

Study on improving the legislation of domestic carriage of goods by water

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Abstract: The status and practice of domestic legislation on the carriage of goods by water reflect the urgent need for improving its legislation on the carriage of goods by water. China's legislation for the carriage of goods by water are mainly focused on the nominal implementation of *Maritime Law of the PRC*, the choice of legislative pattern, the application of laws on the documents of carriage of goods by water and the legal system of actual carrier and other aspects. Considering that it is the time to amend the *Maritime Law*, in order to maintain the integrality of the *Maritime Law*, it is recommended that the rules on domestic carriage of goods by water be incorporated into the *Maritime Law* in the form of a special chapter under the premise of coordinating with the *Civil Code of the PRC*, and meanwhile, further improve the specific legal system of domestic carriage of goods by water to adjust the intricate and complex legal relations of coastal and inland water transportation in China in a timely manner.

1. Introduction

In March 2015, the Belt and Road Initiative (hereinafter the "BRI"), a major initiative based on the framework of building all-round connectivity on land and sea, was officially launched. As of June 2023, China has signed more than 200 cooperation documents on BRI with 152 countries and 32 international organizations. At present, the formation of a new transport pattern in countries along the Belt and Road (hereinafter the "BR") and the implementation of the Yangtze River Economic Belt Strategy have led to the flourishing development of domestic waterborne cargo logistics network. However, domestic coastal and inland water transportation, as an indispensable and important part of domestic waterborne logistics transport of goods, the legal institutions of which has been absent since the abolition of the Rules for the Carriage of Goods by inland water (hereinafter the "Cargo Rules"), barely satisfied domestic shipping practice. For example, the principle of attribution of responsibility of the carrier, the actual carrier, the limitation of liability and other special legal institutions on carriage of goods by water have not yet constituted a unified normative system, restricting the further development of domestic carriage of goods by water. Therefore, it is necessary to study the improvement of the legislation on domestic coastal and inland water cargo transportation in the light of the characteristics of China's domestic water cargo transportation and the practice of shipping laws.

2. The necessity of improving the legislation of domestic carriage of goods by water in the context of the new era

As one of the necessary means for the construction and implementation of the BRI in China, maritime transportation acts as a prominent role in building different economic corridors in Central Europe and Central Asia. The *2022 Coastal Interprovincial Freight Vessel Capacity Analysis Report* released by the Ministry of Transport shows that the scale of different types of vessels along China's coasts has increased to a certain extent. Under the dry bulk transport market, as of the end of 2022, there are a total of 2,427 dry bulk vessels transporting more than 10,000 tons along China's coastal interprovince, with a tonnage increase of 6.5%; under the container transport market, there are a total of 350 container vessels transporting more than 700 TEU along the coast, with an increase in the number of containers carried of 5.4%. Concerned about coastal transport at the same time, the inland waterway transport system should not be underestimated, China itself has three major inland waterway transport, say, the Yangtze River, Pearl River, Heilongjiang, while in recent years the country attaches great importance to the development of inland water transport, improve the domestic legal protection of waterborne transport of goods of great practical significance.^[1]

2.1 Status of domestic legislation on the carriage of goods by water

Chapter IV of the *Maritime Law* is the chapter of “*Contract for the Carriage of Goods by Sea*”, which, as its name suggests, is directly aimed at the contract for the carriage of goods by sea, and the carriage of goods between ports along the coast of China should have been within its scope of coverage. However, as the *Maritime Law* is in urgent need of promulgation, there are still many practical problems of domestic and foreign inland water transport that cannot be reconciled, and Chapter IV only regulates the relationship between international carriage of goods by sea, for the time being. In terms of coastal and inland water transport of goods, the former Ministry of Transport took the lead in formulating the Cargo Rules, a departmental regulation, to regulate the relevant legal relations. The main content of the Cargo Rules was determined in accordance with the *Contract Law* (Lapsed). However, according to the relevant provisions of the Legislative Law, laws enacted by the National People's Congress shall be prior to departmental regulations, and at the same time, departmental regulations cannot contradict the laws. It directly led to the repeal of the Cargo Rules in 2016 on the grounds that it had a lower legal hierarchy and did not have the reference value for resolving complex commercial contracts. Therefore, in the domestic legal application of water transport of goods, the coastal carriage of goods is regulated by the content other than Chapter IV of the *Maritime Law*, and the field of the contract of coastal carriage of goods and the whole field of carriage of goods by inland water can only take the *Civil Code* and Part III of the *Civil Code* (Contract) as the criterion for hearing the relevant cases, and a lot of issues of shipping practice lack of legal basis in line with the special characteristics of carriage of goods by inland water.

