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MARITIME LAW NEWSLETTER · SEPTEMBER 2013

CONTENTS

COSCO Yong Sheng took polar route as shortcut from China to Europe

COSCO Yong Sheng is the first Chinese vessel embarking history by taking the Arctic shortcut rather than sailing along the usual south route through the Suez Canal. As said on the official website of COSCO, the Arctic route would cut 15 days off the regular travelling time.

On 8 August 2013, the vessel sailed off Dalian to Taicang Port for loading cargo and then she departed from Taicang Container Terminal bound for her final destination at Rotterdam on 15 August 2013. On 10 September 2013, the vessel arrived at the Rotterdam anchorage.

The new route has attracted great attention from the shipping industry and applications for taking the route has been increasing. The Russian Authority, NSR Administration, granted 4 full transit permissions on 2010 and the number has increased to 46 last year. Until 22 August 2013, NSR Administration had received 529 applications for using some or all of the Northern Sea Route and 449 permissions have been granted.

However, safety and environmental concerns have caught eyes of both potential users of the route and the legislators. To ensure vessel safety and to protect the vulnerable environment of the Arctic area, the IMO are currently developing an international code for safety of ships operating in polar waters (Polar Code). We will look attentively at the IMO legislation process, especially the Code's environmental requirements.

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China's Tax Reform goes Nationwide since 1 August 2013

The Reform

After a nearly two-year trial of the Pilot Value-Added Tax (VAT) Reform Programme, the country has expanded the reform to the whole nation since 1 August 2013. Back to January 1 2012, the pilot programme initiated in Shanghai for selected service industries, such as transport and advertisement industries, and then expanded to 9 provinces and 3 cities in August 2012, and now it is applicable nationwide.

Before the reform, manufacturers and service providers paid their taxes in different venues. VAT was mainly levied from manufacturing industries engaged in sale of goods and provision of processing, repair and assembling services within China, as well as from importation of goods into China. By contrast, Business Tax (BT) is levied upon the sale of immovable property, and sales of intangible goods and services.

Although VAT and BT are both turnover taxes, their levy follows different mechanisms. For general VAT payers excluding the small-scale VAT payers with a less annual turnover, input VAT incurred in the purchase or construction of fixed assets (excluding immovable property) can be credited against output VAT. Unlike VAT payer, enterprises operating in most service sectors may not deduct from their BT payable those VAT and BT paid for services received or property purchased. As a result, double taxation constrained development of service industry.

Future Impact

The VAT reform aims at boosting Chinese service sector, and upgrading China from a manufacturing hub into an R&D and modern service power house. As transportation industry is one of the few service industries in the reform list, foreseeably the reform will significantly influence and may restructure the transportation industry.

On a forum taking place in late 2012, Mr. Xu Shanda, the former vice-minister of the

State Administration of Taxation, said that the VAT reform was initially designed to replace BT in both manufacturing and service sectors when VAT was first introduced in 1994, but it was only implemented in the former at that time due to the pressure from local governments. For protection of tax revenue of local governments, the service industry, which was deemed as less important at that time, had to face heavier tax burden and double taxation whilst the manufacturing industry had been developing quickly and finally made China the world's largest manufacturing centre. According to a study of China Center for Economic Research at Peking University, the overall tax rate for the service industry under the current system is 18.2% converted into VAT standard while the typical VAT rate now is only 17%.

Under the new tax regime, 11% VAT is levied on transportation companies, including enterprises engaged in shipping, aviation, railway and road transportation. In the past, these companies had to pay BTat a rate of 3% , and VAT incurred for purchasing vessels, bunkers and other materials cannot be credited against the BT payable.

Perhaps China's VAT reform may not bring substantial effect upon the deep sea service sector in short meter in consideration that deep sea service operators usually choose to flag out and take the benefit of favorable jurisdiction and tax regime. The reform will have a significant impact upon domestic shipping companies due to cabotage service was restricted to Chinese flagged vessels. According to a survey carried out by local transportation administration in Zhejiang Taizhou, among the 69 shipowners domiciled in the city, 27 owners reported tax burden has been reduced in comparison with previous BT system, and 37 reported that their tax remained at the same level. Only 5 owners or 7.2% of the total reported that their tax burden was increased, and the government was prepared to subsidize these 5 companies against their increased tax burden.

