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Rule

1. China Updates the Regulations on Safety Supervision and Management of Ships Carrying Dangerous goods

The PRC Ministry of Transport promulgated the Regulations on Safety Supervision and Management of Ships Carrying Dangerous Goods on 9 August 2018 (hereinafter referred to as Regulations 2018), which has come into effect on 15 September 2018. Meanwhile, the existing Regulations which have been revised in 2012 and the first part of the Rules on Carriage of Dangerous Goods in Package by Waterway will be abolished. Compared to the old rules and regulations, the new version has been updated in the following aspects:

1. Requirements for ships and personnel management

The Regulations 2018 stipulate that ships carrying dangerous goods must install and adopt automatic identification system (AIS). Ship operators and managers shall intensify the dynamic shipmanagement. The ship operator or manager engaged in carriage of dangerous goods shall employ full-time safety management personnel.

2. Unifying requirements for domestic and international carriage of dangerous goods

Carriage of dangerous goods by inland water has been under high risk exposure in recent years, especially in the water area along Yangtze River. This has reflected that requirements for domestic transport of dangerous goods shall be tightened. Under such background, the Regulations 2018 have unified the requirements for domestic and international carriage of dangerous goods. Ships carrying dangerous goods shall strictly conform to the IMDG Code. Ships carrying Group B solid bulk cargo shall comply with the requirements under the IMSBC Code.

3. Packaging and container management

The Regulations 2018 have contained a new chapter on packaging and container management, which stipulates requirements for packaging of dangerous goods to be carried by ships and new types or improved types of packaging. Requirements for containers to be stuffed with dangerous goods have also been specified. The container to carry dangerous goods must be clean, dry and stainless and shall be inspected and approved by ship survey authorities attested by the State Maritime Safety Administration.

4. Safety responsibilities of shippers and carriers

Shippers shall provide carriers with information about types, quantities, characteristics of dangerous goods and emergency measures for disposal, and also report the relevant information to the competent maritime safety administration. Carriers shall verify information provided by shippers. Cargos which do not meet requirements for fitness of carriage shall not be loaded on board for sea carriage.

5. Requirements for safety supervision upon ships carrying bulk liquefied gases

In view of the special danger of carriage of liquefied petroleum gas, the Regulations 2018 stipulate that a consultation system shall be established between ships and shores before loading and unloading operations, and that written agreements on cargo operation, ballast operation and emergency response should be concluded.

When conducting gas test in navigable waters, the institute responsible for operation shall conduct safety risk argumentation.

6. Requirements for washing tanks of coasters carrying dangerous goods

The Regulations 2018 require that the coasters carrying hazardous bulk liquid cargo shall wash their tanks at wharfs, special anchorages and washing stations intended for such kind of cargo, and also specify under what circumstances the washing can be exempted so as to effectively prevent the deliberate discharge of chemical tank washings and sludge from polluting the marine environment.

7. Identification of dangerous goods

The Regulations 2018 have also specified the scope of dangerous goods to be carried by ships by enumeration, which shall include the followings:

a) The dangerous goods in package named in the list of Part 3 of the IMDG Code and other goods in package which are assessed of safety hazards although not in above list;

b) The Group B solid bulk cargos which are named in Appendix I of the IMSBC Code and other bulk goods which are assessed of chemical hazards although not in above list;

c) The bulk oil cargos listed in Appendix I of MARPOL Convention;

d) The bulk liquid chemicals listed in Chapter 17 of IBC Code and other bulk liquid chemicals which are assessed of safety hazards although not in above list;

e) The bulk liquefied gas listed in Chapter 19 of the IGC Code and other bulk liquefied gas which are assessed of safety hazards although not in above list;

f) Other dangerous goods which are providing in national standards or the accessed or concluded international treaty.

By promulgating the Regulations 2018, the PRC Ministry of Transport have unified the requirements for international and domestic transport of dangerous goods and intensified management upon shippers and carriers. It shall be wise for relevant shippers and carriers to pay special attentions to those new provisions for compliance with law.

