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WJ News

1. Wang Jing & Co. Ranked as 2019 Outstanding Comprehensive Law Firm by Asialaw Profiles

Asialaw Profiles announces Asialaw Profiles 2019 Rankings will come out in early October and the 2018 Rankings has been partially published, rating Wang Jing & Co., as an "outstanding" comprehensive law firm.

In recent years, while keeping its edge over rivals in such conventional practice areas as admiralty, maritime and insurance, Wang Jing & Co. has actively explored other practice areas related to its existing service types, e.g. international commodity trade, international logistics, construction/lease/financing of marine engineering, investment, M&A and other legal fields, and has represented Chinese enterprises in arbitration and litigation proceedings in London, New York, Singapore and Hong Kong etc.

This ranking demonstrates that Wang Jing & Co. has successfully shifted from a firm specialized in conventional areas of maritime and admiralty to be a comprehensive law firm, and is highly recognized by clients in Asia-Pacific region. Wang Jing & Co. will continue working to live up to the trust and recognition, providing clients with better and more comprehensive legal services.

Asialaw Profiles Rankings is published in October every year, providing law firm recommendations and editorial analysis of 13 practice areas and 14 sectors in 25 jurisdictions of Asia-Pacific – from Australia to Vietnam. The research and analysis process of Asialaw Profiles is extensive and widely respected. From the research and analysis, Asialaw Profiles produces rankings of recommended, highly recommended and outstanding firms and practice areas, complemented by our market leading editorial, which contains extensive analysis of the key players and deals, as well as quotes from leading clients.

China's 2018 Negative List – Liberalization of Foreign Investment Restrictions on Shipping and Shipbuilding Industries

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On 28 June 2018, the PRC National Development and Reform Commission (**NDRC**) and the Ministry of Commerce (**MOFCOM**) jointly released the Special Administrative Measures on Access to Foreign Investment (Negative List) ("**2018 Version**") and this new Negative List came into effect on 28 July 2018.

Compared with the 2017 version included in the Catalogue of Industries for Guiding Foreign Investment (Revision 2017) ("**2017 Version**"), the Negative List cuts down restricted or prohibited industries from 63 to 48, and substantially relaxes restrictions on foreign investment.

Negative List

In particular, the 2018 Version removes restrictions on foreign investment in the following maritime sections or business:

1. For design, manufacturing and repair of ships (including subsections), it removes the restriction of Chinese party as the controlling shareholder.

It means entities that are 49% or above foreign-owned will be able to engage in vessel design, manufacturing and repair of ships in China.

2. For international marine transportation companies, it removes the restriction of Sino-foreign equity or contractual joint ventures).

It means entities that are 100% foreign-owned will be able to establish international marine transportation companies in China.

Although dispensed with the requirement for equity or contractual joint ventures, entities that are 100% foreign-owned will still be governed by the Law on Wholly Foreign-Owned Enterprises (The "WFOE Law") in respect of capital, the timing of capital contributions, cash contributions, capital contribution verification reporting requirements and restrictions on the repatriation of capital. It is unclear whether the Interim Measures for the Examination and Approval of Wholly Foreign-funded Shipping Companies in respect of the conditions, the documents and the procedures for the establishment of a wholly foreign-funded shipping company will be amended in the near future.

3. For international shipping agencies, it removes the restriction of the Chinese party as the controlling shareholder.

It means entities that are 49% or above foreign-owned will be able to establish international shipping agencies in China. Nonetheless, such foreign-owned international shipping agencies are still subject to other restrictions as set out in Article 7 of the Detailed Rules for the Implementation of the Regulations of the People's Republic of China on International Maritime Transportation. In particular, it shall have fixed business premises and necessary business facilities and at least two senior business executives with more than three years of experience in international maritime

In the meantime, for foreign-funded domestic shipping agencies, it must be established via a Chinese-foreign equity joint venture or a Chinese-foreign contractual joint venture, and the proportion of foreign investment shall not exceed 49%.

The Negative List continues the principle to liberalize foreign investment in international shipping whilst maintaining restrictions on foreign capital for domestic shipping.

It is anticipated that the Chinese Government and the Ministry of Transport will take actions to amend a series of relevant laws and regulations, including the Detailed Rules for the Implementation of the Regulations of the People's Republic of China on International Maritime Transportation and the Provisions on the Administration of Foreign Investment in International Maritime Industry.

Liabilities for collision within towage service under English law—based on Towcon 2008

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In maritime practice, towage is one of the most important services provided within the shipping industry, which is frequently encountered during ships arriving at/leaving ports, loading/discharge of cargoes, carriage of goods between ports, and etc. Inevitably, risks at sea, especially collisions at sea, are commonly associated with towage services, either as between the tug and the tow or between the towage flotilla and a third party vessel, as the consequence of which a great number of property losses are caused every year. Thus, in dealing with the liabilities emerged as the result of a collision at sea within towage service, both English law and the Towcon 2008 have established a series of rules in handling the legal relationships arising thereof.

I. General rules

Apart from special admiralty rules, the law of tort is generally applicable to collisions at sea in the same way as it is applicable to torts on land. Accordingly, a collision at sea will generally give rise to an action in negligence, in respect of which the general rules of tort will apply. On that basis, maritime legislations are enacted, including the 1910 Brussel Collision Convention providing that the vessel at fault shall be liable for the damages caused. Another foundation that is of material importance is laid down by section 187 of the Merchant Shipping Act 1995 (hereinafter referred to as "MSA 1995"), by which it is stipulated that if two or more vessels are at fault, the liabilities to make good the damages or losses (including that of innocent third party vessels) shall be in proportion to the degree in which each ship is at fault. In addition, the international admiralty regime of limitation of liability is also applicable by virtue of section 185 of the MSA 1995, which has given the LLMC 1976 domestic effect in English jurisdiction.

II. Collision among towage flotilla under Towcon 2008

Adopting a knock-for-knock regime, the Towcon 2008 has allocated risks and liabilities between the tug and the tow in a much more balanced way compared to some other standard towage terms, for which reason it is now universally adopted for ocean towage services all around the world. Accordingly, under the knock-for-knock pattern set forth by clause 25(b) of the Towcon 2008, it is stipulated that (i) any type of loss or damage sustained by the tow or any property on board the tow and (ii) any consequential loss arising therefrom and (iii) any expenditure for the purpose of wreck removal, moving, lighting, buoying, preventing or abating pollution in relation to the tow, shall be for the sole account of the hirer, with explicit reference to the exclusion of liability even such damage or loss is caused by the negligence or unseaworthiness on the part of the tugowner. In the same vein, those damages or losses suffered by the tug, including any consequential loss and any expenditure for wreck removal, etc. howsoever caused in relation to the tug shall be borne solely by the tugowner. Furthermore, either the tugowner or the hirer will be contractually obliged to indemnify the other party if any of them has sustained any damage or loss which ought not to be distributed to that party according to the arrangement of the contract.

Therefore, in summary, when a tug collides with its tow, both of them shall have no recourse against each other, while each party has to undertake the loss of or damage to their own vessel and any property thereon, which however will ultimately be settled by their insurers. In respect of cargo claims, if the cargo owner is exactly the hirer, then the situation is straightforward as he will have no recovery from the tugowner under clause 25(b). However, supposing the towowner is the hirer, who is independent to the cargo owner, the solution will be slightly different. As between the cargo owner and the tugowner, the towage contract is irrelevant, indicating that the cargo owner can still seek damages from the tugowner based on the usual admiralty rules and law of tort. Subsequently, as the loss of or damage to cargo on board the tow shall be covered by the hirer under the arrangement of the Towcon 2008, the hirer will then be obliged to indemnify the tugowner if the tugowner has settled any cargo claim raised by the cargo owner for such collision.

III. Collision involving a third party vessel

When a collision at sea occurs between the towage flotilla and a third party vessel, the legal relationship as between these parties could be slightly complicated. To clarify such relationship, four basic questions can be summarized as (i) which party among the towage flotilla shall be held liable to the third party vessel, and (ii) limitation of or exemption from such liability, and (iii) liability as between the tug and the tow, and (iv) limitation of or exemption from such liability.

1. The doctrine of control

The starting point is that subject to the doctrine of privity, the towage contract is irrelevant as between the towage flotilla and the third party vessel. In view of this, the third party vessel shall be entitled to claim for damages against the tugowner and/or the towowner irrespective of the arrangement of the Towcon 2008.

However, as amongst the towage flotilla, the circumstance is more complicated in deciding which party is at fault and shall be externally liable to the third party vessel. In retrospect, what is the dominant position in the old common law is the presumption of servant, i.e. that the tug was legally presumed to be the servant and under control of the tow, for which reason the towowner is vicariously liable to the third party vessel, no matter whose fault within the towage flotilla has caused the collision. Such a legal hypothesis without taking account of any factual issue is apparently far from justice. Thus, in *the Devonshire* the rule was reformed and the doctrine of control was imported.[1] In summary, the core part of the new rule indicates that the issue of control shall be a question of fact rather than a question of law and is dependent on the factual conditions on a case by case basis. To sum up, a number of factors can contribute to the solution to this factual problem. First of all, the towage contract shall be taken into consideration, as sometimes the parties might by agreement confer the power of control to each other. Secondly, since it is no longer a matter of law as a whole but a matter of fact which shall be assessed in detail, the fact of control shall be judged not only by the towage process as a whole but also by certain single specific operations. Last but not the least, the cases emerged before *the Devonshire* are still valuable for reference, as they involved some considerations about the factual elements, for example the environmental factors or the physical condition of the tow. Beyond that, another reform has also been brought in, that is, the matter of control is no longer decisive for the ascertainment of liability. After all, what is laid down by law is that the ship at fault shall be liable. Although in the majority of cases, the vessel that has actual control is normally deemed as the vessel at fault, it shall never be taken for granted. For example, if the order given by the tow, as judged by the tug's seamanlike appreciation, is obviously negligent, but the tug nevertheless heedlessly obey it, then the tug might be deemed to be at fault, even in fact the tow has control over the tug. Briefly speaking, the doctrine of control is the dominant approach in

deciding who inside the towage flotilla is at fault, but not all.

2. The flotilla issue

Once the question of liability is settled according to above, the next problem will be the extent to which such liability can be limited. The question to decide whether a tug or a tow is entitled to limitation of liability shall be simple and straightforward, which has been clearly clarified by the LLMC 1976 itself. However, due to the peculiar structure of towage flotilla, the issue of calculating the figure of limitation of liability is comparatively complicated. For example, in some cases it is by the fault of the tug, based on whose tonnage the limitation figure can be relatively small, that has led the damages to be caused by the innocent tow, whose tremendous tonnage can result in such huge damages. In some other circumstances, the tug and the tow share common ownership, which appears that the tugowner possess two vessels for the purpose of calculating limitation of liability within a single accident. In pursuing maximum economic benefits, the claimant will always desire the figure of limitation to be calculated by the aggregated tonnage of both the tug and the tow, by contrast with which the defendant will want the basis to be the tonnage of the tug or the tow only. Such an argument with respect to the aggregation of tonnage is the "flotilla issue" and has long been debatable in English law.

The leading principles were ultimately established by three authorities. In *the Bramley Moore*, the innocent tow *Millet* collided with a third ship *Egret* and both the tug *Bramley Moore* and *Egret* were at fault.[2] The first trial judge held that the limitation figure of the tugowner should not be calculated by the accumulated tonnage of both the tug and the tow but instead by reference to the tug's tonnage only. This opinion has also been upheld by the court of appeal. According to Lord Denning, this question should be judged by looking into the reason of the losses. In the present case, since the tow was innocent, it was obvious that the collision and the losses arising therefrom were the consequence of the fault of the tug. Therefore, an important principle was established, which indicated that the limitation figure of the tug and that of the tow should be calculated separately based on the situation of the fault of each party, and that the tugowner could limit his liability independently and without consideration of the tow's tonnage. Later in *the Sir Joseph Rawlinson*, the issue of common ownership was solved.[3] In that case, the innocent tow collided with a third ship *GLC* on account of the fault of the tug. In the meanwhile, the tug and the tow were commonly owned by a same person. It has been found by the court that the crew of the tug were negligent in operating both the tug and the tow, whereas the judge considered that it was only the fault of the tug that gave rise to the collision rather than that of the tow or the towage flotilla as a whole. Whether the ownerships of the tug and the tow were common or not should make no difference. Therefore, the tugowner should be entitled to limit his liability by reference to the tonnage of the tug in spite of the fact that he possessed the tow as well. *The Sir Joseph Rawlinson* was followed later by *the Smjeli*, where the fault of both the tug and the tow has caused damages to the third party vessel .[4] The tug and the tow had common ownership and thus, the limitation figure of the owner was calculated on the basis of the aggregated tonnage of the tug and the tow. At that stage, a complete system has already been shaped. Subsequently in *Smith v Mobius*, the summary of the "flotilla issue" in English law was approved by Morison J.[5] Firstly, the owner of each ship in the towage flotilla can limit his liability on the basis of the tonnage of his own ship. Secondly, the question by reference to the tonnage of which ship the limitation figure is calculated depends on the fact by which vessel's fault the loss is caused. Lastly, in principle, whether the tug and the tow are separately owned or commonly owned shall make no difference.

3. Arrangement of Towcon 2008

As above-mentioned, there is no room for the Towcon 2008 to apply between the towage flotilla and the third party vessel who shall be able to file a claim for damages subject to the general rules as described above. On that basis, regardless of the fact that the tugowner or the hirer is exempted from certain losses through the arrangement of the Towcon 2008, any of them will have to settle the claim by the third party vessel in the first place under the applicable general rules. After that, it is by virtue of the indemnity provision in the Towcon 2008 that the tugowner and the hirer are able to achieve the purpose of immunity as mutually agreed in the towage contract. In this regard, the Towcon 2008 has focused its solution on the physical contact point between the towage flotilla and the third party vessel. As provided by clause 25(b)(i), if the exact contact in the collision occurs between the tug and the third ship, or obstruction is created by the presence of the tug, then any loss or damage of whatsoever nature and any consequential loss thereby suffered by the third party vessel and their property as a result of that contact or obstruction shall be borne solely by the tugowner. It goes on to provide that the tugowner shall indemnify the hirer against any such loss or damage as well as any liability arising therefrom. Likewise, the equivalent for the benefit of the tugowner is stipulated in clause 25(b)(ii) under the precondition that any loss or damage arises by reason of contact with the tow or obstruction created by the presence of the tow.

4. Indemnity and limitation

Given the arrangement of the Towcon 2008 as above-mentioned, a special argument arises as between the indemnity provision and the limitation convention, in other words, whether an indemnity claim under clause 25(b) of the Towcon 2008 shall be subject to limitation of liability under applicable laws. In *Smith v Mobius* it was held that such an indemnity claim was contractual, arising as a result of the knock-for-knock agreement rather than the direct connection with the operation of the vessel, thus fell outside the scope of the LLMC 1976.[6] However, the debates did never cease and with great arguments and criticisms, this case should not be deemed as the correct approach for three major reasons. In the first place, as is defined by article 2(1) of the LLMC 1976, a series of liabilities of whatsoever basis shall be subject to limitation. Accordingly, no matter it is contractual or tortious, the legal basis of a claim shall not be a decisive element in determining the right of limitation. Secondly, it is also explicitly provided by article 2(2) that claims, even if brought by way of recourse or for indemnity under a contract or otherwise, shall also be subject to limitation. After all, instead of a mere contractual claim, an indemnity claim is still related to the collision at sea and the liability arising therefrom, as it operates as a mechanism for the transfer of collision liability. The fact that it operates in the form of indemnity will not change its essence as collision damages. Furthermore, as stipulated within clause 25(d) of the Towcon 2008, nothing in the Towcon 2008 shall affect the benefit of limitations of liability accorded to the tugowner by any applicable statue or rule of law. In summary, notwithstanding that arguments exist on the construction of the aforesaid provisions, they shall be read that limitation shall apply to the indemnity claims. To achieve an answer on this matter, the function of the towage contract shall be taken into account, which is to allocate risk by virtue of a knock-for-knock system. Therefore, if it is supported that such an indemnity claim is free from limitation, it will mean that a smaller ship, for example the tug, may be subject to liability exceeding the limitation figure by reference to its tonnage. And if such situation occurs, then the towage contract is imposing excessive risk to the parties, rather than merely allocating normal risk. Once again, it is allocation that the Towcon 2008 concentrates on, rather than imposing. Moreover, considering the fact that the Towcon was first drafted in the 1980s, the time when the LLMC 1976 has already come into force, it is also reasonable to infer that the draftsmen have been wanting the limitation to be

applicable by creating clause 25(d) in the 2008 version. In summary, an indemnity claim under the Towcon 2008 shall be subject to limitation of liability.

IV. Conclusion

To sum up, the Towcon 2008 has been well arranging the relationship between the tug and the tow when collision occurs within the towage flotilla. In respect of collision involving a third party vessel, external liability to the third party vessel shall go through the examination of the doctrine of control as well as the flotilla issue subject to English law. As to the liability between the tug and the tow in that circumstance, it has also been properly arranged by the Towcon 2008. Somehow, however, it seems that the issue between indemnification and limitation of liability remains unsettled, although there are well reasons to support certain claims. Notwithstanding the efficiency, coherence and convenience brought by the Towcon 2008 into the towage industry, it will be inevitable for disputes to keep emerging, for the reason that in business world every party will seize every opportunity to find any ambiguity in the wording of the contract.

[1] [1912] AC 634.
[2] [1964] P 200.
[3] [1972] 2 Lloyd's Rep 437.
[4] [1982] 2 Lloyd's Rep 74.
[5] [2001] CLC 1545.
[6] [2001] CLC 1545.

Ship Arrest in China in Relation to Bankruptcy of Shipping Companies

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In recent years, more and more shipping companies go bankrupt due to the declining shipping market, making arrest and auction of vessels more complex than usual.

We were consulted by a Russian client about the possibility of a potential arrest in China in the circumstance that the vessel had been sold by auction in bankruptcy proceedings in another country. In brief, the answer is negative given that the vessel could not be arrested in China as the vessel would be discharged from all her debts/encumbrances after auction.

However, questions may arise from the arrest of vessels in many scenarios.

1. Conflicts between Bankruptcy Law and SMPL

In accordance with the Bankruptcy Law of PRC, the court where the debtor is located will have the jurisdiction over a bankruptcy matter. However, the Special Maritime Procedure Law of PRC ("SMPL") provides that the property preservation (especially arrest of vessels) for a maritime claim shall be subject to the jurisdiction of a maritime court where the assets are located.

Moreover, Article 19 of the Bankruptcy Law further provides that the preservation of the debtor's property/assets shall be lifted and the enforcement procedure stayed once the court accepts an application for bankruptcy of the debtor.

Conflicts arise from the above provisions in relation to how to proceed with the ship arrest in a bankruptcy matter. We will discuss this below.

2. When the registered owner goes bankrupt

As per Article 19 of the Bankruptcy Law, the court will not grant an application for property preservation after a bankruptcy application has been accepted. Even if the court does not know the bankruptcy proceedings at the time of ship arrest, it shall also lift the preservation.

If the bankruptcy proceedings come to an end, few disputes or problems will arise when the court dismisses the application for arrest of the vessel. But if the bankruptcy proceedings just commence or there is a long way to reach the end, it will be not sensible to dismiss the application for arrest of the vessel or lift such arrest.

It is well known that the vessel will not be put into service in the bankruptcy proceedings. In the circumstance, the conditions will become worse as maintenance and security costs of the vessel are increasing day by day when she has to lay up at an anchorage, a shipyard or elsewhere. Subsequently, the ship value will decrease, which may seriously prejudice the creditors' interests, as well as the debtor's.

Taking the above into account, some maritime courts are inclined to grant a maritime claimant's application for arrest and auction of a vessel. Furthermore, some of them distribute vessel auction proceeds in accordance with

their final judgment on merits. But meanwhile, some other maritime courts tend to dismiss the application or lift the arrest as per the Bankruptcy Law.

In order to clarify the position and the application of law, the Supreme People's Court ("SPC") indicated last year in an internal conference that the maritime court shall lift the arrest or stay the auction proceedings if the shipowner goes bankrupt.

Strictly, this SPC guidance did not take ship conditions into consideration. We thus take the view that the court should grant the application for arrest and/or auction of the vessel even if the shipowner goes bankrupt. The court may sell the vessel by auction and retain the auction proceeds without distribution at this stage. The auction proceeds, as the property of the bankrupt, shall be distributed in the bankruptcy proceedings. By doing so, the maintenance and security costs will be limited and the ship value retained for any distribution in the future. Since the auction proceeds are not distributed in a particular maritime claim, the interests of both the creditors and debtor will undoubtedly not be prejudiced.

3. When the bareboat charterer goes bankrupt

If the vessel is under bareboat charter, the bareboat charterer will be liable for many maritime claims, such as cargo damage, collision and etc. As a matter of PRC law, maritime claimants may apply for arrest of the vessel under bareboat charter involved in disputes provided that the bareboat charterer is liable for the maritime claims and remains as the bareboat charterer at the time of arrest.

In this regard, the question is whether the maritime claimants may apply to the court for arrest of the vessel let to the bareboat charterer who goes bankrupt.

Given that the vessel, which is not property of the bareboat charterer, will not get involved in the bankruptcy proceedings of the bareboat charterer (if any), the Bankruptcy Law will not bind the application for arrest and auction of the vessel under bareboat charter. Accordingly, the maritime claims against the bareboat charterer will be settled in separate maritime proceedings.

The above are common occasions where the debtor goes bankrupt. In practice, there are also some more special and complex scenarios.

4. Special scenario I

One of the special scenarios is that the vessel is let to the charterer under bareboat charter and the shipowner goes bankrupt. As discussed above, we take the view that the maritime claimants shall be entitled to apply for arrest of the vessel. In this circumstance, the SPC tends to opine that if the maritime claims are secured by maritime liens, mortgages or possession, the claimants may claim for payment in priority from the ship value/price.

5. Special scenario II

Another special scenario is that the shipowner changed before the arrest of the vessel. Hereunder is a recent matter handled by us. We call the vessel in dispute as M/V "K" in short.

M/V "K", flying a foreign flag, was owned by company P. The vessel was let to a shipping company (the "Operator") on finance lease basis with an option of purchase. The Operator employed crewmembers and was responsible for the business operation of the vessel.

Based on a Deed of Ownership Transfer, P transferred the ownership of M/V "K to its affiliated company P1 in 2014. This deed had been submitted to the state authority where the vessel was registered for change of registration at the material time.

The Operator went bankrupt due to depressed markets. However, before the Operator went bankrupt, they failed

to assist the shipowner in replacing ship certificates, including nationality certificate and ownership certificate onboard.

Due to the bankruptcy, the Operator defaulted on payment of crew wages, agency commissions and repair costs, and laid up the vessel at anchorage for nearly one year. In absence of supplies, the master requested for salvage from local MSA, and the vessel was then towed to port by a local company (the "Salvor"). Various creditors then applied to a local court for arrest of the vessel.

First question: who shall be liable for the maritime claims?

The Maritime Code of PRC provides that the transfer of ownership, unless registered, shall not act against a third party who could only obtain the registration information from ship certificates onboard. Therefore, even if the Deed of Ownership Transfer had been submitted to the state authority, this will not act against the third party who relies upon the ship certificates onboard.

Accordingly, if the shipowner is proved to be liable for any maritime claims, P, the registered owner as shown in the ship certificates, shall be liable for the claims.

In this matter, subject to supporting evidence, the Operator, who employed the crewmembers, operated the vessel and executed business contracts with others, shall be liable for the claims. The shipowner has no obligation for such claims unless evidence suggests the contract also binds the shipowner.

Second question: who is entitled to file an application for arrest of the vessel?

SMPL provides that the claimants may apply for arrest of the vessel involved in a dispute in any of the following circumstance:

(1) the registered owner is liable for the claims and is the registered owner at the time of arrest;
(2) the bareboat charterer is liable for the claims and is the bareboat charterer or registered owner at the time of arrest;
(3) the claims are secured by ship mortgages or the like;
(4) the claims are related to ship ownership or possession; and
(5) the claims are secured by maritime liens.

In this matter, current evidence does not suggest the shipowner /bareboat charterer is liable for the claims, or the claims are secured by mortgages or the like, or the claims are related to ship ownership or possession. Hence, the only ground for arresting the vessel is that the claims are secured by maritime liens.

As a matter of the Maritime Code of PRC, the claims secured by maritime liens only include:
(1) crew wages;
(2) personal casualties during ship operation;
(3) port charges due on ship's account;
(4) salvage; and
(5) claims in tort during ship operation.

In this matter, only the crew wages and salvage claims are secured by maritime liens. Thus, only the crewmembers and the Salvor are entitled to apply for arrest and auction of the vessel.

Third question: whether all the claims shall be distributed from the vessel auction proceeds?

In our opinion, the claimants who are not entitled to arrest of the vessel shall not take part in the distribution of the vessel auction proceeds. Instead, as mentioned in the first question, they shall seek recovery from the debtor, say, the Operator.

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Developments of Setting up a Wholly-owned Foreign Shipping Company in china

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In and around 1990s and 2000s, many foreign shipping companies, for instance, PIL, MSC, MSK, CMA CGM and etc., set up their own wholly-owned foreign shipping enterprises (the "WOFSEs") in China. Actually, most of the WOFSEs were headquartered in Shanghai, China. In those years, a foreign company, before setting up the WOFSE, was required to run a representative office for more than 3 years in China. In the past several years, no further shipping company came to China to set up new WOFSEs.

But in the year of 2017, the biggest Japanese shipping company, ONE, set up a joint venture company in China. The services for setting up the WOFSEs in China are coming back to lawyers' desks. In the end of 2017, this firm provided services and assistance for another foreign shipping company in setting up a WOFSE in China.

Nowadays, the requirements and formalities for setting up a WOFSE in China change, as do Chinese policies and laws. Hereunder we would like to share our experience in respect of the latest provisions in such field.

1. Previous requirements for setting up a WOFSE

In accordance with the Interim Measures for the Examination, Approval and Administration of Wholly Foreign-funded Shipping Companies handed down by the Ministry of Transport ("MOT") in 2000 (the "Interim Measures 2000"), to set up a WOFSE, a foreign shipping company shall satisfy the following requirements, *inter alia*:

(1) It has been engaged in the shipping business for 15 years or more;

(2) It has operated a representative office in the port city where it intends to establish a shipping company more than three years;

(3) Its vessels call at Chinese ports regularly (every month);

(4) It has minimum registered capital of USD 1 Million;

(5) It shall apply to the Ministry of Commerce ("MOC") for pre-approval before going through registration formalities with the Administration for Industry and Commerce ("AIC");

(6) After registration, it shall apply to the MOC for a business license of WOFSE to operate shipping business.

…

According to the above, the formalities are complex as the foreign shipping company shall first operate a representative office in China for more than three years and then apply to the MOC for pre-approval. Without the pre-approval, it will not be allowed to set up a WOFSE in China.

2. Latest provisions and policies

In 2015, the MOT replaced Interim Measures 2000 with Interim Measures 2015, whereby the MOT removed the

requirements for minimum capital and operation of a representative office. Meantime, the pre-approval will be done by local Department of Commerce (with prior consent of the MOT). Others mostly remain unchanged.

However, with the deepening of reform and opening up, PRC policies change day by day. In particular, the pre-approval becomes unnecessary in recent times. The State published Catalogue of Industries for Guiding Foreign Investment. If the industry is listed in the Catalogue of Encouraged Industries for Foreign Investment, the pre-approval will not be required any more. This quite simplifies the formalities for setting up a WOFSE in China.

3. Registered capital

Pursuant to the Interim Measures 2000, the registered capital of a WOFSE shall not be less than USD 1 Million, which is a compulsory requirement. Although the Interim Measures 2015 removed the provision regarding the registered capital, local governments may take this as the custom and always request the capital not to be less than USD 1 Million.

In addition, if the company name of a WOFSE contains "China", the head office of the AIC demands that the capital shall not be less than RMB 50 Million (equivalent to about USD7.7 Million).

The Interim Measures 2015 further provides that the headquarters shall increase its registered capital by USD 120,000 for every new branch.

4. Quorum at the time of registration

As per the Interim Measures 2015, and in our experience in corporate registration with the AIC, Chinese employees of a WOFSE shall not be less than 85% of its total employees after it is established.

5. Conclusions

Since the majority of WOFSEs were set up in Shanghai, the establishment of WOFSEs as a highlight in investment promotion is welcomed by local governments of other coastal cities within PRC. In this regard, the new company may negotiate with the local government to gain some preferential policy. Considering especially that more and more free trade areas ("FTA") are approved by the State, foreign shipping companies may find more convenience in setting up a WOFSE in these areas.

Furthermore, since the 2018 version of Special Administrative Measures on Access to Foreign Investment has taken effect since 28 July 2018, we will keep an eye on the possible new regulations and laws on setting up WOFSEs in China.