

**CHINA'S APPROACH TOWARD INTERNATIONAL CONVENTIONS:
THE IMPACT of the HAMBURG RULES on the MARITIME CODE of the PRC**

by

LAI XU

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

What is the importance of the shipping industry to international commerce? What does China's shipping industry look like? What are the major International Maritime Conventions that dominate maritime legislation? What International Maritime Conventions has China adopted? How has Chinese maritime legislation developed? What has been the impact of International Conventions on the development of Chinese maritime legislation? These questions are particularly significant, especially after China's entry into the World Trade Organization. Three international conventions, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, are the primary rules regulating the transport of goods by sea. Although China has not acceded to any of these three conventions, Chinese maritime legislation makes some reference to these conventions. This article will analyze the impact of these conventions on Chinese maritime legislation and answer the questions above.

INDEX WORDS: Chinese Maritime Code, Hague Rules, Hague-Visby Rules, Hamburg Rules, Actual Carrier, Limitation of Action, International Convention, China, U.S.

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LAI XU

L.L.B, Shanghai Maritime University, the People's Republic of China, 2006

**A Thesis Submitted to the Graduate Faculty of the University of Georgia in Partial
Fulfillment of the Requirement of the Degree**

MASTER OF LAW

ATHENS, GEORGIA

2008

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LAI XU

Major professor: Gabriel M. Wilner

Committee: Thomas A. Eaton

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
University of Georgia
August, 2008

DEDICATION

To WENJIU XU & YOUMEI LI, my parents

Thank you for all you have done for me.

Best wishes for your 25th Anniversary.

ACKNOWLEDGEMENTS

I am grateful to Professor Gabriel M. Wilner for assisting me with this thesis and for his guidance and unwavering support in my academic efforts during the LLM program.

I also owe thanks to my friend, Ms. Rebekah Rashidfarokhi, for her careful editorial assistance.

TABLE OF CONTENTS

Chapter	Page
ACKNOWLEDGEMENTS.....	v
I. INTRODUCTION.....	1
II. BACKGROUND.....	5
i. A brief introduction to the international shipping industry.....	5
ii. The development of a shipping industry in China.....	6
III. THREE MAJOR INTERNATIONAL MARITIME CONVENTIONS.....	11
i. Hague Rules.....	11
ii. Hague-Visby Rules.....	13
iii. Hamburg Rules.....	15
IV. HAMBURG RULES and the MARITIME CODE of the PRC.....	16
i. A brief introduction to the Hamburg Rules.....	16
ii. Attitudes toward the Hamburg Rules.....	17
iii. Maritime Code of the PRC adopts some articles from the Hamburg Rules.....	21
V. LIMITATION OF ACTION: THE INFLUNENCE OF INTERNATIONAL CONVENTIONS ON CHINESE LAW.....	31
i. Introduction of limitation of action.....	31
ii. Limitation of action under the statues of different countries.....	31
iii. The influence of international conventions on the establishment and implementation of Chinese maritime law.....	36

VI. CHINESE MARITIME LAW LEGISLATION.....	41
i. Legislative history of Chinese Maritime law.....	43
ii. The development of Chinese Maritime law.....	45
VII. CONCLUSION	51
APPENDIX.....	57
1. ABBREVIATIONS (ALPHABETICALLY).....	57
2. MAIN LEGISLATION RELATED	58
BIBLIOGRAPHY.....	59

CHAPTER I

INTRODUCTION

“China’s own maritime law was introduced only four years ago, but is among the most modern in the world and closely follows international practices.”¹

Patrick Griggs, President of the International Maritime Law Committee

Since the early 1980s, when China adopted its “open-door” policy as a long-term strategy, the country’s foreign trade with countries and regions around the world has grown dramatically.² To accommodate the needs of a steadily developing foreign trade, China’s shipping industry has undergone rapid expansion in recent years.³ Over ninety percent of China’s import and export goods are transported by sea, and the advantages China can reap from maritime transport are enormous.⁴

As a result, Chinese courts have been met with a growing number of disputes to review and adjudicate, and these disputes have involved both foreign and domestic litigators.⁵ Although China is becoming a major transportation and trade country, Chinese maritime laws and regulations relating to shipping are still not matched with the international community

¹ Courts Handle Maritime Cases, China Daily, September 22, 1998

² See China International Economic Consultants, INC., The China Investment Guide 1986 at 50. “China contains relationship with over 180 countries and regions in the world. In 1984, the volume of the country’s total import and export was US \$ 53.5550 billion, an increase of 28% over the pervious year.”

³ Id.

