



WANG JING & CO.

敬海律师事务所

Providing you with our continued insight and dedication

MARITIME LAW NEWSLETTER • JUNE 2013

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FIRM NEWS

Wang Jing & Co. Holds Annual Partner Meeting in Sanya, China

In mid-May, Wang Jing & Co. held its annual Partners' meeting in the Hilton's Doubletree Resort at Haitang Bay, Sanya. The meeting summarized the 2012 performance of Wang Jing & Co. and the partners made plans and arrangements for Wang Jing & Co.'s business, market development and work division in the coming two years.

The Partners are conscious of the predictable depression of the international shipping industry in the coming two years. Wang Jing & Co. is fully exploring its current resources and to playing to its shipping business strengths to provide its clients with the utmost professional and thorough legal services. Our industry leading lawyer teams will continue to provide clients with high-end services, maintaining Wang Jing & Co.'s strong reputation and enhancing its competitiveness in the market. The Partners are confident that the Firm's hard work and dedication will overcome the future difficulties in the market for both the Firm and its clients.

After the meeting, the Partners, accompanied by their families, relished the opportunity to get out of the office, rejuvenate and enjoy the fresh air, the beautiful sunshine and the delicious food Sanya has to offer.

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Sentence Passed on Foreign Master for China's First Case of Traffic Offence at Sea with Foreign Elements

A recent case in China highlights the strict attitude the Chinese authorities are taking towards maritime accidents.

On 7 May 2013 a judgment was passed in the first instance hearing of China's first case of traffic offence at sea involving loss of lives. Judgement was pronounced in the 5th Tribunal of Zhoushan Intermediate People's Court, Zhejiang Province and sentenced the defendants, two Burmese men, the Master and Second Officer of a Singaporean container vessel (the Vessel), to four years' and three years' imprisonment respectively as a penalty for a traffic offence.

Case Summary

The Vessel sailed from Shanghai towards Ningbo. When the Vessel was in waters southeast of Dongfu Mountain in Zhoushan, the Second Officer of the ship failed to keep a proper lookout while the ship was amid a concentration of fishing vessels in extremely poor visibility and complicated navigation conditions, resulting in a collision. The accident causing the sinking of a fishing vessel, the death of 4 crew members and the disappearance of 3 others.

It was ascertained by the authorities that the Second Officer did not reduce speed, stop the engine nor attempt any rescue operations. It was further discovered that when the Master was informed of the collision he likewise did not take any rescue action nor report the incident to the competent authorities. The Court held that the defendants violated the regulations on traffic and transport at sea. The Second Officer was held to be chiefly responsible while the Master was held to be negligent in management.

This is the first case of its kind to be heard in the Chinese Courts, never before have foreign vessels or crew been prosecuted for traffic accidents. The Chinese authorities have shown their determination to fully

investigate all accidents involving merchant ships and fishing vessels and will utilize all means necessary to bring offenders to justice.

The case unequivocally demonstrates a shift in the Chinese authorities' attitude towards the investigation and prosecution of maritime traffic accidents, especially in the case of loss of life at sea. As a result, it is more important than ever for foreign shipowners and their crew to be diligent and compliant with both local and international regulations.

Should the unfortunate occur, in order to avoid prosecution, shipowners and their crew must remain mindful of their obligation to report the accident and of their obligation to perform salvage and rescue. Further, once the accident has been properly reported to the authorities, the ship's crew must be prudent when making accident reports and statements to the Chinese competent authorities investigating the accident.

MARITIME LABOUR CONVENTION 2006 ENTRY INTO FORCE 20TH AUGUST 2013

The International Labour Organization's (ILO) Maritime Labour Convention 2006 (MLC 2006) will come into force on 20 August 2013. Currently, 35 countries have ratified the MLC 2006, accounting for 68.8% of world gross tonnage. It is noteworthy that China and Hong Kong are currently absent from the List of country ratifications. Nevertheless, due to the global application of the Convention, shipowners of vessels flying the flag of China or Hong Kong should also be cautious regarding the compliance required by the Convention.

