WANG JING & CO
敬海律師事務所

MARITIME LAW NEWSLETTER

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CONTENTS

INDUSTRY NEWS

China Releases Decision to Build Country Ruled by Law

On 23 October 2014, the Fourth Plenum of the Chinese Communist Party's 18th National Congress passed a landmark legal reform plan.

There are seven plenums in each five-year term of office. In the past, the Fourth Plenums normally focused on topics such as economic development and the party's governance. This year's plenum is especially noteworthy because, for the first time, its theme is devoted to "ruling country by law"(In Mandarin:依法治国).On 28 October, Xinhua published full text of "The Decision of Central Committee of the Communist Party to Promote Ruling Country by Law"(the Decision).On the following day, Xinhua published "President Xi Jinping's Explanation to the Plenum Regarding the Decision" (the Explanation).According to the Decision, the Party is aimed to build China as a country ruled by law in 2020.To fulfill the ambitious goal, the Decision and Explanation pointed out the various problems existing in China's legislation, administrative, law enforcing and judicial systems and promised measures to tackle them gradually.

Regarding the legislation system, the Decision criticizes the laws and regulations made under the current system as low quality and lacking of law execution procedures provisions. The Decision further indicates that the problem is resulting from conflicts of interests between different government departments and the departments' tendency to acquire greater power but refuse to take extra responsibility at the same time. Three measures are introduced in the Decision to tackle the problem. Firstly, the National People's Congress should enroll more members with background of law profession and establish a system to consulting law professionals during the legislation process. Secondly, in making administrative regulations, mechanisms should be established to encourage public involvement and third parties should be introduced to break the deadlock resulting from conflicts of interest between different government departments. Thirdly, it is said that local government's power of legislation should be clearly defined by law, and local government will be banned from making by-laws.

Regarding reforming the administrative and law enforcing systems, the Decision adduces five measures to solve malpractice and corruption problems. Those measures include increasing transparency, creating internal power restriction mechanisms and requiring authorities to hire legal consultants and conduct compliance review before implementing important policies. The Decision also promised to establish the list of governments' power and promote the legislation work to define the government department's organization structure, role, power, procedures and liability.

The key topic of the Decision and Explanation is improving the countries' judicial system to deliver justice to the society. To emphasize the importance of judicial justice, President Xi Jinping has cited Francis Bacon's famous quotes on law and justice. The Decision announced four new mechanisms to reform the current system. Firstly, the Supreme Court will establish circuit courts to hear first instance inter-provincial important administrative and civil cases. Secondly, it will explore to expand the jurisdiction area of courts and procuratorates beyond the administrative division boarders. Thirdly, it will explore to establish public interest litigation mechanism enabling the procuratorates to sue the authorities who breached the laws. Fourthly, in criminal cases, the court will take the central role therefore increasing the awareness of liability among police force and prosecutors and reducing malpractice and injustice.

The Decision also announced to establish the mechanism to recruit legislator, judge and prosecutor from practicing attorneys and law professors. At the same time, the Decision furthered that all the new judges and prosecutors will be recruited by the provincial courts and procuratorates while the fresh judges and prosecutors will all have to climb up their career ladders from the bottom, i.e. the lower district court.

To summarize, the Decision revealed a complex road map. The Decision aimed to build China into a country ruled by law in 2020. It means that there is five years left henceforth. To achieve such an ambitious goal in time, it is expectable the country will have to overcome great challenges and difficulties en route.

China Launched New Policies to Boost the Country's Shipping Industry

China launched long-term policy guidelines on Wednesday, 3 September 2014 pushing up share prices of China Shipping and CIMC Group.

China overtook US as the largest trade nation in 2013 and the country has world's fourth largest fleet with a capacity of 142 DWT accounting for 8% of world's capacity. However, Chinese shipping industry has suffered loss recent years due to high fuel cost and severe overcapacity resulting from massive order of ships in the peak time around 2008.

To reverse the industry's sluggish performance and to build an efficient and echo-friendly fleet by 2020, the State Council published Several Guidelines to Promote Development of Shipping Industry on Wednesday. The State Council said that "Shipping is a key component in economic development and plays an important role in protecting a country's maritime rights and economy." And tax and regulatory reforms are expected to be coming soon to upgrade and modernize the country's fleet. The Vice Minister of Ministry of Transport

welcomed the guidelines saying “This is the first time the state council upgraded shipping industry to national strategy and made long-term policy guidelines since the establishment of P.R China. This designing from the top will have a big effect to boost the shipping industry”.

Shipping companies’ shares soared in response to the new Guidelines. On Wednesday, China Shipping’s shares were up 6.8% while China International Marine Containers Group soared 7.6%. China Shipping’s shares continued to surge and were 5% up by the close of trading on Thursday. COSCO shares also rose two percent on Thursday.

COSCO-Vale Deal to end the Valemax ban

COSCO Bulk and Vale entered into a framework agreement on 12 September 2014. Under the agreement, Vale will sell four Valemax vessels (VLOC) to COSCO bulk while another 10 VLOCs will be built by COSCO yards. In return, Vale will lease back those VLOCs for 25 years. Sources predicted that China’s VLOC ban may be soon lifted after the agreement. Both companies may claim victory for the milestone agreement which will ease the friction between the two giants since 2008.

