencies. When this happens, it will present Chinese judges with real challenges in choosing the right currency and exchange rate. The way English courts deal with this question provides a valuable reference to Chinese courts. Also, the question concerning the relevant time to convert foreign currency into the domestic one has not been raised and it is expected to find divergent solutions in practice. This should be paid attention to by Chinese lawmakers and the date of judgment is recommended for the purpose of conversion.¹

In conclusion, there is no shortage of problems and difficulties in Chinese shipping law. Vague or contradictory provisions and the consequential unpredictable nature of the decisions of maritime courts have led to criticism from litigants, which in turn are detrimental to their faith in Chinese shipping law. It will be some time before Chinese courts become the foreigner's choice of forum in

¹ See 8.4.5.

the immediate future. The development of the shipping industry requires a developed framework to regulate and protect legal interests and resolve maritime disputes. As China works diligently on improving its legal atmosphere to promote maritime trade, it will be to China's benefit to continue reforming and improving the shipping law. Given its progress in ten years time after starting basically from scratch, its strong desire for legal modernisation and its healthy attitude towards English shipping law, the overall direction is positive. Chinese shipping law can be revised, interpreted and enforced in a more uniform, impartial and reasonable manner if Chinese drafters widen their horizons, respect the international tenor of existing conventions and learn from English shipping law. Only in this way can China reform its law rapidly and effectively without having to waste time in the process of trial and error. As CMC's revision is imminent, the author devoutly wishes that this thesis can be used as a tool by lawmakers to help Chinese shipping law overcome obstacles, to keep national laws based on conventions on track, and to help China to ease into the process of international maritime harmonisation. It is also hoped people from either side find this thesis helpful and that it facilitates sea trading between the two countries. In the light of the practical experiences in trial of maritime cases and on basis of absorbability of and drawing lessons from foreign advanced legislating techniques, China can develop an advanced judicial system of own special features for trial of shipping cases. The author trusts that the reformed CMC shall provide a powerful and legal assurance for China's maritime courts to try shipping cases justly, efficiently and predictably.

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