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When vessel encounters typhoon leads to cargo loss, shall it be categorized as the exemption of liability by invoking peril of sea or by navigation fault? Time charterer or shipowner, who is the actual carrier?

-----A Brief summary of the Supreme Court opinion

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In the article, "*A success of carriers in defending liability exemption by invoking typhoon*", our law firm published in "Wang Jing & Co., Xiamen Maritime Law Review" volume 8, 2015, we shared the disputed matter related to the causes of cargo loss in this claim. In the meantime, we introduced the court opinion in the first instance judgment from Shanghai Maritime Court and also the 2nd instance judgment from Shanghai Higher People's Court. After the judgment of the second instance was given, the cargo insurers challenged the judgment to the Supreme Court for retrial. Recently, we received the civil ruling from the Supreme Court for this case. After a long and tough fight, with several twists and turns, we defended successfully with liability exemption on behalf of the shipowner. Here, we are going to briefly introduce the two main opinions in the Supreme Court's ruling as follows.

First, the causes of cargo loss in this case.

Regarding the causes of cargo loss, which is the main dispute in this case. In the first instance, the court considered it was because of typhoon "Muifa", at the same time, the severe sea condition created by typhoon (80% causation) together with lashing defections (20% causation), contributed to the cargo loss. In the causation, the severe

sea condition caused by typhoon fulfilled the "Act of God and perils of the sea" as provided in Article 51 paragraph one clause three of the Chinese Maritime Code (CMC); However, the court hold a conservative attitude in liability exemption by invoking typhoon, the court considers that it was an imprudent and negligent decision for the vessel to sail towards Jeju Island for avoiding typhoon. It was because of the master's prematurely set sail decision made the vessel encountered typhoon "Muifa" in short distance, which is the reason for cargo loss. Thus, the inappropriate decision given by captain to avoid typhoon constituted the main reason for cargo loss. The negligent decision for avoiding typhoon qualified the navigation negligence for master in CMC. The carrier and actual carrier shall be exempted from the compensation liability.

The Supreme Court sustained the appeal court's opinion in its final ruling. The Supreme Court considers the major and decisive reason for cargo loss in this dispute was lack of sufficient prudence on master's decision for avoiding typhoon. Based on this, the court categorized this negligence into master's navigation negligence, the carrier and actual carrier shall have an exemption from this liability.

The conservative attitude in Chinese judicial ruling was also reflected in the Supreme Court's opinion. In judicial practice, it is rare to see court supports carriers' liability exemption by invoking typhoon defence according to "Act of God and perils of the sea" in Article 51 paragraph one clause three of CMC. The number of the cases truly distinguished "force majeure" and "Act of God, perils of the sea" are even fewer. The first instance for this case possessed an extreme positive international judicial effect. However, it is interesting to note that ultimately the Supreme Court choose to maintain the 2nd instance judgment's opinion by invoking the liability exemption of navigation fault.

Second, the issues related to legal position and liability of time charterer and the shipowner.

In regard to the issue, whether the time charterer or shipowner shall be identified as the actual carrier, the supreme considers that the time charterer only completed lashing operation of the disputed cargo, it was not actually involved in carriage or control of the cargo or vessel. Based on that, the time charterer was not qualified as the "actual carrier" defined in CMC. On the other hand, the shipowner owns the ship and was

actually involved into the carriage of cargo, at the same time, its master authorized the ship agent to issue the bill of lading on behalf of the shipowner. Thus, it shall be recognized as the actual carrier in this case.

In general, the Supreme Court's identification of actual carrier in this case follows the common practice in Chinese maritime practice. If the vessel is not under bareboat charter, it is very likely for the court to consider that it is the shipowner who actually performed carriage of cargo based on the ownership of the performing vessel. In light of this, the court will further conclude the ship owner is the actual carrier in the case. The Supreme Court has reconfirmed this holding, which shipowners shall beware.

On the other hand, because the Supreme Court has remained the recognition of a minor cause of the cargo loss was the insufficient cargo lashing and securing. Based on the fact that the cargo lashing and securing was actually performed by Time charterer but not ship owner, the Supreme Court sustained the court holdings in the first and second instance, ruling that shipowner is not liable for cargo loss in this case. Until now, this series of cases, whose object more than seven million dollars, running for six years, related to three maritime courts and five cargo loss dispute series cases are finally concluded with a retrial ruling given by the Supreme Court. Being as the attorneys for the shipowner in these claims, we profoundly realized the extreme difficulties for shipowners to invoke "Act of God, the peril of the sea" exemption in cargo claims. We value this victory for shipowner in this particular case, at the same time we would like to see more flexible attitude and more open-minded opinion from the court in this regard.

[KIND REMINDER]

The above are merely some simple understanding given on the basis of our reflection during the process of handling maritime disputes. As the first Chinese regulations concerning the independent guarantee, it is believed that the new Judicial Interpretations on Independent Guarantees will provide useful guidance for the trial practice of disputes over maritime security. Hope any issues that remain unclear and disputable could be clarified in the future judicial practice.