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WANG JING & CO.

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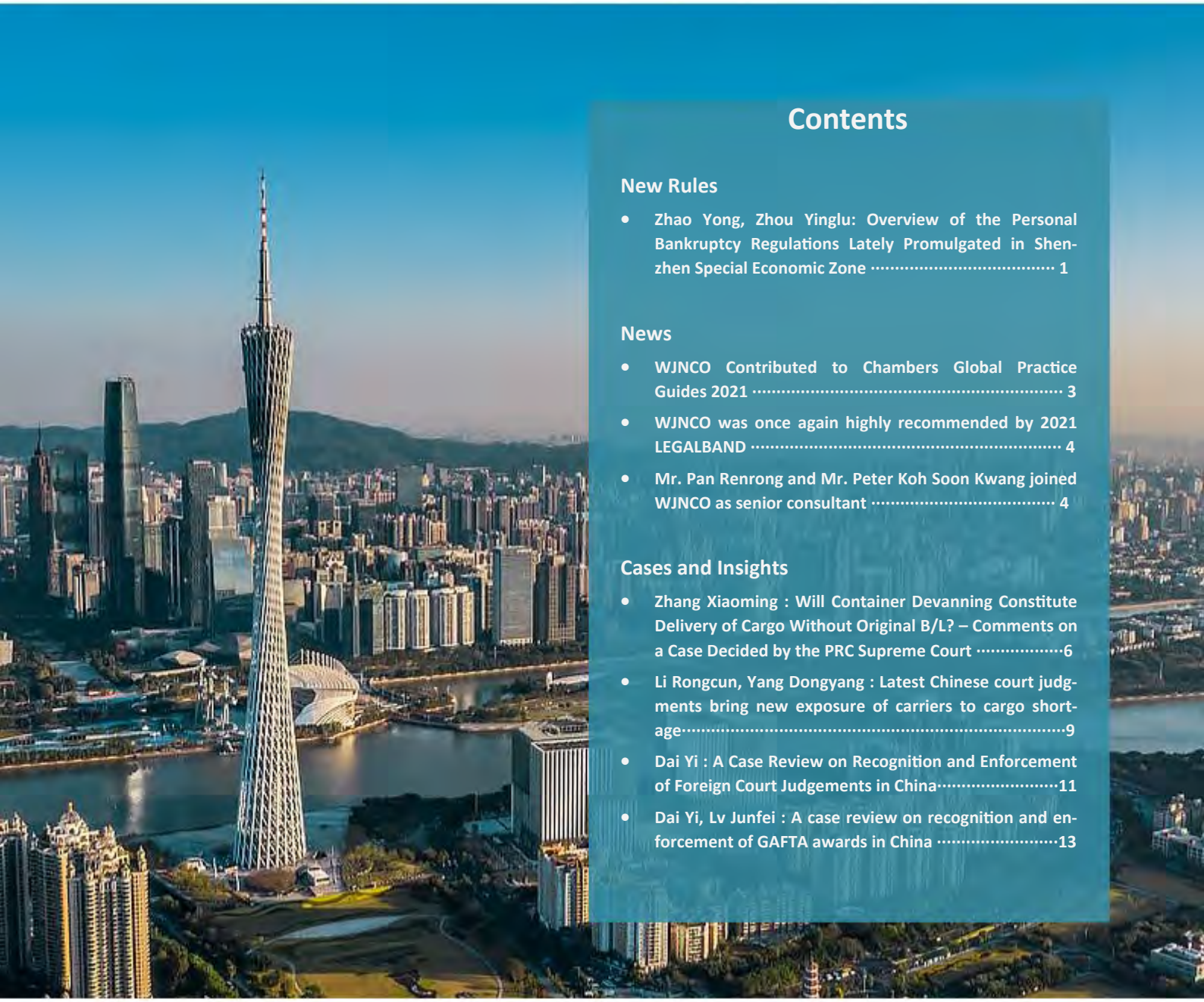
Maritime and Commercial Law Newsletter



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| New Rules

Overview of the Personal Bankruptcy Regulations Lately Promulgated in Shenzhen Special Economic Zone

On 1 March 2021, the *Personal Bankruptcy Regulations of Shenzhen Special Economic Zone* (hereinafter referred to as the "*Regulations*") officially came into effect, and the Shenzhen Bankruptcy Administration, China's first governmental agency administering personal bankruptcy affairs, was also inaugurated. Promulgation of the *Regulations* marks the parallel running of personal bankruptcy system and enterprise bankruptcy system in Shenzhen, and represents a significant breakthrough in China's exploration of personal bankruptcy systems.

Under this newly legislated personal bankruptcy system, when a natural person has assets far less than his debts and is unable to repay debts, he/she may voluntarily apply for bankruptcy liquidation or subject to his/her creditor's same application according to legal procedures, having his/her remaining assets fairly distributed among his/her creditors so as to get released from his/her obligation of debt repayment. This article provides a general interpretation of the *Regulations* as follows.

I. Entitled Applicants

1. According to Article 2 of the *Regulations*, a natural person who resides in the Shenzhen Special Economic Zone and has participated in Shenzhen social insurance scheme for three consecutive years, in case of financial inability in debt repayment or asset insufficiency to pay off all his/her debts for reason of production, business operation and livelihood consumption, can apply for bankruptcy liquidation with the people's court.

2. Article 9 of the *Regulations* also stipulates that, when a debtor is unable to pay off his/her debts due and payable, the creditors who individually or jointly having a due claim of RMB500,000 or more against the debtor may apply to the people's court for bankrupting the debtor.

II. Proceedings for Personal Bankruptcy

Usually three proceedings are mainly adoptable, including liquidation, reorganization, or composition.