⁴ Research and Markets (<http://www.researchandmarkets.com/reports/c79177>) has announced the addition of "China Shipbuilding & Repairing Industry Report, 2007-2008".

⁵ Maritime Courts Shift to Nation's Judicial System, China Daily, July 1, 1999 [hereinafter Maritime Courts Shift].

standards.⁶ As China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations.⁷

Within the last forty years, China has enacted over twenty shipping-related laws and regulations, including a Code of Maritime Law (Maritime Code or Code).⁸ China began drafting a maritime law in 1952 and although a first draft was completed in 1963, China did not have a formal or official Code until 1993.⁹ To create its Maritime Code, China borrowed heavily from some of the international conventions.¹⁰ China also examined various other international accords, adopting some provisions as written and changing others before incorporating them into the final document.¹¹

International maritime conventions such as The Hague Rules¹², the Hague-Visby Rules¹³ and the Hamburg Rules¹⁴, the Maritime Liens and Mortgages Convention, the Salvage Convention, and the Limitation of Liability Convention and the Arrest of Ships Convention have a very important impact in China. Most notably, the three Rules are the major international conventions regulating the carriage of goods by sea. Although China has not acceded to any of these three conventions, Chinese maritime legislation has made some reference to these conventions.¹⁵ Not

⁶ Courts Handle Maritime Cases, *supra* note 1, “China must exchange information and reviews in a timely manner with foreign countries because China is a big transportation and trade country, said Vice Minister of Communications Zhang Chunxian.”

⁷ *Id.*

⁸ See Maritime Law of The People’s Republic of China [Maritime Code of PRC]. Adopted at the 28th Meeting of the Standing Committee of the Seventh National People’s Congress

⁹ China’s Socioeconomic Headache, *the Nikkei Weekly*, September. 4, 2000, at 18

¹⁰ See Frances Williams, Shipping Liberalization Push, *FIN. TIMES*, Oct. 6, 2000, at 12

¹¹ *Id.*

¹² 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of lading, opened for signature Aug. 25, 1924, 51 Stat. 223, 120 U.N.T.S. 155, reprinted in 6 Benedict, [hereinafter Hague Rules].

¹³ 1968 Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, Cmnd. 6944, reprinted in 6 Benedict, [hereinafter Hague-Visby Rules].

¹⁴ U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, U.N. Doc. A/CONF.89/13 (1978) [hereinafter Hamburg Rules]

¹⁵ Shipping: Big League Hopes, *China ECON. Rev.* Dec. 23, 1999

only does the Chinese Maritime Code (Maritime Code of the PRC) incorporate many of these conventions, it also provides that the conventions acceded to by China have a "supreme" status among the different sources of law.¹⁶ It is even suggested that Chinese maritime law is a conventional-based legal system. This article will analyze the impact of these conventions on Chinese maritime legislation.¹⁷

The Maritime Code of the PRC has 278 articles. In addition to general and miscellaneous provisions, the Code regulates vessels, crew, charters, towage, salvage, collisions, general average, limitation of liability, marine insurance and the carriage of passengers. It was the largest statute China had ever enacted until the new Criminal Code in 1997 and it regulates a wide range of maritime shipping matters.

Chapter II of this article explores the importance of the shipping industry to international commerce and briefly introduces the development of the shipping industry in China by discussing three developing periods in the past fifty years.

In order to fully understand the origins of Chinese Maritime Code (Maritime Code of the PRC), we shall look at some important international conventions. Among these are: the Hague Rules of 1924, the Visby Protocol of 1968(Hague-Visby Rules), and the Hamburg Rules of 1978. These are the major international conventions in the area of maritime law, and establish the basic rules governing the liability of shippers and carriers in the movement of goods though

¹⁶ Id.

¹⁷ Id.

international commerce. Chapter III takes a brief look at the three conventions and their connections with Chinese laws.

As the Hamburg Rules are not widely accepted throughout the world, the problem regarding the status of port operators under the Hamburg Rules might be only a theoretical dilemma. In reality, the Hamburg Rules have significant superiority over The Hague and Hague-Visby Rules. The pros and cons of the Hamburg Rules will be discussed in Chapter IV, which includes an analysis of the impact of the Hamburg Rules on the Maritime Code of the PRC as well as a review of some articles illustrating the issue of an “actual carrier”.

Chapter V takes a brief look at the introduction of “limitation of action” and compares limitation of action under the statutes of different countries. This chapter goes on to explain the most important Chinese legal cases that raise this issue and analyze the influence of international conventions on the establishment and implementation of Chinese maritime law.

Chapter VI begins by examining the legislative history of Chinese maritime law and the development of legislation, most notably the development of the maritime court system. Chapter VII summarizes the important points discussed in this document and concludes that the Maritime Code of the PRC is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China's unique circumstances.