From the late 1970s, Japan’s rising iron ore demand pushed its steel makers, led by Nippon Steel, to seek security of supply. The World’s iron ore pricing mechanism gradually shifted from CIF Rotterdam basis to Japan-led FOB benchmark system because many Japanese steel makers operated their own fleet. The contracts then were based on 10-year contract with annual secretive price negotiations. However, the Japan-led system had faced pressure for adjustment since 2000 when China’s consumption gradually took the major role. Unlike Japanese counter parties, China’s steel makers usually seek domestic owners such as COSCO or international shipping companies to provide transportation service.

In 2008, two events led Vale to roll out its mega-ship plan. In that year, for the first time the Australian miners, BHP Billiton and Rio Tinto, negotiated a different settlement than Vale to account for the significant freight differential. Since 2006, China’s robust demand created severe supply shortage. Rising BDI significantly increased the cost for shipping Vale’s cargo damaging the company’s competitiveness in Chinese market. By June 2008, the freight difference between Brazil and Australian meant that it cost US$55/t more to ship ore to China from Brazil than transport it from Australia.

In late 2008, Vale launched its $4 billion strategy of building its own VLOC fleet. Following, the freight market collapsed suddenly during the global financial crisis. And the overcapacity problems were aggregated by record orders of new vessels in the peak times. Thus, at the very beginning, Vale’s plan was strongly opposed by COSCO-led Chinese shipping industry. COSCO chartered in many cape size vessels at high level market between 2006 and 2008. The Valemax is the world’s biggest bulk carrier with 400,000 dwt. In contrast, typical cape size vessels’ carrying capacity is only about half of Valmax. Should these mega-ships be allowed to docking Chinese ports directly, the traditional cape size design can hardly compete with Vale’s mega new design.

In January 2012 when the Valemax started to join service and prepared to sail to China, the Ministry of Transport (MOT) banned Valemax’s docking by issuing Notice on Change of Regulating on Berthing of Vessels Beyond Design Capacity. Some Media reported that COSCO lobbied hard with the MOT to keep out the Valemax. It was also reported COSCO, and Vale engaged in several around negotiation but failed to reach an agreement then. COSCO wanted to acquire Vale’s existing ships and insisted Vale’s ore should be shipped by Chinese owners. Vale refused the plan and took actions to fight back. Rotterdam, Malaysia and the Port of Sohar are announced by Vale as transshipment hubs for the Valemax. A 280,000-dwt floating terminal station (FTS) was built in Subic Bay in the Philippines for transshipping cargoes. And in May 2012, COSCO’s president Ma Zehua said Vale had shunned the company’s fleet for about two months due to the ban, even if it meant using more expensive ships from other owners. Transshipment later was proved not a solution for Vale because the operation was so expensive that will wipe out the cost saved by using Valemax. The Southeast Asian monsoon season also could damage the efficiency of cargo operation.

While the tension between Vale and COSCO continued, the Australian miners managed to expand their production at a staggering rate further eroding Vale’s market share in China. Currently, the iron ore price was driven to its five-year lows caused by slowing Chinese demand and rising Australian output. Finally, it seems that the two countries top political leaders noticed the problem. Since late 2012, MOT was replaced by the working group under National Development and Reform Commission (NDRC) to handle the issue of docking the Valemax in Chinese ports. The working group was consisted of personnel from steel makers, port operator, ship owners and major banks and its job cover energy, construction and all the trade and investment issues between Brazil and China. The working group’s achievement was finally tested in July 2014 when President Xi attended the BRICS summits held in Brazil. President Xi’s visit was accompanied by a large group of Chinese business leaders including Mr. Ma Zehua, the president of COSCO, and wide-ranging business agreements were made during the visit. On 17 July 2014, in the witness Brazillian President Dilma Rousseff, President Xi Jinping and other business leaders, including Mr. Ma Zehua, Vale signed agreement with Bank of China and China Eximbank opening a credit totaling 7.5 billion USD. Two months later, Vale’s president Murilo Ferreira flied to COSCO’s Beijing office to end the two companies’ tension by signing the framework agreement with COSCO Bulk.

Although yet happened, resources predicted that the ban would be soon lifted benefiting the two countries economy. Under the current market, voyage charter freight rate of cape size vessels is 18-22 USD per ton for shipping ores from Brazil to China while for shipments from Australian to China, the rate is 7.5-10 USD. It is predicted Valemax can reduce the freight to about 10 USD per ton. The cost may be further cut by improved loading/unloading design. According to the agreement, Vale would close the freight disadvantage and could better compete with the Australian rivals while COSCO secured important stream of income in the next 25 years.

Wang Jing & Co. won "Shipping & Maritime Awards 2014 (PRC Law Firm)" presented by China Law & Practice Journal

Wang Jing & Co. Law firm won “Shipping and Maritime Awards 2014 (PRC Law Firm)” presented by China Law & Practice Journal held in Beijing Marriott Hotel on September 18, 2014. This is the third time that the China Law & Practice has granted the firm such an award after the year 2009 and 2011.

China Law & Practice, by reference to the influence of participating law firms and their contribution to the development of China’s legal industry, nominates law firms for the final award. The final winner commonly is a top-tier law firm with remarkable achievements and innovation in its related field of practice.

It is Wang Jing & Co.’s great honor to receive such an award. We will continue to provide excellent services as feedback to our clients' recognition. On this occasion, we would like to express heartfelt gratitude to all the teams and individuals who have made outstanding contribution to the development of the firm.

