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Content

Rules

1. New Safety Inspection Rules in China

China have recently updated the local rules to regulate the PSC inspection on foreign vessels trading to China and the FSC inspection on Chinese vessels (both types of inspection are conducted by China Maritime Safety Administration). The previously governing *2009 Ship Safety Check Rules* has been replaced by the new *Ship Safety Inspection Rules* which has taken effect since 1 July 2017 and new features cover that:

a. Port entry/exit permissions for Chinese vessels engaged in international trade are no longer required.

In the past, international trading vessels, either Chinese or foreign registered, were obligated to obtain permissions before they could legally enter and exit from Chinese ports. The New Rules lift the requirement for Chinese flagged vessels and replace it by a reporting mechanism, under which international trading Chinese-registered vessels may call at Chinese ports by reporting to the port authority via Internet/fax/text message 4 hours prior to arrival and departure.

The rules concerning foreign vessels remain unchanged though – entry application shall be submitted 7 days ahead of estimated arrival date or before departure from the last port of call if transit is less than 7 days; exit application shall be filed within the 4 hours before departure or together with entry application if the vessel would stay for less than 4 hours.

b. Extending "Ship Safety Inspection" to cover "Ship Spot Inspection"

The quasi-PSC/FSC spot-check inspection scheme known as "Ship Spot Inspection" ("SSI") that China MSA have implemented as a pre-check to consider if the strict PSC/FSC inspection is necessary has now become part of the redefined "Ship Safety Inspection" under the New Rules. All vessels are now formally required to cooperate with the SSI and to keep SSI reports along with PSC/FSC reports on board for at least 2 years.

According to the New Rules, PSC/FSC inspection shall be carried out when the SSI reveals such need. Moreover, if SSI exposes ship deficiency that may endanger navigation, crew's safety, marine environment, or any behaviour violating the marine traffic safety regulations, the MSA can take law enforcement actions against the vessel and liable parties. Failure in cooperation during inspection or failure in well keeping the reports shall be imposed with fine from RMB1,000 to RMB30,000.

c. Launching of a national Vessel Comprehensive Quality Archive

The New Rules guide China MSA to establish a unified platform -Vessel Comprehensive Quality Archive ("VCQA") to collect and process vessels' quality records. The VCQA has in fact been promoted since the end of 2014 as part of the central government's initiative for a social credit system. It aims at establishing a credit-based administration system to raise administrative efficiency by focusing supervision on "high risk" vessels. Currently the system seems to target on Chinese vessels and shipping companies. It remains unknown now as to whether and when similar measures may extend to foreign vessels and entities.

2. Supreme People's Court replied to ascertain jurisdiction on disputes over property preservation during litigation

As a matter of Chinese laws, in case of a wrongful application for property preservation, the applicant shall undertake loss and legal consequence incurred thereby and duly indemnify the respondent. For property preservation action before litigation, there have already

been legal regulations to guide that the claims raised by the respondent or by any interested party for compensation due to wrongful application shall be subject to jurisdiction of the people's court which accepts that application or enforce the preservation action.

Recently the Chinese Supreme Court have issued a guidance to establish that claims arising from wrongful property preservation during litigation shall also be subject to jurisdiction of the people's court which accepts that application or enforce the preservation action. The guidance has become effective since 10 August 2017.

3. Convention on Choice of Court Agreements

Convention on Choice of Court Agreements is an international treaty concluded during The Hague Conference on Private International Law. This Convention shall apply in international cases to exclusive choice of court agreements concluded in certain civil and commercial matters. A judgment issued by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States where the Convention is applicable.

The Convention was signed in 2005 and has taken effect since 1 October 2015. China signed to accede to the Convention on 12 September 2017 but has yet ratified it.