At present, the domestic legal relations of the contract of carriage of goods by inland water is mostly based on the *Civil Code* and Part III of the *Civil Code* (Contract). The *Civil Code* regulates the equal legal relations between civil subjects, since the most of its provisions is of principle. In addition to the validity of the contract and other issues of principle, other aspects of the use of the effect is not very satisfactory. Although the provisions of the Contracts chapter on freight contracts are operable in practice, the lack of a special regime for water transport could easily lead to problems of fairness in the division of liability between the parties to the contract of carriage and problems in the enforcement of claims.^[2]

2.2 Practical requirements for domestic carriage of goods by inland water

When hearing cases involving the contract for the carriage of goods by inland water, the courts of China first need to determine the rights and obligations of the two parties in accordance with the terms of the contract agreed upon by the parties, and secondly, they can reasonably decide on the share of responsibility of the two parties for the damage caused. Therefore, as an important part of the contract for the carriage of goods by inland water, the contract terms are also the key to the judge to decide the case. In practice, most of the domestic contract for carriage of goods by water contains the rights and obligations of both parties to apply the provisions of the Cargo Rules, that is, the relevant provisions of the Cargo Rules are incorporated into the contract for carriage of goods by water, at this time should be the Cargo Rules as the key to determine the rights and obligations of both parties.^[3] However, as the Cargo Rules was abolished in 2016, it is a departmental regulation without legal effect. If the parties still make relevant agreements in the contract after the Cargo Rules lapsed, the Cargo Rules should not be directly invoked. Unless the parties in the terms of the contract for carriage of goods by inland water has been the specific provisions of the Cargo Rules in a reasonable manner, or simply incorporated into the agreement is difficult to have legal effect. Due to the lack of domestic law on the carriage of goods by inland water, the parties to the contract for the carriage of goods on the coast and inland water are difficult to find appropriate legal reference or incorporation in the contract, at the same time, the parties are unable to accurately informed of the statute of limitations of laws or regulations, which on the one hand increases the difficulty of contracting by the parties, and on the other hand is also detrimental to the healthy development of China's waterborne cargo transport industry.^[4] Therefore, the practice of domestic carriage of goods by inland water requires that China must improve the domestic legislation of carriage of goods by inland water to firmly provide legislative guarantee for the healthy and stable development of domestic waterway transportation industry.

3. Difficulties in improving domestic legislation on the carriage of goods by inland water

3.1 The Maritime Law applied nominally

The Maritime Law has a prominent problem of nominal application in judicial practice, and ambiguous attribution of the institution. Professor He Lixin takes the maritime cases during 2008 to 2017 from China Judgments Online (wenshu.court.gov.cn) as the statistical objects in her *Research Report regarding the 25 years judicial application of Maritime Law*. After careful combing and comparison, the following conclusion is drawn: in the practice of domestic maritime trial, the proportion of Maritime Law applied in maritime disputes is less than 15%, which means that more than 80% of maritime cases are not heard and adjudicated according to the *Maritime Law*.^[5] To a certain extent, this shows that the overall situation of the application of the *Maritime Law* in maritime justice is not satisfactory. At the same time, the article also further pointed out that the application of the *Maritime Law* to resolve the relevant disputes of the court of first instance maritime court, the court of second instance is not a specialised maritime court, compared to the proportion of the application of the court of first instance, the *Maritime Law* as the basis for the adjudication of the case accounted for a smaller proportion of the trial. In addition, in recent years, the proportion of maritime trial practice in the application of the Maritime Law tends to reduce, the Maritime Law is more and more difficult to satisfy the development of the practice of domestic maritime trial.