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China International Commercial Courts- A New Choice for Dispute Resolution ?

Dai Yi/Qu Jiaqi

On 29 June 2018, the Supreme People's Court of China (*the "SPC"*) officially launched its two International Commercial Courts in Shenzhen of Guangdong Province and in Xi'an of Shaanxi Province (*the "CICC" or collectively "CICCs"*) to adjudicate international commercial cases according to *the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court* (the "Provisions"), which clarify functions and powers of the CICCs and have come into effect since 1 July 2018.

The CICCs specialise in resolution of international commercial disputes. As a permanent adjudication organ of the SPC, the Fourth Civil Division of SPC is responsible for coordinating and guiding the two CICCs. Judges of the CICCs are selected by the SPC from experienced judges familiar with practices in international commerce and investment and having language proficiency to work in both Chinese and English. Currently, the SPC has appointed eight Judges for the CICCs. A tribunal hearing a specific case will consist of three or more judges.

We now summarise key features of the CICCs as follows:

I. CCICs' jurisdiction

The Provisions specify that the CICCs may handle five categories of cases including:

(1) First instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least 300,000,000 Chinese yuan;

(2) First instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's Court for which permission has been obtained;

(3) First instance international commercial cases that have a nationwide significant impact;

(4) Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions;

(5) Other international commercial cases that the Supreme People's Court considers appropriate to be tried by the International Commercial Court.

The term "international commercial case" is extensively defined to refer to any case in which one of the following factors is present:

(1) one or both parties are foreigners, stateless persons, foreign enterprises or other organizations;

(2) one or both parties have their habitual residence outside the territory of the People's Republic of China;

(3) the object in dispute is outside the territory of the People's Republic of China;

(4) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China.

Apparently the CICCs in theory offer a new choice for the resolution of international commercial disputes where the amount in dispute is more than RMB 300 million based on the parties' consensus. Nonetheless, Article 34 of the Chinese Civil Procedure Law shall be taken into account when considering opting for lawsuits before the CCICs (*Article 34: The parties to a contract may agree to choose the people's court of the place linked to the dispute including where the defendant is domiciled, or the contract is performed, or the contract is executed, or the plaintiff is domiciled or the subject matters located in writing, to have jurisdiction over the case, as long as this jurisdiction choice does not violate the provisions of this Law regarding the jurisdiction by level and the exclusive jurisdiction.*). In other words, the case under this category must have substantial connection with mainland China. In this regard, other international commercial courts such as Dubai International Financial Centre Court, Singapore International Commercial Court and Abu Dhabi Global Market Courts have no such requirements.

II. The Expert Committee

First group of 32 Chinese and foreign experts are appointed to consist of the expert committee (the "Committee") on 26 August 2018 in accordance with the Provisions. The Committee members come from China and countries along the route of the Belt and Road.

In accordance with the Provisions, under international commercial disputes between parties, the Committee shall first attempt to mediate and issue a mediation agreement if parties agree so.

III. Evidence

The Provisions also set out certain requirements for evidence. In principle, any evidence submitted by the parties concerned (whether or not that have been notarised and legalised or otherwise certified) are required to be "cross-examined" during the hearing.

In addition, the parties concerned are permitted to adduce evidence in English without corresponding Chinese translation with consent of the opposing parties.

IV. Ascertainment of foreign laws

The Provisions have provided more possibilities for ascertaining foreign laws, including but not limited to ascertainment through the particular parties, Chinese and foreign legal experts, law ascertaining institutes, the Committee, the central government of a country that has entered into a judicial assistance treaty with China, and the Chinese embassy in that country, as well as its embassy or consulate in China.

V. One-stop dispute resolution mechanism

The CICCs are a three-in-one dispute resolution platform including integrated litigation, mediation and arbitration.

▪ **Mediation**

Within seven days of accepting the dispute case, and upon agreement by the parties concerned, the CICCs are empowered to appoint Committee members or an international mediation institution to mediate the dispute. If the parties have reached an agreement under mediation, the courts are further empowered to issue a mediation award or a judgment in accordance with the mediation agreement if the parties so request.

