SMU LAW REVIEW 2010-2011

海大法律评论 2010-2011

上海海事大学海商法研究中心 编

上海浦江教育出版社

海大
法律评论
2010—2011

上海海事大学海商法研究中心　编

上海浦江教育出版社

图书在版编目(CIP)数据

海大法律评论 2010—2011 / 上海海事大学海商法研究中心编. —上海：上海浦江教育出版社, 2011.12
ISBN 978-7-81121-207-5

Ⅰ. ①海… Ⅱ. ①上… Ⅲ. ①海商法—文集 Ⅳ. ①D996.19-53

中国版本图书馆 CIP 数据核字(2011)第 276517 号

总社地址：上海市海港大道 1550 号上海海事大学校内（201306）
分社地址：上海市蔡伦路 1200 号上海中医药大学校内（201203）
电话：021-38284923　51322547　　传真：021-38284916
上海图宇印刷有限公司印装　　上海浦江教育出版社出版发行
开本：787 mm × 960 mm　1/16　印张：27　插页：2　字数：350 千字
2011 年 12 月第 1 版　　2011 年 12 月第 1 次印刷
责任编辑：张　婕　　封面设计：赵宏义
ISBN 978-7-81121-207-5　　定价：60.00 元

《海大法律评论 2010-2011》编委会

上海市普通高等学校人文社会科学重点研究基地
海商法研究中心(编号 SJ0706)

序

《海大法律评论》创办的宗旨，是为了丰富上海海事大学及我国海商法、航运法和相关领域法律的学术研究，为学界提供学术交流和分享学术成果的平台，促进我校及我国海商法、航运法和相关领域法律的研究。

上海海事大学的法学教育始于20世纪60年代初。我国已故海商法泰斗魏文翰和魏文达教授在我校开创了我国海商法教学与研究的先河。我校于1979年取得改革开放后第一批法学硕士学位授权资格，现有国际法、民商法和经济法等3个法学硕士点。经过几代学人的不懈努力，获得较为丰硕的法学教学与研究成果，尤其是在海商法和航运法领域，我校教授直接参加了我国《海商法》《港口法》和《航运法》(起草中)等的起草，一系列航运法规、规章的起草和修改，以及国家重大航运政策的论证和制定，完成多项重大研究课题，于国内外公开出版了一批学术著作和教科书，发表了许多有价值的学术论文。目前，我校的法学教学与研究以法理学、民商法、经济法、国际经济法、国际公法、国际私法、行政法、诉讼法等为基础，以海商法、航运法和海洋法为重点，学术梯队健全，师资结构合理，学术思想新颖，学术资料丰富，正在向着更高的目标迈进。

出版物以《海大法律评论》命名。“海大”是上海海事大学的简称，在“法律评论”之前冠以“海大”两字，显示出“法律评论”具有以海商法和航运法为主要内容的我校法律研究与教学“海”的特色，并区别于国内直接以“法律评论”为名的出版物。

《海大法律评论》以海商法和航运法的研究为主，兼顾海洋法、民商法、经济法等其他法律领域的研究，力求学术成果具有前沿性、理论性和实践性，包括学术论文和专题研究报告、国内外最新立法与动态的分析和研究、典型案例评析、学术动态和学术书评等。每一卷的栏目名称根据当

年海商法、航运法和相关法律领域的重点、热点问题及稿件情况作适当调整。

《海大法律评论》将坚持学术自主、自律的原则，秉承严谨、开拓、求真、务实的精神。《海大法律评论》作为连续性法学类出版物，每年公开出版一卷。

连续出版物的价值在于延续持久并不断创新。我们将不断努力，力争将《海大法律评论》办成一份具有鲜明的海商法和航运法特色并兼顾其他相关法律领域、有影响力的连续性法学类学术出版物。同时，我们期望不断得到同行的支持和批评，使《海大法律评论》成为提高我校法学教学水平和加强我校法学研究能力的载体，为繁荣我国海商法、航运法和相关领域法律的学术研究作出贡献。

上海海事大学书记、教授

於世成

2011 年 12 月

前 言

本卷保持学术自主、自律的原则，秉承严谨、开拓、求真、务实的精神，以“海商法”和“航运法”栏目为特色和重点，并设有“域外法”和“相关法域”栏目，力求反映这些领域具有前沿性、理论性和实践性的学术成果。