Financial Consultancy Team formed by Wang Jing & Co.

To better serve our clients, Wang Jing & Co has invited senior accountant Mr. Michael Chen and his team to join Wang Jing & Co. Mr. Chen and WJ will come together to incorporate a financial consultant company. On 1st August, the two parties signed an agreement to launch the cooperation and begin the process of incorporation.

WJC FINANCIAL CONSULTANT LTD.,GUANGZHOU, is committed to providing professional consultant services on financial and taxation affairs to clients from home and abroad. Mr. Chen received his bachelor's degree from Guangdong University of Foreign Studies in English, following a MBA degree at Hong Kong University of Science and Technology. He qualifications include a CICPA Certificate, CIA Certificate and ACCA Certificate and he is also qualified as a Senior Manager(Independent Director) of the Shenzhen Stock Exchange Listed Company. Mr. Chen has worked with Enrst & Young and has years of rich experiences in fields including corporate finance, accounting, taxation, investment and financing. He also has expertise in emerging areas including company listing and transfer pricing. Mr. Chen can advise, prepare reports and advise on financial affairs and taxation in English.

The new corporation is expected to work with WJ members to serve our clients with a comprehensive and professional expertise on laws, finance and taxation. We hope the new corporation will create a prosperous future and share growth with our clients.

The Supreme Court Issues White Papers Celebrating 30 Years Anniversary for the Establishment of Maritime Courts

On 2 September 2014, the Supreme Court held media conference. During the event, the speaker recalled the history of development of maritime courts and the judicial practices up to present. According to the speaker, the ten maritime courts had heard 225,283 cases with claim totaling over 146 billion RMB from 1984 to the end of 2013. During the same period of time, the courts had arrested 7,744 ships among of which 1,660 were flying foreign flags.

In the conference, the Supreme Court issued Bilingual white paper summarizing the 30-year development. According to the white paper, China now has 10 maritime courts and 39 sub tribunals along the country’s coastline to hear the first instance maritime cases. Provincial high courts will hear the appeal case while Supreme Court will make the final decision in retrial case. In 1992 and 1999, Chinese Maritime Code and Maritime Procedural Law were enacted by Chinese legislators. Following, 16 jurisdiction explanation were issued by the Supreme Court to supplement CMC and the Procedural Law. On 1 February 2002, China Foreign-related Commercial and Maritime Trial (www.CCMT.org.cn) went on line. Since then, the website has published 8，258 judgments and attracted more than 10 million visits. Currently, the daily visit of the website is about 2000.

Ten typical maritime cases were released in the event. Underneath, we summarize some of these important cases and provide our comments.

SELECTED TYPICAL CASES PUBLISHED BY THE SUPREME COURT

"*Maersk Shipping*"- Seal Charge and Common Carrier

The Facts

Maersk Shipping (China) Co., Ltd (Maersk) engaged in container shipping business in Xiamen, and Penavico Xiamen was the local agent of Maersk. Before March 2005, Xiamen Yinghai Industry and Development Co., Ltd (Yinghai) had been managed to pick up containers from Penavico and provide haulage service for Maersk's client. On 3 March 2005, Maersk noticed Penavico to stop providing containers and seals to Yinghai and refused its booking orders. Yinghai later lodged a case in front of the Xiamen Maritime Court applying an order to force Maersk to accept its booking orders and to allow Yinghai to continue the haulage service as before.

The Decision

In the first instance, Xiamen Maritime Court held that international liner companies were not common carriers and should not be forced to contract with the public. In the appeal Fujian High Court, it was held that Maersk was common carrier and its explicit refusal to contract was in breach of the common carrier's duty to compulsory contacting. Maersk was order by the Fujian High Court to accept Yinghai's booking order.

Maersk appealed the case to the Supreme Court for retrial of the case which was allowed. In the retrial, the Supreme Court held that to be a common carriage service means the service had to be provided to the general public without discrimination, and the carrier must have monopoly position. It was further held international liners' service to facilitate international trade and was not general public service towards. And the carrier had no monopoly position, and its price was not under government control. Thus services provide by Maersk did not conform to the definition of common carriage service prescribed in Article 289 of Contract Law. Maersk's appeal was allowed by the Supreme Court.

Comments

This is the leading case for the definition of "common carriage service" under Contract Law.

"*The Mariner*"- American Bank Enforces Ship Mortgage in China

The Facts

On 19 June 1997, JPMorgan Chase Bank (JPMorgan) entered into a loan agreement with Seastream Shipping (Seastream) and other four companies to lend 35 million USD to the companies. On 27 June 1997, Seastream entered into mortgage contract with JPMorgan mortgaging the vessel MV "Mariner" to the latter to secure the 35 million USD loan. The mortgage was duly registered at the London registry office of the flag state Bahama. On 7 July 1999, the parties entered into another agreement for an additional loan of 2 million USD. On 18 July 2000, the parties signed additional agreement according to which the mortgage of MV "Mariner" was extended to cover the 2 million USD additional loans and the loan was also secured by registered mortgage. On 14 March 2002, JPMorgan applied to the Guangzhou Maritime Court for arresting MV "Mariner" on the basis that Seatream had default on its debt totaling at 7,323,377.26 USD. Following, JPMorgan applied to the court to sell the vessel. The court allowed the application, and the JPMorgan bought the vessel for 5.94 million USD in the auction.