The aspect of carriage of goods by inland water obviously reflects the nominally application of Maritime Law. For example, disputes relating to the carriage of goods by inland water are handled under the jurisdiction of the maritime courts, but since the *Maritime Law* does not regulate the carriage of goods by coastal and inland water, the maritime courts can only take the *Civil Code* and

Part III of *Civil Code* (Contract) as the basis for adjudicating the relevant cases, which is not a reasonable practice.

One of the difficulties in ameliorating the nominal application of the *Maritime Law* lies in the question of determining where the legislation institutes of the *Maritime Law* belongs. This issue has been quite controversial in the theoretical community, between the two major schools of thought “civil and commercial law system” and “maritime law system”. The former alleges that *Maritime Law* is based on civil law, which is a particular case of civil law, and if it is caught in the circle of autochthonous, it is easy to become an anomaly of domestic legislation; the latter argues that maritime law is a broad category covering public law, private law and its related international rules, and emphasizes on taking advantage of the specificity of maritime law to play the role of constructing a comprehensive system. The author agrees with the former point of view, maritime law exists as a particular law of civil law, the revision of maritime law should be coordinated with the civil law system, and be in line with the characteristics of development of China’s maritime judicial practice.

3.2 Choice of legislative pattern

In the early drafting of the *Maritime Law*, due to the major difference and uncooperativeness between international and domestic carriage of goods by water in the practice and operation of the system, meanwhile the Ministry of Economy and Trade who stands for the cargo owner’s interests had quite opponent opinions. The Ministry of Economy and Trade and the Ministry of Transportation has ultimately reached a compromise on the “dual-track approach” applying to the carriage of goods by water in *Maritime Law*, which caused a series of legal problems.^[6] At present, due to application of *Civil Code* and the Part III (Contract) to the carriage of goods by inland water and the lack of Legislative resources, it is not operable and realistic to separate legislation on domestic carriage of goods by inland water. Therefore, should be by the time of the revision of the *Maritime Law*, a reasonable way to incorporate the rules for the carriage of goods along the coast and the inland waterways, which is easier to achieve.

It is divergent to expand the scope of application of *Maritime Law* to include the domestic carriage of goods by inland water, there are also three legislative patterns to choose from, namely, a special section, a special chapter and a special chapter with authorisation, and there are divergent views as to whether to achieve a “parallel system” with the international carriage of goods by sea or to continue with the existing “dual track approach”. For completeness, it is applicable to combine the regulations on carriage of goods by inland water into the *Maritime Law* as a particular section, but it is still not determined that whether the other chapters on the special systems of the *Maritime Law* (say, the limitation of liability) could apply to the inland vessel, which is lack of completeness on legislation. If the regulations on carriage of goods by inland water can be stipulated as a special chapter in the *Maritime Law*, it will coordinate with the other chapters, resulting from which the limitation of liability and general average can be applied to inland vessels, suffering divergences from the shipping industry. Most of the opponents believe that the form of a special chapter greatly affects the aesthetics of the law, and at the same time too much change to the existing law and judicial practice, on the contrary, it will increase the difficulty of the parties to the contract. The third pattern refers to the coastal carriage of goods for the provisions of the chapter, allowing inland waterway vessels to refer to the application of the degree of realisation is easier than the first two, but in the system is more complex, and in the application of the law also seems to be more circuitous.^[7]

3.3 Legal application of documents of carriage of goods by inland water

Chapter IV of the *Maritime Law* distinguishes between domestic and international carriage of goods by water in the form of a “dual-track approach”, the main reason for this being that the transport