The MLC 2006 provides a set of comprehensive rights and protection for seafarers and it has consolidated 36 ILO Conventions and one Protocol which are listed in Article X. In general, the MLC 2006 covers safe and secure working and living conditions, fair contractual employment terms, the payment of wages and a right to medical care. The MLC 2006 applies to ships of 500 gross tonnes or over, engaged in international voyages; and ships of 500 gross tonnes or ... continued overleaf

over, flying the flag of a Member State and operating from a port, or between ports, in another country.

Maritime Labour Certificate and Declaration of Maritime Labour Compliance

Under the MLC 2006, Member States are liable to establish effective systems for the inspection and certification of maritime labour conditions. Regulation 5.1.3 requires concerned vessels to carry on board a Maritime Labour Certificate (Certificate) and a Declaration of Maritime Labour Compliance, (DMLC) and to have the same be available to seafarers and Member State inspectors on request.

The Certificate will be issued by the Member State's Administrative authorities. Appendix A5-I of MLC 2006 provides various items which the Member State must inspect and approve before certifying a ship. Among others, the Authorities must inspect and approve seafarers' employment agreements, the use of any licensed or certified or regulated private recruitment and placement service, on-board complaint procedures and the payment of wages.

The DMLC will consist of two parts. Part I shall be completed by the Authorities and should identify a list of items to be inspected and national requirements embodying the relevant provisions of MLC 2006. Part II will be drawn up by the shipowners and should identify the measures adopted by the shipowner to ensure ongoing compliance with the requirements between inspections, and measures proposed to ensure continuous improvement. All deficiencies are to be recorded, and under extreme situations, the vessel may be detained by the port authorities until all the deficiencies have been rectified to the standards satisfactory to the port authorities. As such, it is important for shipowners and other concerned parties to fully understand and be prepared for the certification requirement when the MLC 2006 will enter into force in this August.

Seafarer Recruitment and Placement Service

Strict regulations concerning seafarer recruitment and placement are stipulated in Regulation 1.4 to protect seafarer's interests. In this respect, it is estimated that around 40,000 Chinese seafarers join the international labour market each year and most of these seafarers find their placement through Chinese private recruitment and placement services. Considering more than 68.8% of the world's gross tonnage of ships will fall within the ambit of the MLC 2006, it is critical for the Chinese private recruitment and placement service industry to carry out their business in compliance with the relevant regulations.

The MLC 2006 sets up the detailed responsibilities of Member States to license, monitor and regulate private recruitment and placement services. Each Member State is required to ensure that the private seafarer recruitment and placement services operating in its territory shall be operated in conformity with "a standardized system of licensing or certification or other form of regulation". In order to do so, the MLC 2006 provides a set of minimum requirements for Member States. The requirements state that seafarer recruitment and placement services shall be prohibited from using means, mechanisms or lists which aim to prevent or deter seafarers from gaining employment. The recruitment and placement services are also prohibited from charging seafarers, directly or indirectly, for their recruitment services, except for the cost of obtaining a national statutory medical certificate and seafarer's personal travel documents.

It is also provided under Standard 1.4 that each Member State should require the shipowner flying its flag, who uses seafarer recruitment and placement services based in countries which have not ratified the MLC

2006, to ensure those services meet the Convention standards required. Although China is not a Member State under the MLC 2006, the Convention will at least affect Chinese private seafarer recruitment and placement services in this respect.

Financial Security Requirements on Shipowners

According to Regulation 2.5, Member States shall ensure that seafarers on vessels flying their flags are entitled to repatriation at no cost to the seafarers themselves. In addition, the MLC 2006 also provides that the Member States should ensure seafarers on vessels flying their flag are entitled to compensation in the event of the death or long term disability of seafarers due to an occupational injury, illness or hazard.

