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Content

Rules

1. General Provisions of the Civil Law of the People's Republic of China came into force on 1 October 2017

General Provisions of the Civil Law of the People's Republic of China ("General Provisions") aims to protect the civil rights and interests of the parties in civil relations and brings some new rules to us, one of which is the time limitation.

In comparison with General Principles of the Civil Law of the P.R.C. ("General Principles"), which has been effective since 1987, the General Provisions changed the general time limitation from two years to three years and deleted the one-year special time limitation (including disputes over personal injuries, sales of substandard goods without proper notice, delays and rejections of paying rent and loss of or damage to property under the care of other party).

Therefore, two different views on the limitation of above four natures of disputes appeared. One is their time limitation should be changed to three years while the other is it should remain unchanged.

The former holds although General Principles is still effective, the new law (say, General Provisions) should prevail if there is any conflict. Furthermore, it is also specified in Article 188 of General Provisions that if there are otherwise provisions in laws, such provisions shall prevail. The latter view holds there is no conflict between General Principles and General Provisions and the time limitation of above four disputes should be one year because it is unspecified in new law.

In accordance with the book named <The understanding and application of General Provisions of the Civil Law of the P.R.C.> chiefly edited by Mr. Shen Deyong, vice president of Supreme People's Court of the P.R.C, the rules of special time limitation should prevail over that of the general time limitation. In the meantime, two examples are given by this book to illustrate above principle including the provisions in Contract Law and Insurance Law. Therefore, we suppose the book's view is that the "otherwise provisions" do not cover the provision of one-year time limitation in General Principles. However, the exact limitation needs further interpretation.

WJ News

1. The firm's partners invited to attended to the London International Shipping Week 2017

As invited by the UK's Department of International Trade (DIT) and the British Consulate-General in Guangzhou, our Senior Partner Mr. Chen Xiangyong and Partner Mr. John Wang, as members of the China Maritime Industry Delegation, attended to the third London International Shipping Week in the UK from 11 to 15 September 2017(LISW17).

In fact, before his attendance to LISW17, Mr. Chen Xiangyong has been retained by British Consulate-General Guangzhou as a senior expert advisor in Chinese maritime law for the British Governmental Prosperity Fund.

LISW17 was organized by the Advanced Machinery & Marine Transport Group of DIT in association with the British Ports Association, the Department for Transport, Maritime London, Maritime UK, Shipping Innovation, Society of Maritime Industries (SMI), The Baltic Exchange, and etc.. China's delegation consisted of professionals from various institutes and sectors, including marine architecture, ship design and building, international cargo transport, maritime and commercial, ship financing and leasing, etc.

Despite of a busy working schedule, China's Ambassador in the UK, Liu Xiaoming, was present at the "Belt and Road" breakfast meeting of LISW17 to make a toast and speech. He expected Chinese enterprises could take advantage of UK's position as the global shipping service centre and turn cooperation between the two countries in shipping financing, shipping law, shipping dispute resolution and shipping insurance into new highlights for the "Belt and Road".

The delegation met LMAA President Ian Gaunt and former president Clive Aston at the Baltimore chamber of shipping and attended the seminar "How does Arbitration Support London" held by LMAA with hundreds of maritime arbitration experts.

The delegation then visited the world's leading shipbroker and integrated shipping services provider, Clarksons. Stephen Gordon as their Managing Director particularly introduced to the delegation their business in China and made in-depth discussions on how to promote and expand their Chinese market share.
Thereafter, the delegation participated into the London Chinese Shipping Forum organized by the London Chinese Shipping Association and subsequently visited the ING Bank which has a leading role in ship financing and leasing and the professional law firm, HFW.

The delegates were further invited to attend the welcome reception hosted by the British government in Lancaster House which was once a royal residence, where they had intimate conversations with the Minister of UK's Department of Transport, John Hayes and the President of UK Shipping Association, David Dingle, and had taken photos with them.

