Wang Jing Maritime Bulletin 201803

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Rules

1. The provisions of the Supreme People's Court on application for approval of the arbitration cases that are subject to judicial review and the provisions of Supreme People's Court on certain issues related to the conduct of judicial review of arbitration cases

The Supreme People's Court issued the Provisions on Application for Approval of the Arbitration Cases that Are Subject to Judicial Review (the "Application Provision") and Certain Issues Related to the Conduct of Judicial Review of Arbitration Cases (the "Conduct Provision") and these provisions entered into force on 1 January 2018 which solve the question of reality in the process of application for recognizing and enforcing foreign arbitration award.

Application Provision makes it clear that in conducting the judicial review of non-foreign-related arbitration cases or arbitration cases not related to Hong Kong, Macao or Taiwan, each intermediate people's court or special people's court shall report for approval to the higher people's court to whose appellate jurisdiction it is subject of any case it has reviewed, which it intends to determine that the arbitration agreement therein is invalid, or the enforcement of the arbitral award of a Mainland arbitration institution is to be refused, or such an award is to be set aside. After the case review by the Supreme Court can a ruling be rendered according to the opinion of the Supreme Court.

Article 3 of Conduct Provision stipulated that where an applicant's application for the recognition of a foreign arbitral award is related to a lawsuit pending before a people's court, and the respondent has neither domicile nor property in the China mainland, the people's court before which the related lawsuit is pending shall be competent to hear the application. Where the people's court before which the related lawsuit is pending is a basic people's court, the application to recognize the foreign arbitral award shall be heard by its direct superior people's court. Where the people's court before which the related lawsuit is pending is a higher people's court or the Supreme People's Court, that court may decide to hear the application by itself or direct that an intermediate people's court hear the application. In case the foreign arbitral award is related to an arbitration administered by a Mainland arbitration institution, the respondent has neither domicile nor property in the Mainland, and the applicant applies for the recognition of the foreign arbitral award, the people's court in whose jurisdiction the Mainland arbitration institution locates shall be competent hear the application.

2. The provisions of the Supreme People's Court on certain issues related to the conduct disputes over marine natural resources and compensation for damage of ecological environment (the "Marine and Ecology Provision")

Marine and Ecology Provision came into force on 15 January 2018 and clarified the extent of compensation, general rules for loss determination and its alternative method.

The compensation includes preventive measures cost, recovery cost, period loss, investigation cost. If the alleged recovery cost or period loss cannot be determined, the people's courts may determine it as the interests which the liable parties obtained from the tort or the reduced pollution prevention cost which resulting from the liable parties. If the people's courts cannot ascertain the alleged recovery cost or period loss in accordance above method, the people's courts may refer to official statistical information of government or other information which can proof the average income or average prevention cost over the same period and exercise their discretion.

WJ News

1. Two senior associates are promoted to be Partners of this firm.

Wang Jing & Co. Law Firm announces that from 1 January 2018, Mr. Wilson Wang and Mr. Li Jianping are promoted to be the partners of our law firm.

>>Wilson Wang

Mr. Wang graduated from Dalian Maritime University with a LLB degree at maritime law, and obtained a LLM degree with Distinction at Tulane law School in the United States. He obtained the PRC lawyer practising license in 2009. Mr. Wang also obtained the Practising Certificate to practise as a solicitor of England and Wales in 2017.

Mr. Wang has been handling foreign related litigation and arbitration cases for over ten years and has profound knowledge in PRC law and common law. He is experienced in dealing with matters in relation to bill of lading, C/P, shipbuilding and finance, L/C and bank guarantee, cross-border investment and M&A, arbitration and many other fields. He has served as legal advisor or expert in PRC law in many litigation or arbitration proceedings in England, Singapore and Hong Kong.

Mr. Wang has won high praise from clients with his diligent and precise work style. As a member of this firm's professional lawyers and legal experts, Mr. Wang will continue to provide high-quality legal service to clients.

>>**Li Jianping**

Mr. Li Jianping graduated from Dalian Maritime University with a LLB degree majoring in Maritime Law. He was employed by a Chinese well-known shipping company in which Mr. Li worked as a business manager coordinating with shipowners, masters, cargo interests, portside, shipyard, customs and other relative partier for over 500 ships. In 2004, M. Li was sent by the company to a oceanic container vessel as the shipowners' representative. Mr.Li worked as the Legal Supervisor and Director of the department of legal affairs from September 2006 to August 2012.

He joined Wang Jing & Co. in September 2012 and has been a member of our firm ever since. Mr. Li has substantial experience in dealing with matters relating to admiralty, shipping, integrated logistics, disputes over warehouse building, company merger and dismantlement, company bankruptcy and etc. Mr. Li also served as a legal counsel for many large - scale enterprises.