CHAPTER II

BACKGROUND

“Shipping is truly an international industry and will play an increasingly important role in the growth of international trade.”¹⁸

William A. O'Neil, International Maritime Organization (IMO) Secretary-General

i. A brief introduction to the international shipping industry

1. The role of the shipping industry in international commerce

The shipping industry plays an important role in international commerce; its importance is clearly visible even in our daily lives.¹⁹

No matter where you may be in the world, if you look around you, it is probable that you will see something that either has been or will be transported by sea. There is every likelihood that the chair you are sitting on, the paper you are reading, the radio to which you may be listening, or even the clothes you are wearing have something in their content that has been carried on board a ship.²⁰

The advantage of choosing transportation by sea is that international commerce depends upon the timely and efficient movement of goods and passengers to and from the ports of

¹⁸ International Maritime Organization (IMO) Secretary-General William A. O'Neil, Building Maritime Partnerships, Message for World Maritime Day 2000, [hereinafter O'Neil]

¹⁹ Id. According to the Secretary-General, most people never consider the impact shipping has on their lives.

²⁰ Id. In an address of World Maritime Day 2000, IMO Secretary- General William O'Neil observed.

maritime nations.²¹ Consequently, the maritime transport service industry is a vital component of the global economy.²²

2. The importance laws and regulations in the shipping industry

Because the shipping industry has tremendous profit-generating potential, the industry is highly competitive.²³ With the continuous expansion of foreign trade, China's shipping industry is becoming increasingly important. Like most maritime countries in the world, China attaches great importance to the development of her merchant marine.²⁴ China's economically vital shipping industry has been growing continuously to meet the increasing demands of foreign trade.²⁵

In this competitive environment, shipping companies construct new port facilities, build larger, faster ships, and fund research to develop state-of-the-art, cargo-handling equipment in order to stay competitive.²⁶ The promulgation of new laws and regulations often accompanies changes in the physical characteristics of the industry.²⁷ These sizable investments in time and money intensify competition for market share and ultimately lead to conflict and confrontation.²⁸

ii. The development of a shipping industry in China

1. A brief introduction to the Chinese marine market

²¹ See Frances Williams, Shipping Liberalization Push, FIN. TIMES, Oct. 6, 2000, at 12

²² See John Zarocostas, U.S., Other WTO Members Support Proposal to Restart Maritime Services, J. COM., Oct. 6, 2000, at WP.

²³ See Thomas J. Schoenbaun, Admiralty and maritime law, St. Paul, Minn.: Thomson/ West, c2004, at 149

²⁴ See excerpt from the Seventh-year Plan of National Economical and Social Development of the P.R.C., (delivered by Zhao Ziyang at the Fourth Session of the Sixth National People's Congress on March 25, 1986, People Daily (Beijing) March 26, 1986) "Total volume of import and export trade reached US\$ 83 billion by 1990."

²⁵ Id.

²⁶ See generally BILIANA CICIN-SAIN & ROBERT W. KNECHT, The Future of U.S. Ocean Policy 213 (2000). The U.S. Department of Transportation Maritime Administration (MARAD) hopes to revitalize the U.S. shipbuilding industry by making loans available to commercial shipyards for the construction of large passenger vessels. See DEPT. of TRANSP., Budget of the U.S. GOV'T, Fiscal Year 2001, at 223.

²⁷ Id. at 225

²⁸ Id.

China has over 18,000 km of coastline, 1000,000 kilometers of navigable inland waters and more than 700 ports.²⁹ From 1979, as a process of economic reform and reconstruction³⁰, China has opened its borders to the outside world while simultaneously and vigorously strengthening its legal system to meet new demands.³¹ In 1974, China's fleet³² was ranked twenty-third in size in the world, but by the end of 1984, China owned 1,262 vessels totaling 9,300,358 gross tons, and ranked in the top nine in size in the world's shipping community.³³

According to the International Maritime Organization (IMO), there are literally thousands of ships engaged in providing transport services internationally.³⁴ At least eighty percent of the world's trading goods are transported by ships.³⁵ For example, in the U.S. alone, the waterborne cargo industry contributes seventy-eight billion dollars each year to the U.S. Gross Domestic Product.³⁶ China's shipping industry is equally important to its economy; nearly ninety percent of the goods China imports and exports arrive or leave through Chinese ports,³⁷ and approximately seventy-five billion dollars in bilateral trade passes between U.S. and Chinese ports annually.³⁸