documents for domestic and international carriage by water are different. In practice, the domestic carriage of goods by water is generally issued by the carrier to receive the goods after the bill of lading, in the delivery of goods without a single delivery only need to verify the bill of lading on the identity of the consignee information, and the international carriage of goods by water is issued by the carrier to receive the goods bill of lading, because the bill of lading can be circulated in the market, the consignee needs to pick up the bill of lading proves that it has the right of property in the goods. To the bill of lading and sea waybill of the actual flow of comprehensive analysis, the nature of the two documents is very different, the former is only the carrier of the two sides of the contract of carriage of proof and receipt of goods, the latter not only bear the two functions, or an important evidence of rights in rem, with can be loaded to let the sex and the circulation of the sex.^[8] At the same time, drafting period of *Maritime Law* does not have the conditions of a unified document, with the same substantive law regulating the domestic and foreign water transport of goods in the economic environment at the time of the document is not very realistic, in order to protect the domestic water transport of goods industry and stabilise the order of the domestic water transport market, domestic and foreign waterway transport to different legal norms to be adjusted. Therefore, in order to regulate the legal issues involved in the flow of sea waybill, Cargo Rules in Chapter IV also provides in detail the function of the waybill and how to record the use of related situations. But at present, China's domestic legal system for the carriage of goods by water documents are missing. The author believes that, within a short period of time in order to legal unity, in the international carriage of goods by sea and the domestic waterway transport of goods in a unified document more difficult, it should be for the actual operation of the domestic waterway transport process of reasonable legislation.

3.4 Regime for Actual carrier

In the carriage of goods by water, the carrier who has signed the contract of carriage of goods with the shipper in many cases transfers part or all of the carriage of goods to a third party for performance, which is the biggest feature of the contract of carriage of goods compared with other ordinary contracts, that is, breaking the relativity of the contract. The actual carrier system from the *Maritime Law*, the Cargo Rules also clearly stipulated in this regard. The current *Civil Code* does not have the concept of the actual carrier, and such entrustment or sub-delegation relationship for the *Civil Code* agency system breakthrough, which in fact for the third party who is not a party to the contract to create performance obligations. In the event of damage to the goods, according to the relevant provisions of the Cargo Rules, this is the carrier and the actual carrier to assume joint and several liability, but at this stage can only be based on the *Civil Code* for the third party to perform the contract of the provisions of the contract, the contract creditor should be claimed from the debtor. Such provisions obviously do not meet the characteristics of the practice of carriage of goods by water, at the same time, judicial practice cannot be flexible use of the actual carrier system, to some extent, lack of balance between the interests of the ship and cargo considerations, but also easy to cause a waste of judicial resources. It is due to the lack of legal application of the actual carrier system, in the maritime trial practice, it is difficult to determine the actual carrier in the domestic contract for the carriage of goods by waterway legal relationship, and then cannot properly deal with the carrier's liability. Therefore, adhere to the problem-oriented, how to improve the actual carrier legal system in the field of domestic waterborne carriage of goods is worth thinking about the difficult problem.

4. Countermeasures to improve domestic legislation on the carriage of goods by water

4.1 Focus on harmonisation with the Civil Code

A law should have a clear system of attribution and play its legal roles of guidance, prediction and evaluation on the basis of a profound theoretical foundation. In order to better solve the problem of nominal application of the *Maritime Law* already mentioned, it is suggested that the *Maritime Law*, when incorporating domestic waterway carriage of goods, should fully take into account the practice of maritime trial, coordinate the domestic legislation on waterway carriage of goods with the principles of the *Civil Code* and its contractual content of the carriage of goods, and avoid over-emphasis on the special nature of waterway carriage and fall into the self-system circle, ignoring the proportion of the reality of the judicial application of maritime trial, thus weakening the significance of the domestic legislation on the carriage of goods by water.^[9]