Li has enriched experience in admiralty, shipping, bill of lading, chartering, logistics, insurance, land development and general corporate legal issues.

2. Mr. Wang Jing attended the Asia Pacific Regional Meeting of Terralex

From February 1st to February 4th, 2018, our senior partner Mr. Wang Jing presented the Terralex 2018 Unofficial Asia Pacific Regional Meeting in Kuala Lumpur, Malaysia. Our new partner Mr. Wang Weisheng also participated the meeting. This meeting was hosted by AZMI ASSOCIATES in Malaysia with a total of more than 40 representatives from member firms in 14 countries including Australia, New Zealand, Singapore, Japan, Thailand, the Philippines, Malaysia, etc.

Terralex is the fifth global network of law firms with more than 10,000 law firms worldwide as its members, it provides the member law firms with business opportunities, mutual legal support among firms, and chances of cross- District communications.

The 2018 Asia-Pacific Unofficial Meeting has three sessions, 1) development of Crypto Currencies; 2) development of Fintech in Asia Pacific; 3) open discussion on "One Belt and One Road" initiation. Our partner Mr. Wang Weisheng has addressed a speech on the Fintech's development in China in the second session.

After the meeting, the host party arranged the delegates to visit the Kuala Lumpur Regional Center for Arbitration, the Malaysia Federal Court and Court of Appeals.

Recognition and Enforcement of Foreign Judgments in China

- Judicial practice and latest development

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With economic developments, China has intensified her commercial ties with many other countries all over the world, yet it is inevitable that various kind of legal disputes will incur. Presently it remains arguable whether judgments involving Chinese companies rendered by foreign courts could be recognized and enforceable in China. Apparently, if the answer is not, effectiveness of these judgments will be seriously affected and clients, who have spent substantial legal costs are unlikely to obtain compensation.

I. Basic principles and related laws

Fundamental position under Chinese law is that, foreign judgments can be enforceable in China provided that certain conditions are satisfied.[1] The precondition for enforcement is the procedure of recognition and compulsory enforcement. It is generally accepted that in China foreign judgments do not bear legal effect until having been recognized by Chinese courts. Several precedent cases decided by the PRC Supreme Court support such proposition. Therefore, the procedure of recognition and enforcement is essential. The PRC Civil Procedure Law provides the basis the recognition and enforcement of foreign judgments before Chinese courts. In accordance with Article 282 therein, recognition and enforcement of a judgment issued by a foreign court shall be through either international treaties or Principle of Reciprocity, and the foreign court judgment shall not violate the basic principles of Chinese law, state sovereignty, security or public interests.[2] Thus, the two ways for foreign judgments to be recognized and enforced are: applications based on international treaties or conventions between the two countries, and applications based Principle of Reciprocity.

II. Judicial practice

Where a bilateral treaty is applicable, the recognition and enforcement shall accord to relevant provisions of the treaty. The first case Chinese court recognized and enforced foreign judgments was based on a bilateral treaty. In case *Italy B & T Ceramic Group s.r. l*, the applicant filed an application with a Chinese court for recognition and enforcement of a bankruptcy judgment and Writ of Property to be confiscated and transferred issued by a court of Milan, Italy. The Chinese court, relying on the Treaty on Civil Judicial Assistance between China and Italy, recognized the legal effect of above decisions.

In the absence of international treaty or convention, the application shall be based on reciprocal relation. As for the determination of reciprocal relation, China adopts a strict *de facto* reciprocity (i.e., there must be a precedent case decided by foreign court to recognize and enforce PRC courts judgment). Such approach causes China and countries with no precedent case in this area (e.g., Japan) fall into a vicious circle of not recognizing and enforcing judgments from each other. In 1995, the PRC Supreme Court rejected the applicant's request in "Reply on whether people's courts should recognize and enforce a Japanese court judgment with content of money debts" ([1995] Ming, Ta Zi No. 17), stating that "China and Japan did not conclude or participate in international treaties or conventions on mutual recognition and enforcement of court judgments and rulings, and did not establish reciprocal relations". Likewise, Chinese courts refused to recognize and enforce judgments of courts from Australia and Germany.[3]

III. New Developments in Chinese Judicial Practice

1. Convention

On 12 September 2017, Wu Ken, China's Ambassador to the Netherlands, on behalf of the Chinese government signed the Convention of 30 June 2005 on Choice of Court Agreements ("the Convention"). Member states of the Convention include the European Union (covering European territory of all member states except Denmark), Mexico and Singapore. China, same as Ukraine and the United States, signed the convention, but has not yet ratified it. Once ratified, the Convention will have two main effects on civil and commercial legal relationships governed by the Convention in China. One is the establishment and exclusion of the court's jurisdiction, and the other is the recognition and enforcement of member states' court judgments. Article VIII of the Convention provides, "a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention." By then, foreign judgments that can be recognized and enforced in China will increase significantly. The Convention has in-depth provisions on jurisdiction, applicable decision, and contains many exceptions. Matters not specified in the Convention are governed by domestic laws. Therefore even under the Convention, uncertainties exist regarding the enforcement. Business entities and their lawyers shall be careful of the court jurisdiction clause in contracts, and procedural matters in foreign court proceedings (e.g., service of documents, raise of defence), so as to avoid judgments being rendered as unenforceable in China.