Comments

In the case, the plaintiff, defendant and the flag state were all foreign countries. It is a typical case in which the Maritime Court applied foreign laws. Our firm is involved in the case. We represented one of the claimants and firstly took actions to arrest the vessel which triggered series of law suits in relation to the vessel.

"*Zhejiang Textile*"- Can "Actual Shipper" Sue ?

The Facts

On 31 July and 7 August 2000, Zhejiang Textile Import and Export Group Co. Ltd (Zhejiang Textile) sold a cargo of school uniforms to an international buyer. Zhejiang Textile entrusted Huahai International Shipping Co., Ltd to arrange transportation of the cargo. Huahai sub-entrust the shipment to Shanghai Wailianfa International Shipping Co., Ltd which went on to entrust Shanghai Sumsung International Shipping Co., Ltd. Shanghai Sumsung booked space with Evergreen Marine Co., Ltd (EMC) who issued 21 sets of Master Bills of Lading. The B/L shippers were three foreign companies. However, Zhejiang Textile paid the freight the receipt of which was confirmed by EMC. The cargo was delivered without production of original bills of lading. The cargo price had been never paid. Zhejiang Textile lodged a case against EMC in front of the Shanghai Maritime Court claiming loss of cargo

price and others.

The Decision

Shanghai Maritime held that although the plaintiff, Zhejiang Textile, was not the B/L shipper, he had proper title to sue because he was the lawful B/L holder who paid the freight and delivered the goods to the defendant who issued Bills of Lading according to the plaintiff's requirement. Shanghai Maritime Court decided in favor of the plaintiff awarding a damage of 2,602,562 USD, 3,111,486.35 RMB and interests. The defendant appealed to the Shanghai High Court which was rejected.

Comments

This is a leading case regarding Chinese cargo seller's title to sue where the B/L shipper was not the seller. This is also the first case which was recognized by Taiwan District Court.

"*The Trade Expansion*"- Proved to be Innocent in a Collision Case

The Facts

"SHANWEI 12138", fishing vessel owned by Mr. Xiaoyuan Zhong, were requisitioned by Zhuhai Anti-smuggling Office to carry out patrol and other operation. At about 0300 hours 25 November 1992, the government vessel collided with a merchant vessel that sailed from Hong Kong and sank after the collision. Among those on board, 15 persons were rescued with remaining 6 dead. Mr. Xiaoyuan Zhong, the owner of the fishing vessel, and the Z Anti-smuggling Office lodged a case against the defendant in front of the Guangzhou Maritime.

Key evidences:

1. Hong Kong VTS Radar Record
2. PLA Navy Radar Record
3. Paint Sample Test Report issued by Guangzhou Police Office
4. Zhangjiagang MSA investigation record
5. Statement of MV "BARZAN"

The Decision

In the first instance, Guangzhou Maritime Court held MV "Trade Expansion" had collided with "SHANWEI 12138" and awarded the plaintiff damage in the amount of 2,390,400 RMB, 20,000 HKD and interests thereof. The defendant appealed the case to Guangdong High Court and was dismissed by the latter. The defendant found a Statement of MV "BARZAN" from Taiwan Court and applied to the Supreme Court for retrial of the case with the newly discovered evidence. The key evidences and the professional witnesses were cross-examined again in front of the Supreme Court. The Supreme Court held the evidences adduced by the plaintiff were not enough to prove, on the balance of probability, that MV "Trade Expansion" had collided with "SHANWEI 12138"

Comments

Our firm assisted the owner of MV "Trade Expansion" during the whole process of this case. This is a leading collision case regarding balance of probability. The Statement of MV "BARZAN" was evidence originated from Taiwan proceeding. In the retrial of the case in the Supreme Court, the court confirmed such evidence as lawful and relative, and it was the first time for a PRC Court to recognize evidence originated from Taiwan proceedings.

"*The HAGAAG*"- "All Risks" under PICC Policy

The Facts

On 28 November 1995, Hainan Fenghai Grain & Oil Co., Ltd (Fenghai) insured a cargo of 4,999.85 MT palm oil with PICC Hainan and the insurance covered "all risks". According to the insurance terms, the insurer shall be liable for any or all losses caused by any external factors during the transit of cargo by sea. There were also five exclusions in the policy. The cargo was carried by MV "HAGAAG". The vessel sailed from the loading port in November 1995. However, due to the dispute between the vessel's owner and time charterer, the planned voyage was abandoned and the parties lost contact with the vessel. In April 1996, MV "HAGAAG" was detained by Shanwei Coast Guard for smuggling. According to the prosecutor's letter (1996) No. 64, the palm oil cargo was either steeled or confiscated by Chinese Custom Authority. The insured claim total loss to the insurer who expressly denied the claim. The insured lodged a case against the insurer in front of the Haikou Maritime Court.

The Decision

In the first instance, the Haikou Maritime Court held that the reason for cargo loss was due to the criminal act of the shipowner and such reason was an external factor beyond the control of the insured. The court held the insurer should pay the insurance claim in the amount of 3,593,858.75 USD.

The insurer appealed the case to Hainan High Court. It was held that the insurance policy covered listed risks and the claim was outside cover of all risks insurance. The court thus allowed the appeal and dismissed the claim of the insured.