2. The three important periods of development in China's shipping industry

²⁹ See Green Jeanette, *China and the law of the sea, air, and environment*, Alphen aan den Rijn, The Netherlands; Germantown, Md.; USA: Sijthoff & Noordhoff, 1979

³⁰ *Id.* at 129

³¹ *Id.*

³² "Lloyd's of London estimated that in 1985, the world's merchant fleets had a cargo capacity of 600 million tons—170 million more than was needed." See "Ship building ought to be expanded," *China Daily*, June 13, 1986, at 4

³³ See *The China Ocean Shipping Company, Materials on International Shipping* 1(1985)

³⁴ *Id.* "Commercial vessels include passenger ships, container vessels, oil tankers, chemical tankers, gas carriers, bulk carriers and other cargo craft."

³⁵ See *Id.* According to MARAD, the United States maintains a private domestic fleet of over 44,000 vessels. *The Impact of U.S. Coastwise Trade Laws on the Transp. Sys.: Hearing before the House Subcommand. On Coast Guard and Mar. Transp. of the Comm. on Transp. and Infrastructure, 104 Cong. (1996) (Statement of Albert J. Herberger, Mar. Adm'r. of MARAD)*

³⁶ See *Marine Board Committee on Ship's Ballast Operations, National Research Council, Stemming the Tide: Controlling Introductions of Nonindigenous Species By Ships' Ballast Water* 22 (1996)

³⁷ *CICIN-SAIN & KNECHT*, *supra* note 26, at 213.

³⁸ See Anna Wilde Mathews, U.S., *China Square Off Over Shipping*, *The Asian Wall ST. J.*, Jan. 29, 1999, available at 1999 WL-WSJA 5426990; Tim Sansbury, *US and China Start Slowly: Hopes Are High*, *J. COM.*, Sept. 23, 1999, at 4. "Recent estimates put the figure nearer to one hundred million."

Three major periods comprise the development for the past fifty years in China's shipping industry.

a. The Early Development Period

The People's Republic of China (PRC) has emphasized the development of a blue-water, globally-oriented shipping industry since its founding in 1949.³⁹ At that time, the Chinese Merchant Marine consisted of only fourteen vessels.⁴⁰ By 1961, China already owned approximately 1500 ocean-going vessels⁴¹ and increased its tonnage at an average rate of 13.6% per year, a rate greater than that of any other country in the world.⁴² Also, China established the China Ocean Shipping Company (COSCO) to oversee the development of its merchant marine.

43

COSCO is a state-owned enterprise specializing in managing ocean-going ships of Chinese ownership. Today, COSCO is transporting a major portion of the country's total freight and is a significant operator in the world shipping market.⁴⁴ To offer liner and tramp services for carriage of container cargo, general cargo, and passengers, COSCO has opened many trade routes to a number of countries and regions.⁴⁵

Another shipping-related corporation under the Ministry of Foreign Economic Relations and Trade is the China National Chartering Corporation (SINO-CHART), established in 1951

³⁹ Mark S. Hamilton, *Sailing In A Sea of Obscurity: The Growing Importance of China's Arbitration Commission*, 3 *Asian- Pac. L. & Pol'y J.* 10 at 3

⁴⁰ See Kevin Li, *Beijing Move to Harmonize Ship Arrest Rules and Procedures*, *LLOYD'S LIST INT'L*, Mar. 1, 2000, a

⁴¹ *Id.*

⁴² Hamilton, *supra* note 39

⁴³ Chunk Ling & Zhou Taizuo, *Overseas Transport* 25 (1982) [hereinafter *Overseas as Transport*]; *COSCO Introduction to China Ocean Shipping Company* 3 (1986)

⁴⁴ COSCO celebrates its 25th anniversary, 4 *Maritime China* (Spring 1986).

⁴⁵ *Id.*

under the name China Overseas Transportation Corporation and renamed SINO- CHART in 1955.⁴⁶ SINO- CHART specializes in the chartering of ships throughout the world and has a good reputation throughout the international charter market.⁴⁷

b. The Fast- Developing Period (After entry into the WTO)

While the maritime transport service industry is important to all nations, it is particularly important to China. After entering the World Trade Organization (WTO), China's shipping industry has entered the "the fast-developing period".

In 1994, Chinese-owned and registered vessels were sailing to over 1100 ports in 150 countries.⁴⁸ In the last twenty years, China has become a major maritime transport service provider, but while China's emphasis on its shipping industry is relatively recent, its experience with alternative forms of dispute resolution is centuries-old.⁴⁹

It is often said that China's accession to the WTO has led to an exponential increase in world trade.⁵⁰ The maritime transport service industry continues to account for the carriage of a significant percentage of that trade.⁵¹ China is committed to becoming the world's leading provider of ships and shipping services,⁵² and has invested heavily in improving its shipyards,

⁴⁶ See SINO- CHART, Introduction to China National Chartering Corporation.