▪ **Arbitration**

If the parties opt for solving the dispute by arbitration, the dispute will be referred to an international arbitration body. The parties may apply to the CICC, either prior to commencement of or during the arbitration proceedings, for a court ruling on preservation of property, evidence or conduct.

All judgments and rulings rendered by the CICCs are final and unappealable and are legally effective, whilst a mediation award issued by the CCIC will have the same legal effect as court judgments/rulings. The parties may apply to the CICC for enforcement of these judgments, rulings and mediation awards. If the parties refuse to accept the judgements/rulings, they can also apply for a retrial before the SPC and the SPC shall form another collegiate panel for the retrial.

For comparison purpose, other international commercial courts including Dubai International Financial Centre Court, Singapore International Commercial Court and Abu Dhabi Global Market Courts all established the first instance court and the court of appeal, and adopt the system of the second instance as the final.

VI. Official online litigation platform

To increase efficiency and convenience of the dispute resolution mechanism, the Provisions also provide for electronic case registration, payment, review of files, exchange of evidence, service of process and hearings on line.

VII. Conclusion

The establishment of CICCs remarks a new dispute resolution mechanism under China's current legal regime. Compared to litigation, arbitration is by far a more popular dispute resolution method in international commercial projects involving Chinese elements. It is worthwhile to keep monitoring parties' choices/ experiences for dispute resolution at the CICCs and see if the courts may offer a viable option for resolving international commercial disputes. Of major importance will be the stance that the CICCs take towards the enforcement of foreign arbitration awards.

In the meantime, however, there are certain procedural and practical issues which shall be further clarified, such as the legal status of the Committee and how the experts remain neutral in the disputes. Foreseeably further new regulations or interpretations will be promulgated in this respect.

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China SPC Launched the Fourth Judicial Interpretations Concerning Application of the PRC Insurance Law

Li Rongcun/ Li Lan

On 31 July 2018, the Supreme People's Court have issued the Fourth Interpretations on Several Issues Concerning Application of the PRC Insurance Law ("Interpretations IV"). The Interpretations IV taking effect since 1 September 2018, have given further guidelines on resolving disputes over transfer of insured subjects, rights and obligations of parties to the insurance contract, subrogation rights and liability insurance. We will introduce herein some significant highlights of the Interpretations IV and provide our observations on possible impacts and risks incurred thereby.

Highlight 1. No need for insurer to remind or explain again when the insured subject is transferred by his assured

The Interpretations IV provide in Article 2 that "*where the insurer has performed the obligations of reminding and explanation stipulated in the Insurance Law to the policy holder if the assignee of the insured subject alleges the clause exempting the insurer's liability to be invalid on grounds that the insurer fails to remind or explain to the assignee after the transfer of the insured subject, such allegation shall not be upheld by the People's Court*". Such provision clarifies that the insurer is merely obligated to remind and explain to the specific policyholder. If the insured subject has been transferred, the insurer is not obligated to remind and explain to the assignee of the insured subject again.

Highlight 2. The insurer shall indemnify reasonable expenses incurred by the assured for loss prevention and/or mitigation

The PRC Insurance Law prescribes in Article 57 that *"the assured shall, at the time of occurrence of an insured accident, endeavor to adopt the necessary measures to prevent or mitigate losses. Upon occurrence of an insured accident, the insurer shall undertake necessary and reasonable expenses incurred by the assured for prevention or mitigation of losses of the insured subject; the amount of expenses undertaken by the insurer shall be calculated separately from the payable indemnity amount and shall not exceed the insurance amount"*. The insurer is thus regulated to compensate the necessary and reasonable expenses, but in practice the insurer often refuses to pay these expenses on excuse that measures adopted by the assured are not of significant effects in loss prevention or mitigation.