To ensure compliance with the above, it was also provided that Member States shall require ships that fly its flag to provide financial security to cover the potential obligation. Shipowners' liability in the event of (b) is generally already covered under standard P&I cover. However, claims in the event of repatriation may not be covered under P&I club cover. In response to the financial security requirement, all the International Group (IG) Clubs have agreed to extend the scope of standard P&I cover to include repatriation in cases of insolvency and in the other circumstances listed in the MLC 2006 where seafarers are entitled to repatriation.

While China has not currently ratified the MLC 2006, after the Convention enters into force, Chinese vessels engaging in international trade will fall under its ambit. In anticipation of this, the Ministry of Transport ('MOT') has set up a working group for the implementation of the Convention, which includes training administrative officers, ship owners and other stakeholders, preparation for the certificating procedure, and the drafting of guidance for shipowners. Furthermore, the MOT are liaising with the Ministry of Human Resources and Social Security for the ratification. Currently, the *Regulation for the Career Security of Seafarers*, which incorporates the major requirements of the MLC 2006, has been drafted and presented to the legislative authorities for enactment. It is anticipated that China will ratify the Convention in the near future. We shall continue to follow this matter and will keep our readers updated.

John Wang & Lucas Feng

LIABILITIES AND REMEDIES FOR CREW WORK-RELATED CASUALTY

In our previous Newsletter we introduced the topic of the Revocation of the Provisions Limiting Damages to RMB800,000/Person for Personal Injury or Death at Sea. In view of this, how to deal with a claim for work-related casualty under the Chinese law becomes a common concern of shipowners and P&I clubs. It appears that injured crewmembers or their bereaved families may have multi-access to make their claims for work-related casualties at sea. However, whether such remedies are compatible remains to be uncertain.

It is arguable that under Chinese law, crewmembers may seek compensation under the work-related injury insurance arranged by the shipowners or their agents and claim against the shipowners for any actual damages outside the coverage of the work-related injury insurance in tort.

Additionally, for personal casualties arising from the tortious act of the shipowners, the injured or their bereaved family may also claim against the shipowners for compensation for mental damage, if any, under the *Supreme Court Interpretation of Some Issues Concerning*

the Mental Damage Compensation Due to Civil Tort.

Insurance for work-related injury

As a matter of Chinese law, all domestic employers incorporated in China are strictly required to arrange insurance for work-related injury for their employees. That said, it is arguable that foreign companies/shipowners are not legally obligated to do so. However, Article 27 of the Seamen Assignment Provisions builds a platform for foreign shipowners to establish contractual obligations in respect of work-related injury insurance under the manning service agreement with their crew agents in China.

In accordance with Article 24 of the Seamen Assignment Provisions, the crewmembers shall enter into a labour contract with the Chinese crew agents and/or employment contract with the foreign shipowners. These two kinds of contracts are of a different nature in the strict legal sense. Given that the Chinese Labour Contract Law takes effect only if the employers are incorporated in China, a contract concluded with foreign employers/shipowners should be referred to as an employment contract.

However, it should be pointed out that in the case where the terms of the employment contract entered into by the crewmembers and the foreign shipowners prejudice the legal rights/remedies available to the crewmembers under the Chinese mandatory laws (such as the Chinese Labour Law and the Chinese Labour Contract Law), any disputes arising from the employment contract in relation to the crewmembers' rights and interests should be decided subject to Chinese law, even if the governing law clause under the employment contract has been otherwise agreed.

Nevertheless, once a work-related injury accident occurs, the employer shall apply to the social insurance administration for ascertainment of the work-related injury within 30 days from the date of the accident, failing which the injured may file such an application (within one year from the date of the accident) and the employer should be liable for the medical treatment and other necessary expenses incurred by the injured until the date of application in accordance with Article 17 of the Chinese Work-Related Injury Insurance Regulations. Where the injured is disabled and deprived of work capacities, fully or partially, the relevant assessment for work capacity should also be arranged accordingly.