4.2 Determination of the pattern of domestic legislation on the carriage of goods by water

As mentioned above, due to the tightness of China's legislative resources, separate legislation on the domestic carriage of goods by water is not operational, and it would be appropriate to take advantage of the opportunity of the revision of the *Maritime Law* to improve the domestic law on the carriage of goods by water.^[10] Although the international carriage of goods by sea and domestic carriage of goods by water is the ultimate trend to implement the principle of attribution "single-track approach", but from the practice of various fields of view, a short period of time to change the domestic "rules" of carriage of goods by water is not very realistic. Professor Hu Zhengliang raised the "minimum dual-track approach" in the *Basic Problems and Suggestions for Points of Modification of China's Maritime Law*.^[11] In the context of the "dual-track approach", in order to maintain the integrity of the system, it is proposed to adopt a special chapter to incorporate the domestic carriage of goods by water. A special chapter should be devoted to the domestic carriage of goods by water, and the *Maritime Law* should be applied in parallel with the international carriage of goods by sea. At the same time and China's shipping economy has a similarity and are subject to the influence of the German legal system of Japan, the domestic carriage of goods by water and the international carriage of goods by sea, respectively, in the Japanese Commercial Code, Japan International Carriage of Goods by Sea Act,^[12] Japan's domestic carriage of goods by water is applicable to the Japanese Commercial Code, the General Principles of Transportation and Maritime Law, and the Japan International Carriage of Goods by Sea Act, which regulates the international carriage of goods by sea.^[13] This is similar to our country's incorporation of domestic carriage of goods by water in the form of a special chapter. Such a legislative pattern has the following advantages: firstly, it can reflect the importance of the status of domestic carriage of goods by water; secondly, it shows that inland waterway vessels can apply the contents of other chapters, which means that inland waterway vessels can apply the system of ship's priority, enjoy the limitation of maritime liability, and have the right to apportion the common sea loss, which also solves the embarrassing situation of the sea vessel and the inland waterway vessel navigating on the same waterway facing the same risk without the limitation of liability; lastly, it solves the problem of the limitation of liability. This also solves the embarrassing situation of sea-going vessels and inland waterway vessels facing the same risks in the same waterway without any limitation of liability; finally, from the point of view of the technical difficulties of legislation, it is less difficult to stipulate the provisions in the form of a special chapter in the *Maritime Law*, which has little impact on the process of amending the law.

4.3 Improvement of specific institutions

The incorporation of domestic carriage of goods by water into the *Maritime Law*, for the sake of harmonisation of the regimes, adjustments to the regime of domestic carriage of goods by water and to the relevant parts of the chapters other than chapter IV.

First of all, the scope of adjustment of the *Maritime Law* for domestic waterway transport contracts should be clarified. In view of the fact that the scope of adjustment of the *Maritime Law* should be related to the “sea” suggests that the scope of adjustment should be extended to the navigable waters directly connected with the sea,^[14] such as the water transport within the Yangtze River, the Pearl River and its trunk lines. For the carriage of goods on other lakes, considering the small volume of transport, it is more difficult to be regulated by the *Maritime Law*, and it is recommended to be regulated by the Contracts Section of the *Civil Code*.

Secondly, taking the characteristics of water transport practice as a starting point, attention should be paid to clarifying the rights and obligations of both parties under the contract for the carriage of goods by water, stipulating the minimum obligations and maximum rights of the carrier, and clarifying the system of limiting the liability of the unit in the event of damage to the goods, so as to strike a balance between the interests of the cargo party and the ship party under the contract for the carriage of goods. At the same time, with reference to the Cargo Rules and the provisions of the *Maritime Law* on the international carriage of goods by sea, it is proposed to clarify that the carrier has the basic obligations of seaworthiness, prudent and proper management of the goods, and shall not unreasonably deviate from the course of the voyage, so as to appropriately regulate the principle of freedom of contract for the carriage of goods by water. It is suggested that the actual carrier system should make reference to the provisions of articles 45 and 46 of the original Cargo Rules to clarify the legal status of the actual carrier and the principle of assuming responsibility. The regime for the carriage of deck cargo and the regime for the carriage of dangerous goods should be clearly defined. In addition, the domestic law on the carriage of goods by water should meet the requirements of coordination with the Part III of the *Civil Code* (Contract). Regarding whether the carrier has the obligation to notify the consignee to take delivery of the goods in a timely manner, it is suggested to take the legal loopholes highlighted in judicial practice as a starting point, and appropriately incorporate them into the general system of the Contract Part, so as to make up for the lack of the legal system of the domestic legal system for the carriage of goods by water.

The establishment of a special maritime regime should be based on the provisions of the Cargo Rules and the *Maritime Law* on the international carriage of goods by sea. For example, in the Yangtze River and other inland waterways, sea vessels and river trade vessels sailing in the same waterway face the same risk, and sea vessels can apply the limitation of liability system, if the limitation of liability system excludes the application of inland waterway vessels is contrary to the principle of fairness. At the same time, once the river trade vessels enjoy the limitation of maritime liability and the right to apportionment of common sea losses, is bound to cause the reduction of the interests of the cargo owner, is likely to trigger the interests of the cargo owner and the ship game war. In order not to affect the revision process of the *Maritime Law*, it is recommended that the domestic legislation on the carriage of goods by water in the inclusion of maritime special regime, weighing the interests of both sides of the ship and cargo, to avoid an imbalance between the interests of both parties to slow down the progress of law revision.