WJ News

1. Eight cases handled by Wang Jing are included in a book composed by the Supreme People's Court

The Book "Judicial Theory & Practice Overview Concerning the Belt and Road Initiative: Maritime Case Selections" is chiefly edited by Ms. He Rong, vice president of the Supreme People's Court, published by the Law Press of China, and officially circulated in December 2016. The Supreme People's Court selects a total of 24 typical cases for this book which consists of 4 chapters: Dispute over Contract of Carriage of Goods by Sea, Dispute over Ocean Freight Forwarding Contract, Dispute over Damages in Tort, and Other Disputes. The said cases provide significant guidance on how to deal with practical legal issues related to the Belt and Road Initiative for the future and warn Chinese enterprises against potential legal risks in the process of "going abroad".

Of the cases selected for this book, eight were wholly or partly handled by our lawyers, representing 33.3% of all the selected cases. The eight cases are respectively:

1. Haichiman Shipping S.A. v. Shanghai Shenfu Chemical Co., Ltd. and Dorval Kaiun K.K. (dispute over cargo damages under contract for carriage of goods by sea)

2. Guangxi Xianlin Import and Export Co., Ltd. v. Lucretia Shipping SA and China Ocean Shipping Agency (PENAVICO) Qinzhou Co., Ltd. (dispute over contract of carriage of goods by sea)

3. Fuzhou Jifeng Shipping Ltd. v. DAE HO SHIPPING CO., LTD. (dispute over ship collision damages)

4. Jiangxi Rare Earth and Rare Metals Tungsten Group Import & Export Co., Ltd. v. RCL FEEDER PTE LTD and other entities (dispute over liabilities for maritime property damage)

5. Guangxi Port Qing Oils & Fat Co., Ltd. (广西港青油脂有限公司) v. Owner or Bareboat Charterer of M/V "MYKONOS" (Dispute over ship arrest application)

6. Daewoo Shipbuilding Marine Engineering Co., Ltd. v. Rongjin Corp. (荣晋公司) (petitory action of dispute over ship mortgage contract)

7. DVB Bank SE v. ISIM Amin Limited and ShokoohSahar Kish Shipping Co. (dispute over ship ownership)

8. Case of Application by Bunkers Marine Pte Ltd. for Pre-litigation Arrest of M/V "NASICO LION"

The cases related to the Belt and Road Initiative are of apparent foreign-related features and mostly involve participation of foreign entities, with some involving identification of applicable legal provisions of countries along the Belt and Road or the application of international conventions through the grasp of international rules. Handling such cases demands a high level of legal expertise and English language skills of the handling judges and lawyers. One third of all cases selected by the Supreme People's Court for the book "Judicial Theory & Practice Overview Concerning the Belt and Road Initiative: Maritime Case Selections" are handled by our firm, which illustrates our firm's capacity in dealing with major foreign-related cases with enriched experience and also fully demonstrates our lawyers' high level of competency and professionalism in providing foreign-related legal service.

2. Six cases handled by Wang Jing are selected as the Ten Typical Case of 2016 by the Supreme People's Court

In order to play a demonstration and reference role of the typical cases, the Supreme People's Court announced Ten Typical Cases of 2016, six of which were handled by Wang Jing & Co. The six cases are respectively:

1. 21 people v. Conoco Phillips China Inc. & China National Offshore Oil Corporation (dispute over liability for marine pollution damage)

2. Shaoxing Kingston Knitting and Textile Co., Ltd v. Mitsui O.S.K. Lines, Ltd. (dispute over contract of carriage of goods by sea)

3. Nanhai Rescue and Salvage of Ministry of Transport v. Archangelos Investments E.N.E. (dispute over salvage contract)

4. Zhenjiang Water Supply Company Limited v. KDB CAPITALCO., LTD (dispute over water pollution damage)

5. DVB Bank SE v. ISIM Amin Limited & Shokooh Sahar Kish Shipping Co. (dispute over the ownership of vessel)

6. Case of application by Daewoo Shipbuilding& Marine Engineering Co., Ltd. for recognition of foreign arbitration

Chinese Courts ruled to break liability limitation for collision damage claim

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First instance judgment: Shanghai Maritime Court (2014) HuHaiFaHaiChuZi No.85;
Second instance judgment: Shanghai High People's Court (2016) HuMinZhongZi No.24;
Retrial ruling: The Supreme People's Court of P.R. China (2016) ZuiGaoFaMinShen No.1487.