In the bankruptcy process, the court is to decide whether a bankruptcy case may be accepted and announced, and the bankruptcy administrator is to implement administrative regulations; by limiting the debtor's consumption, job qualification, borrowing/lending ability, etc., and examining the debtor's performance of some specified obligations within a certain period. The debtor's unpaid debts may be conditionally exempted, but the administrator, creditor(s) or the interested parties are conferred the right to withdraw their

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Zhao Yong has practiced as the licensed lawyer from 1999 till now. He has abundant experience in handling contentious and non-contentious matters as well as arbitration cases in relation to International trade, merger and acquisition, corporation, finance, maritime and admiralty, marine engineering and financing, logistics, construction, insurance, and labor.

Zhou Yinglu was qualified as a Registered PRC Lawyer in 2020. He She handles corporate affairs, international trade, foreign investment, civil and commercial litigation and arbitration.

applications for such debt exemption.

III. Exemptible Properties

Article 36 of the *Regulations* stipulates that, in the bankruptcy liquidation procedure, the debtor's properties to be exempted from enforcement shall not exceed RMB200,000, covering reserves for living expenses and personal belongings of the debtor and his/her dependants.

With regard to identification of exemptible properties, the Shenzhen intermediate court only provides some general guidance on common technical issues. For instance, the exemptible properties indicating as no more than RMB200,000 refer to a reserved monetary amount rather than any physical property; and it shall be properties free from any ownership disputes or encumbrances; the reasonable living expenses reserved for the debtor and his/her dependants shall be determined by reference to Shenzhen annual standards on social assistance for low-income residents. However, norms for specific items and ceiling value for each item within the stipulated scope of exemptible properties are yet to be determined by Shenzhen intermediate court according to practical experience.

IV. Preventing Abuse of Personal Bankruptcy

Personal bankruptcy system aims at protecting "responsible but unlucky" ones only. In order to prevent debtors who have the ability to pay off their debts from abusing the personal bankruptcy system, maliciously escaping debts and prejudicing lawful rights and interests of creditors, the Regulations provide for the following schemes to prevent abuse of personal bankruptcy.

1. Property Declaration

Article 33 of the *Regulations* stipulates that, in the bankruptcy process, the debtors shall declare not only the properties and rights under their own names, but also the property and rights under the name of their spouses, minor children and other close relatives living together; the scope of declaration is dramatically wide and covers all properties and rights with disposable value at home and abroad under the names of the applicable persons; any changes stipulated in the *Regulations* as occurred to the debtor's properties within two years before the date when a court decides to accept the bankruptcy application shall also be declared by the debtor.

2. Revocation of Debtor's Property Disposal

Articles 40 and 41 of the *Regulations* provide that, where the debtor, within two years before the bankruptcy application is filed, gratuitously disposes of his/her properties or rights/interests or conduct transactions on apparently unreasonable conditions, set up on his/her own house property any right of habitation for others, and/or make individual repayment or conduct other act of disposition to his/her immediate family members or other interested parties, the administrator has the right to request the court to revoke the same act(s). Those who are aware that the debtor is in bankruptcy or on the verge of bankruptcy but still carry out the related acts above with the debtor, causing economic losses to the creditor(s), shall also bear compensation liability.

3. Nullification of Court Decisions on Repayment Exemption

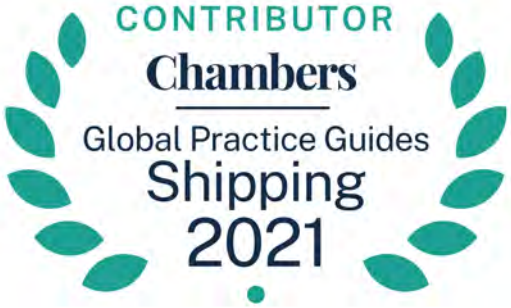
Under Article 103 of the *Regulations*, where the debtor is found procuring a repayment exemption by fraudulent means, the creditor or any other interested party may apply to the court for nullifying the court decisions on repayment exemption. Accordingly, in case, after the examination period, the debtor is found procuring repayment exemption by fraudulent means, the creditor may at any time apply to the court for nullification of the court decision on "exempting the debtor from repaying his/her outstanding debts".

Implementation of the *Regulations* in Shenzhen is to accumulate experience for a nationwide legislation on personal bankruptcy. Due to the first implementation of personal bankruptcy system in Shenzhen and legal discrepancy in this respect between regions that will follow, the debtors after going through the bankruptcy proceedings may still be at stake to be claimed by creditors and courts in other regions. Meanwhile, at the initial stage of implementation of the personal bankruptcy system, to supervise and enforce personal bankruptcy cases in strict compliance with the *Regulations* are typically important, especially when joint efforts and cooperation by multiple departments are required to supervise the debtors during the examination period. Practical experiences will certainly avail to improvements of the personal bankruptcy system.

| NEWS

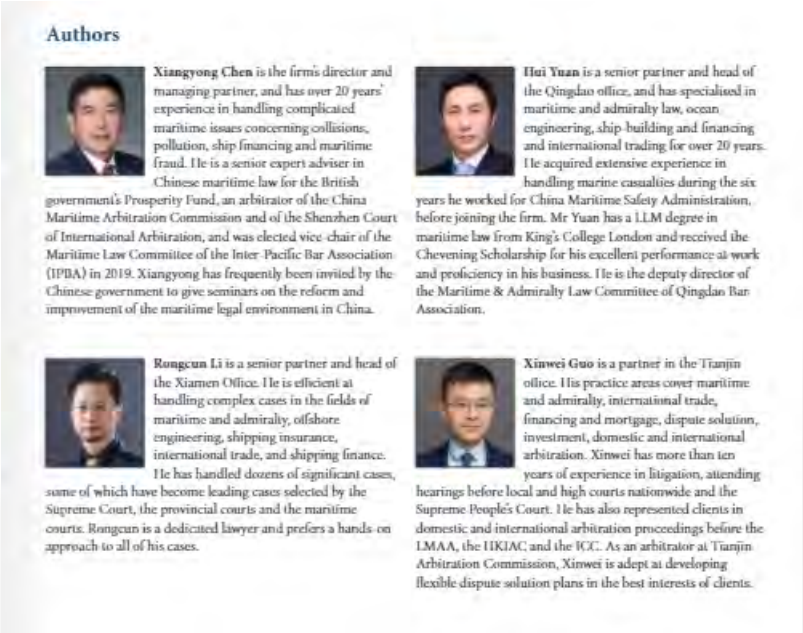
WJNCO Contributed to Chambers Global Practice Guides 2021