The insured applied to the Supreme Court for retrial of the case. During the retrial, the Supreme Court held that the cargo loss should be covered by the policy because the policy did not expressly exclude the accident. The Supreme Court overruled Hainan High Court's decision and reinstated the first instance decision.

Comments

This is the leading case defining the scope of cover for all risks policy. The decision set out following three rules: 1. All risks policy is not insurance covering listed risks; 2. Loss must be caused by external factors; 3. The loss should occur during the cargo's transit. In this case, we represented PICC in the first instance, appeal and Supreme Court's retrial.

"*Yongxin Sugar*"- Indemnity for Unauthorized Fisheries Claims

The Facts

The plaintiffs were three fish farmers who bred and aqua-farm shell fishes in the water of Hougang river mouth. At the time of the accident, the fish farm's license had all expired. Since October 2003, the defendant started to operate and produce sugar. In the middle of November 2003, the plaintiff found large quantity of their shell fishes died. On 25 November 2003, the local environmental authorities found the defendant discharge into the sea 35 MT's boiler washing waters which was heavily polluting. On 8 January 2004, the Guangxi Provincial Fishery Authority produced the test report and held that the abnormal death of the shell fishes was not due to disease, and the seawater sampled from the fish farm was highly polluted with a COD of 11.4 mg/L. The loss was ascertained as 2,118,000 kg by local fishing experts, and the authority held the loss was caused by the defendant discharging waste waters containing pollutants beyond the level prescribed by the law. The authority ascertained that the direct economic loss of the incidents amounted to 9,319,200 RMB. The plaintiff lodged a case in front of the Beihai Maritime Court against the defendant.

The Decision

In the first instance, the court held that the polluting waste water discharged by the defendant caused the death of shell fishes farmed by the plaintiffs, and the defendant should be liable to compensate. However, as the plaintiff's license had expired and their farming behavior was thus illegal, the plaintiff's loss of income thus would not be recoverable but the fish seedling loss should be reasonably compensated. The plaintiff has faulted in illegal fish farming thus they should be liable to themselves for 60% of the seedling loss. The court finally awarded that the defendant was legally responsible for 300,484 RMB. The plaintiff appealed to the Guangxi High Court who dismissed the appeal and upheld the Beihai Maritime Court's decision.

Comments

This is an important environmental case involving fish farming without license. In those cases, the court will not protect the fish farmer's rights regarding profits. However, polluters will be liable to compensate the farmers for the cost of purchasing fish seedling. In this case, the court held that the polluter was liable for 40% of such seedling cost, and the fish farmers were liable for 60% for illegal fish farming.

"*Qian'an Paper*"- Exception to Polluters' Joint and Several Liabilities

The Facts

The plaintiffs were 18 fish farmers, and the defendants were nine factories discharging waste water into Luan River and Daqing River In 1997, Mr. Sun Youli and other 17 people signed agreement to operate six aquaculture farms. Such farms were duly established and licensed by the local authorities. In the early October 2000, severe pollution, accident occurred at the river mouth of Luan and Daqing rivers in Wangtan, Leting. The farms suffered severe losses due to the accident and lodged a claim in front of the Tianjin Maritime Court against nine factories that discharged waste water into the rivers. Among the nine factories, only Qian'an Chemical processed their waste water to the law prescribed standard before discharge into the rivers.

The Decision

In the first instance, the Tianjin Maritime Court held that the nine factories were subject to joint and several liability for a damage amounting to 13,659,700 RMB. The case was appealed to the Tianjin High Court who held that Qian'an Chemical's liability should be different from other eight polluters as the local environmental authority had ascertained its waste water was within the law prescribed standards. The Tianjing High Court finally ruled that Qian'an Chemical should be liable independently for RMB 140,000 while other eight companies should be jointly and severally liable for RMB 6,553,250.

Comments

This is an important case regarding pollution liability in case where pollutants were discharged according to the environmental law and regulations.

"*The Ning An 11*"- 50% Limitation Fund for Coastal Vessel

The Facts

On 23 May 2008, MV Ning An 11 sailed from Qinhuangdao, China with a cargo of coal to Shanghai. On 26 May 2008, the vessel collided with #2 loading machine of Waigaoqiao Port during her berthing operation. On 9 March 2009, CSBC applied to the maritime court to establish a limitation fund in the amount as prescribed in Ministry of Transport's Measures regarding Coastal Vessels which was half of the amount of China Maritime Code or LLMC 1976. The Port's Insurer, PICC Shanghai, submitted letter of dispute to the court alleging: 1. The owner had no right to limit; 2. The cost to handling the wreck of loading machine was unlimitable; and 3. The vessel was an international sea-going vessel. Therefore, the CMC limitation found should apply.

The Decision

In the first instance, the court allowed the owner to establish the fund. The Shanghai Maritime Court held that PICC Shanghai's first point was regarding subject matter which will not be decided by the court in the fund establishment case. Regarding the second point regarding unlimitable debt, it was held that the argument could not bar the court from allowing the owner to establish the limitation fund. Regarding the third point, the court held that the vessel was providing coastal transportation service in the subject voyage and her license echoed that the vessel was only allowed to do cabotage. Therefore the amount of limitation fund should be ascertained according to the MOT's Measures. PICC Shanghai appealed the case which was dismissed by the Shanghai High Court.