2. Reciprocal Relationship

On 9 December 2016, Nanjing Intermediate People's Court ("NIC"), when reviewing application for recognition and enforcement of foreign court judgment between Kolmar Group AG and Jiangsu Textile Industry (Group) Import and Export Co., decided to enforce the civil judgment No. O13 made by High Court of Republic of Singapore on 22 October 2015. NIC held that, "China and the Republic of Singapore did not conclude or participate to any international treaty on mutual recognition and enforcement of court judgments, but because the High Court of Republic of Singapore enforced a civil judgment made by Suzhou Intermediate People's Court in January 2014, according to the principle of reciprocity, this Court should recognize and enforce the civil judgments of Singaporean courts, provided other conditions are satisfied. After review, the civil judgment did not violate the basic principles under Chinese law or the state sovereignty, security and public interests." As such, the judgment of the Singaporean court was recognized and enforced.

On 30 June 2017, Wuhan Intermediate People's Court ("WIC") recognized and enforced judgment No.EC062608 made by a court of Los Angeles, United States in Ruling (2015) E Wuhan Zhong Ming Shang Wai Chu Zi No. 00026. Although there is no bilateral treaty on mutual legal assistance in civil matters between China and the United States, the ruling held that "upon review, the evidence submitted by the applicant shows that there is precedent that the court of the United States enforced civil judgments of Chinese court, and therefore the applicant has established that a reciprocal relationship exists between China and the United States in relation to the reciprocal enforcement of civil judgments".

In WIC's decision, the precedent referred by WIC was the case where a court of California, United States, recognized and enforced a judgment of Hubei Higher People's Court ("HHC") in 2009. In that case, the California court judge, relying on the "Uniform Foreign Money Judgments Recognition Act", recognized and enforced a judgment of HHC, and ordered the respondent, Robinson Helicopter Company to pay the two Chinese claimants, USD 6.5 million plus interest.

Whilst confirming the reciprocal relationships, WIC elaborated other factors affecting foreign judgment being recognized and enforced in China and the primary one is that it shall not violate fundamental principles under Chinese law or state sovereignty, security, public interests. Regarding the respondents' objection that they did not receive summons from the foreign court, WIC decided that the applicant had submitted evidence proving that investigation on the respondents' service address had been conducted and the foreign court decided to serve court writs by public notice which was subsequently actually issued so it should be deemed that the US court had lawfully

Effected service upon the two respondents. For the respondents' argument that the Shares Purchase Agreement was real, legitimate and effective, and the purchase price of the shares should not be returned to the applicant, WIC held that the review for recognition and enforcement are judicial assistance proceedings, which should not cover the substantive issue such as legal relationship among the parties, and further in view that the US court had made decision on the substantive dispute, WIC should not readdress it.

IV. Conclusion

Although China has currently concluded treaties on civil judicial assistance with some countries, not all treaties include provisions on mutual recognition and enforcement court judgments (e.g., the treaties between China and Singapore, China and South Korea). Further, China has not signed bilateral treaties in this area with its major trade partners (e.g., the United States, Japan). It results in few precedents available in real practice regarding applications for recognizing and enforcing foreign court judgments based on bilateral treaties. The Convention is the first signed by China in this area. If the Convention is ratified, it will renew the legal basis for recognizing and enforcing foreign judgments.

Turning to applications based on reciprocal relations, NIC and WIC in their recent judgments confirmed the reciprocal relations between China and Singapore as well as China and the United States. Although China is not a country of case law, such judgments still have exemplary effect. However, in their judgments NIC and WIC did not explicate the criteria for recognizing and enforcing foreign judgments. Therefore, even for judgments from countries with reciprocal relation, the reviewing standard remains as uncertain. Based on precedents and experience, we summarize the relevant standards adopted by Chinese courts as: 1) whether the court rendering the judgment has jurisdiction over the case; 2) whether the foreign judgment is final and effective; 3) whether in the foreign proceedings, the summon and service are legal and in accordance with applicable procedural rules; 4) whether the foreign judgment is obtained through fraud to procedural matters; 5) whether there are duplicated proceedings; 6) other public law matters (i.e., whether the foreign judgment violates the basic principles of Chinese law or state sovereignty, security and public interest). Chinese courts generally do not review the case merits.