⁴⁷ Id.

⁴⁸ See John SHIJIAN MO, Shipping Law in China 3 (1999). "The 1993 International Shipping Registrar ranked the People's Republic of China (PRC) as the 9th largest maritime transport service nation in terms of registered vessels. Hong Kong was 14th. Naturally, Hong Kong's reversion to Chinese control in 1997 augmented China's already formidable presence as a shipping power. However, China's commitment to the growth of its shipping industry began long before the return of Hong Kong. Since the 1950s, China has encouraged and financed numerous projects designed to increase capacity and improve efficiency."

⁴⁹ Id.

⁵⁰ Brad L. Bacon, the People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma, 9 MINN. J. Global Trade 369, 369 (2000); Rob McKay, WTO Boost for Chinese Maritime Sector, LLOYD'S LIST INT'L, May 26, 2000, at 1

⁵¹ Id.

⁵² See McKay, *supra* note 5; See also George Lauriat, China Shipping: The Great Leap Forward 121 (1983).

ports, and port facilities.⁵³

c. The Steady- Developing Period

At the beginning of the 21st century, China's shipping industry entered into "the steady-developing period".

China's shipbuilding industry grew quickly during the first three quarters of 2007, and a variety of indicators have confirmed this growth.⁵⁴ The output of the shipbuilding industry amounted to 12.03 million DWT, a rise of 44 percent over the same period last year.⁵⁵ Over all, the exported shipping hit 9.77 million DWT, with 81 percent of shipbuilding output completed.⁵⁶ Recently, China has also revised its regulatory scheme in response to criticism calling into question the fairness and transparency of Chinese laws and procedures,⁵⁷ these changes also facilitates China's entry into the WTO.⁵⁸

⁵³ Id.

⁵⁴ The Rising Trend of Market Demand Will Greatly Promote the Steady Growth of China's Shipbuilding According to 2007-2008 Report Business Wire January 10, 2008

⁵⁵ Id.

⁵⁶ In addition, new shipbuilding orders reached 64.34 million DWT, up 120 percent from a year earlier. Of all, the exported shipping arrived at 57.22 DWT, a share of 89 percent in the new shipbuilding orders. The handheld shipbuilding orders were up to 129.35 million DWT, up by 111 percent year-on-year. Of all, the exported shipping got to 113.07 million DWT, accounting for 87 percent of handheld shipbuilding orders.

⁵⁷ Recent increases in admiralty actions are making new procedures for handing lawsuits necessary, particularly with the rise in the number of foreigners filing cases. Maritime Lawsuits, *supra* note 48.

⁵⁸ Id *supra* note 50

CHAPTER III

THREE MAJOR INTERNATIONAL MARITIME CONVENTIONS

The legal world of maritime transport is complicated, primarily due to the existence of three differing sets of rules that can be adopted and applied to carriage contracts either by cargo carriers or national legislation.⁵⁹ The 1924 Hague Rules are the first international mandatory rules creating uniform international maritime law, standardizing the rights and obligations of contracting parties, and protecting the future of bills of lading and ocean trade by establishing a balance between cargo and carrier interests.⁶⁰ In 1968, the Hague Rules were amended with the document referred to as the Hague-Visby Rules.⁶¹ The Hague-Visby Rules underwent minor modification in 1977.⁶² The Hamburg Rules emerged in 1978 from the United Nations system (UNCITAL⁶³ and UNCTAD⁶⁴) and were born of political agreement rather than commercial compromise.⁶⁵ In addition, the Hamburg Rules, unlike the Hague Rules and Hague-Visby Rules, were drafted in the continental rather than the Anglo-American legislative style.⁶⁶

i. The Hague Rules

⁵⁹ See Barton S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 *Ann. Surv. Int'l & Comp. L.* 111,122 (1995)

⁶⁰ Karan Hakan, *the Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules*. Lewiston, N.Y.: E. Mellen Press, 2004, at 27

⁶¹ Tetley, *M.C.C.* 3 Ed. 1988, *op. cit.* at 1039

⁶² *Id.* at 1010, "but not only in those rare cases when the Hague Rules apply and not when the Hague/Visby Rules apply."

⁶³ UNCITAL: Commission that formulates and regulates international trade in cooperation with the World Trade Organization

⁶⁴ UNCTAD: United Nations Conference on Trade and Development

⁶⁵ Hakan, *supra* note 60. at 35

⁶⁶ *Id.*