The Delegation also partook in the UK International Maritime Xchange hosted by DIT in Somerset House. Doctor Aaron Cai, the Senior Regional City Officer of British Consulate-General Guangzhou made a speech to elaborate how the Regional City Offices of British Embassy and Consulate-General in China promote the UK's maritime and commercial services in China.

2. Wang Jing & Co. provided legal service for Norwegian customers to build the world's first largest Super Ocean Farm

Our Norwegian customers built the world's largest "Super Ocean Firm" in China, which was delivered by Qingdao Shipyard, Wuchang Shipbuilding Industry Group, a subsidiary of the China Shipbuilding Industry Corporation.

The "Super Ocean Farm" has been successfully shipped to Norway and will be put into use.

In this project, partners Mr. Wang Jing and Mr. Xu Jun provided legal consultation service for the Norway customers.

In recent years, shipbuilding orders have declined in China, many shipyards transferred to tailor building various marine engineering equipment, such as drilling platforms, offshore wind power facilities and large fishing cage equipment, all these will be new legal services opportunities.

Chinese court adjudges carrier shall deliver cargo upon shipper's instruction under telex release

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Case background

Shandong Minmetals Garments Co., Ltd (the "Minmetals") booked space from Vanguard Logistics Services (Hong Kong) Limited (the "Vanguard") via Qingdao Zhuoyuan International Logistics Co., Ltd. (the "Zhuoyuan") in 2014. On 16 August 2014, Vanguard surrendered the photocopy of bill of lading (the "B/L") to Minmetals care of Zhuoyuan. As per the said B/L marked "TELEX RELEASE", the shipper is Minmetals, while the consignee is Morning Glow Inc. Upon arrival on 3 September, the subject cargo was delivered to the consignee as named in the B/L by Vanguard on 16 September.

Then, Minmetals lodged a claim against Vanguard and Zhuoyuan before Qingdao Maritime Court (the "QMC") on the grounds that Minmetals sustained losses of cargo payment because Vanguard delivered the cargo without their instruction. QMC affirmed that Vanguard should indemnify Minmetals for their losses; on the contrary, Zhuoyuan, as the freight forwarder, might not indemnify Minmetals for they were not at fault in this case. Dissatisfied at above Civil Judgment rendered by QMC, Vanguard referred the case to the appellate court.

Judgment

In the first instance, QMC ascertained that Vanguard should indemnify Minmetals for their losses of cargo payment for the reasons as below:

First of all, as a non-vessel operating common carrier (NVOCC), Vanguard issued photocopy of the B/L to Minmetals, whereby Vanguard and Minmetals entered into a contract of carriage of goods by sea;

In addition, telex release B/L was only the evidence of the contract of carriage executed between Minmetals and Vanguard and the cargo could not be delivered at discharging port by mere presentation of the telex release B/L. Vanguard's marking subject B/L photocopy with "TELEX RELEASE" indicates both Vanguard and the shipper Minmetals agreed upon how the cargo should be delivered. In other words, Vanguard promised to Minmetals that they would deliver the cargo to the consignee designated by the shipper as per telex release instructions and the original copy of B/L is not a necessary. However, in breach of the above agreements, Vanguard delivered the cargo in absence of the telex release instructions sent by the shipper Minmetals, depriving the shipper of their actual control over the cargo. Therefore, Vanguard should indemnify Minmetals for their losses arising therefrom.

During the proceedings of second instance, this case came to an end with the help of the court's mediation.

Comments

Since there is no explicit definition of "telex release" in prevailing international conventions and national legislations and in accordance with the relevant operation specifications, how far a carrier is obligated to deliver the cargo is greatly in dispute in theory and in practice alike.