The international legal ranking agency, Chambers, published Global Practice Guides 2021. Wang Jing & Co, as consecutive contributors to GPGs for 2018 to 2020, was invited again to author the China Chapter for Shipping Guide 2021, as part of the Chambers Global Practice Guide series, which provides expert legal commentary and pragmatic analysis on the major practice areas in key jurisdictions home and abroad, and create global and practical overviews of the legal landscape across major practice areas.



This China chapter was drafted by partners Mr. Chen Xiangyong, Mr. Yuan Hui, Mr. Li Rongcun and Mr. Guo Xinwei, which is the forth time that WJNCO contributes to the China chapter of the Chambers & Partners Shipping Guide.

The chapter focus on major shipping legal issues, which covers nine issues including Maritime and Shipping Legislation and Regulation, Marine Casualties and Owners' Liability, Cargo Claims, Maritime Liens and Ship Arrests, Passenger Claims, Enforcement of Law and Jurisdiction and Arbitration Clause, Ship-Owner's Income Tax Relief, Implications of the Coronavirus Pandemic, Force Majeure and Frustration in Relation to COVID-19.



Authors

Xiangyong Chen is the firm's director and managing partner, and has over 20 years' experience in handling complicated maritime issues concerning collisions, pollution, ship financing and maritime fraud. He is a senior expert adviser in Chinese maritime law for the British government's Prosperity Fund, an arbitrator of the China Maritime Arbitration Commission and of the Shenzhen Court of International Arbitration, and was elected vice-chair of the Maritime Law Committee of the Inter-Pacific Bar Association (IPBA) in 2019. Xiangyong has frequently been invited by the Chinese government to give seminars on the reform and improvement of the maritime legal environment in China.

Hui Yuan is a senior partner and head of the Qingdao office, and has specialised in maritime and admiralty law, ocean engineering, ship-building and financing and international trading for over 20 years. He acquired extensive experience in handling marine casualties during the six years he worked for China Maritime Safety Administration, before joining the firm. Mr Yuan has a LLM degree in maritime law from King's College London and received the Chevening Scholarship for his excellent performance at work and proficiency in his business. He is the deputy director of the Maritime & Admiralty Law Committee of Qingdao Bar Association.

Rongcun Li is a senior partner and head of the Xiamen Office. He is efficient at handling complex cases in the fields of maritime and admiralty, offshore engineering, shipping insurance, international trade, and shipping finance. He has handled dozens of significant cases, some of which have become leading cases selected by the Supreme Court, the provincial courts and the maritime courts. Rongcun is a dedicated lawyer and prefers a hands-on approach to all of his cases.

Xinwei Guo is a partner in the Tianjin office. His practice areas cover maritime and admiralty, international trade, financing and mortgage, dispute solution, investment, domestic and international arbitration. Xinwei has more than ten years of experience in litigation, attending hearings before local and high courts nationwide and the Supreme People's Court. He has also represented clients in domestic and international arbitration proceedings before the LMAA, the HKIAC and the ICC. As an arbitrator at Tianjin Arbitration Commission, Xinwei is adept at developing flexible dispute solution plans in the best interests of clients.

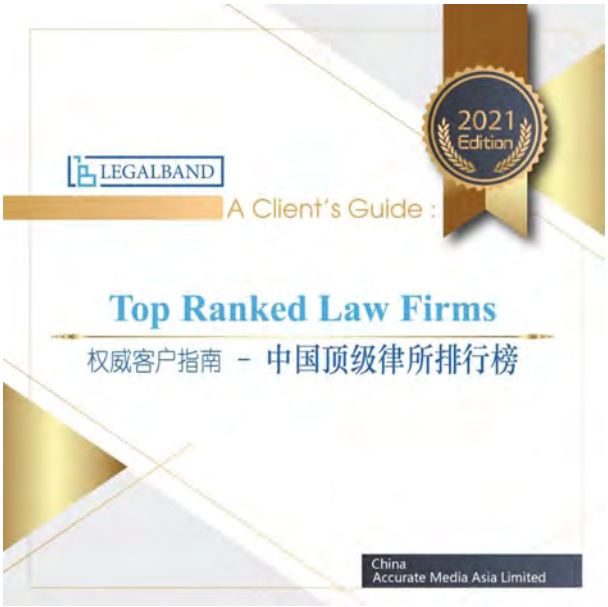
You can get access to the full text of Chambers & Partners China Shipping Guide 2021 at:
https://gpg-pdf.chambers.com/view/589360981/i/

Should you have any enquiry about it, please feel free to let us know.

| News

WJNCO was once again highly recommended by 2021 LEGALBAND

On April 14, 2021, LEGALBAND, a celebrated legal media, released its 2021 Client's Guide-Top Law Firm and Lawyers Rankings of China legal Service Market.