5. Conclusion

Coastal and inland water cargo transport industry occupies a large proportion of domestic shipping system. Domestic water transport of goods law should be to regulate the water transport of goods market for the purpose, in China’s legislative resources are relatively tight, it is recommended to take

advantage of the opportunity to amend the Maritime Law, appropriately expand the scope of adjustment of the “sea”, and reasonably incorporated into the domestic law of the carriage of goods by water. At the same time, in order to improve the nominal application of Maritime Law application, the author believes that the actual situation of coastal and inland waterway transportation should be taken as a starting point, so as to further improve the domestic legislation of carriage of goods by water. In view of the contradictory in the judicial practice, the author suggests to gradually propose the laws and regulations for domestic waterway transportation in line with China’s civil and commercial law system and the characteristics of maritime law, so as to ensure the development of domestic coastal and inland waterway transportation, and to provide high-quality legal services for the “One Belt, One Road” initiative.

References

- [1] Hou Wei (2017). *Proposal on putting the carriage of goods by inland waterway into Maritime Code of the People’s Republic of China*, *Chinese Journal of Maritime Law*, 28 (3):11-18.
- [2] Huang Jing(2021). *The situation, characteristics and enlightenment of judicial litigation of the cases of domestic carriage of goods by waterway—an empirical study based on cases published by China Judgements Online*, *Chinese Journal of Maritime Law*, 32 (2):84-91.
- [3] Yuan Faqiang, Nan Di(2020). *On the legal source of maritime transport customs under maritime law—also on the revision of Article 268 of the Chinese Maritime Code*, *Chinese Journal of Maritime Law*, 31 (1):83-93.
- [4] Zhao L J(2015). *Uniform seaborne cargo regimes: a historical review*. *Journal of Maritime Law and Commerce*, 46 (2):133-170.
- [5] He Lixin, Liang Jiacheng (2018). *Report on the 25-year judicial application of the Chinese Maritime Code*, *Chinese Journal of Maritime Law*, 29 (2):42-53.
- [6] Huang Jing (2018). *Application of Chinese Maritime Code to domestic carriage of goods by waterway*, *Journal of Shanghai Maritime University*, 39 (1):104-110.
- [7] Wu Xu (2019). *Legislative model of domestic carriage of goods by water under the background of the amendment of China Maritime Code*, *Chinese Journal of Maritime Law*, 30 (1):11-17.
- [8] Hu Zhengliang, Sun Yue(2023). *The Legal Regime Governing the Domestic Carriage of Goods by Waterways: Solution of the Current Typical Legal Issues*, *Chinese Journal of Maritime Law*, 34 (1):15-26.
- [9] Wang Shumei, Hou Wei (2017). *Some opinions on the revision of the Maritime Code*, *Chinese Journal of Maritime Law*, 28 (3):3-10.
- [10] Hu Zhengliang, Han Lixin, Sun Siqi(2021). *Revising Chinese Maritime Code Fundamental Theories and Main Regimes*, *China: Law Press*, 309-318.
- [11] Hu Zhengliang, Sun Siqi(2017). *The Basic Issues and Main Proposals for the Revision of the Chinese Maritime Code*, *Chinese Review of International Law*, 20(4):53-71.
- [12] Cao Shan, Jiang Zhengxiong(2017). *Reference values of the law of carriage of goods by sea in other East Asian jurisdictions for Chinese legislation*, *Chinese Journal of Maritime Law*, 28 (3):32-39.
- [13] Chen Haoze, He Lixin(2018). *Analysis on the latest revision of the general provisions of transport law in Japanese Commercial Code*, *Chinese Journal of Maritime Law*, 29 (3):88-97.
- [14] Force R (2013). *Admiralty and maritime law (second edition)*. Washington, D C: Federal Judicial Center, 1—280.