敬海律師事務所
WANG JING & CO.

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Maritime and Commercial Law Newsletter

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News

Case Handled by WJNCO Listed on "Deals of the Year 2023" by China Business Law Journal

On 19 March 2024, China Business Law Journal, the famous legal media, released its "Deals of the Year 2023".

China Business Law Journal has selected cases and deals with major significance from mountains of submissions from Chinese and foreign law firms taking into account the significance, complexity and innovative nature thereof. Among the submissions, a maritime ship collision dispute handled by Ms. Zhang Jing (Partner) and Mr. Chen Jingzong (Associate) of WJNCO was made to the list.

Key Summary: the Tianjin Maritime Court ruled that Portovenere and Lerici (Singapore) Pte. Ltd. was entitled to claim the debt from Qinhuangdao Boen Trading Company Ltd. in the amount of USD581,961 and, within such limit, enjoyed the maritime lien over the auction proceeds of SHENG JIA HE 2.

In 2020, Singapore-flagged LNG tanker PORTOVENERE suffered a sudden boiler malfunction, resulting in complete power outrage and loss of manoeuvrability, and the vessel was drifting westwards; at the time of the malfunction, the Chinese-flagged vessel SHENG JIA HE 2 was anchored in open waters but did not switch on AIS or keep out of the way of the drifting PORTOVENERE as per the observation of good seamanship. When PORTOVENERE was attempting to resume power, the two vessels collided in the open waters off Daya Bay, Huizhou, which caused damages to the hull of PORTOVENERE.

Knowing that SHENG JIA HE 2 had been applied for auction by an asset management company due to arrears of the shipowner, WJNCO immediately applied for registration of claim with the Court and filed a declaratory action.

This case is different from the normal collision cases in three aspects:
Firstly, as the collision involved a vessel out of command and an anchored vessel, it is quite controversial as to the determination of the faults and proportions of liability of the two vessels. In the Maritime Safety Administration (MSA) Water Traffic Accident Investigation Report (the "Report"), the cause of the accident was initially attributed to the loss of control, lack of look-out, and failure to take collision-avoiding measures on the part of the vessel not under command merely based on the inductive reasoning that "anchored vessels are generally considered as not liable". On behalf of the owner of the vessel not under command, we raised objections and applied for re-examinations, arguing that it was simply an objective fact that the malfunction led to the vessel being out of control, and that the loss of control does not constitute negligence on the part of the crews in manoeuvring the vessel to avoid a collision, and thus was not the cause of the accident; although the anchored vessel was indeed at anchor, it shall still bear the responsibility to maintain proper look-outs and take timely and effective collision avoidance measures. Thus, the failure of the anchored vessel to fulfil these two obligations was also a direct cause of the accident. Eventually, the MSA fully adopted our viewpoints and revised the Report, which laid a solid foundation for us to argue for a favourable proportion of liability in the subsequent litigation process.

Secondly, according to the Maritime Code of China, maritime claims arising out of collisions shall be entitled to maritime liens; the period for enforcing maritime liens is one year from the day the maritime lien arises, which shall be exercised by the applicable court through ship arrest. However, in this case, within the one-year period, a third-party asset management company applied to the Court for arrest and judicial auction of the vessel due to debt disputes. Under such circumstance, we lost the condition to enforce the maritime lien by arresting the vessel, but could only register our claim during notice period of the judicial auction. Therefore, it was a dispute focus as to whether our maritime liens had been lost. For such, we conducted extensive research and managed to convince the Court to accept our viewpoints through analysis of the legal rationale therein and provision of few judicial precedents. Eventually, the Court held that the enforcement of our maritime liens through claims registration is in essence the

same as that through ship arrest, which provided a guarantee for our priority of compensation from the auction proceeds.

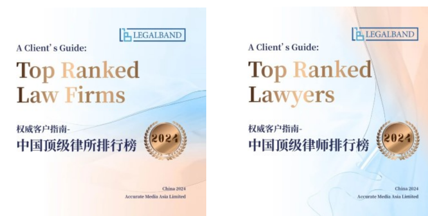
Thirdly, in this case, the judicial auction, claim registration and declaratory action were all filed with a maritime court. However, as the maritime court was entrusted by an intermediate people's court to auction the vessel, the auction proceeds were kept by the intermediate court, involving allocation of the monies across different courts. Through our efforts, we managed to obtain the allocated sums promptly, which effectively safeguarded the legitimate interests of the client.

Ms. Zhang Jing focuses on dispute resolution in Maritime & Admiralty, Offshore Engineering, Commercial Disputes and International Trade. Ms. Jing was honored as "1,000 Elite Lawyers on Foreign-Related Matters" by the Ministry of Justice of the People's Republic of China in 2019, was shortlisted for the "Woman Lawyer of the Year of ALB China Regional Law Awards: Coastal Areas" by Asian Legal Business in 2021 and 2022 consecutively, the "Woman Lawyer of the Year: South China & Central China" in 2022 and 2023 and was nominated as "Women in Business Law Awards 2023". Her clients include major P&I clubs, shipping companies, offshore engineering companies, and trade companies, and many major and difficult maritime and commercial cases that she has represented are of great influence.

Mr. Chen Jingzong joined Wang Jing & Co. in 2020. His primary practicing areas are wet and dry shipping and foreign-related civil disputes, including collision, carriage contracts such as Bs/L, charter parties and other admiralty disputes.

WJNCO Was Again Listed in LEGALBAND's Top Ranked Law Firms and Top Ranked Lawyers

Recently, the renowned law rating agency LEGALBAND released its 2024 Client's Guide - Top Ranked Law Firms and Top Ranked Lawyers.



LEGALBAND, with its headquarter in Hong Kong, is the professional legal ranking agency of Accurate Media, an international media group. LEGALBAND produced this year's rankings based on the long-term and in-depth observation on the Chinese legal market, with its Chinese research team spending months carrying out thorough studies of submissions from law firms and lawyers and extensive survey with clients and legal profession via phones, emails, etc., providing a professional guide to enterprises for choosing law firms and lawyers.

In this year's rankings, WJNCO was again listed in the Top Ranked Law Firms with practice areas of Maritime & Admiralty in Band 1 and Insurance in Band 2. Mr. Chen Xiangyong, Director and Managing Partner of WJNCO was again listed in the Top Ranked Lawyers with the practice area of Maritime & Admiralty in Band 1 for his professional excellence, prominent legal expertise, and prestigious reputation in the industry.

This is the seventh time since 2017 that WJNCO has been listed in the Top Ranked Law Firms by LEGALBAND. It is the firm's great honor to be recognized and trusted by clients and other legal profession regarding our legal services of specialist strength in the areas of maritime & admiralty and insurance.

Practice areas listed: Shipping - Maritime & Admiralty

The maritime & admiralty team at WJNCO offers broad and international standard services in handling maritime & admiralty cases to P&I clubs, ship owners, brokers, charterers, logistics companies, etc. The team consists of lawyers with international education background and abundant professional and practical experience working for shipping companies, maritime courts and maritime administration. The team also retains several ocean captains as marine consultants who are able to deal with various admiralty cases skillfully to support the team. For years, the team has accumulated abundant practical experience, especially in producing best solutions, providing efficient on-site assistance and considerate after-services to clients in complicated and remarkable cases. The team has also actively participated in the revision of the Maritime Law and Special Maritime Procedure Law of China and the demonstration of other maritime and admiralty regulatory policies.

Practice areas listed: Insurance

Equipping with solid theoretical foundation and enriched practical experience, WJNCO gathers a strong team of lawyers specialized in providing insurance legal services. The team has represented hundreds of insurance companies in handling insurance disputes and claims in China and abroad, focused on advising on insurance terms and P&I agreements, and actively participated in litigation and arbitration relating insurance claims. In addition to marine insurance (including ship insurance and shipping cargo insurance), WJNCO also has a competitive edge in dealing with non-marine insurance matters including aviation, property, engineering, liability, credit, etc.

Lawyer listed

Mr. Chen Xiangyong started practicing law in 1994. Over the past 30 years, he has handled numerous complicated and remarkable shipping cases, a handful of which have been written into the PRC Supreme People's Court's Selected Cases of Maritime Trial in China during the 30th anniversary of the establishment of the Maritime Courts. He has participated in the demonstration of stipulating regulatory policies on the limitation of liability for maritime claims, liability for oil pollution damage and establishing insurance system on civil liability for oil pollution led by the Supreme People's Court of PRC and Maritime Safety Administration of PRC. In addition, Mr. Chen sat in the advisory panel for amendments to the Chinese Maritime Law and Special Maritime Procedure Law, and is frequently invited as expert witness to assist the foreign litigation or arbitration proceedings in UK, Australia, Hong Kong, etc. Mr. Chen has been closely working with P&I Clubs, shipping companies, shipyards, oil companies, cross-border trading companies and financial institutes worldwide and has well-established bilateral relations with his clients.

WJNCO Awarded "Shipping Law Firm of the Year" by ALB for the 12th Time

On the evening of 23 May 2024, the gala ceremony of ALB China Law Awards 2024 was held at Rosewood Beijing and ALB announced the award winners at the ceremony. With strong expertise, excellent reputations, and client recognition, Wang Jing & Co. was again awarded "Shipping Law Firm of the Year".

The ALB China Law Awards aim to pay tribute to the outstanding performance of leading law firms, excellent in-house legal teams, and extraordinary legal specialists as well as the prominent transactional cases of the previous year, encouraging more legal teams and practitioners to make significant contributions in their respective fields. The ALB China Law Awards 2024 attracted nearly 260 law firms and in-house legal teams, with a new record of more than 1,800 nominations. Both the nominees and the winners are well-deserved legal elites with glittering performance.

Ms. Yang Junjie from Wang Jing & Co.'s Beijing office received the award on stage

It is another year of effort and reward. Since 2008, this is the 12th time that Wang Jing & Co. has received the award. Wang Jing & Co. adheres to the spirit of competence and commitment by following the strategy of "excelling in the area of expertise" and has maintained the reputation as one of the leading maritime law firms in China since establishment.

With diligent efforts and deep cultivation, Wang Jing & Co. has been moving forward with honours in the fields of Admiralty & Maritime and Insurance in the past 30 years, all of which come from the relentless dedication and continuing endeavour of our colleagues. Wang Jing & Co. will continue to strive with persistence towards new achievements in the foreign-related maritime and commercial fields.

WJNCO Recommended in the Benchmark Litigation China 2024 Rankings

Recently, Benchmark Litigation released its Benchmark Litigation China 2024 Rankings. Wang Jing & Co. was "Highly Recommended" in shipping, "Recommended" in international arbitration, and listed "Tier 3" in commercial disputes. Mr. Chen Xiangyong, director of Wang Jing & Co., was rated "Litigation Star" in the practice areas of international arbitration, shipping, and commercial disputes.

Listed Fields

Shipping

Highly Recommended
Wang Jing & Co

International arbitration

Recommended
Wang Jing & Co

Commercial disputes

Tier 3
Wang Jing & Co

Listed Individual

Xiangyong Chen

Jurisdiction:	Guangdong
Practice area:	International arbitration, Shipping, Commercial disputes
Rating:	Litigation Star 🏆

Benchmark Litigation was established in 2008 and is a renowned legal rating agency under Delinian (formerly Euromoney), focusing on market research in global litigation and dispute resolution. Benchmark Litigation China is a definitive guide to the leading law firms and lawyers within China. The findings are based on extensive interviews conducted by the research team with dispute resolution specialists, litigators, and their clients, combined with an examination of the cases handled by the firms, feedbacks from their clients, and opinions of the legal practitioners in the respective fields and jurisdictions during the research period.

| Cases and Insights

Latest SPC Adjudication: Carrier's Liability for Cargo Loss or Damage in Sea Carriage shall be Limited to the Lost Cargo Value as per Article 55 of the CMC

Abstract: In a recent SPC retrial decision, the SPC held that, considering the literary meaning, interrelation, and legislative intention of Articles 46, 55, and 56 of the China Maritime Code (CMC), Article 55 of the CMC not only provides the way to calculate compensation for loss of or damage to cargo, but also defines the scope of carrier's liability. Where the CMC has explicitly specified the scope of carrier's liability for cargo damage, general principles of the China Civil Code shall not be applied on top of such provision to aggravate the carrier's liability.

Case Reference: (2023) Zui Gao Fa Min Shen No. 2157 (Date of Issuing: 19 February 2024)

Disputes: How to interpret and apply Article 55 of the CMC? Apart from it, whether the carrier shall also be subject to the general principle of full compensation in civil law, i.e., apart from the total loss of cargo, whether the carrier shall be held liable for fees incurred to render the damaged cargo harmless?

Adjudication:
In the captioned case, the containerized cargo (raw chemical materials), upon arrival at the port of destination, was found as total loss by the cargo receiver. As the cargo was of a certain toxicity, special treatment was required to render it harmless, which incurred a large amount of disposal fees. The cargo interests then claimed against the carrier for the lost cargo value and the disposal fees.

The case has gone through the first instance trial, appeal and retrial. Both Parties admitted that the cargo damage occurred during the carrier's period of responsibility and the carrier should be liable for the cargo damage because it was due to the carrier's failure in maintaining proper temperature inside the container. The key dispute lies in the Parties' divergent interpretation and application of Article 55 of the CMC:

- The cargo interests, as the claimants, stated that Article 55 of the CMC only provided a way to calculate compensation amount (loss of cargo value) and did not specify the scope of carrier's liability for cargo damage. As such, the provisions under the China Civil Code concerning general damages and the principle of full compensation under civil law should be applicable. Fees incurred by disposal of the damaged cargo should be deemed as direct loss resulting from the carrier's failure to

Author:

Mr. Chen Xiangyong leads Wang Jing & Co's shipping, insurance and commercial dispute resolution practice. He is recognized and recommended by various legal directories including Chambers & Partners, Legal 500, and Asia legal Business as one of the leading lawyers for shipping, insurance and dispute resolution in China. Being an experienced practitioner in maritime and shipping law, Mr. Chen has handled numerous complicated and remarkable shipping cases, a handful of which had been written into the PRC Supreme Court's Selected Cases of Maritime Trial in China over the past 30 years.

With solid legal background, **Ms. Li Lan** has nearly ten years of practical experience in shipping law and her main practice areas are maritime and admiralty. She has been providing services to domestic and foreign clients for a long time. She is particularly well placed in advising on a broad range of shipping and trade-related matters involving bill of lading, insurance, ship oil pollution, ship collision, the construction and trading of ships, wharf construction, arrest of ships, international trade, etc.

care for the cargo and thus the carrier should be held liable for compensation therefor.

- The carrier defended that Article 55 of the CMC stipulated the compensation rule for the carrier where their liability shall be determined as per the lost cargo value. Therefore, the carrier's liability shall be limited to the cargo value in line with such provision.

The Supreme People's Court of China (SPC) affirmed the judgements by the Shanghai Maritime Court (first instance court) and the Shanghai High People's Court (second instance court) that given the CMC has explicitly specified the compensation amount payable by the carrier for cargo damage, the general principles in civil law should not be applied on top of such provision to aggravate the carrier's liability. Eventually, the SPC dismissed the claim head for cargo disposal fees.

WJNCO Comments:

In China's maritime judicial practice, there are continuous debates regarding the interpretation and application of Article 55 of the CMC. The above latest adjudication from the SPC is a positive sign for marine carriers. According to it, the carrier's compensation liability shall be limited to the loss of cargo value, whilst other consequential costs and losses alleged by cargo owners are not claimable.

Nonetheless, in China, the SPC judgements are not adducible source of law. The above adjudication by the SPC can only be future reference to other Chinese courts when they consider similar cases and has no legal binding effect. Besides, specific details of different cases also affect courts' judgements. For instance, while the captioned case involved total loss of cargo, with respect to those involving partial loss of cargo, in the famous retrial case Hachiman Shipping S.A. v. Shanghai Shenfu Chemical Co., Ltd. and Dorval Kaiun K.K. (case ref.: (2013) Min Ti Zi No. 6) over dispute of damage compensation as per contract of carriage of goods by sea, the SPC determined the calculation method for the partial loss of cargo to base on the cargo depreciation rate, and further supported the claim against the carrier for compensation of cargo damage survey fees paid to ITS and SGS. This case was selected by the SPC as one of the Eight Model Cases Regarding Providing Judicial Services and Safeguards by the People's Courts for the Construction of the "Belt and Road" and was included in the Gazette of the Supreme People's Court of the Republic of China (Vol. 2 of 2016) as a case for study, which apparently is of great reference value and influence.

Furthermore, in the retrial case Laredo Maritime Inc. v. Shandong Provincial Light Industry Supply and Marketing Co., Ltd. (case ref.: (2021) Zui Gao Fa Min Shen No. 1976) of dispute over contract for carriage of goods by sea, the cargo was partially damaged and then auctioned at the port of discharge. The SPC considered that there should be no transshipment or storage fees incurred had the sales contract been normally performed as agreed; accordingly these fees were directly incurred due to the cargo damage. In their retrial judgement, the SPC not only determined to calculate the loss of cargo value as per the cargo depreciation rate, but also supported the claim heads for transshipment fee and storage fee. It transpires that the SPC's opinion on interpretation and application of Article 55 of the CMC varies from time to time in recent years depending on different case details.

In any event, the latest adjudication by the SPC on the captioned case that carrier's liability for cargo damage shall be limited to the lost cargo value as specified by Article 55 of the CMC is a positive signal to carriers after all. It will also encourage the legal practitioners in China to exhaust the maritime law against prevalence of invoking civil law. Yet, whether such view will become a consistent trend in court judgements shall be further tested in actual judicial practice. We will look attentively at the latest development and present our further comments in due course.

Cases and Insights

Should the Shipyard be Liable for the Delay in Ship Repair?

Case Background

In February 2022, the Vessel "SH" grounded off the coast of the Philippines. In March, the Owners asked Shipyard "C" to provide a quotation and the estimated repair duration based on the DD repair specification provided. The Shipyard provided a quotation with payment terms stipulating 50% repair cost to be paid before sailing and the remaining 50% to be paid within 30 days after the vessel departs from the Shipyard; the estimated repair period was indicated as 35 good weather days.

However, the Shipyard's initial survey in early April suggested that the damage to the hull of "SH" had been much underestimated. On 27 April, the Shipyard provided an updated quotation to adjust the price for steel plate, but the payment terms and the estimated repair period remained unchanged.

Disputes arose during the repair as the Owners criticized the Shipyard for not providing adequate labor force, which caused a severe delay in the repair process, while the Shipyard attributed the delays to the Owners' various alterations to the repair scope and requirements.

On 5 October, the ship repair was completed, and the Owners had already paid more than 50% of the estimated repair cost then. In this regard, the conditions for the vessel to depart stated in the quotation should have been satisfied. However, the Shipyard prevented the vessel from departing by not arranging any tugboat, insisting that the final repair fee invoice be signed prior to the departure.

After negotiations, the Owners signed the final invoice and the vessel eventually departed on 8 October, with the entire repair period lasting over five months.

After the vessel departed, the Owners only paid part of the balance repair costs. The Shipyard then filed a lawsuit to claim the remaining repair costs, while the Owners raised counterclaim, arguing that they signed the final invoice under duress and claiming losses due to the delay in ship repair.

Dispute Focuses

- Whether the Shipyard was liable for the delay in ship repair.
- Whether the Owners were under duress when signing the final invoice.
- Whether the Shipyard's detaining of the vessel unlawful.

Author:

Wang Kai is a partner of Wang Jing & Co. Qingdao Office. Kai is proficient at legal procedures including litigation, arbitration, and execution and adept in handling litigation and non-litigation cases involving maritime and admiralty, marine insurance, and commercial affairs while knowledgeable in company law and insolvency & restructuring. Kai also serves as the perennial legal adviser of large-scale state-owned enterprises, shipping companies, and forwarding companies, providing his clients with comprehensive legal services including corporate compliance, legal risk prevention, and dispute resolution. With his solid erudition in law and the rigorous and practical working attitude, Kai is highly recognized and trusted by his clients.

Court Judgement

The court held that it cannot be proved that the ship repair was delayed by the Shipyard since the actual quantum of the steel plate to be renewed is much more than the initial estimation. The extension of the repair period can be justified under such circumstance.

It is not well-established that the Owners were under duress when signing the final invoice, as the Parties had negotiated the repair costs and the Shipyard had made discounts on the final repair costs.

Although the Owners argued that the Shipyard prevented the vessel from departing by not arranging any tugboat, the court deemed the evidence insufficient to substantiate the alleged as the evidence is merely a WeChat message from the local agent.

Based on the above, the court in the first instance supported the Shipyard's claim and dismissed the Owners' counterclaim.

The Parties eventually reached an amicable settlement during the second instance proceedings.

Our Comments

It is not uncommon that disputes occur during the process of ship repair, including those over repair period, repair costs, repair quality etc., particularly when the ship repair work is complex.

In principle, shipyards should be liable for delays in repair caused by their fault. In practice, however, discharging the burden of proof in this regard can be challenging for shipowners.

In the captioned case, the repair period indicated in the quotation seems too short since the actual workload was much more than the initial estimation. Additionally, the continuous discussions regarding the repair scope and requirements during the repair process might indeed have contributed to the delays. Although the Owners believed the repair was in fact delayed by the Shipyard due to insufficient labor input, the intricate nature of ship repair makes it rather difficult to definitively establish a reasonable repair period or assign fault to the Shipyard.

Similarly, it is difficult to establish the alleged intentional detention by the Shipyard and coercion in signing the final invoice, as the Shipyard acted discreetly and found various excuses to conceal their true purposes.

There are some tips for shipowners in ship repair projects to lower the risks:

1. Try to ascertain the specific repair scope, repair costs and repair period in the ship repair contract before commencement of the repair.

2. Specify in the contract that the shipyard should not take any measures to detain the vessel (including but not limited to refusal of arranging tugboats or other necessary assistance), except for the cases of liens, otherwise the shipyard should be liable for the shipowners' losses thus caused.

3. Request the shipyard to periodically report the progress of ship repair and the anticipated delivery date.

4. Record properly special circumstances which may affect the repair period, such as bad weather, force majeure etc., and check with the shipyard from time to time.

5. Raise objections to the shipyard in writing and engage lawyers for assistance once there is a sign of delay in repair or other breach of contract scenarios.

Cases and Insights

Risk Alert: Is it worthwhile escaping after entering an illegal fish farm?

Background

In recent years, the Xiamen Maritime Court, which has jurisdiction over maritime cases in Fujian Province, where our office mainly practices, has handled several cases related to ocean vessels accidentally entering illegal fish farms:

→ *"HL106/FX169/BHJ117" case*: In March 2021, the three vessels accidentally entered an oyster farm in Pingtan, Fuzhou, and the fish farmers claimed RMB 16 million for compensation. The defendants successfully defended that the oyster farm was illegally operated due to lack of licenses for the use of sea area and the farming activities. Consequently, the court only supported about RMB 1.36 million of the farmers' claim, which was upheld by the appeal court.

→ *"HCE" case*: In April 2023, the vessel entered an illegal abalone farm in Luoyuan Bay, Fuzhou, and was demanded for a cash security of RMB 15 million. As the fish farmers used various means to hinder the vessel's departure, the shipowners had no choice but to provide the required cash security after over 30 days of delay. However, the subsequent accident investigation report by the MSA found faults on both parties and thus both should bear equivalent liability. It is estimated that the cash security provided by the shipowners exceeded 50% of the fish farmers' losses.

→ *"DL" case*: In November 2023, the HK-flagged vessel similarly entered an illegal abalone farm in Luoyuan Bay and was demanded for a cash security of RMB 13 million. After 10 days of delay, during the negotiation period, the vessel caught the fish farmers off guard and "escaped", leading the fish farmers to lower their claim expectations and finally accept a cash security of RMB 5 million. As the vessel departed without the MSA's approval, the MSA imposed penalty on the vessel.

Risk Analysis

Based on the aforementioned cases, it is apparent that when a vessel inadvertently enters an illegal fish farm, shipowners are exposed to the following risks:

- <u>Illegal and Obstructive Actions by the Fish Farmers:</u>

Illegal fish farms are not marked on sea charts and there are normally no

Author:

Li Rongcun joined Wang Jing & Co. in 2002 after working for Penavico and is now director of the firm's Xiamen Office. Rongcun is efficient at handling complex cases in the fields of maritime & admiralty, offshore projects, shipping insurance, international trade, and shipping finance. Some of the significant cases he represented are selected as model cases by the Supreme People's Court, High People's Courts and maritime courts while some are selected as one of the outstanding dispute resolution cases by the Business Law Journal.

Zheng Xiaochen joined Wang Jing & Co. after graduation. She is mainly responsible for dealing with cases in connection with maritime contracts, insurance claims, international trade, corporate affairs, and maritime administration etc.

warning beacons around the farms to alert the passing vessels. As a result, vessels will not realize that they have accidentally entered a fish farm until abnormalities occur (e.g., entangled by aquaculture facilities or trapped by fishing nets after contacting therewith). However, such entry will be noticed by the fish farmers in short and they will take actions immediately (e.g., boarding the vessel without authorization or using small boats to intercept/besiege the vessel to prevent the vessel from leaving) to force the shipowners to accept their unreasonable demands (e.g., a huge amount of cash security or a quick settlement at the site). This is exactly what happened in both the *"HL106/FX169/BHJ117" case* and the *"HCE" case.*

- Exorbitant and Extravagant Claims by the Fish Farmers:

In China's judicial practice, on the premise of legal aquaculture, courts would support claims for loss of income/indirect losses (e.g., loss of profits, etc.) while in the event of illegal aquaculture, courts would not support loss of income/indirect losses to the aquaculture areas incurred by the vessel. Under the circumstance, fish farmers engaged in illegal aquaculture would often demand exorbitant (or even false) and extravagant claims in the attempt to remedy the "loss of income/indirect losses" from the accidents. In the *"HL106/FX169/BHJ117" case*, for instance, the fish farmers claimed as high as around RMB 16 million. Yet, based on the evidence submitted by the parties and the court's investigation, it was found that most of the aquaculture products had already been harvested and sold before the accident, and thus only RMB 1.36 million (9% of the initial claim) was supported by the court.

- Difficult and Challenging to Recover the Overpaid Cash Security:

Even if the subsequent MSA investigation or court judgment might hold that the liability to be borne by the shipowners is less than the fish farmers' losses, recovering the overpayments can be extremely challenging once the high cash security is paid since most of the fish farmers engaged in the illegal farming activities are natural persons (not companies) whose capacity to refund is limited.

- MSA Penalties for Unapproved Departures:

In the *"DL" case,* the vessel managed to get the cash security demand reduced from RMB 13 million to RMB 5 million by way of "escaping". Nonetheless, the shipowners received a penalty decision from the MSA due to the unapproved departure, though the penalty amount is said to be not large given that the shipowners have taken good remedial measures after the escape.

According to the relevant laws and regulations, subject to the gravity of such "escape", the shipowner, operator, or manager of the vessel will be fined RMB 100,000 ~ RMB 500,000; the captain and the crew member liable will be fined RMB 5,000 ~ RMB 50,000, whose certificates of competency will be permanently suspended (if the certificates were issued by a Chinese authority).

Comments

When fish farmers illegally operate fish farms without a legal license for the use of sea area or their farming activities, they tend to take various actions to hinder the vessel from departing the accident site in the attempt to force shipowners to provide a large amount of cash security or to accept a quick settlement at the site. Considering the great difficulty in recovering any overpaid amounts from fish farmers (even through legal proceedings) and the different consequences of the *"HCE" case* and the *"DL" case* in terms of cash security, opting for an "escape" strategy and accepting the MSA penalties seem more economical for shipowners.

However, before proceeding with such an "unconventional" strategy, it is advisable to assess the potential outcomes i.e., the liability to be borne by the shipowner, operator, manager, captain and/or crew member liable. It is also crucial to well prepare remedial measures to deal with any penalty or punishment imposed by the MSA.