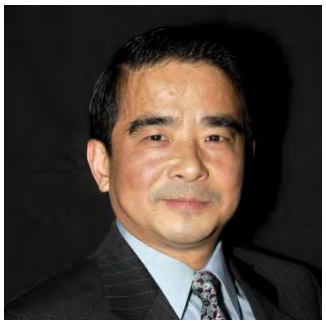


In accordance with the list, WJNCO was ranked again in **Top Law Firms: Maritime & Shipping field (First Level) and Insurance field (Second Level)** relatively. Based on outstanding expertise, prominent legal skills and distinguished reputation, director and managing partner **Mr. Chen Xiangyong** ranked at **first level top lawyer for Maritime & Shipping** field and Senior Consultant **Mr. Zhong Cheng** was ranked at **second level top lawyer for Insurance** field.

Chen Xiangyong

Zhong Cheng

Mr. Pan Renrong and Mr. Peter Koh Soon Kwang joined WJNCO as senior consultant



Pan Renrong

As a licensed lawyer of State and Federal Courts of both New York State and New Jersey State, Renrong graduated from Ocean-Going Department of Shanghai Maritime University and was awarded Bachelor of Economics in 1982, obtained a Juris Doctor degree from PACE UNIVERSITY SCHOOL OF LAW in 1989, and was admitted as a lawyer by Ministry of Justice, Beijing, PRC in 1985. Renrong became licensed by State and Federal Courts of New York State in 1990, and licensed by State and Federal Courts of New Jersey State in 1993. In his early years of practice, Renrong worked as a lawyer & legal consultant for Legal Affairs Dept., China Council for the Promotion of International Trade and later for China Global Law Office, Beijing, PRC, being one of China's First Generation International Practicing Attorneys.

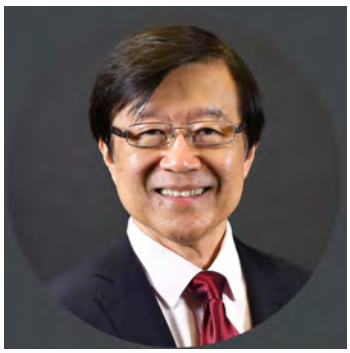
From 1986 to 1988, Renrong worked as Apprentice and later as Attorney-at-law for the famous law firm "Haight, Gardner, Poor & Havens" in New York City, mainly practiced international commercial laws and maritime laws, representing major shipping concerns and airlines in litigation and arbitration for disputes over ship and aviation casualty, oil pollution, tort and insurance liability, ship and aircraft leasing and financing, international commercial lawsuits and transactions, maritime arbitration, charter-parties and carriage of goods contracts, aviation products liability and regulations.

In 1990, Renrong worked as a senior counselor in Law Offices of William F. Pan, New York City, counseling for Formosa Plastics Inc., COSCO Shipping, China

Shipping, China Civil Aviation Administration, and representing various major Chinese owned Corporations in matters of incorporation, commercial immigration, and commercial litigation.

In 1996, Renrong became an independent partner of Law Offices of Ren Rong Pan, mainly practicing in International Commercial Transactions and Litigation, Immigration, Maritime Law and Admiralty, Intellectual Property, Real Estate, Corporate Affairs and Tort Liability.

With great expertise in international commercial law and maritime law, Renrong is also excellent in dealing with legal matters and criminal defense in connection with international commercial litigation and transactions, immigration, intellectual property, real estate, corporate affairs and tort liability, with substantial experiences in successfully having enforced arbitration awards in New York and New Jersey in favor of Chinese companies.



Peter Koh Soon Kwang

For more than 20 years, Peter has represented clients in arbitral, tribunal and court proceedings in Shipping and Commercial law cases in Singapore, England and British Columbia/Canada. He appeared in the Federal Courts of Canada, Supreme Courts of British Columbia, High Courts of Singapore and assisted London Silks in the Commercial Courts and the Privy Council in London. For many years, he acted for major protection and indemnity clubs and was the Legal Correspondent for Japan P & I and China P & I, shipowners, shipyards and other marine-related industries. Peter was the Chief Representative of an international law firm for five years in Beijing and is currently an accredited arbitrator with both China Maritime Arbitration Commission and China International Economic and Trade Arbitration Commission. He is a director of Vancouver Maritime Arbitrators Association. For 5 successive years, he was also the Secretary-General of the Singapore Maritime Law Association.

Currently, he is a visiting professor at 9 Chinese universities, including China University of Political Science & Law, Xiamen University, Renmin University, and Wuhan University. He is also a Visiting Professor at China's two premier maritime universities: Dalian Maritime University and Shanghai Maritime University. From 2008 to 2012, he taught a shipping law module leading to the LLM double degrees from New York University and National University of Singapore.

He had lectured on subjects relating to English Marine Insurance law and English Admiralty law for courses organized for British and European lawyers by Lloyd's of London Press some time ago. He also conducted courses for BIMCO, Japan Shipping Exchange, Singapore Shipping Association and China P & I Club.

His publications include the following:

- Author, Major Issues in Shipping Law (with PRC and English Comparative Notes) (1st Edition)
- Author, Major Issues in Company Law (with PRC and English Comparative Notes) (1st to 4th Editions)
- Co-editor, Mergers and Acquisitions in China (1st and 2nd Editions)
- Author, Marine Insurance & the New Institute Cargo Clauses (Published by Longman's in London)
- Author, Law of Partnership in Singapore and Malaysia
- Editor, Carriage of Goods by Sea
- Author of national chapter, Tetley's International Conflict of Law, Common, Civil & Maritime

Rongren and Peter both once worked as Senior Consultant of WJNCO. Their rejoining represents a high recognition of WJNCO's performance, and will enhance WJNCO's strength in offering premium legal service in areas of shipping, commercial trade, real estate, migration commercial litigation and arbitration, corporate affairs and securities supervision.

| Cases and Insights

Will Container Devanning Constitute Delivery of Cargo Without Original B/L? – Comments on a Case* Decided by the PRC Supreme Court

For unifying judgment rules, the PRC Supreme Court published the Guiding Opinions on Unifying Application of Laws to Strengthen Retrieval of and Reference to Similar Cases (for Trial Implementation), stipulating that since July 2020, similar precedents should be retrieved for reference to consider cases where no explicit judgment rules are available or unified judgment rules are not set yet. The sequence for similar cases to be retrieved by grading their significance is: first, guiding cases issued by the PRC Supreme Court; secondly, model cases issued by the PRC Supreme Court and cases where judgments made by the Supreme Court have taken effect, thirdly, reference cases issued by the provincial higher people's courts and cases in which the judgments made by such courts have taken effect, fourthly, cases in which the judgments made by superior courts of the case handling courts have taken effect. Except for the guiding cases, judgment rules set in other similar cases can be references to courts.

