敬海律師事務所
WANG JING & CO.

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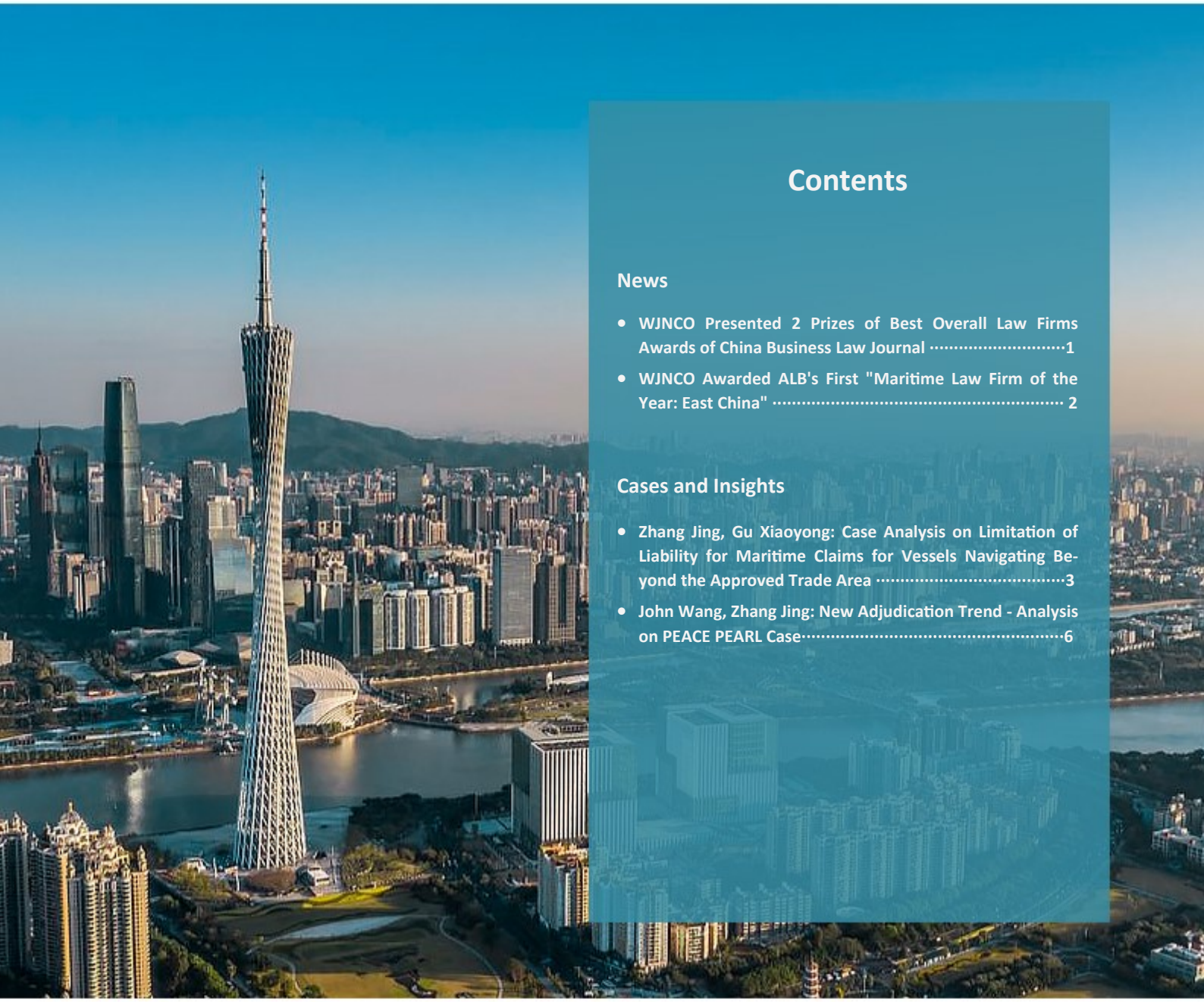
Maritime and Commercial Law Newsletter



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| News

WJNCO Presented 2 Prizes of Best Overall Law Firms Awards of China Business Law Journal

On 21 September 2022, China Business Law Journal published its list of China Business Law Awards (Regional Awards): Best Overall Law Firms 2022.

To make comprehensive evaluation, the prestigious legal newspaper had carefully appraised each law firm in terms of their performances in transactions, cases, and other notable achievements in the previous year, and took the nominations and recommendations from professionals, including in-house counsels, decision-makers, government officials, and scholars across the sector.

WJNCO and its Tianjin office shows up twice on the list of the Best Overall Law Firms 2022 on account of their excellent performance in the sector last year.

区域奖项 卓越综合实力律所（广东）

区域奖项 卓越综合实力律所（华北）

The Journal comments that after winning well-known new clients from the locality, the Tianjin Office of WJNCO has almost grown into a full-fledged company with major practice areas of foreign-related business, SOEs and governmental affairs, and maritime and admiralty. In addition, some of the cases handled by the office, such as the contract dispute of "Dark Blue I", which totals 130 million yuan, were selected by the Supreme People's Court as a modal case of the year 2021.