And the short-term impact of the VAT reform is even more noticeable for local commodity traders who usually charter in ships and adopt other transportation means. Considering those companies usually operates with razor thin net profit margin, crediting the freight VAT against their output VAT may bring a significant increase on the net profit. According to our survey to a major local commodity trader, the tax reform will ... continued overleaf

boost their net profit by about 30%.

In long term, if the reform can, as it aimed at, gradually upgrade China from the world largest manufacturer into a major service provider and from an investment-driven economy to a consumption-driven one, the world trade and economy landscape may be reshaped.

Memorandum of Cooperation entered between Guangzhou Maritime Court and MSA Shenzhen

On 9 August 2012, the Guangzhou Maritime Court Shenzhen Tribunal entered with MSA Shenzhen Nanshan Branch the "Memorandum of Cooperation and Building Harmonious Shipping" for setting up a pre-litigation mediation mechanism to handle marine incidents and casualties. On 11 April 2013, further agreement was signed between the court and MSA with more details laid down.

Under Chinese law, the MSA has authority to investigate incidents occurred in Chinese waters and the MSA investigation reports and comments therein regarding apportionment of liability bear heavy evidential weight in the eyes of Chinese maritime courts. Furthermore, MSA has strong enforcement power, and their cooperation is very important for the Chinese maritime courts to enforce property/evidence preservation orders. In contrast, in pollution cases, MSA's oil clean-up claims are subject to the decision of maritime courts.

In recent years, some maritime courts and local MSA have established cooperation by signing agreement or memorandum of conduct. Back to August 2011, Xiamen Maritime Court signed agreement with MSA Xiamen to intensify and optimize their cooperation in information sharing, evidence preservation, ship arrest and dispute resolution. In 2012, Beihai Maritime Court established pre-litigation mediation organization with MSA Guangxi and MSA Yunnan . In 2013, Memorandum of Cooperation to develop marine economy was entered between Ningbo Maritime Court and MSA Zhejiang .

With respect to the Memorandum entered between Guangzhou Maritime Court and MSA Shenzhen ,MSA Shenzhen expressed in a meeting held in association with Guangzhou Maritime Court in 2012 that cooperation must be intensified in handling personal injury cases as the cases cannot be properly solved by the individual work of either party. As a result, detailed agreement was entered by Guangzhou Maritime Court and MSA Shenzhen this year. However, it shall note that the Memorandum is only applicable to some of the Shenzhen ports, and no similar agreement has been entered between Guangzhou Maritime Court and MSA Guangdong .

Judicial Interpretation on Insurance Act II and its impact on time limit for subrogation claims against carriers

The Judicial Interpretation and related Legislation

On 7 June 2013, the Supreme People's Court of the People's Republic of China published the Interpretation II on Several Issues concerning the Application of the PRC Insurance Act (hereinafter referred to as "the Judicial Interpretation"). Article 16 of the Interpretation translates as follows:

> "The insurer shall exercise the subrogation rights in his own name.
>
> According to Article 60 (1) of Insurance Act 2009, the time limitation for an insurer's subrogation right shall be calculated from the date when it acquires such right".

Article 60 (1) of Insurance Act 2009 provides as follows:

> "In the event that insurance claim arises due to fault of a third party, the subrogation right of the insurer against the
>
> third party shall accrue when the insurer paid the insurance claim, and the insurer's subrogation rights shall be in the amount of insurance claim he actually paid."

With respect to time limit for insurance claim against the insurer, it is provided in Article 26 of Insurance Act 2009 that limitation period for insurance claims, except life insurance, is 2 years, counting from the date when the insured accident occurred. However, the Insurance Act 2009 does not specify the time limit for subrogation claims. Thus the time limit for subrogation claims can only be inferred by reference to other laws. In accordance with Article 257 of the Chinese Maritime Code, the limitation period for claims against the carrier with regard to the carriage of goods by sea is 1 year, counting from the date on which the goods were delivered or should have been delivered by the carrier.

The opinion of law practitioners

Generally, there are two schools of thoughts regarding how the new interpretation shall be comprehended in conjunction with all the provisions mentioned above. One is in favour of cargo insurers, and the other is in favour of ocean carriers and their liability insurers.

Arguments for cargo insurers

Before the issuance of the said new Judicial Interpretation, it is general viewed that insurance subrogation falls into statutory assignment of creditor's rights, so the limitation period for the insurer's right of subrogation and the date from which such period shall be calculated shall conform to the time limitation granted to the insured. The Chief Judge of the 2nd Civil Tribunal of the Supreme People's Court (this Tribunal was in charge of drafting the said new Judicial Interpretation), Ms. Liu Zhumei, shares with such general viewpoint in her article published in February 2013. And the draft of such Judicial Interpretation published on 22 March 2013 is also prone to hold that the time limitation for the insurer's right of subrogation shall be calculated from the date on which the insured knows or should have known the infringement of its rights. However, the new Judicial Interpretation eventually makes the different provision. From the explanations made by the Supreme People's Court after issuing the new Judicial Interpretation, such provision is designed to protect the insurer's rights, preventing the insurer from missing the time bar for subrogation claims due to relatively long time needed to handle with insurance indemnification by the insurer.

Despite of the above, the new Judicial Interpretation is not applicable to the subrogation claims in marine insurance. Firstly, pursuant to the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes, the trial of cases concerning marine insurance subrogation disputes shall be only based on the legal relationship between the third person and the insured In this sense, the subrogation claims in marine insurance are in nature disputes between the insured and the carrier arising from the carriage of goods by sea. Given that the Maritime Code is the special law applicable to the carriage of goods by sea, it shall prevail. And the new Judicial Interpretation shall only be applicable to the claims for property damages in various insurances other than marine insurance. Secondly, under the PRC law, the insurance subrogation falls into assignment of creditor's rights. According to Article 82 of the Contract Law of the People's Republic of China, upon receipt of the notice of assignment of rights, the obligor may assert against the assignee any defence it has against the assignor. Therefore, with respect to the subrogation claims in marine insurance, the carrier may assert against the insurer its defence in the time limitation it has

shall also be calculated from the date on which the goods were delivered or should have been delivered by the carrier. Thirdly, according to the relevant provisions of the Special Maritime Procedure Law of the People's Republic of China, where the insurance indemnity obtained by the insured cannot make up all the losses caused by the carrier, the insurer and the insured may, as joint plaintiffs, demand indemnity from the carrier. If the time limitation for the insurer's subrogation claim shall be calculated from the date on which the insurer has acquired the right of subrogation, while the time limitation for the insured's claim shall be calculated from the date on which the goods were delivered, then as the insurance indemnification usually occur later than the date on which the goods were delivered, it might thus exist such event that the insured (normally is the shipper or the consignee) has missed its time limitation for claim while the insurer, as the assignee, is till entitled to benefit from the time limitation for subrogation claim, which is obviously abnormal as it is the basic principle in assignment of creditor's rights that "Nemo plus juris ad alium transfere potest quam ipse habet (One cannot transfer to another a larger right than he himself has)". Lastly, as indicated by some judgments handed down by Shanghai Higher Court, Guangdong Higher Court and Shandong Higher Court, it is generally confirmed that the limitation period for the insurer's subrogation claim in marine insurance is 1 year counting from the date on which the goods were delivered or should have been delivered.

The new Judicial Interpretation reflects the legislators' wish to protect the insurer's rights. It is said that the Supreme People's Court is now putting promulgation of a further judicial interpretation concerning marine insurance on the agenda. It will definitely attract various attention as to whether marine insurance will follow the said Article 16 of the new Judicial Interpretation.