Article 6 of the Interpretations IV targets at encouraging the assured to adopt necessary measures to prevent or mitigate losses. It stipulates that "*Upon occurrence of an insured accident, where the assured requests the insurer to undertake the requisite reasonable expenses for prevention or mitigation of losses of the insured subject pursuant to the provisions of Article 57 of the Insurance Law, and the insurer counterpleas on grounds that the measures adopted by the assured were not of actual effect, the People's Court shall not support the insurer's allegation.*" Accordingly, whether the expenses incurred for loss prevention and/or mitigation should be compensable shall depend on whether they are "necessary and

reasonable" other than whether the measures adopted were of actual effect.

Highlight 3. The insurer can seek recovery from the policy holder.

Article 8 of the Interpretations IV prescribes that "*where the policy holder and the assured are different legal entities whilst the policyholder causes an insured accident as a result of damaging the insured subject, if the insurer lodges a subrogation claim against the policyholder to exercise the assured's right to request for compensation, the People's Court shall accept the subrogation claim, unless otherwise stipulated by laws or agreed in the insurance contract.*"

Accordingly, the policyholder, if they are not the assured, are able to prevent themselves from being claimed by the subrogated insurer relying on the above "proviso" by reaching agreement with the insurer. As long as the agreed terms are not against Chinese Law, the insurer shall be bound by it. It is therefore our suggestion to the insurance company to pay attention to the terms and conditions of insurance contracts to be concluded; once they agree to waive rights for claim against the policyholder in the insurance contract, they are not entitled to claim against the policyholder even though it is proven that the insured accident is caused by the policyholder.

Highlight 4. Principles to handle the situation where the assured waive their rights to claim compensation from the third party

In real insurance practice, it is common that the assured would waive their rights of claiming compensation against a possibly liable third party. Accordingly, the Insurance Law provides in Paragraph 1 of Article 61 that "*upon occurrence of an insured accident and prior to making insurance indemnity by the insurer, where the assured waive their rights to claim for compensation from the third party, the insurer shall not be liable for compensation.*" However, it remains as ambiguous on how to deal with the waiver by the assured of their rights to claim against the possibly liable third party before occurrence of the insured accident. Paragraph 1 of Article 9 in the Interpretations IV now clarify that the insurer are not entitled to claim against the possibly liable third party if the assured have, prior to conclusion of the insurance contract, waive their right to request for compensation from that third party.

Moreover, Paragraph 2 of Article 9 of the Interpretations IV stipulates that "*at the time of conclusion of the insurance contract, where the insurer enquire whether any aforesaid waiver of right but the policyholder fail to advise truly, resulting in failure of the insurer's subrogation claim, the People's Court shall support the insurer's request for refund of the corresponding insurance indemnity, except where the insurer are or should have been aware of the aforesaid waiver and still agree to undertake insurance.*" It can be seen that the prerequisite for the insurer to recall the insurance indemnity is that the assured fail to advise truly their prior waiver of right inform on the insurer's enquiry. Furthermore, Interpretations II on Several Issues Concerning Application of the Insurance Law of PRC provides in Article 6 that "*the notification obligation of a policyholder shall be limited to the scope and contents enquired by the insurer. where the parties concerned have any dispute over the scope and contents of the enquiry, the insurer shall bear the burden of proof.*" Therefore, if the insurer fail to enquire their assured about any waiver of rights, the assured have no obligation to inform without enquiry and any possible adverse consequences incurred thereby shall be undertaken by the insurer.

To avoid impact upon subrogation claim arising from assured's forfeiture, we suggest the insurer write in their form of insurance slip to require the assured to disclose whether they have waived the right to claim against a third party or any other behavior/agreement which would affect

the subrogation claim. The insurer shall be cautious if the assured have already acknowledged the waiver, because in accordance with Paragraph 6 of Article 16 of Insurance Law, "*where an insurer is aware, at the time of conclusion of the contract, that the policyholder has not provided truthful information, the insurer shall not rescind the contract; upon occurrence of an insured event, the insurer shall still be liable to compensate or pay the insurance indemnity.*" That says, if the insurer agree to launch insurance cover under such situation, they shall be liable for the insurance accident and are not entitled to claim against any liable third party.

Highlight 5. Regulation on how to deal with the situation where the liable third-party pay extra indemnity to the assured

To seek balance of interests among insurer, assured and third parties, Article 10 of the Interpretations IV expresses whether the assured can be extra compensated by the third party after receiving insurance indemnity from the insurer as follows:

1) if the insurer has indemnified the assured and acquired the subrogation right but not yet inform the third party, or before the notification of subrogation reaches the third party, the third party has made compensation to the assured, the insurer shall not raise a subrogated claim against the third party but can request for refund of the insurance indemnity partially if not all;

2) Where the insurer has informed the third party that he has obtained the subrogation right, and yet the third party still compensate the assured, the insurer is entitled to lodge a subrogated claim against the third party directly.

Obviously whether the notification of subrogation has reached the third party is vital important under the above legal concept. For avoidance of unnecessary disputes, we suggest the insurer informing the third party timely of their subrogation by various methods including emails, fax and courier and keeping the relevant receipts.

Highlight 6. Starting point of the time bar for liability insurance claim has been specified.

It remains arguable for quite a long time when the time bar of assured's claim under liability insurance should start counting and four dominant views are:1) the time when accident occurred; 2) the time when the assured is claimed; 3) the time of determination of the liability and 4) fulfillment of the liability of indemnity. According to the book <Understanding and Application of Provisions in the Chapter-Insurance Contract of < the Insurance Law of PRC>> compiled by the Interpretations Team of the Supreme People's Court, "*the time bar of the assured's claim under liability insurance shall start from the date on which the third-party raises claim against the assured.*" Obviously, it adopts the second view "the time when the assured is claimed".

The Interpretations IV initially adopted the 4th view as mentioned above in Article 23 of the Draft for Comments, which prescribed that "*the time bar of the assured's claim under liability insurance shall start from the date on which the assured indemnify the third party.*" But it received overwhelming criticism to the effect that it was unfair to the insurance company if the starting point of time bar depends on when the assured agree with the third party to compensate. Thus in the formally released version, the Interpretations turn to adopt the third view and stipulate in Article 18 that "*the time bar of claim by the assured against their commercial liability insurer shall commence from the date on which the assured is held as liable for compensation towards a third party.*"

Highlight 7. Settlement agreement between assured and third party does not necessarily bind the insurer.

The Supreme People's Court indicate that the original purpose of Article 19 of the Interpretations IV is to protect and endorse settlement agreement concluded between the assured and the third party, however, it seems rather difficult to achieve such legislative intent.

Paragraph 1 of Article 19 of the Interpretations IV stipulates that "*where the assured under a liability insurance policy and a third party have reached settlement with respect to the assured's compensation liability with prior consent of the insurer, if the assured asserts that the insurer should bear insurance liabilities within the scope of the insurance contract in accordance with the settlement agreement, the People's Court shall support the assertion.*", and its Paragraph 2 further makes it clear that as long as the insurer do not confirm consent to the settlement, they are entitled to reassess the liability insurance scope and indemnity amount. In other words, once the insurer are not involved in or expressly disagree with the settlement between the assured and the third party, the settlement agreement bears no binding force upon the insurer. For avoidance of deprivation of defense to the insurance scope and indemnity amount, it seems better for the insurer not to confirm the settlement even if they get involved in the settlement negotiations.

The formally released Interpretations IV contain 21 articles and delete 5 articles from the previous Draft for Comments. The deleted articles are about legal consequences of carrier's effecting insurance against cargo loss, undertaking of insurance liability for unrepaired insured subject, the interrupt of time bar of assured's claim for insurance compensation and the insurer's recovery against the third-party's guarantor. Mr. He Xiaorong, member of the Supreme People's Court Judicial Committee, explained in a press briefing that the Interpretations IV do not provide adjudication standards for some premature issues which are still under exploration and shall be further tested by real practice." It seems that issues touched by those deleted articles still remains arguable.