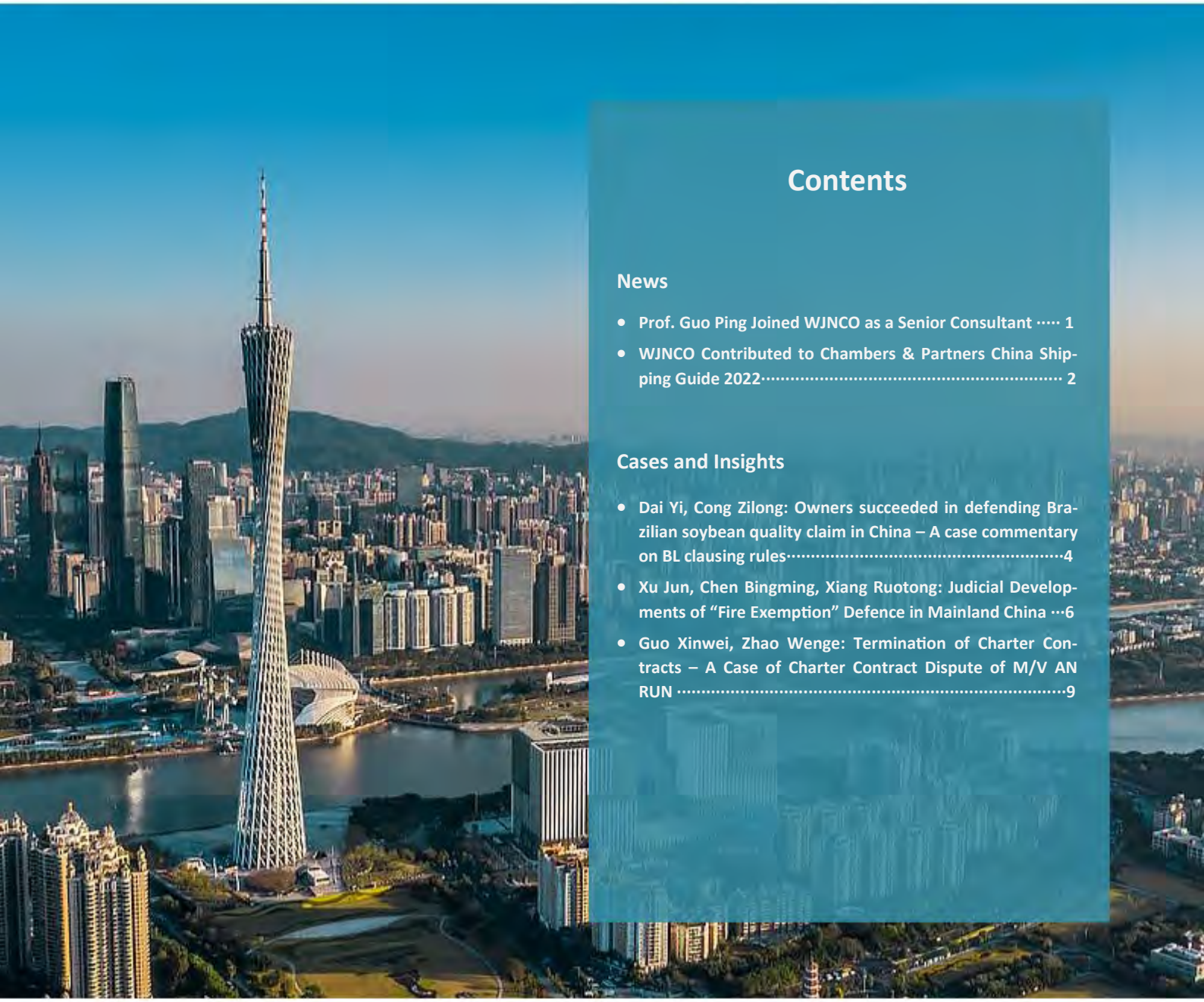
敬海律師事務所
WANG JING & CO.

May 2022

Maritime and Commercial Law Newsletter



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| NEWS

Prof. Guo Ping Joined WJNCO as a Senior Consultant

This is to announce the good news that **Prof. Guo Ping** of Sun Yat-Sen University School of Law, a well-known scholar of international law and maritime law, joined WJNCO as a part-time lawyer and a senior consultant.

Prof. Guo is now: a PH.D/M.Sc supervisor at School of Law (Sino-British School of International Maritime Law) of Sun Yat-Sen University; a distinguished research fellow of Southern Marine Science and Engineering Guangdong Laboratory (Zhuhai); an executive director of the Supreme People's Court Fourth Civil Judicial Division Research Centre for International Maritime and Ocean Law (Sun Yat-sen University).

Prof. Guo previously taught at Dalian Maritime University for years as a professor. She once studied abroad as a visiting scholar sponsored by Ministry of Education at the Institute of Maritime Law of University of Southampton in the UK and at the Research Institute of Maritime Law of Tulane University in the US, and meanwhile she is a senior Fulbright Scholar. Her publications include: Studies on Legal Problems with International Freight Forwarders, Comparative Study on Legal System of Multimodal Transport, Practice and Law: Charter Parties, etc.. What's more, she published numerous works and papers about maritime law systems, Rotterdam Rules, energy safety, cruise industry and ship oil pollution. Meanwhile, the positions undertaken by Prof. Guo include:

Standing director of China Maritime Law Association;
Standing director of Yangtze River Maritime Law Society;
Standing director of Guangdong Province Law Society;
President of Research Association of Ocean and Maritime Law of Guangdong Province Law Society;
Vice president of Research Association of Shipping Law of Guangdong Province Law Society;
Standing director of Guangzhou Research Association of International Shipping Justice;
Deputy secretary-general and academic director of Institute of Maritime Law of Liaoning Law Society;
Arbitrator of China Maritime Arbitration Commission, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission, Dalian Arbitration Commission, Nantong Arbitration Commission, Jiuquan Arbitration Commission, Shenyang Arbitration Commission and Shijiazhuang Arbitration Commission.

Prof. Guo has profound knowledge and students all over the world. Teaching and researching maritime laws for years, Prof. Guo has cultivated numerous talents for China's maritime circle. Meanwhile, she has in-depth knowledge of changes in shipping practice and maritime justice and can employ leading-edge theories into shipping and legal practice, thus greatly contributing to integration of legal theories and practices. WJNCO, as a first-rate law firm in shipping laws, not only demonstrates its top-level ability in practice, but also values the cultiva-

tion of top-level legal talents to a great extent by promoting its cooperation with universities.

It is not only an advance of WJNCO's strength in legal service of shipping but also a model of "integration between industry (legal practitioners) and education (law schools of universities)" that Prof. Guo joined WJNCO as a senior consultant, and it is also an example of sharing resources and advantages by both sides. WJNCO will contribute with utmost effort to the building of high-level teaching and research platform of foreign-related legal practice and the practice base for top-level legal talents in the Great Bay Area in an all-round and multi-angle manner.

WJNCO Contributed to Chambers & Partners China Shipping Guide 2022

The worldwide renowned legal rating agency Chambers and Partners recently published its 2022 Chambers Global Practice Guides("GPGs"), where the Shipping – China Section is composed by four partners/associates of WJNCO as invited, including John Wang, XU Jun, Song Jia and Zhao Yuxuan. This is the fifth time that WJNCO contributes to the China chapter of GPGs.

GPGs provide expert legal commentary and pragmatic analysis on the major practice areas in key jurisdictions around the world, and create global and practical overviews of the legal landscape across major practice areas. The 2022 China chapter covers the following nine topics:

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 Clauses; Ship -Owner's Income Tax Relief; Implications of the Coronavirus Pandemic; Additional Maritime or Shipping Issues.

You can get access to the full text of 2022 China chapter at http://wjnco.com/up2/20220322100509_4702.pdf. Should you have any enquiry about it, please do not hesitate to contact us.

| Cases and Insights

Owners succeeded in defending Brazilian soybean quality claim in China – A case commentary on BL clausing rules

I. Case background

The Receiver purchased a shipment of Brazilian soybean from the Seller. On 24 February 2017, M/V Megalohari (the "**Vessel**") arrived at Paranagua, Brazil for loading the soybean cargo. Before loading, the Carrier obtained a pre-declaration certificate and cargo information from the Shipper in accordance with SOLAS Convention. Due to raining, loading operation was suspended and the hatch covers were closed a few times. After loading, the loadport ship agent issued clean Bills of Lading (the "**BL**") on behalf of the Master and the Vessel set sailed. On 16 April 2017, the Vessel arrived at Songxia Port, Fuzhou, China. During discharge, the Receiver found that the cargo was mixed with various types of debris, carbonized and heat-damaged kernels. The Receiver applied for ship arrest for security purpose and managed to preserve the Vessel's registry certificate, cleanness certificate, and mate's receipt. As usual, the arrest order was lifted after a China Re LOU had been provided by the Carrier.

II. BL clausing principles

The Receiver then filed a cargo quality claim in tort with the Xiamen Maritime Court (the "**Court**") against the Owners. The Receiver alleged that quality of the cargo provided by the Seller was not in conformity with the sales contract, but the Master failed to clause the BL, prejudicing the Receiver's right to refuse payment to the Seller under the sales contract.

The Court found that Articles 75 and 76 of the PRC Maritime Code were relevant to the carrier's right to clause BL. Article 75 provides that BL clausing is limited to the name, sign, packing, quantity, weight or volume of the cargo, whilst cargo grade and quality were beyond the scope of clausing by the carrier. Specifically, the Court stated that "*the issue as to whether the cargo was in apparent good order and condition required certain technical guidance. **Master and other crewmembers were not required to be experts for all types of cargo carried by the vessel. Whether the carrier should issue clean BL or not depended on the apparent cargo condition observed and***

Author:

Dai Yi started his legal career in 2008 after obtaining LLM from University of Birmingham with distinction. Mr. Dai focuses on serving shipping, trade, and energy clients to resolve shipping and commercial disputes. He is an experienced litigator in all maritime courts and the appeal courts across PR China. Mr. Dai also acts as counsels in arbitration and mediation at CMAC, CIETAC, HKIAC, SIAC, SCMA, LMAA etc., and advises clients on enforcing arbitration awards and judgments in all regions across PR China. Mr. Dai is also frequently consulted by banks and financial leasing companies for asset (ship) finance matters and mortgage enforcement. .

Tony Cong is a graduate from New York University. He passed the PRC bar exam in 2020 and joined Wang Jing & Co. in 2021. He specialises in international trade arbitrations.

found from the surface by usual observation manner, with commonly equipped knowledge, and through naked eyes or some other common and reasonable inspection methods. The inherent cargo quality was excluded." (Emphasis added)

The Receiver argued that the heat-damaged kernels and debris could be observed and the BL should be claused to reflect the visible cargo condition, such as a lot of heat-damaged kernels and debris etc. The Court disagreed on grounds that heat-damaged kernels and debris, albeit noticeable from the cargo stow surface, were quality parameters in essence and were therefore beyond the statutory scope of clausing. In addition, the Court held that "*Clausing shall be made objectively and appropriately. Overly clausing with subjective and uncertain words such as 'a lot of', 'much', or 'little' should be avoided*."

III. Visibility during loading

The Court found that the cargo was loaded on board via conveying belt and loading machines, and that such way of loading would cause debris, ashes, and soybean skins to tumble in the air, thereby reducing overall visibility for the Master/crew to observe the cargo stow surface.

The Court held that visibility during loading was not good enough for the Master/crew to carefully observe on the apparent cargo condition, because "***condition of loading was such that the 60,000+ MT of cargo quickly flew into the cargo holds through the conveying belt. It was apparently beyond the reasonable judging capability of ordinary persons including Master and crew to identify the randomly scattered abnormal kernels (in particular discolored ones) and determine whether the same were compliant with the cargo condition stated on the pre-declaration certificate.***" (Emphasis added)

IV. Common knowledge and intelligence as well as ordinary judging criterion

The Court held that the question as to whether the soybean cargo was in apparent good order and condition should be determined in accordance with the pre-declaration certificate obtained before loading as well as the actual cargo condition at the time of loading.

The pre-declaration certificate indicated that the allowable abnormal kernels were relatively high. When determining whether the actual cargo condition was in line with the pre-declaration certificate, the Court acknowledged that the Master/crew were not soybean cargo expert and that only common knowledge and intelligence as well as ordinary judgment criterion was required. In this connection, the Court held that there was no reasonable ground for Master to clause the BL, because common knowledge and intelligence as well as ordinary judging criterion would tell that the cargo was nothing abnormal but in order as per the pre-declaration certificate, unless there was obvious caked cargo. In addition, the damage contended by the Receiver was heat damage measured by acid value, which could not be observed by Master/crew (who were not soybean experts) with naked eyes.

V. Comments

On 28 February 2022, the above case was selected and published by the PRC Supreme People's Court as one of the 3rd series of Belt and Road leading cases. [1]

The Supreme People's Court viewed that the above case set out following three principles for BL clausing:-

a. Cargo grade and quality are beyond the scope of clausing by the carrier;
b. The requirement for carrier to determine the apparent cargo condition should be reviewed in accordance with prevailing circumstances of the cargo operation; and
c. Unless the abnormal kernels are caked, the carrier's judgment as to nothing abnormal with the cargo is in line with common knowledge and intelligence as well as ordinary judging criterion.

It is also notable that the Supreme People's Court is silent as to the legal effect of pre-declaration certificate and its connection with the BL clausing rules. We consider that the pre-declaration certificate is a quality certificate in nature. Any requirement for carrier to inspect the cargo against the pre-declaration certificate for BL clausing purpose would in essence be requiring the Master/crew to check the cargo quality, which appears to have deviated from the above BL clausing principles.

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[1] https://www.court.gov.cn/zixun-xiangqing-347711.html

| Cases and Insights

Judicial Developments of "Fire Exemption" Defence in Mainland China

In spite of technological developments in the shipping industry, fire accidents on board vessels have not diminished whilst severity has not abated. It is therefore not rare that cargo claims are lodged against carriers for cargo damage/loss caused by fire and/or fire extinguishing operations during the shipment.

Mainland China have not acceded to any international convention governing contract of carriage of goods by sea but the PRC Maritime Code have generally adopted principles and main terms of Hague/Visby Rules. In particular, Article 51in Section 2 of the PRC Maritime Code has modelled the fire exemption terms of Hague/Visby Rules to the effect that carriers should be exempted from liability for any fire claims unless it is caused by the actual faults or privity of carriers. However, there are still some pending and unsettled issues under Chinese judicial practice in relation to application of the statutory fire exemption, for instance, which party should take the burden to prove the fire cause, whether carriers should prove the ship's seaworthiness and crew's reasonable care of cargo during sea voyage for successfully invoking the fire exemption defence. In a recent case involving onboard fire accident we handled, the Shanghai Maritime Court and its Appeal Court rendered explicit and logical guidance on these crucial issues.

I. Case Background

In May 2016, M.V "MF" ("the Vessel") laden with the cargo of plywood, trucks and steel departed from a Chinese port and arrived at discharging port in Djibouti. During discharge, smoke and fire inside the cargo hold was noticed by the crew and the fire was finally extinguished in August 2016 resulting in total loss of cargo partially being destroyed by fire and partially by sea water during the fire-fighting operation.

Fire experts were retained by carriers to carry out investigation and their preliminary conclusion was that the fire was likely caused by unextinguished cigarette butt improperly discarded by stevedores. Nonetheless, the cargo claimants (namely the subrogated cargo underwriters) alleged (in the absence of an on-site investigation) that the fire should be ascribed to the ship's unseaworthiness (e.g. inappropriate cargo stowage inside cargo holds resulting in uncargoworthiness) and/or failure by the crew in taking reasonable

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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.

Chen Bingming worked in shipping companies (as mariner) and MSA (as marine accident investigator) for many years before joining Wang Jing & Co.. Bingming is familiar with navigation technology and has rich experience in marine accident investigation.

Xiang Ruotong joined Wang Jing & Co. in 2021.

care of the cargo during discharge. In other words, the claimants argued that for establishing the fire exemption defence, carriers should first prove the exact cause of fire and the ship seaworthiness as well as reasonable actions taken by the crew to care for the cargo.

The above issues were submitted to the Shanghai Maritime Court and its Appeal Court and both Courts made consistent decisions in their respective judgments.

II. Court decisions on crucial issues

1. Which party should take the burden to prove the cause of fire

Given fire on board vessels is mostly fierce and dangerous, it is not unusual that subsequent investigation fails to dig out or accurately dig out the likely cause of fire. The cargo claimants, however, argue that in practice it is extremely difficult (if not impossible) for them to conduct an on-site investigation so the burden of proof should inevitably rest upon carriers who should carry out comprehensive investigation to ascertain the likely cause of fire; if there is any reasonable doubt about the cause on balance of probability, carriers shall not be entitled to invoke the statutory fire exemption defence.

The Courts at both levels decided that it was fair and reasonable to require carriers to investigate the cause of fire on board vessels but such burden is not absolute. In particular, the Courts clarified that carriers could be regarded as having been discharged from such burden if they had retained professional experts/surveyors to carry out the investigation as far as practically possible but they should not be responsible for the consequence even though no likely cause could be reasonably ascertained by the experts/surveyors or there were any doubt about their conclusions.

In the said case, the Court carefully reviewed the submitted expert reports and accepted their conclusions that the fire was likely caused by the unextinguished cigarette butt improperly discarded by stevedores during cargo discharge.

2. Seaworthiness and fire exemption

The Courts tended to follow Hague/Visby Rules (especially reasoning by England Court in a recent fire precedent case) by taking a stand that due diligence to keep the ship seaworthy was carriers' paramount obligation and thus the premise for their entitlement to fire exemption. Nevertheless, the Courts made it clear in their judgments that by submitting necessary ship certificates and other sailing documents before departure, the carriers had *prima facie* evidence to prove their exercise of due diligence to ensure ship seaworthiness; accordingly the ball was now with the claimants to undertake strict burden of disproof, more importantly, to prove the causation link between unseaworthiness and the fire accident. As the claimants failed to do so and the ship was not unseaworthy at the material times (even if any), it was irrelevant to the fire accident at all.

3. Care of cargo and fire exemption

In both the first instance and the appeal proceedings, the claimants alleged that similar to other statutory exemptions, carriers should not be exempted from liability if the crew's negligence or faults partially led to the fire accident. For defending carriers, we strongly refuted it on grounds that in accordance with Article 51 of the RPC Maritime Code, carriers were still entitled to invoke the fire exemption even if the crew failed to take reasonable

care of the cargo unless the claimant could adduce solid evidence to prove that carriers had any personal faults resulting in the fire accident. In particular, we pointed it out that the claimants' allegations were legally illogical in the sense that carriers' fire exemption was peculiar to other statutory exemptions and that strict requirements to exam carriers' personal faults should be irrelevant if the crew's negligence/faults has been sufficient to deprive carriers of entitlement to fire exemption.

Judges of first instance trial analyzed in details by reference to historical developments of "fire exemption" under Hague/Visby rules and wordings as well as to the logical relation between such a clause and other clauses. They decided that "carriers" should refer to the carriers themselves exclusive of their agents or servants and it followed that in no event should carriers be held liable for any negligent conducts of their servants or agents. In normal circumstances, if the party involved was a company, the decision made by its board of directors or the management may serve as the personal privity of carriers themselves and if carriers should otherwise assume vicarious responsibility, such as "*Respondeat superior*", they should not be entitled to rely upon legal relief, which ran counter to the fire exemption regime.

The judgment went further that there was actually no indication that the carriers themselves had been advised of the stevedores' smoking behavior on board the ship but failed to take any precautionary measures. In other words, although stevedores' behavior was in contravention of relevant regulations by inappropriately discarding unextinguished cigarette butts, in no way should it be, in a strict legal sense, construed as carriers' personal faults.

All that said, the courts at both levels decided that even if there was any negligence in care of cargo by the crew, unless it could be ascribed to personal faults of the carriers themselves, it was not sufficient to deprive carriers of their entitlement to fire exemption.

III. Comments and suggestions to carriers

The Chinese maritime courts and their appeal courts have explicitly responded to certain crucial issues in relation to carriers' fire defence under Chinese law. Their responses are seemingly consistent with principles set under English law and the Hague/Visby Rules. More significantly, their responses provide guidance to carriers involving on-board fire accident.

1. It is necessary for carriers to retain fire experts since the very beginning in order to carry out timely accident investigation for establishing possible causes of fire as well as to preserve first-hand evidential documents in relation to the ship's seaworthiness.

2. In order to successfully invoke the fire exemption defence, carriers should prepare at least *prima facie* evidence to establish seaworthiness.

3. Caution should be always made to the personal conducts of the ship management by reference to the internal sound management system so that the negligence/faults of the crew on board can be separated from carriers themselves.

WJNCO are experienced in arguing fire exemption for carriers involving in on-board fire accident. We are always pleased to provide comprehensive advice if you have any queries on any particular issue concerning on-board fire cases.

| Cases and Insights

Termination of Charter Contracts – A Case of Charter Contract Dispute of M/V AN RUN

Abstract

With the charter contract dispute of M/V AN RUN as an example, this paper tries to clarify related legal issues of the termination of charter contracts. The said case involves a dispute between Port Construction Company and Harbor Engineering Company over the performance of a charter contract. The Port Construction Company sued Harbor Engineering Company for the latter stopped working without instructions and therefore should compensate for the losses, while the Harbor Engineering Company held the termination of contract as defense. The court did not support the claim by the Port Construction Company. Instead, Harbor Engineering Company brought litigation against Port Construction Company to claim for losses in subsequence.

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.

I. Case I

Case Brief

In August 2018, Port Construction Company needed a grab dredger for a port construction project. Through business contacts, Port Construction Company entered into a charter contract (vessel: M/V AN RUN) with Harbor Engineering Company, for which the latter shall provide the former the needed dredger. In the contract it says the dredger is for "dredging", and the chartered vessel is a grab dredger. However, when construction started, Harbor Engineering Company discovered that the dredger was actually used for excavating tonnage stones by Port Construction Company, which was absolutely not agreed in the contract and such operation did great damages to vessel safety and the equipment thereon. Subsequently, Harbor Engineering Company stopped working in September 2018. Port Construction Company then initiated the legal proceedings in November 2018, claiming that Harbor Engineering Company shall refund Port Construction Company the prepaid rents and compensate losses for their undue lockout.

Clarifying Legal Issues

1. The Right to Terminate Contracts

The right to terminate a contract is a right agreed by both parties in the contract or a right granted by the law. Where such a right was agreed upon by parties in contracts, when condition meets, any of the parties may terminate the contract per the agreement; where such a right is granted by law, its application shall be subjected to Article 94 of Contract Law and special terms in contracts entered into.

In this case, Port Construction Company used the dredger for stone excavating, which is not the purpose specified in the contract and therefore violates the contract. According to Article 219 of the Contract Law, "where the lessee fails to use the lease item in the agreed manner or in a manner consistent with its nature, thereby causing damage to it, the lessor may terminate the contract and claim damages." Pursuant to this Article, Harbor Engineering Company is entitled to the right to terminate the contract. By notifying Port Construction Company when excising its right, Harbor Engineering Company may successfully terminate the contract at the time the notice is received by Port Construction Company.

It should be noted that the notice for termination of the contract does not require specific forms. In this case, Harbor Engineering Company notified Port Construction Company the termination through WeChat message, which was contended by the court to be a lawful means to terminate contracts. Harbor Engineering Company did not violate the contract and therefore the court rejected the claims of Port Construction Company.

2. Legal Effects of Termination of the Contract

Article 97 of Contract Law stipulates clearly that "after the termination of a contract, performance shall cease if the contract has not been performed; if the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore such party to its original state or adopt other remedial measures, and such party shall have the right to demand compensation for damages." It should be noted that, different to a revoked contract, which would be null and void, a contract that has been terminated annihilates only the effect of the contract forward, which means the contract is no longer binding for the two parties for performance; however, for obligations that have been performed already, it is not necessarily that all the performed should be restored.

In this case, the Port Construction Company's violation happened during the performance of contract. According to the contract, although the agreed hire is 2 months and the monthly rent is RMB1,100,000, but the contract also specifies that the working hours per month is 550; therefore, the actual amount of the rent is RMB2,000 per hour. Ultimately, the court calculated the payable rent that should be paid by Port Construction Company based on the actual working hours of the dredger (supported by related working sheets) and found that Harbor Engineering Company shall refund Port Construction Company the rest prepaid amount deducted from the payable amount.

II. Case II

Case Brief

The termination of contract will not lift liabilities for breach of contract for any party, especially when the termination is cause by one party's violation and thus the other party cannot have its contract purposes fulfilled. Therefore, in this case based on the said facts, Harbor Engineering Company in reverse sued Port Construction Company

and request that the latter shall undertake liabilities of breach of contract accordingly.

Clarifying Legal Issues

1. Compensation for Losses after Termination of the Contract

According to Article 113 of Contract Law, the amount of compensation for losses shall be equal to the losses caused by breach of contract, including the direct losses and also the interests receivable after the performance of the contract. In this case, Harbor Engineering Company claimed not only the contractual penalty (i.e. dispatch fees) but also the receivable interests (i.e. rents) after the performance of the charter contract. Because of insufficient evidence, the court only support Harbor Engineering Company's claim for the contractual penalty.

2. Dispatch Fees

In this case, it was agreed between the two parties that when Port Construction Company breaches the contract, it shall compensate Harbor Engineering Company RMB400,000 as "dispatch fees". In addition, both parties agreed that when the performance of the contract begins, Port Construction Company shall pay RMB500,000 as "dispatch fees" also in advance to the other party. During the litigation, the two parties disputed whether the payments named samely as "dispatch fees" shall be paid. Seeing from the contract and the final Judgment, the prepaid "dispatch fees" by Port Construction Company is the cost for lessor's dispatching the dredger to the place for construction, which the Judgment says: "the 'dispatch fees' that had been paid alleged by the defendant was the cost for the plaintiff to perform the contract, not the 'dispatch fees' agreed for breach of contract. " Therefore, though the payments have the same name literally, they refer to different meanings. The 'dispatch fee' claimed by Harbor Engineering Company during the litigation is the amount agreed by both parties for the breach of contract and the court supports this claim.