To sum up, applications for recognition and enforcement based on principle of reciprocity are not necessarily approved due to the uncertain reviewing standards, and it shall be reviewed on case by case basis. The Convention provides more explicit provisions on conditions and criteria for recognition and enforcement, despite of some ambiguities in the Convention itself. In any event, both signing of the Convention and the recent judicial precedents reflect that Chinese courts are moving forwards to adopt a more open-minded attitude in this area. Moreover, the PRC Supreme Court, in its recent work report, has indicated that by formulation of judicial interpretation on recognition and enforcement of foreign civil and commercial judgments, enforceability of foreign judgments in China will increase rapidly. Foreseeably foreign judgments in line with standards are more and more likely to be recognized and enforced in China in the future.

[1] This article only discusses the recognition and enforcement of foreign judgments in mainland China and does not cover Hong Kong, Macao and Taiwan areas.

[2] Article 282 of PRC Civil Procedure Law, in the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaty or convention concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China, and not violate state sovereignty, security or public interest of the country, recognize the validity of the judgment or written order, and if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this law. If the foreign judgments or rulings contradict the basic principles of the law of the People's Republic of China or violate the state sovereignty, security or public interest of the country, the people's court shall not recognize or enforce it.

[3] In March 2007, the PRC Supreme Court, in the "Reply to query on application by Fraser Power Engine Co., Ltd. requesting for recognition and enforcement of an Australian Court's judgment", stated that, "the research suggested that, China and the Commonwealth of Australia did not conclude or participate in any international treaty or convention to recognize and enforce civil judgment or ruling, or establish any reciprocal relations. There is no legal basis for the application of Fraser Power Engine Co., Ltd. and it should be rejected." In 2010, the PRC Supreme Court in "Reply to query on the application for recognition (and execution) of judgment 20460/07 of Offenburg state court, the Federal Republic of Germany" ([2010] Min Si Ta Zi No. 81), stated that the court of Offenburg in Germany is not authorized to serve the judgment to the respondent Beijing Fu Kela Furniture Sales Co., Ltd. by post. It is proposed that Beijing No. 2 Intermediate Court to clarify and explain to applicant that after the service of judgment in line with ways recognized and accepted by Chinese laws, the applicant can reapply. However, the High Court of Berlin, Germany, based on the principle of reciprocity in German Civil Procedure law, had firstly recognized a judgment of Wuxi Intermediate People's Court dated September 2, 2004.

Analysis on Several Legal Issues Concerning Demurrage (I)

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—the Liability of Consignee

Yang Bo/Xu Fangjie

Demurrage is also known as charge for overdue use of container. It generally refers to costs incurred as a result of the container user's failure in returning the container to the carrier before the time limit for free use of container is due. It is a liability arising from breach of carriage contract. The dispute over claim for demurrage has always been a common argument upon the contract of carriage of goods by sea. In practice, there are yet certain divergences regarding the subject of liability for demurrage. The key issue lies in whether the consignee shall be liable for compensation for demurrage in the circumstance where the original bill of lading is not issued. This article aims at analyzing and discussing the liability of consignee by reference to relevant court cases.

Sea waybill transport and the mode of telex release have widely existed in the present shipping practice. The sea waybill and the bill of lading are both transport documents, with the key difference in that the sea waybill cannot be negotiated and does not function as the document of title. Telex release is also a common practice in maritime transport but there are no definite laws and provisions regulating the same, so it gives rise to various disputes. Sea waybill transport shares the common characteristic with the mode of telex release that no original bill of lading has been issued. In the event where no original bill of lading is issued, there are practical disputes regarding whether the consignee is a party to the carriage contract and shall be held liable for compensation for demurrage.

In Case No. (2016) ZGFMS2157, the carrier and the shipper agreed to adopt telex release and no original bill of lading was issued. When the consignee went through formalities for taking cargo delivery upon the ship's arrival at the destination port, the cargo was ordered to return because the cargo was in nature solid waste which was banned from being imported to China and thus the carrier suffered demurrage. The consignee asserted that as no original bill of lading had been issued, the consignee at destination port as prescribed by the shipper on the duplicate bill of lading did not actually participate in the transportation chain and should not be a party to the carriage contract, and thus should not be held liable for the demurrage. Both courts of first and second instances did not directly support the consignee's argument; instead, they reasoned from the perspective of faults to hold that the consignee had no faults attributing to the cargo return and should not be liable. However, in the retrial proceedings, the PRC Supreme People's Court supported the consignee's argument and reasoned that even if the consignee, purely as the consignee stated in the duplicate bill of lading, handled formalities for taking cargo delivery, it could not prove that the consignee and the carrier were bound by the carriage contract, so the consignee should not undertake obligations as those under the original bill of lading and the carrier was not entitled to claim for compensation from the consignee.