Case background

In March 2013, M/V "Zhe Sheng 97506" ("ZS") collided with M/V "Tai Lian Hai 18" (TLH) at coastal waters off Qidong City, Jiangsu Province. Upon receipt of accident report from the duty officer of ZS, her owner failed to report the collision to the competent authority and ZS fled away with intention. As a result, TLH sank with all 8 crewmembers fell overboard and dead. Owners of TLH thereafter lodged the lawsuit with Shanghai Maritime Court requesting Owner and Manager of ZS to severally and jointly undertake full liability for the collision. In the meantime, Owner of ZS lodged the counterclaim contending that TLH should bear equal or major liability for the collision and alleging that ZS would be entitled to limit liability for the collision claims.

Through investigation, Nantong Maritime Safety Administration ("Nantong MSA") determined that ZS should assume major liability for the accident for reasons that (a) the duty officer did not hold any competency certificate, (b) ZS was sailing beyond the approved navigation area, (c) ZS committed negligence in keeping look-out, (d) ZS failed to proceed at safe speed, (e) ZS did not comply with relevant navigational regulations in restricted visibility, (f) ZS failed to conduct search and rescue after the collision, (g) ZS did not report the collision to competent authority and (h) ZS even fled away without permission. TLH was found by Nantong MSA to assume secondary liability for the accident on grounds that (a) no ship/crew certificates were kept on board at all, (b) the duty officer did not hold any certificate of competency, (c) TLH did not comply with relevant navigational regulations in restricted visibility and (d) TLH did not take effective measures to avoid collision.

Judgments

The first instance judgment issued by Shanghai Maritime Court held that the accident was a both-to-blame collision as both ZS and TLH violated the relevant rules and provisions of the International Regulations for Preventing Collisions at Sea, 1972 and the PRC Maritime Traffic Safety Law. ZS should bear 70% of inter-ship liability and TLH should assume 30% of the liability. In the meantime, the lawfully registered ship manager of ZS failed to perform the obligation of safety management and therefore should jointly and severally undertake the compensation liability with the individual shipowner of ZS.

Meanwhile, the Court found that ZS had conducted a series of illegal acts for long time including (a) sailing beyond the approved navigation zone, (b) failing to apply for visa, (c) employing uncertificated crewmembers to navigate and command the vessel, and etc.. The said miscounts were causes of the accident as well. Whilst her individual owner was fully aware of the occurrence of the accident, he failed to

order the vessel to stay at site for searching and rescuing or waiting, but left the vessel entirely to the duty officer's own decision. Therefore the Court held that neither Owner nor Manager of ZS should be entitled to limit their liability, as the Owner had been aware that loss would probably be resulted in the accident but failed to duly report and the Manager had explicitly knew the aforesaid serious illegal acts by ZS but failed to effectively rectify them.

Owner of ZS subsequently appealed against the first instance judgment before the Shanghai High People's Court, who then delivered the judgment to dismiss his appeal and uphold the first instance judgment. Thereafter, Owner of ZS filed the retrial application before the PRC Supreme Court, who also delivered the ruling to reject the retrial application.