In this article we will discuss a case of dispute over cargo delivery without original B/L which has gone through first instance trial, appeal, and retrial proceedings. As the PRC Supreme Court has set judgment rules for this type of cases, to guide that for carriage contracts where delivery of cargo in fully loaded containers is not necessary, devanning of containers cannot be deemed as *prima facie* evidence of the carrier's cargo delivery and the shipper still needs to prove that the carrier has delivered the cargo without original B/L. In our views, the burden of proof concerning delivery of cargo without original B/L should be reasonably allocated in accordance with case developments. Initially the shipper should provide *prima facie* evidence to prove that the carrier had delivered the cargo without original B/L, whilst the carrier should prove that the cargo was still under their control. The shipper should then evidence that the carrier had actually lost control over the cargo. Instead of being imposed upon one party solely, the burden of proof about the delivery of cargo without original B/L should be adjusted according to what evidence has been actually disclosed by relevant parties at different stages.

In order to help the readers to gain a better understanding of the judgment rules set by the Supreme Court, we make further interpretations as below:

I. Can devanning be regarded as *prima facie* evidence of the carrier's delivery of cargo without original B/L?

Author:

Zhang Xiaoming joined Wang Jing & Co. Qingdao Office as a Senior Associate in 2010, He is well skilled in handling various disputes related to shipping, admiralty, insurance, trading and company.

* Case No.: (2016) Lu 72 Min Chu 2027; appeal No.: (2018) Lu Min Zhong176; retrial No.: (2019) Zui Gao Fa Min Shen 4904.

For purpose of claiming against the carrier for cargo delivery without the original B/L, the shipper shall first prove that the carrier has delivered the cargo in the absence of original B/L.

For containerized cargo, if the B/L is remarked with "CY/CY", "FCL", or "Door/Door" etc., the carrier's devanning of container at the destination port will be a breach of the B/L and may initially evidence cargo delivery without original B/L. Evidence to prove the container has been devanned includes the container's tracing record which may reflect that the container has been engaged in a diffierent sea voyage or the carrier's confirmation of devanning to the shipper.

There are also circumstances where the cargo could be delivered either by full containers or after devanning. In the said case considered by the PRC Supreme Court, while issuing to the actual shipper a House B/L, the NVOCC carrier also booked space from the actual carrier as shipper and obtained a Master B/L. Under the Master B/L, the NVOCC carrier, as the shipper, was obliged to take delivery of cargo and return empty containers to the actual carrier in time. The reason why containers should be devanned immediately upon arrival at port is that empty containers should be returned to the actual carrier ASAP to avoid demurrage, which, once incurred, should be undertaken by the NVOCC carrier first as shipper under the Master B/L and may be unrecoverable from the actual shipper in case of their refusal or incapability to reimbursement. Therefore, it should be in line with the Master B/L and usual shipping practice for the NVOCC carrier to devan containers upon arrival and store the cargo at local warehouses pending delivery under the House B/L. Such practice will also improve the utilization of containers and avoid further loss incurred by delay or failure in delivery.

Accordingly, where the B/L does not require cargo delivery should be in full containers, devanning shall not constitute *prima facie* evidence to tell that the carrier has delivered the cargo without original B/L, further evidence should be adduced by the shipper to testify that the cargo has been taken away despite of their production of the original B/L. In this particular case, the shipper did not demand cargo delivery from the NVOCC carrier. Instead, the NVOCC carrier informed the shipper many times that the cargo was still stored at the local warehouse and requested the shipper to take delivery without further delay.

II. If the shipper initially proved delivery of cargo without original B/L, the NVOCC carrier should counter evidence that the cargo was still under their control.

In the subject case, a local notary public was engaged to inspect the devanned cargo and issued a notarized statement to confirm that all the cargo was stored at warehouse by the local ship agent, so as to prove that the cargo was still under the carrier's control. However, the first instance court still requested the NVOCC carrier to prove the cargo had never been released to anyone else since devanning; otherwise, the NVOCC carrier should undertake consequences of failure in burden of proof. We consider such request for the NVOCC carrier to prove a negative fact is unreasonable and practically impossible, particularly when the NVOCC carrier had proved that the cargo was still under their control.

During the court proceedings, the shipper also alleged the cargo was stored at warehouse of another city other than at the destination port, which indicated that the consignee should have cleared off customs formalities and taken away the cargo, but they failed to coraborate the alleged customs clearance. Apparently the cargo could be stored at a customs-supervised warehouse not located at the port of destination. Even though the customs clearance had been completed, it did not transpire that the carrier had delivered the cargo without original B/L.

