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NEWS

China International Economic And Trade Arbitration Commission (CIETAC) Hong Kong Center Launched

CIETAC was established in 1956 as the first international economic and trade arbitration institution in mainland China. CIETAC is a renowned international arbitration institution and has continued to progress, making notable achievements in foreign-related arbitration. CIETAC is one of the leading Chinese arbitration institutions, serving clients of some 70 countries and regions.

The CIETAC Hong Kong Center was launched on 24th September 2012. The establishment of the CIETAC Arbitration Center in Hong Kong not only aims to serve the purpose of building up CIETAC to be a world-class arbitration institution, but also reflects the close developing relationship between mainland China and Hong Kong.

For our readers' reference, a model arbitration clause provided by CIETAC Hong Kong Center reads as follows:

"Any dispute arising from or in connection with this Contract shall be submitted to China International and Trade Arbitration Commission (CIETAC) Hong Kong Arbitration Center for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties." www.cietachk.org

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The Supreme People's Court of China Revocation of the Provisions Limiting Damages to RMB800,000/Person for Personal Injury or Death at Sea with Foreign Elements Involved

On 14 January 2013, the Supreme People's Court promulgated its *Decisions on Revoking Some Judicial Interpretations and Documents of Judicial Interpretation Nature (the Ninth Batch) Formulated and Promulgated from 1 January 1980 to 30 June 1997* (the Decisions). The Decisions came into force on 18 January 2013.

In accordance with these Decisions, the 1992 Regulations ceased to be effective as of 18 January 2013 and are superseded by the *Maritime Code* enacted on 1 July 1993 (hereafter the Maritime Code) and the *Interpretations of the Supreme People's Court on Application of Law in Trial of Cases Regarding Damages for Personal Injury* enacted on 1 May 2004 (the 2004 Regulations). This settles the dispute in judicial practice as to whether the RMB800,000/person limit on damages for personal injury or death at sea as should remain applicable.

History

Ever since their enactment, the 1992 Regulations had been an important criterion used by Chinese courts for trying cases regarding damages for personal injury or death at sea involving foreign elements. Even after the Maritime Code was enacted, and the 2004 Regulations came into force, the courts still continued to apply the 1992 Regulations as the Supreme People's Court did not announce the revocation of these regulations.

However, in view of inflation and the changes in income in the recent 20 years, there has been a lot of controversy in the academic field as to whether the RMB800,000/person limit provided by the 1992 Regulations should remain applicable. In practice, different courts and different judges hold different opinions. There existed cases in which the judgment ordered compensation in view of the actual losses suffered by the injured.

In 1999, Ningbo Maritime Court tried a case of dispute over damages for personal injury at sea. The Plaintiff, a pilot, was injured and suffered irreparable paraplegia after falling off the pilot ladder. The Plaintiff claimed against the defendant for damages in the amount of about RMB7.6 million. The court eventually awarded damages of around RMB3.7 million, far beyond the RMB800,000 limit. The court made their judgment based on the consideration that the price level and income at the time the 1992 Regulations were made had changed significantly, with medical expenses increasing rapidly. Therefore, in seeking a just and reasonable outcome, the court held that the defendant should make compensation not according to the outdated basis on which the 1992 Regulations were made, but according to the actual losses incurred.

The defendant disagreed with the first-instance judgment rendered by the Ningbo Maritime Court and lodged an appeal to the Higher People's Court of Zhejiang Province. The second-instance court tried the case and affirmed the original judgment. The court held that "there are express provisions in the Maritime Code of China enacted on 1 July 1993. The Regulations on Damages dated 18 November 1992 formulated by the Supreme People's Court conflict with the provisions of the Maritime Code. In accordance with Article 6 of the *Notice on Studying, Spreading and Implementing the 'Maritime Code of the People's Republic of China'* issued by the Supreme People's Court on 18 November 1992, after the Maritime Code comes into force, all regulations and interpretations formulated by the Supreme People's Court on trial of maritime cases will no longer apply if they conflict with the Maritime Code."