In respect of the judicial practices in China, in the opinions of some courts, once a carrier-issued telex release B/L is accepted by the shipper, it shall be regarded that both parties have reached consensus on how the cargo shall be delivered. As a result, before the carrier delivers the cargo, it becomes unnecessary for them to receive the shipper's further instruction or approval; on the other hand, some courts may believe even though the shipper accepts the carrier-issued telex release B/L, it does not mean the carrier may deliver the cargo with the above B/L presented. Instead, the carrier shall still seek such specific instruction from the shipper. Obviously, QMC upheld the latter opinion in handling the aforesaid case. QMC affirmed that the parties concerned had confirmed the nomination of consignee at destination port and had agreed that the cargo could be delivered by way of "telex release". However, it is arguable that QMC ascertained Vanguard and Minmetals agreed upon the cargo being picked up by the shipper-nominated consignee on the basis of the shipper's telex release instruction, because there was no evidence indicating such ascertainment was the indeed agreement by both parties.

In conclusion, in view of the absence of referable explicit legal provisions or uniformed international and customary practices in relation to "telex release" at present, for the sake of avoiding disputes, it is recommended that carrier and shipper shall try their best to reach specific agreement as to the delivery of cargo, particularly whether carrier shall wait for shipper's "telex release instruction" upon cargo's arrival at destination port, in order to prevent and control potential risks in the procedure of "telex release" as much as possible.

Liability Subject of Oil Pollution Damage in Both-to-Blame Vessel Collision

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Background

In 2011, M/V "Hamburg Bridge" collided with M/V "Oriental Sunrise" in the channel of Qingdao Port, which caused M/V "Oriental Sunrise" sunk and oil spilled while M/V "Hamburg Bridge" only suffered slight hull damages without oil spill.

Thereafter, the local MSA and fish farmers claimed for oil-cleaning expenses and aquaculture losses arising from oil pollution against the owners of the above two vessels respectively.

Qingdao Maritime Court adjudged the collision liability as 70:30 in favor of M/V "Hamburg Bridge".

Comments

Although the above oil pollution claims are settled amicably, some legal issues are worth discussed, especially the liability subject of oil pollution damage in both-to-blame collision.

Currently, there are three controversial opinions as to the liability subject of oil pollution damage arising from both-to-blame collision.

The first opinion holds that the oil pollution damage arising from ship collision shall be regarded as third parties' property losses in accordance with Article 169 of the *Maritime Code of PRC*, based on which the colliding vessels shall undertake liability in proportion. Guangdong High People's Court upheld such opinion in the collision case between M/T "Min Ran Gong 2" and M/T "Dong Hai 209" in 2000.

The second opinion is that pursuant to the *General Principles of the Civil Law of PRC* and the *Tort Law of PRC*, both of the colliding vessels commit the joint tort and shall assume the joint liability. Guangzhou Maritime Court supported such opinion in the collision case between M/V "Vacherna Breeze" and M/V "Chao He" in 1988.

The last opinion takes the view that on grounds of the basic principle of "*the oil-spill vessel shall be liable for the damage*" as set out in international conventions for oil pollution damage, it is the oil-spill vessel/tanker other than the non-oil-spill one that shall be liable for oil pollution damages. Guangzhou Maritime Court was of such opinion in the collision case between M/T "Min Ran Gong 2" and M/T "Dong Hai 209" in 1999.

Paragraph 1 of Article 3 of the *International Convention on Civil Liability for Bunker Oil Pollution Damage* (the "Bunker Convention") provides that "*Except as provided*

in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences." It seems that the *Bunker Convention* is supportive of the principle that "*the oil-spill vessel shall be liable for the damage*", namely, the oil-spill vessel shall assume the full liability, while the non-oil-spill vessel shall not take liability directly.

China has acceded to the *Bunker Convention* and certain judgement had been rendered by Chinese courts as per it. In 2011, Ningbo Maritime Court adjudicated M/V "Min Long Yu 2802" to undertake liability solely for oil pollution damage in the collision with M/V "Desh Rakshak" pursuant to the *Bunker Convention*.