Hence in the appeal judgement issued by Shanghai Higher People's Court, the court held that for LCL cargo, the container devanning could not testify that the carrier had delivered the cargo without original B/L; the notarized statement provided by the NVOCC carrier had evidenced the cargo was still under their control; and completion of customs declarance for the cargo with consignee's payment for relevant costs did not reflect that the NVOCC carrier had lost control over cargo. Moreover the later retrial judgement is-

sued by the PRC Supreme Court affirmed that the NVOCC carrier did not deliver the cargo without original B/L on grounds that (1) after customs clearance the cargo was stored at a local warehouse by the carrier, who had also provided a notarized statement to prove the cargo was still kept at that warehouse; (2) in addition the NVOCC carrier disclosed evidence of shipping back during the first instance trial to manifest that the cargo was under their actual control. Accordingly, customs clearance at the port of destination cannot evidence that the carrier delivered the cargo without original B/L.

There is still exception where albeit the cargo was warehoused at the port of destination, the carrier failed to prove their actual control of the cargo and was thus regarded as having deliveried the cargo without original B/L. In another similar case, although the carrier adduced a notarized document to prove cargo storage in a local warehouse, due to failure in substantiating the cargo was stored therein by them, the carrier was still found liable.

III. The consignee should prove the carrier had lost control over cargo despite of cargo storage in warehouse at destination port.

If the carrier could prove the actual cargo storage in warehouse at destination port, the burden of proof should again be shifted to the shipper to attest that the carrier had lost control over the cargo.

In the subject case, the shipper provided emails from the consignee, alleging that the consignee had taken cargo delivery but returned it to the carrier for reason of improper bar codes adhered to the cargo. However the emails disclosed by the consignee could not transpire they had taken away the cargo and photos therein could only suggested that the consignee had checked the cargo at the carrier's warehouse.

In judicial practice, even though the consignee had truly taken delivery of cargo but later returned the same to the carrier, it remains arguable whether it constituted delivery of cargo without original B/L. In a precedent heard by Shanghai Maritime Court in 2015, the carrier delivered the cargo to the consignee, but the consignee failed to resell the defective cargo and then returned the cargo to the carrier, who had no choice but to ship back the cargo later. The Chinese court subsequently held that the carrier had once delivered the cargo to the consignee without collecting original B/L and thus should be liable for compensation, despite of their recontrol of the cargo afterwards. Nonetheless in another judgement issued by Ningbo Maritime Court where the carrier delivered the cargo to the consignee without collecting original B/L but took back part of the cargo thereafter, the Court opined that since partial cargo was still under the carrier's control, the carrier should not be found liable for delivery without B/L for the controllable portion. Later this case was finalized by mediated settlement during the appreal proceedings, hence the appeal court's attitude on this issue was not explored.

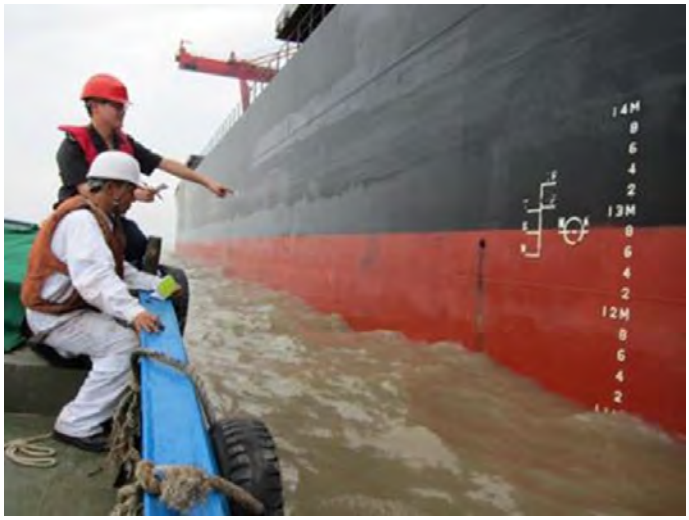
Some other Chinese courts hold that if the cargo has been delivered to the consignee, it shall not be regarded as delivery of cargo without original B/L if the carrier could still deliver the cargo to the shipper. In a judgment rendered by Guangzhou Maritime Court in 2011, the carrier delivered the cargo to the consignee without collecting original B/L, but the consignee confirmed that they could return the cargo to the shipper as per the carrier's instruction. However, the shipper as the original B/L holder refused to take cargo delivery from the carrier but directly claimed loss of cargo price against the carrier. The court held that the shipper failed to prove that they could not take cargo delivery by presenting original B/L and therefore dismissed their claim.

In our view, cargo delivery against B/L is one of the primary functions of B/L, as well as one of the basic obligations of the carrier. Thus, as long as the carrier can deliver the cargo whilst the holder of the original B/L demands delivery by presenting the original B/L, it shall be deemed that the carrier has performed the delivery duty under B/L. Despite that the carrier once delivered or has delivered the cargo to the consignee, it should not be a violation of B/L or cargo delivery without original B/L as long as the carrier could ensure that the cargo could be delivered to the original B/L holder once demanded.

| Cases and Insights

Latest Chinese court judgments bring new exposure of carriers to cargo shortage

In the marine transportation precedents and the People's Supreme Court's views, it is widely accepted that the carriers (usually the owners of the carrying vessels) could be entitled to exemption from liability for the 0.5% shortage allowance if the total cargo quantity discrepancy is below 0.5%, unless the cargo interests could provide sufficient evidence to prove the cargo shortage was caused by the faults of the carriers. This general rule is favorable to the carriers and has protected the carriers from numerous claims filed or potentially filed by the cargo interests and the cargo insurers in recent years. However, the situation now has certain change.



In recent cases before Chinese maritime courts, it is further noticeable that the master signed a clean bill of lading stating a cargo quantity less than that stated in the cargo quantity certificate at the loading port. The cargo receiver or its insurer claimed for cargo shortage based on the clean bill of lading. The carrier raised defending arguments including: (1) the cargo quantity at the loading port is within the 0.5% draft discrepancy allowance compared with the cargo quantity stated in the bill of lading, so the master/carrier had no fault in issuance of the clean bill of lading; (2) the cargo shortage at the discharging port is caused by the short loading by the shipper at the loading port which is irrelevant to the carrier; (3) the cargo shortage at the discharging port is still within the shortage allowance of 0.5%.