Comments

The mechanism of limitation of liability for maritime claims, which has its unique characteristics with a long history, is one of the typical legal mechanisms under maritime law. It is defined as a compensation system to limit the compensation liability of the party liable for the maritime claims, such as ship owners, managers, and etc., to a certain level. Given the special risks of shipping industry, the purpose of this liability limitation mechanism is to properly protect interests of the shipping participants, and it is distinguished from the general principles for compensation of civil damages. Main shipping countries around the world all adopt the regime of liability limitation, and accede to international conventions such as Convention on Limitation of Liability for Maritime Claims, 1976 (hereinafter referred to as "1976 Limitation Convention") constantly to keep pace with the international practice. Although China has not acceded to the 1976 Limitation Convention, the PRC Maritime Code adhere to the legislative spirits embodied by the generally accepted international conventions in this regard, and with reference to the related provisions of international conventions, China have thus developed a regime of limitation of liability for maritime claims similar to that under the 1976 Limitation Convention but with Chinese characteristics.

For a long time, in terms of forfeiture of the right of limitation of liability for maritime claims, the standard has been strict and attitude has been prudent from an international perspective. Therefore, there are few precedents of breaking the liability limitation. The aforesaid judgments are remarkable in the sense that they tend to set up the judicial criteria with respect to forfeiture of the liable party's right to limit liability, namely (a) the vessel sailed beyond the approved navigation zone for long time, (b) the vessel failed to apply for visa before sailing, (c) crewmembers did not hold valid certificates and (d) the vessel fled away after the collision. All are adequate to conclude that the ship owners have faults by act or omission done recklessly and with knowledge that such loss would probably result.

The above case has been selected by the PRC Supreme Court as one of the top 10 remarkable cases in the year of 2016. We shall continue focusing on the latest developments of laws and cases concerning limitation of liability for maritime claims and provide our updated comments and advice.

Do strict requirements under Chinese law for lien on cargo loosen?

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Introduction

Shipowners may think of exercising lien on cargo as the most straightforward and effective remedy when encountering issues with unpaid hire or freight or any payment due under charterparties or cargo carriage contracts. Nonetheless, for years Chinese courts have adopted strict legal tests in examining lien on cargo in China.

More and more clients have approached us for advice on exercising lien on cargo particularly under influence of the current declined shipping market. This article aims at providing certain guidance in conjunction with related decisions recently handed down by the Shanghai Maritime Court in a freight forwarding case.

In what circumstances the shipowners are entitled to exercise lien on cargo in China?

On international shipping market, lien on cargo is usually considered as right agreed upon in writing and the parties concerned shall be bound by such agreement. However, as a general principle under Chinese law, lien on cargo is a statutory right instead of a right agreed upon. In other words, whether a lien may be exercised relies on whether the statutory conditions of a lien have been satisfied. If conditions are satisfied, a lien may be exercised even if there is no agreement on the lien in a contract. If not, no lien shall be exercised in the presence of an agreed lien in a contract. Therefore, the Lien Clause in the charterparties or carriage of goods by sea contracts (which may be purportedly incorporated into the bills of lading) is substantially irrelevant to the rights of lien under Chinese law.

In real practice, it is disputed how the legal concept of "control"/ "possession" of cargo under Chinese law shall be interpreted. Whether the shipowners/carriers are entitled to exercise lien on cargo which is unrelated to the outstanding payment but under the same contract? Whether any party other than the carriers under a B/L or the disponent owners under a time charter has the entitlement to lien on cargo? Whether the shipowners/carriers are still in possession of the cargo when the cargo is discharged to the yard/warehouse arranged by the cargo receivers?

Chinese Judgment

In a recent case, Shanghai Maritime Court handed down a judgment in support of a freight forwarder's legitimate right of lien on cargo. The freight forwarder entered into a long term agreement with the cargo receivers to provide cargo forwarding services including customs clearance, land transportation and storage; however, the receivers failed to pay the agreed service fees for four shipments of cargo. The freight forwarder therefore exercised lien on a subsequent shipment of cargo after they took delivery of the cargo from the carrier on behalf of the receivers and arranged for cargo storage in a third party's warehouse. The cargo receivers disputed the legitimacy of the lien and raised claim against the forwarder before the Shanghai Maritime Court.

Our Comments

Although the judgment is concerning a freight forwarding case, it actually assists to clarify some issues in relation to lien on cargo under Chinese law.