After the work-related injury is ascertained and approved, the injured may claim for insurance indemnity from the social insurance administration. The claimable items and amount should be subject to the Work-Related Injury Insurance Regulations. With regard to the actual loss suffered by the injured which falls beyond the statutory insurance coverage, but still within a reasonable limit, it is arguable that the injured will be entitled to claim directly against the foreign shipowners in accordance with the 2003 Rules.

In practice, foreign shipowners, with no strict legal obligation to purchase work-related injury insurance, occasionally effect payment for the insurance allowance to the crewmembers directly. In such cases, whether to put up the insurance fund to the social insurance administration will be at the crewmembers' own discretion. It is believed by the foreign shipowners that such arrangement will serve the mutual benefit of all parties concerned from a practical perspective. However, there exists a high risk that the crewmembers will choose to retain the insurance allowance and yet still pursue the shipowners for failure to properly arrange insurance.

Remedies and Indemnity

In any given case, there may be a number of insurance policies covering an incident. It is important to distinguish these policies to

establish their limits and applicability.

P&I clubs cover the shipowners' liability for casualties of the crewmembers under applicable laws or binding contracts. However, given the nature of liability insurance, the injured or the bereaved family can only claim against the shipowners rather than the P&I clubs directly. In addition, in some cases, the crewmembers themselves and/or certain employee-friendly shipowners will purchase additional life insurance. In accordance with the Chinese Insurance Law, life insurance is commercial insurance in nature. As such, when an insured accident occurs, the insurance company will be liable to pay the agreed insurance indemnity to the injured or the bereaved family.

In the event that the crewmembers have purchased commercial life insurance and, in the meantime, concluded a labour contract with the Chinese crew agents or an employment contract with the foreign shipowners who have duly arranged work-related injury insurance, once the maritime casualties occur, the most-frequently asked question will be whether the injured or the bereaved family can concurrently seek compensation from (1) the insurance company under the life insurance policy; (2) the social insurance administration in accordance with the Work-Related Injury Insurance Regulation; and (3) the shipowners and/or other liable parties for tort damages.

As a general principle of life insurance, the subject matter insured is life or personal health of the insured, the value of which is not pecuniarily assessable. Although there is always a fixed sum under each life insurance, it shall by no means be considered as the insured value but only the figure agreed by both parties under the insurance contract for indemnity after the insured accident happens. In the meantime, unlike the subject matter insured under property insurance, the right attached to the life or personal health of the insured cannot be transferred or assigned. In other words, after the insurance indemnity, the insurance company will obtain no subrogation right in return, while the insured or the beneficiary under the life insurance policy is still entitled to claim against the other liable party. Therefore, commercial life insurance is fully independent of work-related injury insurance and P&I insurance.

For the actual loss in excess of that covered by the work-related insurance, the crewmembers are entitled to make direct claim against the foreign shipowners in contract or in tort. In addition to the this, if the work-related casualties can be attributed to any other third party, the injured or the bereaved family may also claim against the liable party in accordance with Article 12 of the 2003 Rules for tort damages. It is further confirmed by the Supreme Court in the Reply of [2006] XTZ No. 12 to the effect that if the work-related casualties are caused by a third party, the injured or the bereaved family may, after seeking damages from the liable party, apply to the social insurance administration for further indemnity.

In view of the above, it is feasible that an injured party may recover the same loss from more than one avenue. Once it is established that the foreign shipowners are to blame for the work-related casualties, they would still have to make a strong defence against the tort claims even if the injured/deceased crewmembers have already been covered by work-related insurance and other commercial life insurance. To avoidance unnecessary complications, it is advisable that foreign shipowners retain reliable Chinese agents and carefully formulate the manning service contracts and employment contracts to make sure work-related injury insurance for the Chinese crewmembers on board has been duly arranged.

Yu Hua

Our firm is well versed in all areas of Admiralty law with our experienced lawyers ready at hand to assist. For more information regarding your specific circumstances, please do not hesitate to contact us at info@wjnco.com, or through your usual contact.



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

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