Comments

This is an important case defining "vessel engaged in cabotage". This is also the leading case defining the scope of examination when owners apply to establish the maritime claim limitation fund.

"*Mawei Shipbuilding*"- Enforcing LMAA Award- Breach of LMAA Terms

The Facts

On 15 September 2003, Fujian Mawei ShipBuilding Co., Ltd and Fujian Shipbuilding Industry Group Company Limited entered into a ship building contract with the buyer, First Investment Corp. According to the contract, the buyer has an option to build eight more ships, and all the disputes arose should be submitted to London Arbitration as per LMAA rules. According to the rules, each party should appoint an arbitrator, and the two appointed arbitrators should jointly nominate the third arbitrator to constitute the tribunal. The buyer executed the option to build the eight ships according to the contract. However, the two shipbuilders refuse to perform the option. On 4 June 2004, the buyer initiated arbitration proceeding in London claiming loss of 45.4 million USD against the shipbuilders. The hearing had been held twice before 21 January 2006 when the chairman of the tribunal passed his first draft to the arbitrators appointed by the buyer and builders. However, the buyer appointed arbitrator was arrested by Chinese police due to economic crime. Thus, the final arbitration award was only signed by two arbitrators. On 19 June 2006, the final award was issued holding the builders to indemnify buyer 26.4 million USD. On 5 December 2006, the buyer applied to Xiamen Maritime Court to enforce the arbitration award.

The Decision

The court refused to recognize and enforce the award for the reasons that the arbitration was not carried according to LMAA Rules and English law. It was held that LMAA Rule 8 (e) would apply only when each arbitrator attended the whole arbitration procedure. Otherwise, the tribunal was not entitled to make the arbitration award. Thus, the arbitration procedure was flawed because the absent of the shipbuilder's arbitrator.

Comments

The case was well known to the industry. The court held that at the time of the case there were no LMAA procedures regarding arbitration with an absent arbitrator. The court rejected the arbitration award issued with only two arbitrators' signatures.

CASE REPORT

CMA CGM SA v Ship 'Chou Shan' [2014] FCAFC 90

By upholding the first instance decision, a Full Court of the Australian Federal Court had recently accepted the application to set aside an *in rem* proceeding. The Full Court Judges were satisfied that Australia is clearly inappropriate forum, while China is the "natural and obvious forum" for determination of the Plaintiff's claim arose out of a collision happened in the Chinese EEZ. The decision is not only remarkable in the Australian courts being the first time it approves an application to stay of maritime proceeding under the radical "clearly inappropriate" test, it also conveys practical implications to the Chinese judiciaries and practitioners.

The Facts

On 19 March 2013, the Panamanian flagged bulk carrier *Chou Shan* (CS) collided with the UK flagged *CMA CGM Florida* (CCF) in the Chinese Exclusive Economic Zone (EEZ). The Shanghai MSA commenced investigation in respect of liabilities, as the collision caused about 610 tonnes of fuel oil leaked from the CCF into sea.

Following the accident, both ships immediately proceeded to different Chinese ports for repair. On 9 May 2013, CS was arrested by cargo interest first. In response, CS interests raised the limitation defence and set up the limitation fund under PRC Maritime Code on 13 May 2013 seeking to limit all maritime claims. On 17 May 2013, CCF was arrested at a shipyard by CS interests for collision liabilities, and the proceeding subsequently commenced on 20 May 2013. However it follows that, two days later, on 22 May 2013, CS was arrested again in Port Hedland, Western Australia by CCF interests, who had an *in rem* proceeding against CS already commenced on 9 April 2013 before the Federal Court of Australia without notice to the Defendant. Two parallel proceedings were therefore running between CS and CCF interests on the same subject matter in different jurisdictions, of which China adopts the LLMC 1976 standard of limitation although not a member state to the convention, and Australia, a signing party of the LLMC 1996 protocol which provides a much higher limit for maritime claims.

In order to be relieved from the unfavourable Australian proceedings, CS filed an application for stay of (to set aside) the Federal Court proceeding. By considering such application, the Australian court's principle is to consider "whether Australia clearly inappropriate forum for determination of the plaintiff's claims".

The Judgments

By examining the factors as to the suitability of China as a forum - "the clear proximity to China in terms of distance, the role of the Shanghai Maritime Safety Administration, the commencement of suits there by a variety of parties and the ships streaming to Chinese ports to repair, all place the overarching control by a competent and skilled Chinese court as a natural and convenient consequences", the primary judge concluded that China was the natural and obvious forum and Australia, having no connection at all other than the commencement of the *in rem* proceeding and the arrest of the ship, the clearly inappropriate forum.

The Plaintiff appealed by arguing *inter alia* the primary judge's approach deviated from the Australian principle, under which, they argued, the judge should focus on the advantages and disadvantages of the local forum instead of analysing factors for a foreign court's suitability as a forum.

Appeal was dismissed. It was held the primary judge's conclusion as to China being the "natural and obvious forum" was both defensible in fact and relevant to the assessment of suitability of Australia, and that the primary judge's approach "does not necessarily betray any misapplication of Australian principle". The appealing court also affirmed that weighty consideration shall be given to the importance of avoiding multiple (parallel) proceedings and the serious inconvenience of the potential for inconsistent findings.