WJNCO was founded in Guangzhou in 1994 and has operating branch offices in Shanghai, Tianjin, Qingdao, Xiamen, Shenzhen and Beijing. Upholding the values of "Professionalism, Efficiency, Sharing and Inheritance", it commits itself to delivering professional, network, and quality legal services to its clients all over the world, including shipowners, P&I clubs, insurers, offshore corporations, bankers, financial agencies, logistics organizations, and trading companies.

Drawing on resources from its Guangzhou headquarter and that from the Beijing-Tianjin-Hebei Region, the Tianjin Office established in 2004 is armed with a professional service team to provide multiple legal services, covering the areas of shipping, insurance, trade, corporate affairs, governmental and SOEs affairs, engineering, finance, labor, human resources, and etc.

The awards symbolize the recognition and confidence of the society to and on WJNCO. And it is for those trusts, that clients, as they always did, entrust WJNCO to handle for them the difficult and knotty cases. In return, WJNCO will continue to uphold its serious working attitude and strive for perfection in handling each and every case.

Link to China Business Law Journal Official website:
https://law.asia/zh-hans/top-china-law-firms-regional/

| News

WJNCO Awarded ALB's First "Maritime Law Firm of the Year: East China"

On the evening of August 19, 2022, the gala ceremony of "ALB China Regional Law Awards 2022: East China" was held in Shanghai Tower. International legal media Asian Legal Business (ALB), owned by Thomson Reuters, announced the final winners of the awards at the gala.

The China Regional Law Awards: East China is newly set up by ALB this year, which was designated for the 5 provinces and 1 municipality: Shandong, Jiangsu, Anhui, Zhejiang, Jiangxi, and Shanghai. The prestigious awards aim to pay tribute to outstanding law firms, in-house legal teams and individuals with strong market strength, prominent accomplishments, and impressive performance in the legal service market of East China, and to encourage more legal teams and practitioners to make notable contributions.

Maritime Law Firm of the Year: East China - Non-local
年度华东地区海事海商律师事务所大奖 – 非本地

Wang Jing & Co. Law Firm
敬海律师事务所

After being awarded "Shipping Law Firm of the Year" and "Maritime Law Firm of the Year: The Coastal Areas" by ALB several times, WJNCO, with its rich experiences accumulated throughout the years and its extraordinary performance in recent years in East China market and amongst all its prestigious and competitive peers, was awarded the first "Maritime Law Firm of the Year: East China – Non-local". Mr. Song Jia, one of the new-generation young talent lawyers of WJNCO's Shanghai office attended the ALB gala ceremony and accepted the award.

WJNCO was established in 1994 and headquartered in Guangzhou. Branch offices in Shanghai and Qingdao were strategically established in 2002 and 2005 respectively and have been actively providing professional, efficient, and competitive legal services in the East China market. In recent years, WJNCO was rarely absent from those influential major maritime cases in East China, and has formed a cooperative work mode between offices in South and North China to further expand its business to offshore projects, environment and resource, banking and finance etc., showcasing its leading advantages of professional and integrated management mode, multi-point layout, and network services. More importantly, WJNCO abides by the values of sharing and inheritance. Founders of the previous generation passed unreservedly the law firm's brand and resources to the next generation of WJNCO. In today's WJNCO, post-90s lawyers are the mainstay and post-80s partners shoulder major responsibilities. Full of vigor and wisdom, they will never relent in pursuit of excellence and will continue to strive for progress.

Link to ALB Official URL：https://mp.weixin.qq.com/s/pwXt34CQqXJEKf0OZ1pzhg

| Cases and Insights

Case Analysis on Limitation of Liability for Maritime Claims for Vessels Navigating Beyond the Approved Trade Area

Limitation of liability for maritime claims (LLMC) is a long-standing risk spreading system that allows a person liable to limit his liability to a certain amount specified by law in the event of a major average accident. The availability and calculation of LLMC are always the focus of a dispute, and the settlement thereof concerns not only the vessel's type and her approved trade area specified on her certificates but also her actual navigation area where the accident occurred. The authors present a brief introduction and analysis of this topic with reference to existing judicial practices.

I. Inland ships navigating in coastal waters should not be determined as sea-going vessels and are not entitled to LLMC

1. Inland ships are not entitled to LLMC

According to Article 3 of the *Maritime Code of the People's Republic of China* ("Maritime Code"), applicable ships refer to sea-going vessels only. Therefore, LLMC applies only to sea-going vessels, not inland ships. It is made clear in Article 1 of the *Provisions Concerning the Limitation of Liability for Maritime Claims for Ships With a Gross Tonnage Not Exceeding 300 Tons and Those Engaging in Coastal Transport Services As Well As Those for Other Coastal Operations* ("Provisions on Limitation of Liability") that "these provisions are enacted in accordance with Article 210 of the Maritime Code". Given this, the Provisions on Limitation of Liability derives from the Maritime Code and therefore "**ships** engaging in transport services between the ports of the People's Republic of China as well as those for other coastal operations" shall be limited to sea-going vessels, not including inland ships. To this end, there is no legal basis for inland ships to enjoy LLMC.

2. Can inland ships navigating in coastal waters enjoy LLMC like coastal ships?

Case 1: "Xiang Zhangjiajie Huo 3003" – (2018) Zui Gao Fa Min Zai No.453

The vessel "Xiang Zhangjiajie Huo 3003", with a gross tonnage of 2,071, holding an inter-provincial transport license for general cargo ships in the middle and lower reaches of the Yangtze River and its tributaries and a certificate of seaworthiness for inland vessels under which the vessel is approved to trade in A-Level Navigation Areas, collided with "En Ji 1" at the Minjiang River estuary in May 2016, causing damage to the latter and the goods carried thereon. The owner of "Xiang Zhangjiajie Huo 3003" filed an

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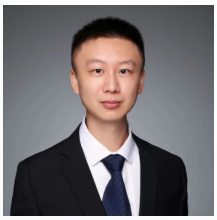

Gu Xiaoyong worked for the Insurance & Claim Department of a well-known shipping company to manage claim matters in the Nordic region prior to joining Wang Jing & Co in 2021. Xiaoyong is skilled in handling disputes of maritime cargo transportation contract, vessel collision torts, and other cases of international trade and business.

application with the competent court for establishment of a limitation fund for maritime claims.

The disputed issue is whether "Xiang Zhangjiajie Huo 3003" can be entitled to LLMC like coastal ships as she was sailing in a coastal area when the accident occurred though it is beyond her approved trade area.

Both the courts of first and second instance held, although the vessel was holding a certificate of seaworthiness for inland vessels, she was actually sailing in a coastal area and thus fell within the definition of "vessel with a gross tonnage exceeding 300 tons engaging in coastal operations in the PRC" as prescribed in the Provisions on Limitation of Liability, so she should be entitled to establish a limitation fund for maritime claims.

The Supreme People's Court (SPC) however overruled the above opinions of the previous courts, holding that the vessel should be an inland vessel as she was so registered on her certificates and was only approved to trade in A-Level Navigation Area, but the collision occurred at the Minjiang River estuary in Fujian Province, beyond her approved trade area. Holding a vessel's description and approved trade area should never be changed for her actual navigation area, the SPC ruled that "Xiang Zhangjiajie Huo 3003" was an inland vessel, not a sea-going vessel as defined under the Provisions on Limitation of Liability and her owner therefore should not be entitled to apply for establishment of a limitation fund for maritime claims.

This case is one of the model maritime cases published by the SPC. The SPC emphasizes that this case is of significance in warning those inland ships who illegally engage in maritime transportation, regulating the shipping order, and unifying the adjudicative criteria for similar cases.

II. Sea-going vessels sailing in coastal areas for coastal transportation or operations could be determined as coastal vessels and enjoy lower limit of liability for maritime claims as per the Provisions on Limitation of Liability

According to Article 210 of the Maritime Code and the Provisions on Limitation of Liability, the limitation amount for sea-going vessels shall be calculated according to Section 1 of Article 210 of the Maritime Code, while the limitation amount for vessels engaging in coastal transportation or operations should be 50% of the foregoing amount. Then, when sea-going vessels engage in coastal transportation or operation, how to calculate the limitation amount?

Case 2: "Ning An 11" – (2009) Hu Gao Min Si (Hai) Xian Zi No. 1

"Ning An 11", with a gross tonnage of 26,358, holding a certificate of seaworthiness for coastal waters, left Qinhuangdao for Shanghai Waigaoqiao Terminal in May 2008 with power generation coal onboard. She collided with a ship unloader during her mooring at the terminal and caused damage to the terminal and the equipment. Afterwards, "Ning An 11" applied with Shanghai Maritime Court for establishment of a limitation fund for maritime claims at 50% of the limitation amount as prescribed in the Maritime Code.

The court of first instance held, although the approved trade area on the certificate of seaworthiness of "Ning An 11" was coastal waters, considering that the verified business scope stated in her transport certificate includes "transportation of general cargoes between ports in domestic coastal areas and middle and lower reaches of the Yangtze River" and that the vessel was actually engaging in coastal transportation when the collision occurred, the vessel should be defined as a vessel engaging in coastal transportation or operations.

The court of second instance supported the opinions of the first-instance court and held that the vessel should be defined in combination of the approved trade area on her certificate of seaworthiness and her actual navigation area. Therefore, the vessel was a sea-going ship for coastal transportation or operations and shall be entitled to 50% of the limitation amount prescribed in the Maritime Code in accordance with the Provisions on Limitation of Liability.

This case is a guiding case published by the SPC and its guiding significance to this type of cases is evident.

Case 3: "Ding Heng 18" – (2020) Su 72 Min Te No.70

"Ding Heng 18", with a gross tonnage of 2,254, holding a business license for international shipping transportation, sailed for Taizhou port after completing cargo discharge at Caojing port and collided with "Tai Dong Huo 5588" near the red buoy #FB6 on the Yangtze River waterway in July 2020. The owner of "Ding Heng 18" then applied for establishment of a limitation fund at 50% of the limitation amount prescribed in the Maritime Code.

With reference to Case 2, Nanjing Maritime Court held, although "Ding Heng 18" had an International Maritime Organization (IMO) number and a classification certificate issued by the China Classification Society (CCS) and was permitted to engage in international transport of dangerous goods, she should be defined on the basis of her approved trade area and her actual navigation area in which the accident occurred. In this case, the collision occurred during the vessel's voyage from Caojing port to Taizhou port for loading. Therefore, the vessel should be determined as a coastal ship engaging in coastal transportation between ports of China and shall be entitled to 50% of the limitation amount prescribed in the Maritime Code in accordance with the Provisions on Limitation of Liability.

This case is one of the ten model cases of "Bringing Tangible Benefits to the People" published by Nanjing Maritime Court in 2021 and also the first case involving application for constitution of a limitation fund at Nanjing Maritime Court since the establishment of the Court.

III. Conclusion

In conclusion, it is possible that a vessel sailing beyond her approved trade area can be defined as a vessel sailing in a navigation area of lower level in view of her actual operation and navigation area. As such, the owner of the vessel would become entitled to a lower limitation of liability which can secure the legitimate rights and interests of the owner. Shipping companies, especially those having vessels operating in coastal areas, can apply LLMC to properly avoid shipping risks. However, vessels sailing in a navigation area of a level higher than her approved trade area are not entitled to limitation of liability because her sailing is illegal. Otherwise, it would be tantamount to encouraging vessels to sail beyond their approved trade area, which will bring safety risks and damage the social and public interests.

| Cases and Insights

New Adjudication Trend - Analysis on PEACE PEARL Case

I. Brief of the *PEACE PEARL* case

1. On 27 January 2020, a consignment of Ukrainian corn was loaded on board MV "PEACE PEARL", and the Master issued five clean bills of lading, in which the shipper was a Ukrainian agricultural company; the consignee was "To Order"; the port of loading was Chornomorsk, Ukraine; the port of discharge was Chinese port. The total cargo weight on the five bills of lading was 67,550 tons. On the same day, SGS issued a draft survey report stating that the vessel was loaded with 67,357.280 tons of cargo, which was confirmed by the representative of the vessel by signing and sealing thereon.

2. Upon arrival at the port of discharge, Zhanjiang, China, a draft survey was conducted and showed the cargo weight was 67,330 tons.

3. The consignee, Xiamen C&D Commodities Limited (hereinafter referred to as "C&D", the Plaintiff), alleged that the carrier was at fault for issuing the bills of lading at the port of loading based on the cargo weight declared by the shipper when it was known to the carrier that the cargo was 192.72 tons short. C&D thus claimed against the carrier for the cargo shortage at 192.72 tons on the ground that the draft survey figure was 192.72 tons shorter than the B/L figure.

II. The *PEACE PEARL* case opens a new path for cargo shortage claims

4. Carriers' liability for shortage of bulk cargo is a contentious issue in maritime cases. However, with the publication of the Concluding Remarks at the National Symposium on Maritime Judicial Practice (16 June 2017) (the "Concluding Remarks") by Wang Shumei, Vice Presiding Judge of the Fourth Civil Tribunal of the Supreme People's Court, the criterion of adjudication for this issue in Chinese maritime courts gradually becomes unified. The remarks on carriage of bulk cargo is hereby summarized as below:

   a. Unless otherwise stated by the carrier, the entry in the bill of lading as to the cargo quantity is absolute evidence to a third party other than the shipper, and the carrier shall deliver the cargo at the weight as stated in the bill of lading.
   b. Since the carrier has reasonable means to check the weight, a standard "unknown" clause in the bill of lading does not relieve the carrier from its obligation to deliver the cargo at the weight as stated in the bill of lading.
   c. The cargo interests need to prove that the cargo shortage occurred within the period of the responsibility of the carrier. Unless specifi-

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Zhang Jing is a partner of Wang Jing & Co. She has been selected as one of the "1,000 Elite Lawyers on Foreign-Related Matters" by National Ministry of Justice and was nominated as "top 10 Guangzhou Foreign-Related Lawyers" by Guangzhou Bar Association and "Woman Lawyer of the Year 2021: The Coastal Areas" by ALB. She focuses on dispute resolution in Maritime & Admiralty, Marine Insurance & Non-marine Insurance, offshore engineering, and international trade.

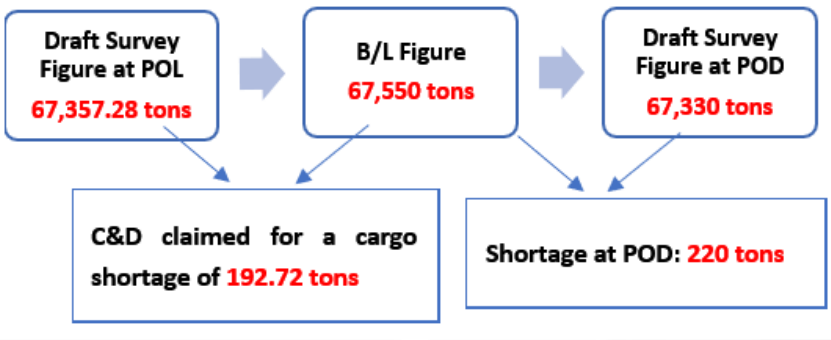
cally agreed, the carrier's responsibility for solid bulk cargo ends when the cargo crosses the ship's rail, and the carriers' liability for liquid cargo ends when the cargo passes the vessel's permanent flange connection (i.e., the flange that connects the ship pipeline to the shore pipeline).

d. As to the cargo weight at the port of discharge, the measurement carried out onboard the vessel before the discharge prevails over the shore scale. The measurement carried out on board generally refers to draft survey for solid bulk cargo and ullage measurement for liquid cargo.

e. In view of the fact that any survey method may have error, for the determination of the cargo weight by draft survey, if the difference between the cargo weight at the port of discharge and the B/L figure falls within the 5‰ allowance, Chinese courts would consider that no cargo shortage occurred; for the determination of the cargo weight by ullage measurement, if the difference between the cargo weight at the port of discharge and the B/L figure falls within the 3‰ allowance, Chinese courts would consider that no cargo shortage occurred, unless the cargo interests could present other evidence to prove that the cargo shortage actually occurred during the carrier's responsibility period, as well as the shortage quantity.

f. If the shortage exceeds the above allowance, cargo shortage can be established and the carrier shall be held liable for the cargo shortage (without deduction of the 5‰ or 3‰ allowance), unless the carrier can prove that it can be exempted from liability.

5. In the *PEACE PEARL* case, the difference between the draft survey figure at the port of discharge and the B/L figure was within 5‰. Instead of following the usual route to claim for the shortage between the draft survey figure at the port of discharge and the B/L figure, C&D claimed against the carrier for the cargo shortage of 192.72 tons on the ground that there was a shortage of 192.72 tons by comparing the draft survey figure at the port of loading with the B/L figure. C&D asserted that the carrier issued the bills of lading based on the cargo weight declared by the shipper when it was known to the carrier that the cargo was 192.72 tons short according to the draft survey report at the port of loading, and that the carrier was at fault for not being in prudent control of the cargo and thus was not entitled to invoke the defence of 5‰ allowance. This opens a new path for consignees to claim for cargo shortage.



III. Courts' key findings on the *PEACE PEARL case*

6. Key findings made by the Guangzhou Maritime Court: the carrier should deliver the cargo to the consignee, who is a bona fide transferee of the bills of lading, at the weight as stated in the bills of lading. The carrier was at fault for issuing the clean bills of lading in spite of having known that there was a cargo shortage based on the draft survey report at the port of loading. Even if the shortage was within the 5‰ allowance, the carrier should not be exempted from liability by relying on the defence of 5‰ allowance. The cargo shortage occurred during the period of the carrier's responsibility, the carrier failed to prove an exculpatory circumstance and therefore shall be liable for the shortage. The shortage shall be 192.72 tons which was calculated based on the draft survey figure at the port of loading and the B/L figure.

7. Key findings made by the Guangdong High Court: the carrier argued that the difference between the draft survey figure at the port of loading and the weight declared by the shipper was 0.285%, which was within 5‰; therefore, the Master had no reasonable grounds to suspect that the cargo weight declared by the shipper was inconsistent with the actual loading weight, and thus was not negligent in issuing the bills of lading based on the weight declared by the shipper. The High Court held that the entries in the bills of lading were absolute evidence for the carrier and the third party, including the consignee, who had been assigned the bills of lading in good faith, and the parties were not allowed to present any contrary evidence to rebut it. Therefore, C&D was entitled to receive the cargo at the weight as stated in the bill of lading. The draft survey report at the port of discharge showed that the cargo weight received by C&D was less than the B/L figure. Considering the fact that the draft survey figure at the port of loading was less than the B/L figure but more than the draft survey figure at the port of discharge, the High Court found that there was a cargo shortage.

8. The High Court also found that: the carrier shall bear the burden of proof to prove that the cargo shortage was a result of reasonable wear and tear, measurement tolerance and relevant industry standards or practices. The carrier failed to prove that the cargo shortage was attributed to the error in the draft survey, rather than other reasons. Therefore, the carrier shall bear the unfavorable consequence arising from its failure to meet the burden of proof, and was not entitled to exempt from liability on the ground that the cargo shortage was within the measurement tolerance of the draft survey. The 192.72 tons of shortage claimed by C&D resulted from the Master's failure to issue the bills of lading in good faith. Therefore, the carrier shall be liable for the 192.72 tons of shortage.

IV. A new adjudication trend in Chinese courts

9. In previous judicial practices, the consignee would normally claim against the carrier for cargo shortage on the ground that the draft survey figure at the port of discharge is short of the B/L figure by more than 5‰, but rarely on the grounds that there is a difference between the draft survey figure at the port of loading and the B/L figure and that the carrier was negligent for the cargo shortage. Among the published cases, only the *Red Tulip* case in 2007 and the *SPICA* case in 2020 involve similar disputes with the PEACE PEAR case.

10. In the *Red Tulip* case in 2007, both the first instance court (the Guangzhou Maritime Court) and the second instance court (the Guangdong High Court) held that, normally, the carrier would describe the quantity of the cargo based on the quantity declared by the shipper. Although the draft survey figure at the port of loading was less than the B/L figure, the carrier was not at fault and was entitled to the 5‰ allowance for wear and tear and measurement error; as the difference between the draft survey figure at the port of discharge and the B/L figure is within 5‰, the carrier was not required to prove that the shortage was attributed to wear and tear and measurement error.

11. In the *SPICA* case in 2020, the Tianjin Maritime Court held that the carrier was negligent if the carrier issued the clean bill of lading in spite of having known that the draft survey figure at the port of loading was less than the B/L figure; the carrier was required to prove that the shortage was caused by reasonable wear and tear, measurement error and other exemptions, failing which, it was not entitled to the 5‰ allowance.

12. However, in the *SPICA* case, the ullage measurement figure at the port of discharge is short of the B/L figure by more than 5‰, and the Court determined the shortage to be the difference between the ullage measurement figure at the port of discharge and the B/L figure. Therefore, the Court's view that the carrier was negligent in issuing a clean bill of lading in spite of having known the ullage measure figure or draft survey figure at the port of loading was less than the B/L figure had no necessary bearing on the outcome of the case, nor could it be considered a break with the previous customary view held by Chinese courts.

13. Strictly speaking, the *PEACE PEARL* case is the first and only case where the Court ascertained the cargo shortage on the ground that the draft survey figure at the port of loading was less than the B/L figure, and it breaks the previous customary view held by Chinese courts. If this case represents a change in Chinese courts' judgment thinking, this change will have a significant impact on carriers.

V. Analysis by Wang Jing & Co.

14. It should be made clear that the following analysis is made based on the premise that the difference between the draft survey figure at the port of discharge and the B/L figure falls within the 5‰ allowance.

i. When the difference between the draft survey figure at the port of loading and the weight declared by the shipper is within 5‰, and the carrier issues a clean bill of lading based on the cargo weight declared by shipper, whether the carrier is in breach of contract or is negligent?

15. In the *PEACE PEARL* case, the difference between the draft survey figure at the port of loading and the B/L figure is 2.85‰. The Guangzhou Maritime Court held that the carrier was negligent in issuing the clean bills of lading when knowing that the cargo was in shortage according to the draft survey at the port of loading. But in the judgment rendered by the Guangdong High Court, the Court avoided the question of whether the carrier was negligent.

16. Article 75 of the *Maritime Code of the People's Republic of China* provides that "*[I]f the bill of lading contains particulars concerning the description, mark, number of packages or pieces, weight or quantity of the goods with respect to which the carrier has the knowledge or reasonable grounds to suspect that such particulars do not accurately represent the goods actually received, or where a shipped bill of lading is issued, loaded or if he has had no reasonable means of checking, the carrier* ***may*** *make a note in the bill of lading specifying those inaccuracies, the grounds for suspicion or the lack or reasonable means of checking*". Article 77 of the same Code provides that "*[E]xcept for the note made in accordance with the provisions of Article 75 of this Code, the bill of lading issued by the carrier or the other person acting on his behalf is prima facie evidence of the taking over or loading by the carrier of the goods as described therein. Proof to the contrary by the carrier shall not be admissible if the bill of lading has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods contained therein*."

17. It is commonly believed that a bill of lading has three functions: proof of the contract of carriage of goods by sea, evidence of title in rem and receipt of the cargo. From the above provisions of the Maritime Code, the entry of cargo weight in the bill of lading and whether the carrier has made a note in the bill of lading demonstrate its function of being a receipt, i.e., a confirmation that the recorded weight of cargo has been loaded on board. In other words, the carrier merely "confirms that the recorded weight of cargo has been loaded on board". Hence, the entry of cargo weight in a bill of lading is not absolute evidence between the carrier and the shipper; only when the bill of lading is transferred to a third party, the carrier shall no longer deny that the cargo weight in the bill of lading has been loaded onboard. It should be noted that, the number or weight of cargo in a bill of lading is usually declared by the shipper and checked by the carrier.

18. In addition, the wording used in Article 75 for the carrier to make a note is "may", not "shall". Hence, making a note on a bill of lading is not a legal obligation but a legal right of the carrier (i.e., "the right to make a note in the bill of lading"): it has the right to consider and decide at its sole discretion whether to make a note in the bill of lading. If a note is reasonably made, the carrier may submit contrary evidence to rebut the corresponding content in the bill of lading and relieve itself from being bound by the corresponding content. If the carrier does not make any note in a bill of lading, the bill of lading will become absolute evidence between the carrier and the third party who is a holder of the bill of lading, and the carrier is obliged to deliver the cargo to the holder of the bill of lading strictly in accordance with the cargo condition recorded thereon, and is not allowed to submit contrary evidence. In view of this, although the draft survey figure at the port of loading is somewhat less than the weight declared by the shipper (within 5‰), the weight difference is only a measurement error, not an actual shortage, and thus the carrier is not obliged to make a note as it is not the carrier's mandatory obligation; the carrier's not making a note in a bill of lading does not constitute a breach of contract or a negligence in the legal sense, not even a negligence in proper care of the cargo (loading), unless the carrier has a deliberate intention of fraud.

19. The carrier's right to make a note in a bill of lading does not mean that the carrier can make notes in the bill of lading at its own will. In fact, due to the three important functions of a bill of lading as mentioned above, a note in a bill of lading which is an important instrument in international sale of goods can lead to a signifi-

cant restriction of its functions, especially its function as a document of title in rem and a receipt. Therefore, the carrier's right to make notes in a bill of lading is restricted, and only in the presence of the circumstances specified in Article 75, i.e., "if the bill of lading contains particulars concerning the description, mark, number of packages or pieces, weight or quantity of the goods with respect to which the carrier has the knowledge or reasonable grounds to suspect that such particulars do not accurately represent the goods actually received", or "where a shipped bill of lading is issued, loaded, or if the carrier has had no reasonable means of checking", can the carrier make a note in the bill of lading, or otherwise the carrier constitutes a breach of contract.

20. As analyzed above, when the shortage between the draft survey figure at the port of loading and the weight declared by the shipper (i.e., the B/L figure) is within 5‰, the carrier may not know and had no reasonable grounds to suspect that the B/L figure did not correspond to the actual weight loaded on board because of a possible 5‰ measurement error. Therefore, the carrier shall not and is not entitled to make a note on cargo weight in a bill of lading. Under such circumstance, the carrier is obliged to issue a clean bill of lading.

21. In summary, we take the view that, when the difference between the draft survey figure at the port of loading and the weight declared by the shipper is within 5‰, and the carrier issues a clean bill of lading based on the cargo weight declared by the shipper, the carrier neither breaches the contract of carriage of goods by sea, nor commits negligence in issuing a clean bill of lading or properly caring for the cargo. In our opinion, the view of the Guangzhou Maritime Court and Guangdong High Court in the *Red Tulip* case remain to be correct. As pointed out by the judge Wang Shumei in the Concluding Remarks, "As a kind of technology, draft survey result shows a probability, but does not have the rigor and precision of natural science. Measurement error objectively exits, and the measurement result still has error even after reasonable correction and it is only the matter of the extent of error. That is why a reasonable measurement error is allowed and it is also the coming of "measurement allowance". It is also for this reason that the Concluding Remarks states that "a shortage after discharge which falls within 5‰ could be determined as a reasonable shortage resulting from natural wear and tear and measurement errors etc., unless there is evidence to the contrary which shows that the carrier is at fault." This is also the possible reason that in the *Pearl Peace* case, the Guangdong High Court did not uphold the finding of the Guangzhou Maritime Court that the carrier had negligence.

ii. When the draft survey figures at the port of loading and the port of discharge are both less than the B/L figure (even though within 5‰), can it prove a cargo shortage?

22. Cargo shortage cannot be simply established by using the weight difference between the draft survey figure and the B/L figure. Furthermore, even if the draft survey figures at the port of loading and the port of discharge are both less than the B/L figure, it cannot prove the existence of a cargo shortage due to measurement errors at the port of loading and the port of discharge.

23. When the difference between the draft survey figure at the port of discharge and the B/L figure is within 5‰, if such difference can be attributed to measurement error, then the same shall apply when the difference between the draft survey figure at the port of loading and the B/L figure is within 5‰, unless there is evidence to the contrary to prove that the carrier is at fault for the cargo weight difference at the port of loading. In the *PEACE PEARL* case, C&D did not prove that the carrier was at fault for the cargo weight difference at the port of loading, and hence we believe that there was no cargo shortage at the port of loading and during the period of responsibility of the carrier.

24. In the *PEACE PEARL* case, the difference between the draft survey figure at the port of loading and the B/L figure, and that between the draft survey figure at port of discharge and the B/L figure, both fell within 5‰. Though the Guangdong High Court did not hold the carrier at fault in issuing clean bills of lading, the Court considered that cargo shortage did occur for the reason that draft survey figures at the port loading and the port of discharge were both less than the B/L figure, even though both differences fell within 5‰.

25. The Guangdong High Court did not elaborate her reasoning and appeared to hold the view that if the draft survey figures at the port of loading and the port of discharge were both less than the B/L figure, it can be

considered that the weight difference was caused by actual shortage rather than the measurement error.

26. In our opinion, the above view of the Guangdong High Court is controversial. The combination of the fact that the draft survey figure at the port of loading was less than the B/L figure and the fact that the draft survey figure at the port of discharge was less than the B/L figure cannot lead to the conclusion that the actual cargo weight was less than the B/L figure. An increase in the number of measurements only reduces the random error, but not the systematic error. Even in the case of random errors, although in theory the random error of the average of multiple measurements is smaller than the random error of a single measurement, this is subject to sufficient measurements. The average of the two measurements at the port of loading and the port of discharge cannot be considered to have eliminated the random error. Furthermore, considering the factor of a systematic error, the above average cannot represent the true value. Therefore, when draft survey figures at the port of loading and the port of discharge are both less than the B/L figure and both differences fall within 5‰, the courts cannot just omit measurement errors and ascertain that cargo shortage occurred.

iii. When the draft survey figure at the port of loading is less than the B/L figure (even though the difference falls within 5‰), is the burden of proof shifted to the carrier?

27. In the *PEACE PEARL* case, the Guangdong High Court held that as the draft survey figures at the port of loading and the port of discharge were both less than the B/L figure, C&D had established a prima facie case, and the burden of proof to prove that the shortage was caused by measurement errors was shifted to the carrier.