Arguments for carriers and their liability insurers

In light of the law mentioned above, it can be inferred from the Judicial Interpretation that the one-year time limitation for the cargo insurer's claim against the carrier shall start to tick since the insurance claim was paid by the insurer while it is not easy to conclude from those provisions that from which date the subrogation claim will be time-barred. Applying the Judicial Interpretation and the Chinese Maritime Code, one extreme explanation could be that the insurer's subrogation claim can only be time-barred after one year elapsed since the insurer paid the insurance claim.

Before the issuance of the Judicial Interpretation, insurance subrogation was generally viewed as assignment of the insured's rights. Therefore, time limit for the insurer's subrogation claim and its calculation shall be the same as that of the insured's claim against third party. The Chief Judge of the 2nd Civil Tribunal of the Supreme People's Court , which tribunal was responsible for drafting the said new Judicial Interpretation, Ms. Liu Zhumei expressed such general viewpoint in her article published in February 2013. According to Article 17 of the draft of Judicial Interpretation published on 22 March 2013,

> "The insurer shall exercise the subrogation rights in his own name.
>
> The time limitation for an insurer's subrogation right shall be calculated from the date when the insured knows or should have known his right was infringed by the third party. However, if the insured claim against the insurer, the time limitation for subrogation claim will be discontinued and restarted to calculate".

Eventually, different approach was adopted in the Judicial Interpretation. However, the new Judicial Interpretation would not change the *status quo* for the calculation of time limit for subrogation claims against the sea carrier. The insurer's subrogation asserted against the insured, i.e., the time limitation for the insurer's subrogation claim should be time barred after one-year elapsed from the date when the cargo was delivered. The reasons are as follows.

First of all, the Insurance Act 2009 does not stipulate specifically regarding the time limit for the cargo claims against the sea carrier. In other words, the Judicial Interpretation and the Insurance Act only provide when the time limit for the subrogation claims should start, but it cannot be clearly inferred from the new Judicial Interpretation when the time limit should terminate.

Secondly, the result will be draconian if the insurer's subrogation claim would not be time-barred one year after cargo delivery. According to the PRC Maritime Code, the B/L holder can recover nothing if he failed to file a case against the B/L carrier within the one-year time bar. So, the B/L carriers are protected by the time bar provided in the Code. However, the protection will be completely deprived if an insurer can enjoy more favorable right than a B/L holder and can lawfully lodge a case after one year of cargo delivery. It seems that this result would not be what the Supreme Court expected. In a insurance law seminar held last year, an attending Supreme Court judge expressed his view that the insurer should enjoy no favorable treatment than the insured with respect to the time limits for the cargo claims. Various supporting legislation can be found for this view such as Article 14 of "Provisions of the Supreme People's Court on Several Issues concerning the Trial of Marine Insurance Disputes", Article 26 of "Several Issues concerning the Trial of Disputes over Insurance Contract" issued by Jiangsu Higher Court.

Finally, the current law is unlikely to be amended considering the importance of certainty in the commercial law field. In the marine insurance sector, both the cargo and the ship side buy insurance to cover the risks involved during the cargo's transit. Thus, in subrogation cases, the courts are just apportioning liability between the cargo insurer and the vessel's liability insurer. Neither side needs special protection, and certainty it is crucial for commercial law. It seems that there is no significant benefit to break the certainty which was established through long time legislation effort and previous trial and decided cases.

Therefore, it cannot be directly inferred from the word of the new Judicial Interpretation that the cargo insurer would only be caught by the time bar one year after payment of the insurance claim. More likely, the cargo insurer is still subject to the one-year time bar as per the PRC Maritime Code.

Pending for the Court's Judgment

The point of Article 16 of the new Judicial Interpretation has yet been tested in front of any maritime court. It can be expected the debate will continue for a while and is worth to see how the maritime courts implement the Supreme Court's new Judicial Interpretation and how it would be applied in those cargo claim cases filed by the cargo insurer against the sea carrier.

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