“海商法”栏目收载了13篇论文。

胡正良、刘畅、黄晶的《Recent development of maritime law in China》，全面介绍和分析了2006年以来我国海事立法的发展，包括我国参加的国际海事条约，我国颁布的海事行政法规和部门规章，以及最高人民法院的海事司法解释。

林源民的《关于“上海格式”的若干意见》，分析了中国海事仲裁委员会于2010年推出的船舶建造标准合同在文字和技术方面存在的问题，并展望了该格式的应用前景。

阮芳的《我国船舶出口信贷立法完善初论》，基于对船舶出口信贷法律现状的分析，以立法形式和立法内容为视角，提出了构建船舶出口信贷法律制度框架的初步设想。

王建瑞的《船舶修理合同的若干法律问题》，结合司法实践，对船舶修理合同的概念、特征、内容等进行分析，并对船舶修理合同法律适用中常见的问题提出了见解。

张念宏的《我国外派船员劳动权益维护的困境和对策》，分析了船员外派中的法律关系、船员外派机构与船员服务机构的区别、外派船员的劳动纠纷管辖、船东互保协会保赔保险的不足、外派船员劳动合同法律适用等问题，并就船员工会作用、外派船员劳动纠纷管辖权、外派船员劳动合同法律适用等提出建议和对策。

高文的《提单管辖权条款之研究》，分析了该条款的性质和效力，对国

内外与此相关的理论和司法实践进行评价，并提出相关的司法实务建议。

魏小为的《危险货物运输中承托双方的责任——兼论对〈海商法〉的修改建议》，分析了危险货物的内涵和外延、托运人托运危险货物的义务和责任以及承运人承运危险货物的权利和责任，并对《海商法》中相关条文提出了修改意见。

陈向勇、陈永灿的《论国际海上运输中危险货物的判断》，分析了“危险货物等同于《国际危规》列举项目”的观点的不足，就危险货物的界定和判断标准提出了见解。

侯利强的《〈侵权责任法〉在我国海事司法实践中的应用研究》，分析了《侵权责任法》在我国海事司法实践中应用的必要性和可行性、具体的应用内容，以及在我国海事司法实践中所面临的困境，并提出解决途径的建议。

阙东丽的《〈防污条例〉关于国际条约直接适用和强制清污费用优先受偿的合法性和合理性分析》，分析了《防污条例》关于国际条约直接适用和强制清污费用优先受偿的规定，以及该规定的合法性和合理性，并提出建立专项清污费用账户的建议。

许光玉、龙玉兰的《油污染损害有关监测及评估鉴定》，针对油污对海洋环境造成生态损害和渔业资源损失的实务问题，提出了法定监测机构作出的专业监测评估报告属于民事诉讼证据中鉴定结论的观点，并提出渔业主管部门对渔业资源损害的调查权与代表国家行使渔业资源损失的索赔权并存时无利害关系的观点。

彭先伟的《集装箱箱位承租人海事赔偿责任限制问题及其最新发展》，分析了海事赔偿责任限制主体从单一的所有权标准发展至物权标准，继而发展至责任标准的演变过程，对集装箱箱位承租人的海事赔偿责任限制问题进行研究，并提出建议。

刘洋的《Payment of pirates' ransom and marine insurance: an analysis under English Law》，基于英国法院关于海盗赎金的判例，分析了海盗赎金在保险上的性质及其他法律问题，并提出了相关建议。

“航运法”栏目收载了4篇论文。

胡正良、刘畅、黄晶的《〈航运法〉立法的指导思想、宗旨与基本原则》，以法理学和经济法的基本理论为依据，立足于我国航运市场经济，运用国家干预市场经济的理论，分析和论述了我国航运市场的特点、战略目标和法律体系等，提出了《航运法》的立法指导思想、宗旨及基本原则。

胡正良、郑丙贵、黄晶、陈伦伦的《航运经纪发展政策与规范管理研究》，以航运经纪基本概念的界定为基础，通过分析上海航运经纪市场的发展现状及存在问题，借鉴伦敦、新加坡和香港发展航运经纪的经验，探讨上海国际航运中心航运经纪市场规范管理的模式和具体制度，并提出发展对策。

于耀东的《上海国际航运中心建设中完善海事纠纷解决机制的研究》，分析了在上海国际航运中心建设中如何完善海事纠纷解决机制和海事纠纷解决程序的创新。

仪喜峰、朴颂的《浅谈海事行政执法自由裁量权》，分析了海事行政自由裁量权存在的合理性，以及存在的法律缺失及程序控制不力之弊端，提出完善海事行政领域实体法规的立法并加强对裁量权的程序法控制，以规范海事行政自由裁量权的行使和运作。