The above claim and defence are basically summarized from M/V SPICA Case

Author:

Li Rongcun joined Wang Jing & Co. in 2002 after leaving Penavico, and now serves as Senior Partner & Director of Xiamen Office of the Firm. Rongcun is efficient at handling complex cases in the fields of maritime & admiralty, off-shore projects, shipping insurance, international trade, and shipping finance.

Yang Dongyang joined Wang Jing & Co. in 2008 and is currently a partner. He is a proficient handler of complex cases in the areas of maritime & admiralty, insurance, international trade, corporate affairs and dispute resolution.

filed by China Life Property Insurance Co. Ltd. Huanan Branch against Madelyn Shipping Co. Pte Ltd heard by Tianjin Maritime Court and M/V PEACE PEARL Case filed by Xiamen C&D Commodities Co., Ltd. against Peace Pearl Shipping S.A. heard by Guangzhou Maritime Court.

Although the shortage at the loading port should not be attributed to the fault or negligence of the master/carrier and the exemption from liability for shortage sounds reasonable when the cargo quantity at the loading port and at the discharging are both within the 0.5% allowance, Tianjin Maritime Court and Guangzhou Maritime Court deemed the carrier should have fault in issuing the clean bill of lading in spite of the obvious fact of shortage, and thus supported the cargo interests' claim for shortage within 0.5%.

Obviously, the above two cases bring new direction of cargo shortage claims by cargo receivers or their insurers if the cargo quantity on the clean bill of lading quantity is less than the cargo quantity stated on the cargo quantity certificates at the loading port. We anticipate shipowners and P&I clubs will face similar situations in shortage claims and would suggest the shipowners should make cautious consideration when signing a clean bill of lading stating a cargo quantity less than the cargo quantity at the loading port and/or disclosing the cargo quantity certificates at the loading port. It will be recommended to sign a bill of lading stating the same cargo quantity with the cargo quantity at the loading port or request the shipper to surrender a letter of indemnity for issuance of a bill of lading stating a cargo quantity higher than the cargo quantity at the loading port.

| Cases and Insights

A Case Review on Recognition and Enforcement of Foreign Court Judgements in China*

I. Introduction

Different from foreign arbitral awards which are normally recognisable and enforceable in China under the New York Convention, recognition and enforcement of foreign court judgements in China involve considerable uncertainty.

Civil Procedure Law of the People's Republic of China (revised in 2017) stipulates international treaties and the principle of reciprocity to be two major legal grounds for Chinese courts to recognise and enforce foreign court judgements[i]. In judicial practice, however, there are few cases where foreign courts judgements have been found by Chinese courts as recognisable and enforceable.

According to published decisions on China Judgments Online (which is run by the PRC Supreme People's Court), only ten cases were reported where foreign court judgements were recognised and enforced by Chinese courts since Year 2000[ii]. Among those determined based on the reciprocal principle, one fact in common was that foreign court decision(s) allowing recognition and enforcement of Chinese court judgment(s) existed first before the Chinese court would proceed to recognise and enforce judgments rendered by courts of that particular foreign country.

In a most recent published case *Wen Xiaochuan* (2018) Z02 XWR No.6 [(2018)浙02协外认6号], the Ningbo Intermediate People's Court followed the above established rules to recognise and enforce a US California court judgment. Case details are as follows:-

II. The US California Court Judgment

In the matter of a dispute over equity investment and lease guarantee contract, Wen Xiaochuan commenced a lawsuit against Huang Kefeng and WBV International before Stanislaus County Superior Court of California, and obtained a favourable judgment on 23 August 2016, where the defendants were ordered to jointly compensate him in the amount of USD155,748. However, the defendants failed to voluntarily perform payment obligation under the said judgement. As one of the defendants Huang Kefeng was domiciled and had enforceable assets in Ningbo, Zhejiang China, Wen Xiaochuan applied to the Ningbo Intermediate People's Court for recognition and enforcement of

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*The author appreciates intern Zhang Yi's research and contribution to this article.

the California court judgement in China.

III. Ningbo Court Ruling

Ningbo Intermediate People's Court approved the recognition application on following grounds:

- Wen Xiaochuan submitted one certified copy and Chinese translation of Judgement No. 2018177 rendered by the Stanislaus County Superior Court of California, together with the application for recognition and enforcement, which satisfied formality requirements for a recognition action.

- Since the United States and China were not parties to any international treaty for mutual recognition and enforcement of court judgements, the application should be reviewed in accordance with the principle of reciprocity.

- Evidence submitted by Wen Xiaochuan showed that the US courts had previously recognised and enforced Chinese court judgements. This could be a proof of reciprocal recognition and enforcement of court judgements between China and the US.

- In addition, recognition and enforcement of the subject California court judgment did not violate fundamental principles under Chinese law or the sovereignty, national security, and public interests of China.

IV. Comments

The above Ningbo court ruling followed the principle of reciprocity, namely recognition and enforcement of a foreign court judgment can be allowed by a Chinese court, provided that the court(s) in that particular foreign country have already recognised and enforced Chinese court judgment(s) before recognition and enforcement application is filed in China.

It was not identified in the Ningbo court ruling whether the US court judgement Wen Xiaochuan relied upon to support his recognition application was rendered by the same California court or by another US court. Answer to this question would be helpful when preparing supporting evidence in similar recognition applications.

Another key issue, which is apparently more significant, is what if there was no existing recognition decision rendered by the court of a foreign country whereby that particular foreign country's court judgment has been presented to Chinese courts with request for recognition. *Opinions by the Supreme People's Court concerning the Judicial Service and Protection for the Belt and Road Initiative（2015）* make it clear that:-

To strengthen inter-regional judicial assistance, Chinese courts, if possible, may approve recognition and enforcement of foreign court judgements in the first place, and expect subsequent reciprocal recognition and enforcement of Chinese court judgements from that particular foreign country so as to establish a mutually beneficial relationship between the two countries.