As a matter of Chinese law, in this case, as both M/V "Oriental Sunrise" and M/V "Hamburg Bridge" are foreign vessels which involves foreign elements, the *Bunker Convention* shall apply with priority. If the principle established by the *Bunker Convention* is "*the oil-spill vessel shall be liable for the damage*", the oil-spill vessel "Oriental Sunrise" shall solely be liable for the oil pollution damage, while the claimants shall not be entitled to claim against the non-oil-spill vessel "Hamburg Bridge" directly.

However, Article 5 of the *Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts* issued in 2015 (the "*Interpretation on Environmental Torts*") provides that "*The court shall accept the case filed by the infringed against the polluter and the third party respectively or simultaneously in line with Article 68 of the Tort Law of PRC. Where the infringed requests the third party to bear the liability, the court shall determine his liability based on his fault extent. The court shall not support the argument raised by the polluter that he shall not assume the liability or his liability shall be mitigated on grounds that the damages are caused by the third party's faults.*" In this case, M/V "Oriental Sunrise" shall be the "polluter", while M/V "Hamburg Bridge" shall be the "third party". Pursuant to such provision, the victims of oil pollution would have the right to directly request the Owners of M/V "Hamburg Bridge" to undertake the liability as per the collision liability proportion.

However, in a foreign-related oil pollution case, the *Bunker Convention* shall apply with priority. Therefore, it needs to be further identified whether or not the *Interpretation on Environmental Torts* may be applied to foreign-related oil pollution cases.

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Does Foreign award's recognition of unlawful external guarantee under Chinese Law violate Chinese public policy?

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Background

A Hong Kong-based shipping company (the "Owners") entered into a time charterparty (the "Charterparty") with a Hong Kong charterer (the "Charterer") for a period of approximately 58 to 60 months. For the sake of performance of Charterparty, a real estate company registered in Chinese mainland issued a letter of guarantee (the "LOU") to the Owners, by which to secure all obligations, liabilities, condition and warranty for the Charterer under the Charterparty. It is also agreed in the LOU that the governing law is English law and any disputes arising from or in connection with the LOU shall be referred to arbitration in London.

Later, as the Charterer breached the charter party, the Owner lodged a claim before London arbitration requesting the real estate company to indemnify the losses and charges arising out of the default of the charterparty. The real estate company responded to the arbitration in London accordingly. In the end, the arbitral tribunal in London rendered a final arbitral award which affirmed the effectiveness of the LOU and ruled the Owners should be fully indemnified. On the strength of the arbitral award, the Owners applied for recognition of the London arbitral award before Qingdao Maritime Court (the "QMC").

During the trial of this case, the real estate company defended the LOU was an external guarantee and should be invalid because such guarantee had not been approved by or registered in foreign exchange authority in China, which violated the mandatory provisions as set out in Chinese law and administrative rules. The London arbitral award affirmed the effectiveness of the subject LOU without any grounds, thus recognizing and enforcing such London arbitral award in China would violate the public policy of China. Accordingly, the real estate company requested QMC not recognizing or enforcing such arbitral award pursuant to Article V (2) of the *New York Convention*.

Judgment

Upon trial, it was decided by QMC that: although the real estate company provided an external guarantee unapproved/unregistered by any competent authority in China, which had violated Chinese legal provisions in connection with external guarantee, such act did not constitute a violation against the public policy in China and the recognition of the same would not go against the basic principles of Chinese law, infringe on national sovereignty, jeopardize national and social public security or contradict good customs and any other circumstances in relation to fundamental social and public interests in China. To conclude, as per the *New York Convention* and the laws and provisions in China, the subject arbitral award should be recognized.

Comments

The focal disputes in the above case are whether the LOU issued by the real estate company has breached the

mandatory legal provisions in China and whether the recognition of such London arbitral award is contrary to Chinese public policy.