·"Control"/ "possession" of the cargo

In the judgment, the Court made it clear that the statutory requirement for cargo "possession"/ "control" could be satisfied when the cargo was under substantial control by the party exercising the lien. That said, if the cargo had been discharged ashore but still at the yard/warehouse arranged/contracted by the shipowners/carriers, legally it could be regarded as still under the shipowners/carriers' possession/control. In the circumstance where the cargo was discharged to the warehouse arranged by the cargo receivers, previously it was taken for granted that the cargo should be deemed as not in possession/control of the shipowners /carriers; but now it becomes arguable in view of the Court's finding above.

·Who can exercise lien on cargo?

Literally the PRC Maritime Code states that only the carriers under a bill of lading contract and the disponent owners under a time charterparty shall have right of lien on cargo. The Shanghai court judgment has crystalized that a freight forwarder is also entitled to exercise lien on cargo. It follows that any disponent owners in the charter party chain (irrespective of under a voyage or time or consecutive contract of affreightment) may exercise lien on cargo as well.

·What cargo can be subject to lien?

The Shanghai court judgment has further clarified that the cargo subject to lien does not necessarily to be those directly connected to the overdue payment. It seems the Court has not stuck to the strict rule but becomes flexible by adopting the PRC Property Law.

Following such way of thinking, it is possible that the disponent owners under a contract of affreightment may become entitled to exercise lien on cargo of a subsequent shipment for outstanding freight of previous voyage.

Although the Shanghai court judgment has been innovative, China after all is not a country of case law. The judgment can be used as supporting evidence, but different Chinese courts will have different views on the issue with lien on cargo and can determine at their own discretion.

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Wuhan Maritime Court said NO to Anti-suit Injunction

Dai Yi/Bai Yang

Case Brief

On 2 June 2017, a Chinese cargo insurer ("insurer") applied for ship arrest before Wuhan Maritime Court ("WMC") against a foreign shipowners for the cargo claim under B/L and WMC granted the arrest order. The insurer subsequently brought the substantive legal action against the shipowners before WMC, who in turned accepted the case.

The shipowners then applied to Hong Kong Court for an Anti-suit Injunction ("ASI") on grounds of the existing arbitration clause in B/L. Hong Kong Court approved and issued the ASI, ordering the insurer to withdraw their claim before WMC and prohibited the insurer from filing any further claim or legal proceedings against the shipowners in Mainland China for any disputes arising from the B/L.

As a response to the ASI, the insurer applied to WMC for maritime injunction, requesting the Court to order the shipowners to withdraw the ASI before Hong Kong Court.

Decision by WMC

WMC found that they obtained jurisdiction over the substantive claim by way of the ship arrest action and the shipowners failed to raise jurisdiction challenge within the statutory defence period. Therefore, WMC held that the shipowners' application for the ASI before Hong Kong Court infringed lawful rights of the insurer to pursue claim before WMC and ordered as following:

1. The insurer's application for maritime injunction against the shipowners was allowed.
2. The shipowners shall apply to Hong Kong Court for immediate withdrawal of the ASI.

Analysis

As mentioned above, WMC, at the insurer's application, issued maritime injunction order against the shipowners to withdraw the ASI. Hereinafter we will refer the maritime injunction order issued by WMC as "Anti-ASI".

According to Article 51 of Special Maritime Procedure Law of PRC ("Procedure Law"), maritime injunction is a remedy available to the applicant against the ongoing infringement of rights or breach of contract. Its purpose is to provide immediate protection to the applicant's lawful rights granted by law or contract. The way to achieve such purpose is for the Chinese court to order the respondent to do or not to do certain actions by way of precautionary maritime behavior preservation in the form of maritime injunction.

In Chinese judicial practice, maritime injunction is traditionally granted in three scenarios, namely, the mandatory release of cargo, ship or B/L. In the instant matter, the Anti-ASI ordering the shipowners to withdraw the ASI rendered by Hong Kong Court does not fall within the above three traditional types of maritime injunctions. Therefore, the Anti-ASI is undoubtedly a remarkable breakthrough.