As the above judgments were made in a time when the 1992 Regulations were still in force, they aroused a lot of controversy in judicial practice. Moreover, as China does not adopt a common law system, the above judgments are not binding on other courts. For these reasons, for over ten years, it remained unclear whether other courts would adjudge beyond the RMB800,000/person limit. This also became a significant factor taken by ship owners for defending claims filed by the casualties, and a significant bargaining counter of ship owners in their negotiation with the casualties. continued overleaf

Future Application
In accordance with the Decisions promulgated by the Supreme People's Court, the Chinese courts will now apply the Maritime Code and the 2004 Regulations to the trial of cases regarding damages for personal injury or death at sea involving foreign elements to assess the damages;

The Maritime Code mainly provides for the limits of liability for claims in cases of personal injury or death at sea involving foreign elements. In particular, for the death of or personal injury to passengers, the damages must not exceed 46,666 SDR per passenger and must not exceed 25,000,000 SDR in total subject to the carrying capacity specified on the ship certificates. The Maritime Code further provides for the limits of liability in respect of maritime claims for loss of life or personal injury; the amounts of which accord to the amounts set forth in the 1976 Convention on Limitation of Liability for Maritime Claims (the LLMC).

The 2004 Regulations mainly provide for the principles of liability apportionment and claims that may be made in respect of claims for loss of life or personal injury. Under these regulations, when a claim is made for loss of life or personal injury, the principles of liability apportionment will be applied to determine the liability of each party involved. If one party is fully liable for the damage, such party shall be fully liable; if both parties were at fault, they shall be liable in proportion to their respective fault. Claims may be made for inter alia, medical treatment, loss of earnings, nursing, travel, accommodation, damages for emotional distress; if the victim becomes disabled due to the injury, claims may also be made for disability compensation, costs of disability aids etc.; if the victim dies, the victim's family may also claim for funeral expenses, maintenance,, lost income and other reasonable expenses incurred in holding the funeral.

Zhao Shuzhou & Jade Neame

Liability for delays in repairing port facilities damaged in ship allision and how to assess loss of use

In respect of disputes over the loss of use arising from a collision between a vessel and a terminal or its facilities, the fairly abstract provisions of the relevant laws, regulations and judicial interpretations allow substantial room for courts to exercise discretion. The opinions of the two lower courts and the Supreme People's Court on a recent case handled by this firm should be of interest to industry practitioners.

Case Summary
A vessel contacted with a terminal crane during a berthing manoeuvre causing damage to the terminal. Owners submitted to their liability to pay for repairs, however, the Terminal insisted that the Owners confirm the crane repair scheme and price before any repair work was made, to which the Owners refused. The dispute led to a suspension of use of the crane for 3 years. The Terminal thus sued the owners for all lost profits incurred in the 3 years.

The first instance court held the Owners and the Terminal should respectively bear 50% of the loss of use of the crane incurred during the period from the occurrence of the damage until the conclusion of the crane repairing contract. The appellate court and the Supreme People's Court both affirmed the decision of the first instance court.

Analysis
It is common for a vessel to encounter disputes over loss of use after colliding with terminal facilities during her operation. In addition, when handling cases of this kind, the determination of the loss of use can be a very complex task; deriving from which there are further issues such as apportionment of liabilities for repair, assessment of the net profits and the repair period, and determination of the existence of causal link between the contact accident and loss of use incurred.

In light of the judgments of the above courts of three levels, we are of the view that, in dealing with cases of collision between a foreign vessel with domestic terminal facilities, China's courts tend to: 1) downplay the importance of the analysis of the causal link between the collision accident and suspension of use of the damaged facilities; 2) uphold appraisal conclusions drawn by the accounting firm on the average daily net profit of damaged facilities.

In our opinion, the two most controversial issues in such cases are 1) how to ascertain the causal link between the collision accident and stoppage of use of terminal facilities, i.e. how to determine the period during which the terminal facilities are out of use as a result of the collision accident; and 2) how to assess the average daily net profit of the damaged facilities.

Causal Link
Ascertainment of a causal link between the collision accident and suspension of use of terminal facilities is a key factor in determining the period of loss of use. After the occurrence of the collision accident, it is common to have a negotiation process before determining a repair scheme; however, what was unusual in this case was that the period from occurrence of the accident until conclusion of the repair contract lasted for nearly 2 years. During the period, a series of moves adopted by both parties complicated the purely tortious claim for damage with contractual elements such as contractual agreements. The two parties adopted a specific method of compensation for damages in tort by reaching an agreement under which the Terminal would be responsible for conducting actual repair work while the Owners would be liable for monetary compensation thereof.

The courts, putting aside the development of any legal relationship between both parties during the negotiation process, were of the view that the repair work should be borne by the Owners, and further loss caused by delay to commence repair work shall be equally borne by both the Owners and Terminal.

[With respect to the courts' decisions], we are of the view that the first instance court's judgment may have contravened the principles of legal integrity and fairness. Objectively speaking, while the Tort Liability Law of the People's Republic of China does not give specific provisions on the method and order of priority for the assessment of tortious liabilities, judges are expected to interpret the law in line with the original legislative intention rather than seeking to resolve a case by evenly imposing punishment on each party through vague reasoning.

In our opinion, since it had been confirmed through negotiation by both parties that the Terminal would be responsible for conducting the repair work, Owners should not be liable for any delay. While the Owners were to be liable for the monetary compensation of the repairs, the Owners were not obliged to make any confirmation on a repair scheme in advance. It follows that Owners should not be at fault for the unreasonable delay in concluding the repair contract and in conducting the repair work which may have given rise to the further loss of use. According to the *Interpretation on the Tort Liability Law of PRC delivered by the Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress*, while ascertaining the nature of the tortious liabilities in cases of this kind, judges shall carefully consider protecting the injured party's rights and interests on one hand; but on the other hand the tortfeasor's rights and interests shall also be protected and no aggravated liabilities may be imposed on the tortfeasor.

From a practical perspective, in most ship collision cases, the damaged ships would conduct the repair work on their own and then recover repair expenses from the opponent ships; there is no precedent in which the repair work was conducted only after a repair scheme and price had been confirmed by the counterparty. It makes little sense to demand Owners' prerequisite confirmation with the repair scheme in similar cases of ship collision accidents with port facilities.

In summary, the courts are expected to clarify the development of a legal relationship between both parties, then reasonably apportion the liabilities between them. It is the responsibility of the court to correctly determine the correct method of imposing tortious liability on the ship Owners, and to correctly analyse the loss of profits and the causation of the same rather than, as indicated in the judgment in this case, to ambiguously ascertain both parties' liabilities without clarifying the causal link. In the long run, especially under the depressed shipping market, such vague judgments may encourage terminal operators to intentionally delay such repair work in order to unduly gain large amounts of loss of use damages.

Ascertainment of Loss of Use

Article 12 of the *Regulations of the Supreme People's Court on Compensation for Property Damage in the Trial of Cases of Ship Collision and Contact* stipulates the calculation of the loss of use damages arising from ship contacting with terminal facilities and defines that determination of the average daily net profit of damaged facilities is another essential factor in determining the loss of use. From our point of view, Article 12 is too rigid, especially when confronted with the following circumstances: 1) where new facilities which have been put into use for less than 3 months immediately preceding an accident; 2) where the damaged asset is not capable of generating profits independently. The issue in the second circumstance arose in the above case.

On determination of the average daily net profit of the damaged facilities, the courts may, discretionarily or upon request by applicants, perform their functions of designating an independent accountants' firm to make a judicial appraisal on the profit. However, in this case the auditors of the accountants' firm had violated relevant legal procedures in performing their audition. We had raised such objection with the Courts of First and Second Instances, nevertheless neither responded to this point in their judgments. The attitudes of the courts show their strong favour towards conclusions drawn from accountant firm appraisals.

In our opinion, such system of designating an independent accounting firm to conduct judicial appraisal, as indicated in this case, gives rise to two problems: 1) it is then difficult to ensure reasonability of the appraisal method adopted by the designated accounting firm, as accounting firms generally do not understand the actual terminal business operations. Where certain terminal facilities are not capable of generating profits independently, it is difficult to determine a reasonable method of calculating net profits of the facilities and any method adopted is most likely inconsistent with actual practices; 2) it is then difficult to justify the auditor's appraisal process and conclusion because most designated accountants' firms are based where the berth is located. It is hard for foreign ship owners to trust that the parties involved do not have any private contact with the auditors during the appraisal process, or whether the appraisal materials collected by the auditors are true and valid. As was seen in the above case, once the appraisal procedure is initiated, foreign ship owners simply lose supervision and control over the appraisal process and are deprived of the right to raise any objection to the appraisal conclusions.

Conclusion

Ship collision cases of this kind commonly occur. Being aware of the tendency of courts in handling such cases and when no corresponding interpretation on the Tort Liability Law of PRC or other similar judicial interpretation has been made, we advise ship owners to, when encountering such cases, make full preparation with their lawyers, including but not limited to; immediately getting involved in the accident survey, reasonably making confirmation on the repair scheme, maximising their rights to get involved and to make proposals in the loss assessment, preserving all kinds of evidence, and cautiously responding to the terminal's various requests, in order to avoid providing basis for the terminal's future claims. Even though a neutral accountants' firm may be designated for judicial appraisal, various data on operating profits of the damaged facilities generated before occurrence of the damage should still be obtained from the terminal and submitted to the court for examination in order to fix materials for appraisal and to avoid inaccurate conclusions drawn under undue-influence during the process of their appraisal.

Chen Xiangyong & Jade Neame

Bunker Pollution and the Limitation of Cleanup Costs

In recent years, China has become a signatory to various international conventions and regulations in relation to oil pollution control and prevention. China has ratified the *International Convention on Civil Liability for Oil Pollution Damage* (the "CLC Convention") and the subsequent *International Convention on Civil Liability for Bunker Oil Pollution* (the "Bunker Convention"). In addition, while China is not a signatory to the *Convention on Limitation of Liability for Maritime Claims* (the LLMC), the convention prompted legislators to update and improve China's own pollution regime.

While great improvements have been made, there still remain some areas of uncertainty, leading to the September 2012 Supreme Court judgment regarding The ZEUS. The case involved a claim for the cleanup costs associated with non-tanker bunker pollution incurred in respect of the grounding of The ZEUS due to the impact of a typhoon.

The case applied the Bunker Convention, under which the ship owner is able to invoke the limitation of liability as provided for under national law. Under Chinese law, the PRC Maritime Code provides that claims for refloating, removing, dismantling or eliminating the harm of a sunken, distressed, grounded or abandoned vessel are not subject to limitation (emphasis added).

In The ZEUS, the Supreme Court was of the opinion that for the purposes of the relevant provisions under the PRC Maritime Code, a "vessel" should be interpreted to refer to "not only the hull, but also the articles onboard the vessel, including the accessories and bunkers, whether they depart from the vessel due to the accident or not". Consequently, it was held that the local MSA's claim for removing or cleaning the bunkers from the vessel should not be subject to limitation.

The Supreme Court's ruling reveals that for the claims that are not covered by the CLC Convention (which sets up a separate limitation for the claims falling into her ambit), the cleanup costs of a sunken, distressed, grounded or abandoned vessel should not be subject to limitation under Chinese law.

Undoubtedly, this ruling is the most influential and controversial with regard to oil pollution claims in China in recent years. Accordingly, in view of China's important role in the shipping market, we advise ship owners, hull underwriters and P&I clubs to reassess their coverage of oil pollution risks and readjust their strategies accordingly.

John Wang & Jade Neame

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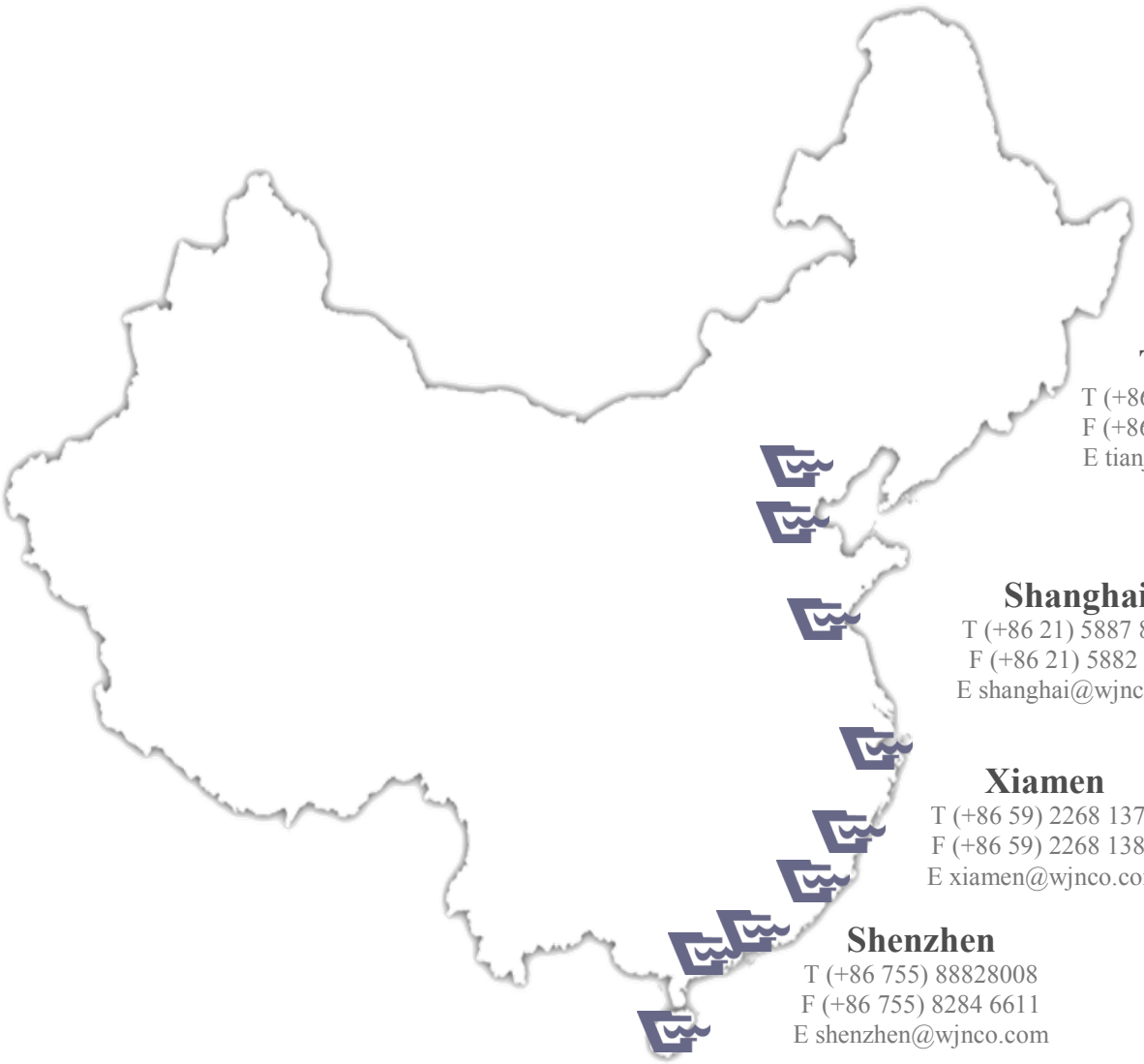

Beijing
T (+86 22) 5985 1616
F (+86 22) 5985 1618
E beijing@wjnco.com

Tianjin
T (+86 22) 5985 1616
F (+86 22) 5985 1618
E tianjin@wjnco.com

Qingdao
T (+86 532) 8666 5858
F (+86 532) 8666 5868
E qingdao@wjnco.com

Shanghai
T (+86 21) 5887 8000
F (+86 21) 5882 2460
E shanghai@wjnco.com

Fuzhou
T (+86 591) 8852 2000
F (+86 591) 8354 9000
E fuzhou@wjnco.com

Xiamen
T (+86 59) 2268 1376
F (+86 59) 2268 1380
E xiamen@wjnco.com

Shenzhen
T (+86 755) 88828008
F (+86 755) 8284 6611
E shenzhen@wjnco.com

Guangzhou
T (+86 20) 8393 0333
F (+86 20) 3808 2990
E info@wjnco.com

Haikou
T (+86 898) 6672 2583
F (+86 898) 6672 0770
E hainan@wjnco.com

www.wjnco.com

Wang Jing & Co. is an award-winning full-service commercial law firm with offices throughout China.