In another Case No. (2017)ZGFMS1477, likewise, the carrier and the shipper agreed to adopt telex release and no original bill of lading had been issued. Demurrage was also incurred after the cargo's arrival at the destination port. The consignee paid relevant freight and asserted taking delivery of cargo, but refused to pay demurrage and put forth argument same as above. The court of first instance viewed that, in accordance with nature and purpose of the contract of carriage of goods by sea, which was evidenced by the sea waybill, it should be ascertained that the shipper and the carrier agreed the carrier to directly release the cargo to the consignee as indicated in the sea waybill; that is, the carrier and the consignee should have concluded and been bound by the contract of carriage of goods by sea. The consignee therefore should be a party to the contract and thus liable for breach of contract. The court of second instance further held that, the consignee was not only named in

the electronic bill of lading but also paid freight to the carrier. Such was sufficient to testify their role as consignee, so the consignee should have entered into the contract of carriage of goods by sea with the carrier and should be liable for compensating the carrier. The PRC Supreme People's Court also upheld the foregoing opinions in their retrial ruling, adjudicating that since the consignee was not only prescribed as the consignee in the sea waybill but also paid freight to the carrier, they should have exercised rights as the consignee at destination and should have been bound by the carriage contract with the carrier and obligated to timely take delivery of cargo, to return the empty containers to carrier and to undertake liability for demurrage.

Both aforesaid precedents involve the same issue of the named consignee's liability for demurrage under sea waybill or telex release bill of lading when no original bill of lading has been issued, but the Supreme People's Court have made different decisions despite of the similar case scenarios. It follows that the said issue remains disputable in judicial practice.

In our opinion, whether the original bill of lading has been issued or not shall not be the sole criteria to test whether the carrier and the consignee are bound by the carriage contract. Instead, the possible contractual link shall be ascertained on a case by case basis so as to avoid unreasonable finding.

For instance, during the sea voyage where no original bill of lading has been issued, in case of any cargo loss, cargo shortage or other occurrence that affects the consignee's rights, the consignee will not be entitled to claim against the carrier based on the carriage contract, following which, the consignee's rights and interest will be prejudiced. Another example is that, where the consignee handles formalities with the carrier for taking cargo delivery, but later delays in returning the empty container to the carrier, if the contractual link between the two is denied simply because no original bill of lading has been issued, the carrier may subsequently be not entitled to claim for demurrage against the consignee, but could only pursue after the shipper. However, since the shipper commits no faults for detention of containers, no doubt they will vigorously defend according to law which in turn put the carrier into a dilemma leaving their rights unsecured.

Furthermore, it is the usual practice in international trade and shipping that costs and expenses incurred at the port of destination shall be undertaken by the consignee; upon the cargo's arrival at the destination, the carrier will notify the consignee of cargo arrival, advise the demurrage tariff, and remind the consignee to timely pick up the containers; when fulfilling formalities for taking cargo delivery, the consignee shall settle the demurrage, storage fees, etc. with the carrier or the terminal before they could take away the cargo. If the consignee's legal status is completely denied simply because no original bill of lading has been issued, a lot of operations in actual practice will fail.

Article 41 of the *PRC Maritime Code* provides that "*A contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another*". Further pursuant to the relativity principle of contract, it is generally considered that it is the shipper who conclude the carriage contract with the carrier and shall be party to the contract. Nonetheless, the carriage contract has also concerned the consignee's interest, so it is commonly accepted that the consignee shall also enjoy/undertake partial rights/ obligations under the carriage contract in certain circumstances and be deemed as a party to the carriage contract. In this connection, there are some academic theories existing in practice, as set out below:

1. <u>Theory providing that the carriage contract is concluded for the third party's interest</u>

The theory proposes that the carriage contract could be construed as having broken the relativity principle of contract and is concluded for the third party's interest. That is to say, when the shipper and the consignee conclude the contract to agree on cargo delivery and the consignee's certain rights and obligations thereunder, the contract should be regarded as made for the consignee's interest; if the consignee also confirm their status therein, they should be deemed as having entered into the carriage contract with the carrier.

2. <u>Theory providing that the carriage contract is assigned to the consignee</u>

As adopted by the U.K. *Bill of Lading Act 1855* and the

U.K. Carriage of Goods by Sea Act 1992, the theory reads that when the bill of lading is assigned from the shipper to the third party/the consignee/B/L holder, the contract of carriage of goods by sea evidenced by the bill of lading is accordingly assigned. Yet it remains arguable whether the carriage contract evidenced by other transport documents can be also regarded as being assigned to the consignee in case of no original bill of lading being issued.

3. <u>Theory providing that the consignee's liability shall be defined by legal provisions</u>

The theory says that the consignee/B/L holder acquire rights according to law rather than conclusion or assignment of contract, but the respective rights of shipper and carrier as agreed by shall conform to those stipulated by law, save that the consignee's acquirement of rights will lead to rest of shipper's rights. Article 78 of the *PRC Maritime Code* provides that "*the relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be determined based on the B/L clauses*". In accordance with Article 86 of *PRC Maritime Code*, if the cargos were not taken away at the discharge port or if the consignee has delayed in or refused to take cargo delivery, any expenses or risks arising therefrom shall be borne by the consignee. These provisions both specify the consignee's statutory obligations under the carriage contract.

In light of the above legal provisions, theories and practices, we take the view that, where the consignee confirm themselves as consignee or expressly accept the carriage contract or transfer of documents, they shall be a party to the carriage contract and thus have certain rights and obligations thereunder. Accordingly, under electronic bill of lading/ sea waybill, whether the consignee shall be a party to the carriage contract and have corresponding rights and obligations shall be ascertained by distinguishing diffident situations as follows:

1. If the consignee described in the electronic bill of lading/sea waybill deny themselves as consignee, they are of course not bound by the carriage contract and shall not bear any liability thereunder.

2. If the consignee stated in the electronic bill of lading/sea waybill confirm themselves in the status of consignee thereunder, and assert their rights with the carrier to take cargo delivery under the carriage contract based on the said electronic bill of lading/sea waybill (regardless whether they actually take cargo delivery or not), it means that the consignee have confirmed the carriage contract evidenced by the electronic bill of lading/sea waybill. In that case, unless the shipper expressly change the consignee before cargo delivery, the aforesaid consignee shall be a party to the carriage contract and acquire relevant basic rights of consignee under the carriage contract, including the right to take cargo delivery and the right to claim for cargo loss, and meanwhile they shall undertake corresponding obligations such as picking up the cargo timely, returning the empty containers in time, and paying the demurrage incurred at port of destination.

3. Regardless in the booking or transport process, if the consignee explicitly confirm the contents of the electronic bill of lading/sea waybill, it shall be interpreted that the consignee are willing to be bound by the bill of lading/sea waybill, which will then be similar to the case involving the holder of original bill of lading, whereby the rights and obligations of the consignee and the carrier should be defined according to clauses of the electronic bill of lading/sea waybill.

In conclusion, in consideration of the current extensive use of electronic bill of lading/sea waybill, determination of the consignee's liability shall no longer be confined to whether original bill of lading has been issued. Instead, it may rather rest upon the actual practice and expression of will by all parties in specific case scenario, so that all parties' interests can be effectively secured.

A Case Handled by WJNCO Selected as Outstanding Thesis of Court System

The thesis titled Determination of Tort Liability on Carrier written by Judges Ni Xuewei and Fu Junyang of Guangzhou Maritime Court ranked 2016 Outstanding Case of the Court System of the PRC. This case, handled by our lawyers Chen Xiangyong and Wang Jun finally obtained the favorable judgment in which the court held that the carrier shall not assume the tort liability for the replacement of goods after seven-year trial including the first and the second instance trials as well as the retrial by the second-instance court as remanded by the Supreme People's Court of the PRC. This article is excerpted from the above-mentioned thesis and is intended to present gratitude to both judges.

Case Summary: In May 2009, the scrap copper stored in 19 containers was shipped onboard MV OTANA BHUM for carriage from Manila, the Philippines to Nanhai City of Guangdong, China by a shipping company as carrier. On 14 July, the cargo arrived at Nanhai and the consignee opened the containers for inspection and discovered that the containerized cargo was a mixture of clods, stones and scrap iron rather than scrap copper as described in the B/L. However, the subject containers were in good apparent conditions without a sign of prying and were properly sealed. Besides, the containers' structures and doors and other components were not damaged. The rider sheets noted the container numbers, ship company's seal numbers, the container weights and other seal numbers (alleged as the CCIC Phils seal numbers which were lost at the time of devanning containers).

In August 2009, the consignee also the B/L holder filed a claim before Guangzhou Maritime Court against the carrier, alleging that the carrier did not duly perform the obligations of caring for and keeping the cargo during their responsibility period, resulting in the loss of the CCIC Phils seals on containers and causing the consignee to sustain losses, and that the carrier shall be liable for tort. Besides, the consignee was in the opinion that even if the containers did not bear CCIC Phils seals when they were received, the carrier shall still assume tort liability as it wrongfully noted down the CCIC Phils seal numbers on the B/L which was false information, due to which the consignee made the cargo payment under the L/C. Further, the consignee contended that the carrier shall be held accountable for tort who failed to promptly notify the consignee the discrepancy between the cargo and what was indicated in the B/L, leading to the cargo payment by the consignee under the L/C.

The Defendant as the carrier defended as below: The reason of cargo loss was fraud in sales transaction and CCIC Phils was at fault for such fraud. Even with the knowledge that the cargo was replaced, the Claimant still made the payment, so it should be responsible for its own negligence. The cargo was replaced before the arrival at the container yard of the loading port, and the subject cargo was lost beyond the period of responsibility of the carrier. Besides, the seals of the subject containers remained as the same at both ends of the loading port and discharging port, Defendants have duly performed their obligations and delivered the cargo properly, the rider sheets of the B/L are not documents based on which carrier should deliver the cargo. Even if Defendants have to be liable to compensate for the loss of cargo, they were entitled to limit their liabilities. The carrier submitted the investigation report issued by the National Bureau of Investigation ("NBI") and applied for the investigator of NBI to participate in the court hearing and give testimony. The first instance court accepted the opinions of the investigation report and maintained that the cargo was replaced before it was delivered to the carrier for shipment.

Judgments: It was ascertained by Guangzhou Maritime Court at the first instance that the carrier wrongfully issued the B/L which constituted an act of tort for the rider sheets of the B/L noting down the numbers of CCIC seals even though the subject containers did not bear any of such seals. Among the required documents

for payment, the L/C only demanded a full set of clean onboard B/L. That said, the payment under the L/C was irrelevant to whether the B/L noted down the CCIC seal number or not. Therefore, although RCL committed an infringing act by wrongly issuing the B/L, it has no causal link with the payment by the consignee under L/C. Therefore, the litigation requests filed by the Claimant against the carrier were rejected.

Higher People's Court of Guangdong Province at the second instance held that under this transportation mode of containers, namely the FCL/FCL terms, the carrier did not need to check whether the goods inside the containers were true with the B/L, but was only responsible for conditions of the containers as a whole. When the containers arrived at the destination port and were delivered to the Claimant, their apparent conditions were good and sound, without any damage to the containers themselves or the seals affixed thereupon. It could be deemed that the carrier had properly delivered the goods according to the bill of lading and conducted no faults. In the meantime, the B/L rider sheet recoded the seal numbers, but it did not clarify that these numbers were CCIC Phils seal numbers, and the payment by the Claimant under the L/C was irrelevant to whether the rider sheets noted such seal numbers. It was thus ascertained by the Higher People's Court of Guangdong Province that Defendants did not have any conduct infringing rights and interests enjoyed by the Claimant. Therefore, the appeal filed by the Claimant shall be overruled and the first instance judgment shall be maintained.

Upon retrial by Higher People's Court of Guangdong Province as ordered by the Supreme People's Court, it was held that, whether the subject B/L noted the CCIC Phils' seal number was of no relevance to payment made under the L/C and, it was appropriate to maintain that there was no causal link between the act of wrongly issuing the B/L and the cargo payment made by the Claimant under the L/C. Also, it was determined that the Claimant failed to furnish evidence to prove that he/she could successfully apply for stopping payment under the L/C if he/she had been immediately informed of the discrepancy between the cargo and the B/L. In other words, Claimant failed to prove that the failure of Defendants in timely informing the Claimant of the discrepancy between the cargo and the B/L was causally lined to the payment made under the L/C. Therefore, the second instance judgment shall be upheld.

Comments by the judges: The case disputes are, in case of fraud under international trading contract, whether the Defendant as the carrier has faults in issuing the B/L and shall be liable for compensating the replaced cargo, which are to be analyzed from the following three respects:

I. Claimant's right of choice at the time when the default liability and the tort liability concurred.

In this case, when the goods actually delivered by the carrier were inconsistent with what was noted in the B/L, the Claimant as the B/L holder and the consignee under the carriage contract of goods by sea, shall be entitled to sue the carrier and demand compensation on the grounds that the carrier breached the contract or infringed the Claimant's rights and interests under the B/L. However, as per Article 30 of Part I of *Interpretations by Supreme People's Court on Several Issues Concerning the Application of the Contract Law of the PRC*, the cause of action shall be determined by the Claimant before the first hearing of the first instance trial. On the one hand, the Defendant can accordingly prepare for defense and the court can successfully conduct trials. On the other hand, it is the Claimant's liability to be faithful to his/her choice upon appraisal of litigation risks. As different rights of claim have distinctions in the following aspects including the components, compensation scope, burden of proof and contentious jurisdiction, if the Claimant is allowed to choose the cause of action without time limit and to change such against the Defendant's defense during the litigation procedures, it not only goes against the requirement of iudicium bonae fidei, but also unjustly pushes the Defendant who has already presented the defensive opinions into a passive position, which would prejudice the fair trial of case. In this case, the Claimant sued for tort and then applied for modifying the cause of action as default following two court hearings. Defendants disagreed with this modification and refused to make defense accordingly. Such application was rejected by the court, the fairness of judicial procedures was thus protected.

The defense for liability exemption and limitation of compensation liability available to the carrier as provided

for in Chapter 4 of the Maritime Code of the PRC shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the Claimant is a party to such contract or whether the action is founded in contract or in tort. It serves as a feature of maritime laws, which can protect the rights and interests of the carrier when the cause of action is sorted to prevent such protection.