“域外法”栏目收载了3篇论文。

张丹的《新加坡航运法对我国〈航运法〉立法工作的借鉴意义》，全面分析新加坡航运法的具体规定、制定背景、目的和效果，与我国相关法律法规进行比较，提出了我国《航运法》制定中可以借鉴的内容。

李连君、刘洋的《仲裁员的选择及替换——试论英国仲裁法律与实践》，从英国仲裁法律及实务的角度，分析了仲裁条款与仲裁员选择之间的关系，以及仲裁员公正与不偏私的标准，并解释了在英国法下撤换仲裁员的理由和经验。

林海所译的G. Edward White的《马歇尔法院和国际法：海盗案件》，通过对比马歇尔法院与当今美国联邦最高法院对于海盗案件的判决，分析了海盗案件涉及的主权性质、美国联邦最高法院管辖权的限制、自然权

利的范围和意涵等马歇尔法院审判哲学的核心问题。

“相关法域”栏目收载了4篇论文。

王铁雄的《论财产所有权观》,通过对历史上财产所有权观念变迁路径的研究,分析了财产所有权观念的演变规律及其发展趋向,指出近代财产所有权观、现代财产所有权观及科学财产所有权观的特征。

吴俐、王晓娜的《福岛核事故波及效应下的法律救济问题》,探讨了核事故损害赔偿诉讼的研究价值,以及我国核损害受害者提起诉讼的程序法和实体法问题。

林江、施帅的《上海发展离岸贸易中心的金融问题》,分析了上海在发展离岸贸易相关金融服务过程中人民币不能自由汇兑、离岸贸易公司向商业金融机构融资难、贸易企业的保险、缺乏相应金融衍生产品规避贸易风险等问题,并提出了相应的对策。

王淑敏的《保税港区构建离岸金融市场的分析与立法对策》,分析了保税港区设立航运离岸金融市场的必要性及其对于建立国际金融中心、迎合创新航运金融衍生产品需求、发展国际船舶融资和航运保险业务的意义,针对保税港区的先天优势和离岸金融的法制环境,阐述了保税港区设立离岸金融市场的可行性,提出了设立与完善离岸金融市场的立法对策。

上海海事大学海商法研究中心主任、教授

胡正良

2011年11月15日

目　录

Recent development of maritime law in China

HU Zhengliang　LIU Chang　HUANG Jing

Abstract: The development of maritime law in China since 2006 is analyzed. Such development is mainly in the form of ratification of *2001 Bunker Convention, promulgation of Pollution Prevention Regulations* by China's State Council and the various judicial interpretations by the Supreme People's Court of China, covering the fields like carriage of goods by sea, collisions at sea, pollution from ships, limitation of liability for maritime claims and marine insurance.

Key words: maritime law; judicial interpretation; carriage of goods by sea; collision at sea; pollution from ships; maritime claims; maritime insurance

1 Introduction

The maritime law in China is a body of rules which regulate the relations arising from maritime transport and those pertaining to ships. The sources of maritime law include: ① the domestic laws adopted by China's National People's Congress or its Standing Committee, the regulations promulgated by China's State Council and the provisions promulgated by the Ministry of Transport and other related ministries; ② the international treaties ratified or acceded to by China; ③ the international shipping practice.

The domestic laws are mainly *The Maritime Code of 1992* (hereinafter referred as to *The Maritime Code*), and the basic laws such as *The Marine Environmental Protection Law of 1982 as Amended in 1999, The General Principles of Civil Law of 1986, The Insurance Law of 1995 as Amended in 2009, The Guarantee Law of 1995, The Contract*

Law of 1999, The Law on Real Rights of 2007 and The Law on Tort Liability of 2009, which shall apply in the cases where *The Maritime Code* does not contain provision. It's important to mention, so far as procedural law is concerned, *The Special Maritime Procedure Law of 1999* solely applies to maritime litigation, and *The Civil Procedure Code of 1991 as Amended in 2007* applies to maritime case where *The Special Maritime Procedure Law of 1999* does not contain provision. The international maritime treaties ratified or acceded to by China shall apply with priority over the domestic laws, regulations and provisions, but their application is limited to the foreign-related matters as a principle. The international shipping customs or usage may be applied to the matters for which neither the domestic laws, regulations or provisions nor any international maritime treaty ratified or acceded to by China contain any relevant provisions.①

Noticeably, the Supreme People's Court of China has the power to promulgate interpretations as to how to apply laws during the trial of cases by virtue of *The Law on Organization of the People's Courts of 1979 as Amended in 1983.* Since 1991, the Supreme People's Court of China has promulgated six judicial interpretations in the area of maritime law to act as supplements to the domestic laws, regulations and international maritime treaties. China is not a case-law country, but the judgements especially those issued by the Supreme People's Court of China may have the effect for reference in dealing with the same or similar cases, although they have no binding effects upon other cases.