When searching through the China Judgments Online database, we find no reported cases where applications for recognition of foreign court judgements before Chinese courts were supported in the absence of existing foreign court decisions on recognition of Chinese court judgements. While expecting more foreign court judgments to be recognised and enforced in China by following the established reciprocal principle, we also look forward to seeing a breakthrough Chinese court ruling to approve recognition in circumstances where courts of either country have not ever recognised the other's court judgments before. We shall follow up developments of law and judicial practice in this aspect and write with our further comments in due course.

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[i] Articles 281 & 282 of the Civil Procedure Law.

[ii] Among the ten reported cases, 4 recognition applications were allowed based on bilateral treaties, while the other six were determined in accordance with the reciprocal principle.

| Cases and Insights

A case review on recognition and enforcement of GAFTA awards in China

I. Brief Introduction

In April 2015, ADM (the "Seller") and Anhui BBCA (the "Buyer"), negotiated the sale and purchase of 50,000 metric tons of US golden DDGS. Both parties confirmed the main sales terms by email. It was expressly agreed that the other terms should refer to the similar sales contracts previously signed by the parties in writing, which included a GAFTA arbitration clause.

Subsequently, the Seller sent the sales contract containing the above agreed terms (the "Contract") through email to the Buyer, who acknowledged receipt by return email. However, the parties did not actually sign the Contract.

The Buyer failed to open a letter of credit as agreed. The Seller therefore commenced GAFTA arbitration against the Buyer for breach of contract and claimed for damages.

During the arbitration process, the Buyer failed to appoint its own arbitrator and defaulted in the whole proceeding despite repeated notices by the Seller and/or the Tribunal.

The Tribunal rendered an arbitration award in default on 16 February 2016 in the Seller's favor (the "Award"). The Seller then applied for recognition and enforcement of the GAFTA award in China at Bengbu Intermediate People's Court, i.e., the intermediate court seating at the domicile of the Buyer in Bengbu city, Anhui Province (the "Court").

II. Applicable Law

As both China and UK are contracting states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), the question as to whether the Award can be recognised and enforced in China should be examined in accordance with the relevant provisions of the New York Convention as per Article 283 of *Civil Procedure Law of The People's Republic of China*[i].

III. Issues under Dispute

Unlike the position taken in the GAFTA arbitration action, the Buyer vigorously resisted recognition and enforcement of the Award at its home court. Having reviewed the Buyer's defence submissions, the Court focused on the issues as follows: -

a) whether there was a valid arbitration agreement between the parties; and
b) whether the arbitration notices were properly and effectively served to the Buyer.

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Lv Junfei joined Wang Jing & Co. after her graduation in 2018.

IV. Court's View

After seeking guidance internally from the Supreme People's Court via the Higher People's Court of Anhui Province, the Court allowed recognition and enforcement of the Award on the following grounds [(2016) W03XWR No.2]:

No evidence to prove invalidity of the arbitration clause under the applicable law (i.e., English law)

Before the Contract was concluded, the Buyer and the Seller had conducted many prior dealings, which were negotiated and concluded through email. Such prior dealings were the trading custom between the parties.

For this particular transaction, the parties have confirmed the commercial terms of the Contract, such as the quantity, shipping date and price, and agreed that all other terms shall refer to the previous sales contracts (containing a GAFTA arbitration clause).

The Buyer shall have the burden of proof to establish that:

a) the Contract was not concluded and the arbitration clause was not therefore legally binding under the English law (i.e., the law of the arbitration venue); and
b) its employee was not legally authorised by the company when negotiating and confirming the sales terms through email.

The Buyer failed to fulfill the above burden of proof. This issue was therefore determined in the Seller's favor.

No evidence to prove any lack of proper notification of the arbitration proceedings to the Buyer

The Court found that the Buyer replied to the arbitration notice sent by the Seller and the Tribunal through email. Even if the Buyer claimed that its email address was invalid, it neither provided any other effective contact information, nor proved that it was deprived of the right to argue its case in the arbitration action due to any failure of proper service of the arbitration proceedings on the Buyer. Therefore, this second issue was also determined in Seller's favor.

V. Comments

In recent years, the author and his team has handled various cases regarding recognition and enforcement of foreign arbitration awards under the New York Convention. Except for the cases where both parties reached settlement before the recognition ruling was issued, all other recognition applications were allowed by courts across China, and we managed to achieve satisfactory recovery for clients during the subsequent enforcement action.

It is not unusual for Chinese parties to default in foreign arbitration proceedings and choose to fight before their home court in China to resist enforcement. In the above case review for enforcement of a GAFTA award, the issues raised by the respondent are typical and popular in similar award enforcement matters in China. Normally, the lower courts would seek guidance from the Supreme People's Court before making any decision. Among the cases we handled, there was only one matter that the court directly issued the recognition ruling without reporting it to the higher court and the Supreme People's Court for guidance.

The Supreme People's Court generally takes a pro-arbitration attitude. When examining grounds to refuse recognition, such as those raised in the above case, the logic and train of thoughts of the Supreme People's Court can be summarised as follows:

The Court shall determine governing law of the arbitration clause first, and validity of the arbitration clause under the governing law.
The question as to whether the contract was established or not is not necessarily related to the validity of the arbitration clause, but only one of the reference factors.

The burden of proof on the question as to whether the employee was authorised by the company when concluding the contract (including the arbitration clause) lies with the respondent.

The burden of proof of invalid service or invalid email address lies with the respondent.

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[i] Article 283 stipulates that: "If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity."