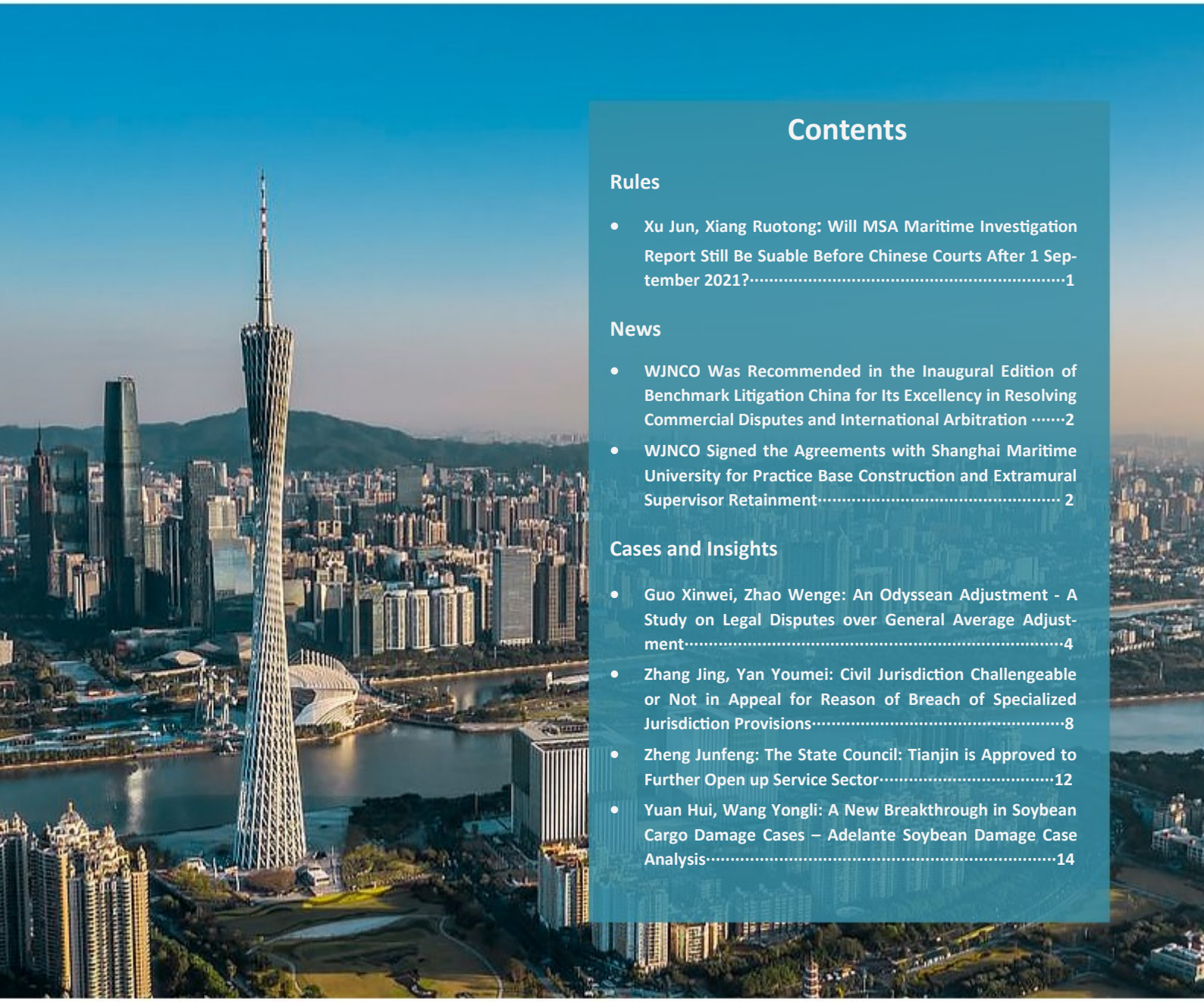
敬海律師事務所
WANG JING & CO.

July 2021

Maritime and Commercial Law Newsletter



Contents

Guangzhou Office

Suite 1504, 15/F.,
Bank of Guangzhou Square,
30 Zhu Jiang East Road,
Guangzhou 510623, P. R. China

Guangzhou	Tel : 86 20 8393 0333
Shanghai	Tel: 86 21 5887 8000
Tianjin	Tel: 86 22 5985 1616
Qingdao	Tel: 86 532 6600 1668
Xiamen	Tel: 86 592 268 1376
Shenzhen	Tel: 86 755 8882 8008
Beijing	Tel: 86 10 8523 5055
Fuzhou	Tel: 86 591 8852 1668

2021 Wang Jing & Co. Law Firm. All rights reserved. The information in this Newsletter is intended as guidance only. It should not be considered as legal advice.

| Cases and Insights

Will MSA Maritime Investigation Report Still Be Suable Before Chinese Courts After 1 September 2021?

In China the conclusions and detailed facts/analysis in Maritime Investigation Reports issued by the Chinese maritime authorities (say Maritime Safety Administration) are always important for consideration on how to handle accidents at sea. Therefore it is not unusual that the parties concerned who dissatisfy with reconstructed case facts/analysis/conclusions therein intend to seek remedy by instituting administrative lawsuits before Chinese courts to challenge the reports. Nonetheless, as a premise it is necessary to figure out whether the Maritime Investigation Reports are challengeable by way of administrative lawsuits.

Before 2019, Chinese courts (especially maritime courts) rigidly decided that they had no jurisdictions to consider administrative lawsuits arising from the Maritime Investigation Reports on grounds that (among others) the reports were relied upon by the courts and the litigating parties as evidence only which did not directly affect any party's interest. This issue has long remained as controversial both theoretically and practically given statutory provisions in China fail to make it clear.

In 2019, the PRC Supreme Court released an unexpected notice to guide that the Maritime Investigation Reports should not be excluded from the challengeable targets of administrative lawsuits. In reasoning the PRC Supreme Court made comparison and contrast between the PRC Maritime Traffic Safety Law (MTSL) and the PRC Road Traffic Safety Law (RTSL). It has been expressly provided in the RTSL that any investigation report issued by the governmental authorities should be regarded as evidence only. In addition, the relevant guidance and regulation handed down by the Chinese Parliament also made it clear in respect of the "evidence" nature of the investigation report for traffic accident on road. However the MTSL did not specify the nature and function of Maritime Investigation Reports for any accident at sea. Following the above guidance by the PRC Supreme Court, Chinese courts at the low hierarchy gradually accepted administrative lawsuits filed by the parties concerned to challenge the Maritime Investigation Reports.

With the newly amended MTSL to take effect since 1 September 2021, this issue shall now be reconsidered. The amended MTSL has explicitly provided that Maritime Investigation Reports issued by the competent maritime authorities should function as evidence only, which is exactly the same as the position under the RTSL. Accordingly following the logic in the above notice of the Supreme Court, the Chinese courts would no longer accept any administrative lawsuit filed by the parties against the Maritime Investigation Reports from 1 September 2021. Nevertheless, what are the Chinese courts' final attitudes shall be subject to further tests in actual judicial practices, especially any further guidance or determination from the PRC Supreme Court in this regard.

Author:

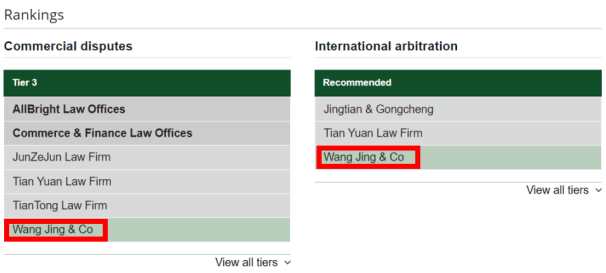
Prior to joining Wang Jing & Co. in 2004, **Xu Jun** had the experience of more than ten years in the shipping industry with COSCO China Shipping in Shanghai and an international transport corporation, and acquired extensive experience in shipping practices. Jun now is a senior partner of Wang Jing & Co.. Jun has extensive experience in handling the cases related to bill of lading, charter party, admiralty, maritime engineering, shipping finance and property/ liability/credit insurance. In addition, Jun is also an excellent negotiator and has extensive experience in litigation.

Xiang Ruotong joined Wang Jing & Co. Shanghai Office in 2021.

News

WJNCO Was Recommended in the Inaugural Edition of Benchmark Litigation

With its professional services and good reputation, WJNCO was recommended by the inaugural edition of Benchmark Litigation China and was put on the two rankings Commercial Disputes and International Arbitration of Guangdong Province.



Since its inception in 2008, Benchmark Litigation was a publication under Euromoney Group. It focused exclusively on the litigation and disputes resolution markets in the US at the beginning, but now it is a top publication in the world focuses on the global dispute resolution market. On June 10,2021, Benchmark Litigation announced the inaugural edition of Benchmark Litigation China, an in-depth, bilingual guide that focuses on the Chinese regional disputes market across six different cities and provinces: Beijing; Guangdong; Shanghai; Zhejiang; Jiangsu; and Western China (Sichuan and Chongqing). The ranking categories include: commercial disputes; construction and real estate; international arbitration; intellectual property; and government and regulations.

WJNCO takes specialization as the foundation for its development, constantly improves the depth and breadth of its practice, and has made remarkable achievements in the extended fields related to shipping and insurance, such as international trade, marine engineering, environmental resources, financial leasing and others, as well as the foreign-related dispute resolutions in these fields. It is a recognition and praise of WJNCO's professional strength in the field of commercial disputes and international arbitration that WJNCO was recommended by Benchmark Litigation this time.

WJNCO Signed the Agreements with Shanghai Maritime University for Practice Base Construction and Extramural Supervisor Retainment

In the morning of 24 June 2021, School of Law of Shanghai Maritime University ("SMU") held the agreements signing ceremony for the cooperation between WJNCO and SMU School of Law in practice base construction and extramural supervisor retainment. Mr. Li Xiping, secretary of CPC Committee of the School of Law, presided over the ceremony.

Mr. Xu Jun, Director of Shanghai Office, was retained as an extramural supervisor of the SMU School of Law, and he signed the practice base construction agreement with SMU on behalf of WJNCO.

*Mr. Xu Jun (second from the left) signed the practice base construction agreement on behalf of WJNCO

Mr. Xu Jun believes that the construction of practice base will serve not only as a bridge between students and the society but also as a talent pool to support future development of WJNCO.

As a leading domestic law firm dealing with foreign-related cases, WJNCO faithfully undertakes social responsibilities, which is the core of WJNCO spirit, and further the inevitable demand of the times. To encourage diligence in schoolwork, WJNCO has founded the "WJNCO Scholarship" for students in SMU School of Law. The construction of practice base is conducive to the university-enterprise cooperation and the integration between industry and education. We welcome students of SMU to take their internships here in our offices!

Mr. Xu Jun is the director of Shanghai office. Prior to joining Wang Jing & Co. in 2004, he had the experience of more than ten years in the shipping industry with COSCO China Shipping and an international transport corporation, and acquired solid legal foundation and extensive experience in shipping practices. Jun is adept at handling the cases related to admiralty, charter contract, maritime engineering, ship sale and purchase, shipping finance, property/liability/credit insurance and others. Jun is also an excellent negotiator and has extensive experience in litigation.

| Cases and Insights

An Odyssean Adjustment - A Study on Legal Disputes over General Average Adjustment

Preamble

On 23 March 2021, M/V "Ever Given" ran aground in the Suez Canal as influenced by heavy winds. After the giant container vessel was refloated, her shipowner declared General Average ("GA") on 1 April 2021. The incident was under worldwide spotlight and triggered various discussions about GA in the shipping industry. Following our release of an article on our WeChat Official Account introducing the GA mechanism, we will further discuss some legal disputes concerning GA by referring to a GA dispute case we handled that spanned 10 years.

I. Case brief

On 30 June 2010, en route from Nansha Port of China to Red Sea Ports via Singapore, the container vessel M/V "Kota Kado" struck an underwater object and ran aground in Chinese waters south of Hong Kong due to crew's negligence in navigation, resulting in water ingress into her bow thruster and other compartments. Due to concerns about ship sinking, she proceeded to shallow water in Hong Kong territorial waters for voluntary stranding at a mud bottom, with salvors' assistance. Operations to salvage ship and cargo were immediately initiated. After the stranding, bilge alarms of two cargo holds which had not been flooded in the initial accidental grounding were activated, with the containerized cargos in holds immersed in and severely damaged by sea water.

After the incident, the carrier pursuant to the sea carriage contracts evidenced by the bills of lading, appointed a Singaporean adjuster to perform GA adjustment under The York Antwerp Rules 1994 (the "94 Rules") in Singapore. On 9 October 2020, the GA adjuster issued the final GA adjustment report concluding that containers and inside cargos which became a total loss should not be allowable in GA because the loss was ascribed to the initial grounding.

The insurer of some containerized cargos (the "Cargos") argued that the total loss of the Cargos was not caused by the accidental grounding but by an extraordinary sacrifice intentionally made for preserving from peril involved in a common maritime adventure, and thus should be allowable as GA. In March 2013, before the GA adjustment report was available, the cargo insurer filed

Author:

Guo Xinwei joined Wang Jing & Co., Tianjin office in 2008. Promoted as partner of Tianjin Office in 2017, Xinwei has more than 10 years of experience in litigation, attending hearings before local and high courts nationwide and the Supreme People's Court. He also represented clients in domestic and international arbitration proceedings before LMAA, HKIAC and ICC. Being an arbitrator at Tianjin Arbitration Commission broadens his minds in developing flexible dispute solution plans in the best interests of clients.

Zhao Wenge joined Wang Jing & Co. Tianjin Office in 2019. She mainly handles maritime & admiralty, international commercial arbitration and international trade matters.

a loss claim before the competent court, which was dismissed on the ground of unsuitability for hearing in the absence of the GA adjustment report. Later in February 2020, the cargo insurer again instituted a similar lawsuit.

II. Jurisdiction over GA cases

Article 32 of the PRC Civil Procedure Law provides "*A lawsuit brought for general average shall be subject to the jurisdiction of the people's court in the place where the ship first docked or where the adjustment of general average was conducted or where the voyage ended.*"

Pursuant to the Civil Procedure Law currently in force, the legislative framework for jurisdiction over civil disputes involving foreign elements which arose in China tends to be unitary[Note 1]. Under this framework, the jurisdiction over a civil dispute involving foreign elements shall be determined first analogically with application of jurisdiction rules governing civil disputes between Chinese parties, provided that application of the rules can guarantee that the international and domestic jurisdictions are of the same nature and share the common values of law[Note 2].

GA acts, expenses and adjustment, in our views, are the core GA issues. Accordingly, the places where such acts, expenses and adjustment were done, incurred or conducted have the closest connection with the GA disputes. Choosing the people's court in the place where the ship first docked or where the voyage ended or where the GA adjustment was conducted as the competent court to hear the GA disputes is an optimum arrangement in the benefit of the parties in terms of geographic location and judicial efficiency. Meanwhile, our search on China Judgements Online for legal precedents on the GA disputes involving foreign elements found five decisions on jurisdiction. In all these cases, the competent courts were chosen under Article 32 of the Civil Procedure Law [Note 3].

In the *KOTA KADO* case, Tianjin Maritime Court and its court of appeals both determined it as a civil dispute involving foreign elements and considered it with application of Part Four Special Provisions on Civil Procedure of Cases Involving Foreign Elements of the Civil Procedure Law.

Article 265 of the Civil Procedure Law stipulates "*In the case of an action concerning a contract dispute or other disputes over property rights and interests, brought against a defendant who has no domicile within the territory of the People's Republic of China, if the contract is signed or performed, or the subject matter of the action is located, or the defendant has distrainable property or the defendant has its representative office within the territory of the People's Republic of China, the people's court in the place where the contract is signed or performed, or where the subject matter of the action is, or where the defendant's distrainable property is located, or where the torts are committed, or where the defendant's representative office is located, shall have jurisdiction*."

In the *KOTA KADO* case, the GA dispute was incurred when the carrier (the defendant) was performing the contracts of carriage of goods by sea, which were signed and performed (shipment commenced) in Tianjin. Tianjin Maritime Court, therefore, had jurisdiction over the case.

The above fresh judicial viewpoints deserves attentions.

III. Appointment of adjuster and validity of adjustment clauses on reverse of B/L

Usually it is the carrier who declared GA and appointed an adjuster according to the GA adjustment clauses on the B/L reserve. The cargo interests rarely participated in this process. In *Case (2015) HHFSCZ No.1003*, the cargo interests raised an objection to the procedure and the final adjustment report, as did the cargo interests in the *KOTA KADO* case.

In the *KOTA KADO* case, the adjuster was appointed by the carrier in accordance with the GA adjustment clauses on the B/L reverse. Different from the jurisdiction and choice of law clauses, the GA adjustment clauses shall be considered valid as long as they explicitly contain the adjustment place and rules and

abide by shipping practice. Moreover, the cargo interests provided the ship interests with GA agreements and bonds, making it clear that GA contribution should be adjusted as provided in the contracts of carriage. This shall be sufficient to demonstrate the cargo interests' full knowledge of the GA adjustment clauses. In view of foreseeability of the clauses, the parties had shown agreement on the GA adjustment clauses before the adjuster was appointed.

In addition, if the cargo interests, being fully aware of the information on the adjuster, raised no objections to the appointment and kept communicating with the adjuster to reason their losses should be allowable as GA, they should not challenge the carrier's appointment of the adjuster in the later court proceedings.

IV. Filing GA action before availability of the GA adjustment report is meaningless due to absence of an essential basis

When the GA lawsuit was first lodged in the *KOTA KADO* case, Tianjin Maritime Court and its court of appeal both held that a GA claim should not be filed before the GA adjustment was completed[Note 4], on the following grounds:

First, both Article 88 of the PRC Special Maritime Procedure Law and Article 62 of the PRC Supreme Court's Interpretations on Issues Concerning Application of the PRC Special Maritime Procedure Law require GA claims to be based on GA adjustment reports. Instituting court proceedings when the adjustment agreed upon by the parties has not been finished not only violates the adjustment agreement but also Article 88 of the PRC Special Maritime Procedure Law.

Second, GA adjustment is a professional assignment. No explicit legal basis is available for a court to directly determine that a loss shall be considered a GA sacrifice or to decide on the GA loss amount. Meanwhile, even if a party's objection to the adjustment report is accepted by the court, the court cannot make a decision without the report. Instead, the court shall instruct the adjuster to carry out a supplementary adjustment or conduct the adjustment anew.

V. Law governing GA adjustment disputes

In the *KOTA KADO* case, the GA dispute in China mainly concerns the GA adjustment report, including whether determinations in the report are reasonable and if the GA contributions decided in the report are reasonable.

Article 269 of the PRC Maritime Code provides "*the parties to a contract may choose the law applicable to such contract…*" As stated above, since the GA adjustment clauses the B/L reserve always set out appointment of adjusters, place of adjustment and adjustment rules, it shall be construed as the choice of applicable law (adjustment rules) by the parties to a contract of carriage.

On the other hand, under Article 274 of the PRC Maritime Code, the law where the GA adjustment is conducted shall apply to legal disputes arising from GA adjustment involving foreign elements. Considering applicable laws at most places where GA adjustment is conducted refer to the York Antwerp Rules, the GA cases shall be considered mainly according to the York Antwerp Rules.

VI. Determinations on GA sacrifices: interpretation and application of rules

In the *KOTA KADO* case, the GA adjustment report did not allow the Cargos as GA sacrifice, a conclusion challenged by the cargo insurer, who maintained that the loss of and damage to Cargo were extraordinary sacrifice intentionally made for preserving from peril involved in a common maritime adventure. We contended whether the loss of and damage to Cargo was GA sacrifice should be determined according to the 94 Rules in conjunction with whether further damage (if any) to the hull and water ingress into cargo holds after the voluntary stranding. These involve the coordinated application of the Rule Paramount, lettered Rules and numbered Rules under the 94 Rules.

Rule V of the 94 Rules provides "*When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the **consequent** loss of or damage to the property involved in the common maritime adventure shall be allowed in general average." [Emphasis added]*

Under Rule V, the word "consequent" shall denote the "cause" rather than the "timing". Accordingly, whether the loss of and the damage to Cargo should be ascribed to voluntary stranding shall be determined based on the cause of flooding rather than the flooding timing simply.

Rule C of the 94 Rules stipulates "*Only such losses, damages or expenses which are the **direct consequence** of the general average act shall be allowed as general average." [Emphasis added]*

Pursuant to Rule C, only losses, damages or expenses directly consequent on the voluntary stranding shall be allowed as GA. It follows if the losses or damage did not depend on the GA act (i.e. they would be incurred irrespective of whether the GA act was made or not), they shall not be considered as direct consequences of the GA act, still less the GA sacrifice.

Rule of Interpretation of the 94 Rules requires "*Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules."*

Therefore, in the absence of a clear provision under Rule V, all losses and damags caused by the stranding shall be determined in accordance with Rule C. This is consistent with the "direct expenses, losses and damages" defined in the Maritime Code.

Also applicable to the foregoing circumstance is Rule E of the 94 Rules, providing "*The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average."*

This rule undoubtedly became a hindrance to the cargo interests challenging the GA adjustment report. As a suggested course of action, the cargo interests shall "*give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure*" and "*supply evidence in support of a notified claim*" as required by the 94 Rules or other adjustment rules.

Afterword

The cargo insurer applied to the Tianjin Maritime Court for withdrawal of action in December 2020. Till then the epic 10-year journey that began with the grounding incident, followed by disputes over GA adjustment, finally came to an end.

GA is a time-honored and complicated mechanism involving expertise. Though the GA adjustment is conducted by professional adjusters, attorneys handling the GA disputes must be competent to carry out multiple demanding tasks. To that end, attorneys should continuously enhance their understanding and apprehension of adjustment rules.

Notes:

[Note 1]: Two legislative frameworks for the jurisdiction over disputes involving foreign interests: the "unitary framework", which emphasizes the application of one set of laws and rules to the international civil jurisdiction and the domestic territorial jurisdiction, with the former decided by quoting the rules of the latter; and the "binary framework", which requires a set of laws and rules to be formulated for each of the jurisdictions. Article 259 of the Civil Procedure Law of the P.R. China provides that Part Four Special Provisions on Civil Procedure of Cases Involving Foreign Elements shall be applicable to civil proceedings initiated within the territory of the P.R. China in regard to cases involving foreign elements; and in the absence of applicable provisions in Part Four, other applicable provisions in the law shall apply. The provisions corroborate that the jurisdiction over civil disputes involving foreign interests that arose in China falls under the "unitary framework".

[Note 2]: XIANG Zaisheng, A Study on the Legislative Framework of International Civil Jurisdiction in China, Science of Law, Issue 4, 2019, Page 183.

[Note 3]: (2016) LMZ No.1435; (2018) Z72MC No.1457; (2000) HSCZ No.054; (2013) JGMSZZ No.0054; (2012) HHFSCZ No.1491

[Note 4]: A previous article published by WJNCO on its WeChat Official Account:
https://mp.weixin.qq.com/s/8bI3EO_Bp9kHcIJu-Byoeg

| Cases and Insights

Civil Jurisdiction Challengeable or Not in Appeal for Reason of Breach of Specialized Jurisdiction Provisions

Introduction

In a recent dispute case concerning maritime freight forwarding contract, the claimant filed the lawsuit with the local primary court and the defendant without challenging the court jurisdiction responded to the claim by making defense. Afterwards, the defendant appealed against the first instance judgment. During the appeal he raised a jurisdiction challenge on the ground that the dispute over maritime freight forwarding contract should be subject to the specialized jurisdiction of a maritime court and accordingly requested the appeal court to overrule the original judgment and hand the case over to a competent maritime court for trial.

Under Article 127 of the PRC Civil Procedure Law and Article 331 of the *Interpretations of the Supreme People's Court on Application of the PRC Civil Procedure Law*, where the case acceptance by the original court is in contravention of legal provisions on jurisdiction by forum level and on exclusive jurisdiction, the litigating parties have rights to raise jurisdiction dissension in appeal and the appeal court shall overrule the original court decisions and transfer the case to a competent court. However, no law has expressly prescribed how to deal with the circumstance where a case is accepted by the primary court in contravention of specialized jurisdiction provisions.

We are of the view that, where a case is accepted by the primary court in contravention of specialized jurisdiction provisions, the litigating parties shall have the right to raise jurisdiction objections in the appeal proceeding and the appeal court shall overrule the original court decisions and transfer the case to a court with competent specialized jurisdiction. Such viewpoint has eventually been supported by the appeal court.

I. Specialized jurisdiction provisions override exclusive jurisdiction provisions, and a breach of specialized jurisdiction provisions is a greater mistake than a breach of exclusive jurisdiction provisions

1. Specialized jurisdiction

Article 12 of the *Organic Law of People's Courts of PRC provides that "the people's courts consist of: (1) the Supreme People's Court; (2) local people's courts at various levels; (3) specialized people's courts".* In China, local people's courts and specialized people's courts are judicial organs categorized by function, and their powers, duties, jurisdictions, applicable procedural laws

Author:

Zhang Jing has been practicing since 2007, and she worked for a well-known maritime law firm as a partner before joining Wang Jing & Co. in 2019. She focuses on dispute resolution in Maritime & Admiralty, Marine Insurance & Non-marine Insurance, Commercial Disputes and Construction of Real Estate, and her clients include worldwide shipping companies, P&I clubs, insurance companies, ports and terminals and logistics companies.

Yan Youmei joined Wang Jing & Co. in 2008, working as a lawyer assistant to several partners of the Firm. She was qualified as a Registered PRC Lawyer in 2017.

and substantive laws are different to varying extents. Specialized jurisdiction generates exactly from such dual division of functions between specialized courts and local courts, and it is the first and paramount factor to consider in determining a court jurisdiction over cases.

2. Exclusive jurisdiction

Exclusive jurisdiction generally means that, under the structure of either specialized courts or local courts, statutorily certain types of cases shall only be heard by some special courts, and they fall beyond the jurisdiction of other courts and shall not be changed by agreement. Under the Chinese law, exclusive jurisdiction provisions are mainly set out in Articles 33 and 266 of the PRC Civil Procedure Law and Article 7 of the PRC Special Maritime Procedure Law. From the court structures and legal provisions of China, it could be seen that exclusive jurisdiction provisions set out in the Civil Procedure Law are basis for local courts to determine their territorial jurisdictions, whilst exclusive jurisdiction provisions set out in the PRC Special Maritime Procedure Law are basis for maritime courts to determine their territorial jurisdictions.

In view of above, specialized jurisdiction overrides exclusive jurisdiction. To identify court jurisdiction over a case while not considering the provisions on jurisdiction by forum level or by agreement, the first step is to determine whether the case lies within the jurisdiction of a specialized court or a local court, and the next step is to determine whether the case is subject to exclusive jurisdiction of specialized courts or local courts. Accordingly, violation of specialized jurisdiction provisions is an error more serious than violation of exclusive jurisdiction provisions.

II. In common with the exclusive jurisdiction, specialized jurisdiction also has an effect of excluding both jurisdiction of other local courts and jurisdiction by agreement

1. Specialized jurisdiction excludes jurisdiction of other local courts

Article 3 of the *Notice of the Supreme People's Court on Learning, Publicizing and Implementing the Special Maritime Procedure Law (Court Issuance [2000]No.7)* underlines that local people's courts at all levels shall strictly implement the case examining and accepting procedures in accordance with provisions of *PRC Civil Procedure Law and the PRC Special Maritime Procedure Law*, and shall not incorrectly classify a case as admiralty/maritime case by any disguised means such as changing the cause of action or adding any third party.

Article 5.2 of the *Several Opinions of the Supreme People's Court on Maritime Trials (Court Issuance [2006] No.27)* further improves the specialized jurisdiction regime for maritime cases by stipulating that "*The parties shall not by accord, and local courts shall not by changing the cause of action, exclude the specialized jurisdiction of maritime courts. Where a local court accepts a maritime case in violation of the laws and the relevant provisions of the Supreme People's Court, as long as one party raises a jurisdiction objection, the court at a higher level shall uphold the objection and transfer the case to a maritime court with competent jurisdiction for trial; besides, the court at a higher level, when finding a local court has accepted a maritime case incorrectly, may also withdraw the case acceptance. The Supreme Court and the higher courts shall strengthen supervision to ensure effective implementation of specialized jurisdiction provisions on maritime cases*".

2. Specialized jurisdiction precludes jurisdiction by agreement

In addition to provisions of the *Opinions of the Supreme People's Court on the Development of Maritime Trials* which expressly prohibits litigating parties from excluding by agreement the specialized jurisdiction of maritime courts, Article 3 of *Provisions of the Supreme People's Court about Several Issues Concerning Jurisdiction of Military Court over Civil Cases (Court Interpretation [2020]No.2)* also stipulates that any agreement between litigating parties to be subject to jurisdiction of military courts shall not violate legal provisions on jurisdiction by forum level, exclusive jurisdiction and specialized jurisdiction.

In the jurisdiction dissension case concerning warehousing contract dispute between Qingfeng Group Song Yuan Jia Feng Cereals Trading Co., Ltd. and Yingkou Port Liability Co., Ltd. [Supreme People's Court

Judgement (2019)MSZZ No. 34], the Supreme People's Court pointed it out that an agreement on choice of jurisdiction in violation of specialized jurisdiction provisions was invalid, saying that "an agreement on choice of jurisdiction shall not only follow the provisions on jurisdiction by forum level and exclusive jurisdiction, but also observe specialized jurisdiction provisions. Since the law set out distinct functions and powers (i.e. duties) between specialized people's courts and other local people's courts, the solemnity of such legislation shall be observed; the *PRC Civil Procedure Law* does not empower an agreement on choice of jurisdiction to select a specialized court or a local court as the court having jurisdiction for case trial; besides, to choose being subject to the jurisdiction of a specialized court or a local court in the first instance trial proceedings will not only vary the forum levels mandatorily stipulated by law for specific cases but also breach legal provisions on litigation channels for specific cases; such choice is apparently contrary to the spirit of relevant provisions of civil procedure law. Therefore, the agreement on choice of jurisdiction shall be deemed invalid if it is in violation of specialized jurisdiction provisions." *(Judicial Opinions Collection of the Supreme People's Court (New Edition) · Civil Procedure Volume I, opinions No.29, page 40)*

In the Case (2016) Supreme Court Retrial No.400 and the Case (2017) Supreme Court Retrial No.58, both the first instance courts and the appellate courts considered them as cases of disputes over principal-agent contracts not subject to exclusive jurisdiction of maritime courts, and dismissed defendants' jurisdiction challenges. The defendants applied for retrial. In retrials, the Supreme People's Court held that, as agreed between claimants and defendants, the claimants instructed the defendants to handle the customs declaration and inspection, berthing, loading and unloading, warehousing, delivery and other relevant formalities at Tianjin port; the claimants claimed for compensation from the defendants on the ground that the defendants did not follow the claimants' written instructions for cargo delivery. These two cases concerned cargo delivery disputes incurred at the warehousing stage in the practice of freight forwarding related to sea carriage of cargo, which were typical under freight forwarding contract. According to the *Provisions of the Supreme People's Court on Several Issues Concerning Trials of Disputes over Freight Forwarding by Sea*, the two cases should be subject to specialized jurisdiction of maritime courts. As the agreement on choice of jurisdiction between claimants and defendants were in breach of the specialized jurisdiction provisions and hence invalid, rulings rendered by both the first and second instance courts were overturned, and the cases were returned to Tianjin Maritime Court for trials.

In view of the above, a court's jurisdiction as chosen by agreement, if in breach of specialized jurisdiction provisions, is invalid; based on the rule of "*argumentum a maiore ad minus*", in the absence of an agreement by litigating parties on choice of jurisdiction, it is not so justifiable for the first instance court to acquire valid jurisdiction by applying the principle of forum prorogatum.

III. Judicial interpretations specifically point out that a breach of specialized jurisdiction of maritime courts can be reason for retrial on a jurisdiction dissension case

Under the *PRC Civil Procedure Law*, only two types of civil rulings can be appealed for retrial: the action-rejection rulings and the action-dismissal rulings; however, as expressly stipulated in Article 3.2 of the Provisions of the *Supreme People's Court on Jurisdiction over Maritime Cases (Court Interpretations [2016] No.2)*, an effective civil ruling on jurisdiction dissension rendered in breach of specialized jurisdiction of maritime courts may be subject to retrial.

Given that a breach of specialized jurisdiction of maritime courts can be a reason for the retrial court to overturn an effective ruling and transfer the case to the competent court, logically it should be more justifiable for it to be the same reason of initiating the appeal and a reason for the appeal court to overturn an effective ruling and transfer the case to the competent court.

IV. In judicial practice, a breach of specialized jurisdiction can also be determined by reference to legal provisions for breach of exclusive jurisdiction

In the Case (2015) Min Yi Zhong Zi No.357 finalized by

the PRC Supreme Court, Qingdao Port Group Co., Ltd. Dagang Branch, had not raised any jurisdiction dissension and the Shandong Higher People's Court already had substantive trial on it; however, as the case was identified as a dispute over contract for cargo custody at port which should be subject to specialized jurisdiction of maritime court, the Shandong Higher People's Court held that "*Although Qingdao Port Group Co., Ltd. Dagang Branch did not raise any jurisdiction challenge and responded to the action by making defense, this case should be entertained by maritime courts. By reference to Paragraph 2 of Article 127 in the PRC Civil Procedure Law, the court accepting this case should not be regarded as competent. As per Article 36 of the PRC Civil Procedure Law of the PRC, this case should be transferred to Qingdao Maritime Court for trial*". In the subsequent appeal, the PRC Supreme Court upheld that a breach of specialized jurisdiction could also be determined by reference to legal provisions set out for breach of exclusive jurisdiction, and supported the decision by the Shandong Higher People's Court.

In the Case (2020) Shan Min Zhong No.773 decided by the Shanxi Higher People's Court, where the claimant and the defendant had disputes over ship financing lease contract; although both parties agreed to opt for court jurisdiction at the place where the shipowner, i.e. a financial company, was located, the financial company was located in Xi'an City where not any maritime court was available. In the appeal proceedings, the Shanxi Higher People's Court held that disputes over the ship financing lease contract should be subject to specialized jurisdiction by maritime courts and accordingly, in light of the territorial jurisdiction provisions, Qingdao Maritime Court had jurisdiction over the case. The agreement on choice of jurisdiction between the parties was invalid due to breach of specialized jurisdiction provisions. The Shanxi Higher People's Court further held that, although the appellant (the original defendant) did not jurisdiction challenge during the appeal, the court should on its own initiative examine whether the case was subject to specialized jurisdiction; whether or not the appellant had raised the challenge during appeal had no relevance with the court's own examination; in accordance with Article 331 of the *Interpretations of the Supreme People's Court on the Application of the PRC Civil Procedure Law,* the original court ruling was overturned and the case was transferred to Qingdao Maritime Court for trial.

The above case precedents and judicial guidance transpire that, in judicial practice, breach of specialized jurisdiction are often determined by reference to legal provisions on breach of jurisdiction by forum level and exclusive jurisdiction. If case acceptance by a local court in breach of specialized jurisdiction provisions, the local court does not necessarily acquire jurisdiction just because the defendant has responded to the claim. Moreover, the case shall be transferred to a court with specialized jurisdiction for trial.

V. In some circumstances, that a civil case subject to specialized jurisdiction being heard by a local primary court may breach both provisions on jurisdiction by forum level and provisions on specialized jurisdiction

Currently, specialized courts in China mainly consist of maritime courts, military courts, railway transportation courts, intellectual property rights courts and financial courts. Amongst them, maritime courts and financial courts are classified as intermediate people's courts according to provisions on jurisdiction by forum level. Therefore, a local primary court, if accepting a case which is subject to specialized jurisdiction by a maritime court or a financial court, will also violate provisions on jurisdiction by forum level and shall, according to law, overrule the original judgment and transfer the case to the court with competent jurisdiction.

| Cases and Insights

The State Council: Tianjin is Approved to Further Open up Service Sector

I. Introduction

The PRC State Council has made an official reply (GH [2021] No.37) to approve the launch of three-year comprehensive pilot programs to further open up the service sector in Tianjin, Shanghai, Hainan province and Chongqing, according to a circular released on the official website of the PRC government on 20 April 2021. Tianjin has become one of the second batch of cities where comprehensive pilot programs are launched to facilitate further opening-up of service sector after Beijing.

On 21 April 2021, the PRC Ministry of Commerce published the General Plan of Comprehensive Pilot Program to Further Open Up Service Sector in Tianjin (hereinafter the "General Plan"), by which they expect to remove certain restrictions for market access, to eliminate administrative barriers, to optimize the overall environment in 4 aspects including key industry, scope, system and mechanism, and policy and factor guarantees.

II. Basic Principles

The program shall accord to developing characteristics of service sector in Tianjin to open up the market at a high level and meanwhile intensify the market-based reform. The program shall actively adapt to the new trend of reshaping the global industrial chain and match with international economic and trade rules.

During implementation of the program, Tianjin shall leverage advantages in geographical location, advanced manufacturing, R&D and commercialization, and open up key areas first.

While opening up to the outside world, Tianjin shall also strengthen the risk awareness and bottom line thinking ability, and constantly improve capability for risk control and prevention so as to ensure industrial safety.

III. Legal Service

To fit the pilot program and to improve the law-based business environment, China (Tianjin) Pilot Free Trade Zone issued Several Opinions on Promoting Development of Legal Service Sector in Tianjin Free Trade Zone (the "Opinions"). It aims at establishing a high-level and high-quality service sup-

Author:

Zheng Junfeng joined Wang Jing & Co. Tianjin Office in 2019. He mainly handles maritime and admiralty, international arbitration and international trade matters.

plying system and a comprehensive and multi-level service platform for Tianjin Free Trade Zone, expanding service scope in Tianjin Free Trade Zone by providing high-level services in lawyer recommendation, notarization, arbitration, appraisal and mediation, so as to render strong support to construction of Tianjin Free Trade Zone and Tianjin's high-quality economic development.

IV. Measures

In line with the aforesaid official reply and the General Plan, efforts shall be made to:

1.Set up a Core Area of Digital Economy

Setting up the Tianjin medical big data storage subcenter, third party hosting platform for medical image data, and other projects relying on the National Supercomputing Center in Tianjin; Building a national data security governance pilot area; Building demonstration zones for block chain technology and industrial innovation and application.

2. Expand the Spillover Effect of the Convention and Exhibition Economy

Speeding up construction of the National Convention and Exhibition Center; allowing exhibitions to be put on record in advance and released by way of guarantee; supporting the hire-purchase method on purchasing of vehicle exhibited and facilitating the exhibition and transaction

3. Deepen the Reform of Streamlining Administration, Delegating Power and Improving Services

Simplifying procedures for identifying new and high technology enterprises; promoting the application of "block chain + electronic certificates" in the comprehensive window of governmental services; loosening practising qualification requirements for overseas professionals.

4. Gather High Quality Financial Resources

Carrying out pilot program on QFLP; supporting financial enterprises in implementing the pilot program of mass transfer of non-performing assets of personal consumption loans; setting up RMB overseas lending fund; supporting non-financial enterprise groups to set up financial holding companies in Tianjin.

5. Open Markets to Benefits People

Building an international consumption center and a regional trade center; opening ports to increase import and export volumes; promoting cross-border settlement in RMB and accelerating distribution of imported goods; attracting worldwide famous educational institutes to set up schools in Tianjin; lowering the entry threshold for foreign-funded medical institutes and encouraging online medical services.

| Cases and Insights

A New Breakthrough in Soybean Cargo Damage Cases – Adelante Soybean Damage Case Analysis

I. Case brief

On 26 September 2016, Company A purchased 60,000 metric tons of Brazilian soybeans from a trading company, which was carried by Company B's owned Adelante. On 7 April 2017, Adelante berthed at the Brazilian port of Barcarena, and was interrupted four times by raining weather during the four-day loading period. On 25 May 2017, Adelante arrived at the outer anchorage of Rizhao Port and submitted a notice of readiness. Company A issued a letter of credit on 16 June2017 and obtained a quarantine permit of the People's Republic of China for the entry of animals and plants on 13 July 2017. On 22 August 2017, Adelante berthed at Rizhao Port. Company A boarded the ship to inspect the cargo's condition and found that the soybeans were seriously moldy/carbonized. Adelante completed its unloading on 15 September 2017, and Company A, upon taking the delivery of the goods, demanded compensation from Company B for the damage.

II. Reasoning in the judgments

Regarding the liability for cargo damage of imported soybeans involved in the case, Qingdao Maritime Court's first-instance judgment focuses on four key disputed issues as follows: 1.Whether the quality of soybeans involved meets the requirements of carriage by sea; 2. Impacts of cargo operation in the rain; 3. Whether ventilation measures taken during the transportation are appropriate; 4. Impact of the delay in unloading on the cargo damage.

After hearing the case, the court of first instance held that the quality of soybeans involved in the case met the requirements of carriage of goods by sea, cargo operation in the rain at loading port had impacts on the subject cargo damage, the improper ventilation measures during the transportation were the main cause of cargo damage, and the delay in unloading is also an important factor contributing to the cargo damage. It could be seen that both parties are at fault. Company A's behavior is the direct cause of Adelante's delay in arrival at destination port for unloading, but for Company B, after normal arrival of the goods at the port of destination, in case of failure to deliver the goods within a reasonable time for reasons other than its own fault, the carrier shall according to law have the corresponding right to dispose of the goods and shall be liable for taking reasonable measures to reduce the losses. Finally, the court of first instance found Company B to be 70% liable for the cargo damage, to the extent of the carrier's fault for breaching its liability and obligations.

Company B appealed against the first instance judgement. Higher People's

Author:

Yuan Hui, Director of Qingdao Office, served as an officer in the maritime administration of Guangdong prior to joining Wang Jing & Co. in 1999. Hui specializes in maritime and admiralty law, ocean engineering, international trading and disputes over ship building and ship financing.

Wang Yongli joined Wang Jing & Co. in 2009 and became a partner of Wang Jing & Co., Qingdao office in 2017. He specializes in maritime and admiralty law, ocean engineering, international trading, property insurance and liability insurance disputes.

Court of Shandong Province, the court of second instance, reversed the proportion of liability determined by the court of first instance and found that Company B shall bear only 30% of the liability and Company A being the consignee shall bear 70% of the liability. The court of second instance found that: 1. Company B has performed its duty of care to avoid the goods being rained and have the goods carefully loaded; 2. During the transportation, Company B did not properly ventilate the cargo and was accordingly liable for the resulting damage. However, what is more noteworthy is that the court of second instance did not hold Company B liable for the delay in unloading. The court of second instance determined that the goods involved arrived at the port of destination within a reasonable period but had to wait for berthing and unloading for nearly 100days during the high temperature season as Company A failed to duly complete cargo import and inspection formalities. In that case, even if Company B had performed its duty of cargo caring, heat damage to the cargo was unavoidable. Moreover, while awaiting completion of import and inspection formalities and before the delivery, Company B had no power or right to dispose of the goods onboard; hence the first-instance court's ascertainment that Company B failed to dispose of the goods for mitigating the loss was not sufficiently grounded. Finally, based on the finding that Company B did not properly ventilate the goods during transportation, the court of second instance held Company B liable for 30% of the cargo damage.

III. Case Analysis

Soybean, a kind of active plant seed, has a respiration mechanism. What's more, soybeans are rich in fat that is vulnerable to oxidation, heating and mold, and in plant protein that is hygroscopic, mutable and with bad storage stability. Therefore, soybeans are in nature highly hygroscopic, not resistant to high temperature, and are apt to quick quality changes during storage. The cause of cargo damage during transportation involves the internal conditions of soybeans and the external factors of soybean storage and transportation, with internal conditions mainly including cargo quality (especially water content), temperature and storage time, and external factors mainly involving the appropriateness of the carrier's cargo caring. The intertwined internal and external conditions often jointly give rise to cargo damage and it is in practice quite difficult to completely separate the roles these factors/conditions play in causing the cargo damage.

Considering that to find the causes of cargo damage requires expertise, when hearing soybean cargo damage cases, if the goods meet the requirements after being tested at the port of loading, the maritime courts often rely too much on CIQ or CCIC's results obtained at the port of destination, and attributes the cargo damage to the carrier's improper caring of goods, especially improper ventilation, and as a result, the courts find that the carrier should bear all or most of the liability.

Prior to the said Adelante case, the "Aquila" case and the "Meijing" case witness carriers bearing the least proportion of liability. In both cases, the goods were not unloaded in time upon arrival, resulting in the cargo being left on board for more than a month. In the case of "Aquila", the water content of cargo at loading port exceeded 13% which is the value of transportable water content. In the "Meijing" case, the carrier's ventilation measures were not improper. Even so, the court held the carrier liable for 50% of cargo damage. As always, the courts always place heavy burdens of proof on the carriers. The proportion of liability is very unfavorable to the carriers.

Fortunately, the court of second instance in the Adelante case rebalanced the liabilities of both parties to the shipment, and especially changed the determination of liability for improper ventilation and unloading delay. The overruling by the second instance court of the Adelante case is ostensibly a redrawing of the liability for soybean cargo damage, and is essentially an adjustment between the liability of both parties of the carrier and cargo interest. As compared with previous court decisions, the judgment has made two major breakthroughs as follows:

1.It is found any impact of ventilation measures taken for delay in unloading only act on soybean surfaces

Since ships are only means of transport, and are not warehouses, they are not suitable for long-term storage of soybeans. Cargo damage of soybean is closely related to storage time. The delay in unloading is still within the period during which the carrier oversees the goods, and

it is necessary for the carrier to take appropriate ventilation measures for the soybean according to its duty to care for the goods. However, due to the anchoring state of the ship, the effect of natural ventilation is very limited. Previous decisions have basically placed too much emphasis on the practical effects of ventilation, simply asserting that the cargo damage was caused by improper ventilation measures.

In examining the liability for the soybean's heat damage during the delay, the court of second instance of the Adelante case recognized that while the ship was waiting for berthing and unloading, the cabin's ventilation capacity was limited, and the ventilation measures could only act on the surface of soybeans, while the damage to soybeans in the lower and middle parts could not be avoided by ventilation. Therefore, the damage to the lower and middle goods is not the result of the carrier's failure to exercise due care in its duty to manage the goods. Therefore, the carrier should naturally bear no liability.

2. The carrier's derogation measures while awaiting discharge shall be limited to "reasonable and practicable"

In general, carriers all wish to unload the goods immediately upon arrival at the port of destination, in this case not only the ship's schedule will not be delayed, but also the risk of cargo damage as a result of their long storage time on board can be avoided. However, in practice, delays in unloading are often caused by the consignee, such as failure to obtain a Bio-safety Certificate of Agricultural Genetically Modified Organisms, Import License, Customs Quarantine Permit, etc. Court had previously held the carriers liable for cargo damage that was clearly caused by delay in unloading (e.g., good at the port of destination but moldy while awaiting discharge), on the grounds that the carrier remained responsible for handling of the goods as soon as possible to reduce the loss while the goods were waiting to be unloaded. The carrier should unload the goods to a warehouse or resell them to avoid loss. Since the carrier has not taken effective derogation measures, it should be liable for the cargo damage of soybeans.

However, since the soybeans imported from abroad are basically genetically modified, they are cargoes for legal inspection. In the absence of an import inspection procedure by the consignee, the derogation measures that the court said the carrier should take, such as unloading the goods to a warehouse or reselling them, were not feasible. The court's determination was unfair to the carrier by creating an "impossible obligation". In the Adelante case, the court of second instance did not mechanically find the carrier's derogation obligations, but held that the carrier did not have the ability and right to handle the goods on the ship while waiting for the import and inspection procedures to be completed and for delivery, and that the carrier could only manage the goods as far as possible and urge the consignee to proceed with the formalities as soon as possible. This is not only consistent with the law, but also in line with the actual situation of the import inspection of genetically modified soybeans. In the absence of a completed import inspection procedure, the carrier, in addition to properly taking care of the goods, can only passively wait instead of taking the initiative to take derogation measures like unloading or reselling the goods. In cases where damage to the goods is caused by the consignee's failure to complete the formalities in a timely manner, it is insufficient on the factual and legal basis of the precedents to determine that the carrier should bear the most liability for the damage caused by delay in unloading the goods.

IV. Summary and Prosperity

It could be seen from the change to proportion of liabilities ascertained to be borne by the carrier in the Adelante case, liabilities of the carrier and the cargo interest, to a certain extent, would in the future be determined in a more detailed manner by taking account of the circumstances of specific case. Although Shandong High Court still found that improper ventilation is one of the causes for cargo damage, a factor still always be asserted as "scapegoat" for other causes of soybean cargo damage in the short term, the court also began to verify the actual effectiveness of ventilation and accordingly review the carrier's liability. In addition, in the event of delay in unloading the goods, the court began to re-examine the carrier's ability to handle the goods and the consignee's obligation to complete the import inspection procedures and to pick up the goods in a timely manner. The consignee can no longer be as "wayward" as before by acting negatively after the ship

arrives at the port of discharge and allowing the occurrence of the damage, while hoping to pass on the loss to the carrier.

Another highlight in the Adelante case is that, it has to a certain extent, changed the status quoin cargo damage case of soybean that CIQ Report on Cargo Damage is extremely difficult to overturn, the court partially overturned the CIQ Report on the cause of the cargo damage (CIQ Report on Cargo Damage believes that the only reason for the cargo damage is improper ventilation, and Shandong High Court found that the main reason for the loss is delayed unloading). In cargo damage case of soybean, although the court's heavy reliance on the CIQ Report on Cargo Damage is still difficult to change completely, it is still possible to overturn the conclusions of the CIQ Report in whole or in part, provided the carrier provides sufficient evidence.

The judgment of the second instance in the Adelante case, which distributed the liabilities of both parties more equitably and rationally, was undoubtedly a promising step for the Court. An interesting question is that, in the Adelante case, the court held the carrier 30% liable for damages due to improper ventilation measures, but if the carrier's ventilation measures were proper, would the court hold the carrier not liable at all? We are not in a state now to answer this question because there is no precedent to follow. However, we believe that if the court can verify the true cause of the damage and distribute the liabilities of both parties fairly and reasonably, then the judgment issued by the court will be more convincing.