Besides adoption of the two basic laws, i.e. *The Law on Real Rights of 2007* and *The Law on Tort Liability of 2009*, the recent development of maritime law in China since 2006 is mainly in the form of ratification of one international convention, adoption of one regulation promulgated by China's State Council, one provision promulgated by China's Ministry of Transport and four judicial interpretations promulgated by the Supreme People's Court of China, which are introduced with analysis below and form the main contents of this paper.

---

① Para.2 of Article 268 of *The Maritime Code*.

2 Carriage of goods by sea: *Judicial Interpretation on Delivery of Goods without Bill of Lading*

2.1 Background

By virtue of Article 71 of *The Maritime Code*[①], where a bill of lading[②] is issued, whether it is a named bill, an order bill or a bearer bill, the carrier is obliged to deliver the goods at destination against production of the bill of lading. Therefore, delivery of goods without bill of lading is illegal under Chinese law.

In the international shipping practice in China, however, a considerable proportion of goods are delivered without bills of lading. According to statistics, such proportions are about 30%, 50% and 70% in the carriage of general goods, containerized goods and liquefied goods in bulk (especially oil) respectively. In the recent years, the ten maritime courts in China handled altogether about 500 cases of delivery of goods without bills of lading every year, i.e. about 5% of all the cases handled by them.

Under such circumstances, the Supreme People's Court promulgated *The Provisions on Certain Issues regarding Application of Law in the Trial of Cases of Delivery of Goods without Original Bills of Lading* (hereinafter referred to as *Judicial Interpretation on Delivery of Goods without Bill of Lading*) on 16 February 2009, which came into effect as of 5 March 2009.

---

① Article 71 of *The Maritime Code* provides: "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the named person, or to the order of a named person, or to order, or to bearer, constitutes such an undertaking."

② Where a bill of lading is referred to, it means an original bill of lading in Chapter Ⅳ "Contract of Carriage of Goods by Sea" in *The Maritime Code*. In the context of this paper, a bill of lading also means an original bill of lading wherever it is referred to.

2.2 Main contents

2.2.1 Bill of lading holder's right to claim

The right to claim against the carrier for damage arising from delivery of goods without a named, order or bearer bill of lading, on the basis of either contractual liability or tort liability, is vested in the holder of bill of lading (Articles 1-3). Therefore, holding bill of lading is a precondition for claim for damage arising from delivery of goods without bill of lading.

2.2.2 Forged bill of lading

Occasionally, the carrier or its agent at destination delivered the goods against a bill of lading without knowledge that it was forged by the person who demanded delivery or other third party other than the holder of the true bill of lading. The question arises whether the carrier's liability for delivery of goods without bill of lading can be exempted by the fraudulent action committed by a third party other than the holder of the true bill of lading. It is specifically provided for in Article 5 of *Judicial Interpretation on Delivery of Goods without Bill of Lading* that, where a person took delivery of goods against a forged bill of lading, the holder of original bill of lading is still entitled to claim against the carrier. The reasoning of such liability lies in that the carrier has the obligation to carry the goods to the destination and deliver the goods to the person who is entitled to take delivery, including examining the bill of lading before delivery. The carrier or its agent at destination who delivered the goods should have the privilege to verify whether the bill of lading produced by the person who demanded delivery was true or forged. In addition, such liability to be borne by the carrier is helpful for protecting the normal documentary transactions and maintaining the reliability of bills of lading.

2.2.3 Amount of indemnity and non-availability of package or kilo limitation of liability

The amount of indemnity for damage arising from delivery of goods without bill of lading shall be calculated on the basis of the value of the goods at the time of shipment plus insurance premium and freight, if paid, i.e. the CIF price of the goods (Article 3). As a result, the holder of bill of lading cannot claim for loss of profit, which is identical with the calculation of amount of indemnity for loss of goods as provided for in Article 55 of