Notably, although the Full Court held that the plaintiff's juridical advantage is not decisive having assessed it under the context of the "clearly inappropriate forum" test, the judgment also indicates that whether Chinese limitation proceeding would debar the Plaintiff from seeking increase security under the LLMC Act 1989 after the Chinese proceeding is resolved remains an open question.

Comments

The Australian principle of asking "whether Australia is clearly inappropriate" is much harder to prove than the test "whether the other court is clearly more appropriate forum" widely adopted by the rest of the common law world. As a result, the traditional view is that it is extremely difficult for an Australian court to stay a proceeding brought under their jurisdiction. The *Chou Shan* however, provides some useful implications on how to satisfy the "clearly inappropriate forum" test.

One important approach approved by the Federal Court in Chou Shan is that where Australia has no substantive connection to the subject matter in dispute, the defendant can establish the "clearly inappropriateness" of the forum by relying on cumulating factors to the suitability of the other forum. It can be seen from the primary judge's opinion (affirmed by the Full Court):

"There is no one factor which would lead to this Court being a clearly inappropriate forum but there are multiple factors, taken cumulatively which do, in my view, lead to that conclusion."

that as to what kind of and to what extent such factors contribute to the conclusion is a matter of discretion.

The decision may be read in conjunction with the previous decision in *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai" (No 2)* made by the same court in December 2012 against a similar application for stay of the Australian proceeding against a ship involved in a collision occurred in the Straits of Malacca. The

collision caused the other ship sunk. The federal court judge held that neither China nor Australia had any substantive connection to the parties, despite that the vessel had been arrested by cargo interest in China, limitation fund had been set up in China, and duplicate proceedings were going on at the Qingdao Maritime Court. It was also held it was not improper to seek juridical advantage by bring the claim to Australia.

The decisions in Chou Shan have also attracted attentions from Chinese judiciaries and legal practitioners. It is believed that the Australian courts recognition to the Chinese legal system encourages the forum shoppers' confidence in the Chinese judiciary, and litigants who are expected to end up the paying party will certainly favour Chinese jurisdiction to the LLMC 1996 protocol regime jurisdictions to better protect their interests. But then the bigger concern is the lack of international significance in the Chinese limitation of liability regime. It again recalls the long-time calling for China, being a biggest player in today's international trade by sea, to accede to the LLMC Convention.

(Our senior partner, Mr. Chen Xiangyong, was called by the successful Defendant to providing expert opinions on Chinese maritime law, civil and maritime procedures, and the conflict of law rules at the Federal Court of Australia.)

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LAW UPDATE

New Tax Regulation over Foreign International Transportation Enterprises and its Impact on Maritime Transportation in China

On 30 June 2014, the State Administration of Taxation of China issued a notice for the Provisional Measures on the Collection of Tax on Non-resident Taxpayers Engaged in International Transportation Business ("the Provisional Measures"), which came into effect on 1 August 2014. The Provisional Measures aims at the incomes (e.g., charter hire, freight and surcharges, charges for loading and unloading, warehousing costs) received by non-resident enterprises conducting International Transportation Business ("ITB") in China. According to the Provisional Measures, non-resident enterprises are required to declare and pay taxes by themselves or by appointed agents. Besides the self-declaration and payment, tax authority can also designate a tax withholding agent who is legally obliged to withhold part of payment (e.g., charter hire, freight, and other incomes under ITB) to non-resident enterprises. Failure of declaring, withholding, or paying taxes can result in compulsory payment of tax due, fines, and penalties.

In pre-2014 era, although legally speaking, non-resident enterprises should declare and pay tax for the income received from ITB, such legal requirements were not strictly enforced by tax authority. There was no specific regulation guiding or demanding foreign companies to declare or pay tax. The major mechanism for collecting taxes on ITB was tax collection at source through withholding agents. In the Circular of the State Administration of Taxation on Issues concerning the Calculation and Collection of Enterprise Income Tax on Watercraft and Aviation Transportation Incomes of Non-resident Enterprises (Guo Shui Han [2008] No.952), the tax authority prescribed a unanimous withholding rate of 4.25%, comprising Business Tax (3%), and Enterprise Income Tax ("EIT," 1.25%), applicable to all revenue received from ITB, and required withholding agents, most of the times, Chinese charterers, to withhold 4.25% of the amounts (e.g., charter hire) that they were going to pay to foreign Owners. In fact, some withholding agents applied a higher withholding rate because they misunderstood, and thought of time charter hire as income arisen from property leasing or royalties, instead of transportation services. In contrast, for those ITB with no Chinese charterers involved, neither business tax nor ITB is actually levied.

Now the newly adopted Provisional Measures define ITB as transportation into or from Chinese ports, and provide that all ITB will be subject to EIT. It seems that even a shipment without a Chinese charterer involved could be considered as ITB, and therefore taxable in accordance with the Provisional

Measures. Such distinct perspective gives rise to two uncertainties. Firstly will the tax attach if a foreign Owner charters a vessel to a Chinese charterer, but the transportation is among foreign ports? Previously such income is subject to business tax, but not EIT. Another is that whether the tax will apply if a foreign Owner charters a vessel to a foreign Charterer, and no Chinese Charterer involved, but the vessel calls at Chinese ports. So far, the State Administration of Taxation gives no clarification in this regard.