II. Effects of the "Unknown Clause" provided in the container B/L

As per Article 3 of *Hague Rules* and Article 1 of *Visby Rules*, the information, inclusive of cargo description, marks, the number of packages or pieces, the weight or quantity, and apparent conditions of cargo, specified on the front of the B/L shall serve as prima facie evidence between the carrier and the shipper and is subject to disproof. "Proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith." In other words, such information is the conclusive evidence for the carrier, the B/L assignee and the consignee, and is not subject to disproof. However, as the container transportation develops, the evidential effect of such noted information concerning the cargo condition in the B/L has undergone subtle changes.

When the cargo is shipped under the FCL/FCL terms, if the carrier does not participate in the packing and seal of cargo, then the cargo descriptions on the B/L including the cargo specifications, marks, packages and weights are all provided by the shipper. For avoidance of claims by the consignee, the carrier usually marks on the front of the container B/L with "Shipper's Load, Count and Seal", "Said to Contain", "Said By Shipper" and "Full Container Load". On the back of the B/L it is printed the "Unknown Clause", which provides "the cargo is packed and sealed by the shipper or its agent and we are unknown of any information noted on the front of the B/L (including the marks, packages, pieces and weights of the cargo)". In judicial practices, the above "Unknown Clause" is gradually accepted. When the cargo is shipped under FCL/FCL terms, the packing and seal of cargo are not conducted by the carrier, who thus could not check the actual loading condition of the cargo inside every container. Since the containers with sound apparent conditions and intact seals are handed over to the carrier at the port of loading and are delivered with the same condition at the port of discharge, it shall be deemed that the carrier has duly performed its liability of cargo shipment and shall not be held liable for compensating any shortage, loss of or damage to the cargo stored inside the containers. However, the effect of the "Unknown Clause" printed on the B/L of less than a container load shall be treated differently under various circumstances. Such clause shall take into effect when the cargo is packed and sealed by the container freight station entrusted by the shipper. Otherwise, if the cargo is packed and sealed by the container freight station entrusted by and on behalf of the carrier, then the "Unknown Clause" indicated on the B/L is inconsistent with the fact, and thus shall be deemed invalid.

Concerning the subject case, the containers were packed and sealed by the shipper, at the time of issuing the B/L the carrier noted that please see the rider sheets for the full information of containers and endorsed the "Unknown Clause". Such rider sheets indicated the container numbers, weights, the ship company's seal numbers of 19 containers and the CCIC Phils seal numbers. The rider sheets were provided by the shipper, on which the container seal numbers however could be verified by the carrier by checking the appearance of the containers. The carrier should be able to find out that the containers delivered at the port of departure merely bore the ship seal numbers rather than any other seals, but failed to indicate such on the rider sheets. Therefore, it was correct in the first instance judgment that the carrier wrongfully issued the B/L.

III. Tort liability to be assumed by the carrier

Generally, if a person commits an act of tort, the following conditions shall be satisfied when such person is to assume the tort liability: a tortious act, a fact of damage, a causal link between the tortious act and the fact of damage, and subjective fault of such person. With regard to this case, the tortious act was that the carrier issued a B/L on which information was untrue with the apparent cargo condition. The carrier failed to perform due diligence when issuing the B/L, which shall be deemed that the carrier was subjectively at fault. And the Claimant didn't receive the agreed cargo and suffered the cargo payment loss. However, if the carrier is to assume

the tort liability, it needed to be further evidenced that there was a causal link between the wrongful issuance of the B/L by the carrier and the cargo payment loss. The causal link serves as an important condition for determination of tort liability. To identify whether the tortious act is casually related to the fact of damage, the following standard shall be conformed to, namely "but for the tortious act committed, the damage would never occur, thus such act is the reason for the damage; While, even though there is no tortious act, the damage still remains, then such act is not the reason for such damage".

The subject cargo was replaced with a mixture of clods, stones, rusting steel iron and scraps before it was handed over to the carrier at the departure port. The cargo damage was due to the fraud committed by a party to the trading contract and took place before the period of the carrier's responsibility commenced. The payment under the L/C required the clean shipped B/L as agreed by the Claimant. Therefore, no matter whether the B/L issued by the carrier indicated the correct seal number, the Claimant would make cargo payment under the B/L, and the replaced cargo would be received. In other words, the tortious act by the carrier didn't generate influence to the fact of damage, and the act of issuing the B/L was not causally relevant to the damage suffered by the Claimant that the agreed cargo had been replaced. This case involves fraud of the international trading contract. If the fraud is committed in the sales transactions, unless the carrier and the seller acted in collusion to cause damage or are jointly at fault for which the joint act of tort shall be established, the Claimant could merely claim from the opposite party under the sale and purchase contract but could not shift the risk to the carrier under the carriage contract.