The external guarantee under Chinese law refers to the guarantee behavior by which guarantor makes warranty in writing to creditor securing the performance of payment obligations in connection with the guarantee contract and accordingly potential cross-border receipts and payments of capital may occur. In this case, the LOU issued by the real estate company for the charterparty concluded between two Hong Kong companies shall be typical of external guarantee under Chinese law. Since the real estate company's issuance of the letter of guarantee was not granted approval or registration from Chinese foreign exchange authority, such act has violated the mandatory provisions with regard to the approval or registration of Chinese foreign exchange supervisor for the external guarantee as promulgated by the *Procedures for the Administration of foreign Guarantees issued by Institutions within the Chinese Territory* and the *Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of Guarantee Law of the People's Republic of China*, which were still effective when the subject case was tried.

As per Article V (2) (b) of the *New York Convention*, where the competent authority in the country where the application for recognition and enforcement is entertained finds out that recognition and enforcement of an arbitral award will contradict the public policy of that country, the authority may refuse to recognize and enforce such award. In this case, the London arbitral award has affirmed the effectiveness of the letter of guarantee issued by the real estate company, which contradicts the mandatory provisions as set out by Chinese laws. To further, the question rests on whether the violation of mandatory provisions as promulgated by Chinese law will be equivalent to contradiction of Chinese public policy? QMC's judgment on this case gives a negative answer to the above question. In the meanwhile, it is also significant for QMC to explicitly detail the specific circumstances of violation of Chinese public policy, including breach of basic principle of Chinese law, infringement on national sovereignty and violation of good customs that may imperil the fundamental social public interests.

According to the judicial practices in China, most of Chinese courts choose to stay prudent in declining recognition/enforcement of foreign arbitral award by reason of violating Chinese public policy. By reference to *Letter of Reply of the Supreme People's Court on Request for Instructions Re Application of ED&F (Hong Kong) Co., Ltd. for Recognition and Enforcement of the Arbitral Award of London Sugar Association* ([2003]MSTZ No.3) and *Letter of Reply of the Supreme People's Court on Request for Instructions Re Application of GRDMinproc Limited for Recognition and Enforcement of the Arbitration Award of Arbitration Institute of the Stockholm Chamber of Commerce* ([2001] MSTZ No.12), the Supreme People's Court opines that a foreign arbitral award shall not be easily declined recognition and enforcement even in violation of mandatory provisions as set out in Chinese law, administrative rules, regulations and departmental rules for it does not necessarily contradict Chinese public policy.

In the case as referred to by the *Letter of Reply of the Supreme People's Court to a Request for Instructions on the Non-Recognition and Non-Enforcement of an Arbitration Award of the ICC International Court of Arbitration* ([2008]MSTZ No.11), Chinese court refused to recognize and enforce a foreign arbitral award as they hold such award might go

against the public policy. To elaborate, the reason given by the court is: since Chinese court had rendered a judgment on disputes over the lease contract between the parties concerned, ICC International Court of Arbitration prejudiced Chinese judicial sovereignty and jurisdiction of Chinese courts by further arbitrating the disputes arising from the lease contract and handing down the arbitration award.

At present, the latest foreign exchange administration in China has eased the restrictions on approval and registration of external guarantee. The *Provisions on the Foreign Exchange Administration of Cross-border Guarantees*, effective since 2014, sets out that the approval, registration or recordation granted by the foreign exchange authority to a cross-border guarantee contract shall not be preconditions for the effectiveness of the contract. On the other hand, the *Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of Security Law of the People's Republic of China* remains unchanged and still include provisions that any external guarantee, absent approval and registration of foreign exchange authority, shall be ineffective. The effectiveness of external guarantee without approval and registration of foreign exchange authority has not reached a decisive conclusion in the Chinese judicial practices so far. However, Chinese courts are still apt to examine and review the case on recognition and enforcement of foreign arbitral award in strict compliance with the *New York Convention*, and tend to be discreet in any possible refusal on the same by reason of violation of Chinese public policy. We will keep an eye on any updates on recognition and enforcement of foreign arbitral award and present further comments and advice in due course.