The Provisional Measures defines Total Income under ITB and provides that actual, reasonable, and relevant expenses are deductible. In Article 7, the Provisional Measures explain that a Taxable Income is the balance of Total Income minor Deductible Expenses. The applicable tax rates (e.g., 10%, 20%, and 25%) are provided by the Law of the Enterprise Income Tax, and other related regulations. The tax to be paid is the result of multiplying Taxable Income with applicable tax rate. As a supplementary method to the above standard calculation, the Provisional Measures refer to the Circular of the State Administration of taxation on Issuing the Administrative Measures for the Assessment and Collection of Income Tax against Non-resident Enterprises (Guo Shui Fa [2010] No.19), which empowers tax authority to assess profit rates for tax payers and apply the profit rates to calculate Taxable Income. The Provisional Measures also provide detailed procedures for tax withholding, registration and declaration, account book setting, and tax treaty benefit application. Below is a brief review of the several salient points in the Provisional Measures.

1.What is International Transportation Business ("ITB")?

According to the Provisional Measures, ITB refer to transportation services of passengers, cargoes, mails, or others into or out of China via self-owned or leased ships, airplanes and shipment slots, and the relevant subsidiary business such as loading, unloading, and warehousing.

The Provisional Measures explicitly provide that voyage charter and time charter are ITB and therefore are subject to the applicable tax rate for transportation services under the Provisional Measures. This clarification ends the long debate of whether charter hire under time charter shall be deemed as income from transportation services, or property leasing. Incomes from property leasing are subject to different tax rates, and sometimes are not included into tax treaties for tax exemption.

2.Who should pay taxes?

A Non-Resident Taxpayer ("NRT") refers to a company incorporated outside China in accordance with foreign laws, and whose actual administrative institution is outside China, and who may or may not have institutions or establishments in China. NRTs engaging in ITB in China should pay taxes in accordance with the Provisional Measures.

3.What are Total Incomes, Deductible Expenses, and Taxable Income?

Total Incomes include, among others, all freight and surcharges, charter hire, passenger ticket revenue, service charges, and any other amount received from the provision of ITB. The Deductable Expenses refer to the actual, reasonable, and related expenses for ITB (e.g., running costs, crew salary, fixed asset depreciation, ports costs, and bunkers). In practice, the tax authority usually adopts a very strict review to the Deductible Expenses, and requires all these expenses should be well supported by written evidence, and sometimes sets upper limit to certain expenses. After fixing Total Income and Deductible Expenses, the tax authority can compute the Taxable Income, the difference of the above two.

4.How the tax is calculated?

The basic rule is to multiply the Taxable Income by an applicable tax rate. Depending on the actual circumstances, the applicable tax rate could be 10%, 20%, or 25%. If a NRT cannot accurately compute or truthfully declare its Taxable Income, the tax authority can adopt an Assessment Collection, by which the tax authority will prescribe a deemed profit rate, usually not less than 15%, to the NRT, and calculate an Ascertained Taxable Income by multiplying the Total Income by the assessed profit rate. The tax will be the result of multiplying Ascertained Taxable Income with applicable tax rate.

5.How the tax is collected?

Self tax registration, declaration, and payment

Within 30 days upon obtaining the business qualifications from relevant authorities or conclusion of transportation contracts/agreements, the NRT shall by itself or by proxy go through the registration formalities at a competent tax authority in places (e.g., a Chinese port) where it conducts ITB. Necessary items for registration include business certificate, relevant business contracts, voyage details, contact points in China, and other documents or information required by the tax authority. After successful registration, the NRT shall set up account books, keep account voucher, carry accounting in accordance with applicable accounting rules to compute income and expenses accurately. Tax shall be declared, and paid monthly or quarterly.

Collection at source through a withholding agent

Besides the above self-declaration method, the Provisional Measures also prescribes tax withholding via agents.

Withholding agents are parties making payment to NRTs, their subsidiaries, branches or agencies or foreign agents, or parties effecting payment through its associated foreign parties or interested third party. They are obliged to withhold part of their payments to NRTs, and pay the same to tax authority. Because withholding agents usually do not have information or documents necessary for computing incomes and expenses accurately, they will apply the above Assessment Collection mechanism, and use a profit rate not less than 15% to calculate Taxable Income. Assuming the withholding agent is a Chinese charterer and an applicable tax rate of 10%, the tax will be no less than 1.5% (i.e., profit rate 15% × tax rate 10%) of the charter hire. Furthermore, the withholding agent is obliged to withhold not only EIT under the Provisional Measures, but also other taxes (e.g., Value Added Tax).

6.Tax treaties on avoidance of double taxation or on maritime transportation

For the NRT residing in countries (e.g., Cyprus, and Greece) concluding tax treaties with China, the NRT can apply a tax exemption in accordance with such tax treaties. The NRT should file such application with supporting documents, including Enterprise Registration Certificates, Certificate of Legal Person, contracts or Charter Party, voyage description, and other documents requested by tax authority.

In addition, on a larger scale beyond the framework of the Provisional Measures dealing with the EIT, other taxes (e.g., Value Added Tax, imposed as a replacement to the Business Tax in accordance with the on-going tax reform in China) may also apply when foreign Owners are engaging in ITB within China. In overall, China has tightened up the tax regulation for ITB, and Owners should be vigilant, and always take various taxes into consideration before concluding Charter Party with Charterers.

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