Pursuant to Article 56 of Procedure Law, in order to obtain a maritime injunction, the followings shall be fulfilled: (1) the applicant has a specific maritime claim; (2) there is a need to rectify the respondent's action which is in violation of provisions of the law or the contract; and (3) the situation is so urgent that failure to grant a maritime injunction immediately will cause damages or damages to increase.

As to condition (1), the Maritime Code and Procedure Law do not provide the definition of maritime claims. As a matter of judicial practice, maritime claims normally refer to those claims listed under Article 21 of Procedure Law. It is notable that the maritime claims referred to in the above Article 21 are such claims that can be subject to ship arrest action and are therefore substantive claims. However, the Anti-ASI deals with jurisdiction dispute, addressing to procedural matters. From this perspective, the Anti-ASI effectively expands the range of maritime claims where maritime injunction is applicable from substantive claims to jurisdiction issue.

Regarding condition (2), there may be conflicts in laws and judicial practices under Chinese law and English Law with regard to the incorporation of charterparty arbitration clause into B/L. Common law countries (including England and Hong Kong) are more likely to accept the legal effect of incorporation of arbitration clause into B/L, but Chinese Courts are normally reluctant to admit incorporation, especially in the circumstance where the claimant is a subrogated insurer. Having said the foregoing, the key issue in the instant matter is that the shipowners failed to raise objection to the jurisdiction of WMC within the statutory defence period. Therefore, WMC duly obtained jurisdiction over the substantive claim and commencement of legal action by the insurer before WMC was legally justified. The ASI obtained by shipowners from Hong Kong Court was deemed by WMC as an infringement of the insurer's lawful right to commence legal action and pursue the claim before WMC, and thus shipowners' such action should be rectified by the Court.

Turning to condition (3), the insurer would face punishment from the Hong Kong Court for failure to observe the ASI. If the shipowners would comply with the Anti-ASI rendered by WMC to withdraw the ASI before Hong Kong Court, the insurer would be relieved from the adverse consequences of the ASI. Therefore, the insurer's application for the Anti-ASI was of time urgency. If the shipowners were dissatisfied with the Anti-ASI, they may apply to the WMC for reconsideration in accordance with Article 58 of Procedure Law but the enforcement of Anti-ASI would not be suspended during the period of reconsideration. If the Anti-ASI failed to be complied with, the shipowners may face punishment set out in Article 59 of Procedure Law. In particular, WMC may impose a fine, detention, or even criminal charge upon the shipowners.

Comments

The issuance of the Anti-ASI is no doubt a breakthrough and innovation under the existing regime of maritime injunction. As mentioned above, the Anti-ASI effectively expands the range of maritime claims where maritime injunction is applicable from substantive claims to procedural matters (i.e. the jurisdiction issue). Notably, one special circumstance in this case is that the shipowners failed to raise jurisdiction challenge, which we tend to believe, is a significant point for WMC to decide they had jurisdiction and the ASI rendered by Hong Kong Court had prejudiced the insurer's lawful right.

Assuming that the shipowners had filed the jurisdiction challenge before WMC on the ground of incorporation of charterparty arbitration clause into the B/L, WMC would have to seek guidance from the Supreme Court via Hubei Higher People's Court before making decision on the jurisdiction challenge. In that case, given the Supreme Court would provide final guidance on the jurisdiction challenge, presumably WMC may not have rendered the Anti-ASI so quickly.

Chinese domestic companies normally ignore the ASI rendered by English Court or Hong Kong Court. WMC issued the Anti-ASI against the party having obtained ASI from Hong Kong Court, which has attracted great attention from Chinese shipping community and the legal profession. This firm will continuously pay attention to development of cases relating to Anti-ASI in China and provide updated comments and advice.