28. We take the view that the above view of the Guangdong High Court is controversial. As we analyze above, although the draft survey figures at the loading port and the port of discharge were both less than the B/L figure, it could neither prove that there was no measurement error at the port of loading or the port of discharge, nor could it prove that cargo shortage occurred. Under such circumstance, the courts should not have considered that C&D has established a prima facie case and thus required the carrier to prove that such shortage was due to measurement errors. Otherwise, in order to meet the above burden of proof, the carrier not only needs to prove that there was no cargo shortage during the period of carriage, but also that the loading weight was the B/L figure. However, considering the facts that there were measurement errors at the port of loading and that the draft survey figure was less than the B/L figure, it is essentially impossible for the carrier to meet this burden of proof. Therefore, the Court's requiring the carrier to prove that the cargo shortage was due to measurement errors is tantamount to the Court's ordering the carrier to be liable for the cargo shortage.

iv. How to determine the shortage weight?

29. In the *PEACE PEARL* case, the Guangzhou Maritime Court directly identified the difference between the draft survey figure at the port of loading and the B/L figure ("the shortage at the port of loading") as the shortage weight during the period of the responsibility of the carrier, but the reasons for the Court to make such finding were not given. The Guangdong High Court differed from the Guangzhou Maritime Court, only ruling that shortage claimed by C&D resulted from the Master's failure to issue the bills of lading in good faith and therefore the carrier shall be liable for the cargo shortage. But the Guangdong High Court did not directly identify the difference between the draft survey figure at the port of loading and the B/L figure as the short cargo weight.

30. According to the common views of the Guangzhou Maritime Court and the Guangdong High Court, the carrier was in fact unable to rely on the defence of the 5‰ measurement error for draft survey to get away from liability. This case would lead the consignees to claim against the carriers for the difference between the draft survey figure at the port of discharge and the B/L figure ("the shortage at the port of discharge", which is usually higher than "the shortage at the port of loading"), without considering measurement errors; or even in the absence of a draft survey at the port of discharge, the consignees may claim against the carriers for the difference between the draft survey figure at the port of loading and the B/L figure. The carriers are thus facing greater risks of claims from the consignees.

v. Possible chain reactions arising from the *PEACE PEARL* case

31. The *PEACE PEARL* case has already attracted wide attention and deep concerns from many international P&I Clubs and shipowners, and a certain number of consignees and cargo insurers have already followed this claim pattern. We have received many consultations regarding this issue since the year of 2020. It is foreseeable that with the issuance of the second-instance judgment in the *PEACE PEARL* case, there will be more and more cases of this kind. In this regard, we have the following concerns:

(a) Impact on international trade

32. Most of the international traders in modern society adopts L/C settlement, which is a typical type of documentary transaction. The bill of lading, together with the relevant trade contract, commercial invoice, packing list, weight certificate issued by an independent surveyor appointed by the seller at the port of loading, quality certificate and certificates of origin, are documents usually required under an L/C settlement. According to the *Rules for the Examination of Domestic Letters of Credit* issued by the Payment & Clearing Association of China and the China Banking Association, the bank shall carefully examine all documents required by the letter of credit and determine whether they are compliant presentations.

33. Where the draft survey figure at the port of loading was less than the cargo weight declared by the shipper but within 5‰, and the Chinese courts still ruled that the carrier was negligent in issuing bills of lading or in properly caring for the cargo and shall be liable for the cargo shortage, there are two options available for the carriers to safeguard their own interests: (1) they may make a note in the bill of lading regarding the draft survey figure at the port of loading; and, (2) they may enter the draft survey figure as the cargo weight in the bill of lading. Under the 1st option, there is no doubt that the bill of lading is unclean and will be rejected by the bank, as a result of which, the L/C settlement fails. Under the 2nd option, since the quantity on the weight certificate and commercial invoice are both determined according to the weight certificate issued by an independent surveyor appointed by the seller (this quantity is also the quantity declared by the shipper to the carrier), it would give rise to the issue that the quantity in the bill of lading is not consistent with that in the weight certificate, commercial invoice, customs declaration documents and other documents, which constitutes an “uncompliant presentation” and blocks the settlement under a L/C.

(b) Impact on international carriage of goods by sea

34. If the shipper insists that the carrier should issue the bill of lading based on the declared weight so that the bill of lading is clean and meets the requirement of compliant presentation in a L/C settlement, the carrier may then require the shipper to provide a letter of indemnity under which the shipper shall indemnify the carrier for the losses sustained by the carrier, including the legal costs, arising from an unfavorable judgment rendered by a Chinese court against the carrier which orders the carrier to be liable for cargo shortage between the draft survey figure at the port of loading and the weight declared by the shipper on the ground that the carrier was negligent in issuing the bill of lading or properly caring for the cargo. The shipper will most likely add this clause into the trade contract, so as to pass the costs and risks onto the consignee.

35. In the presence of a charter party, the shipowners/charters may also include such a clause in the charter party, agreeing that charterers shall indemnity owners for the losses sustained by owners, including the legal costs, arising from an unfavorable judgment rendered by a Chinese court against owners which orders owners to be liable for cargo shortage between the draft survey figure at the port of loading and the weight declared by the shipper on the ground that owners was negligent in issuing the bill of lading or properly caring for the cargo; charterers may have no choice, but to add the same clause in every charter party of the charter chain, which will eventually pass onto the consignee.

36. In this way, shipowners, charterers and shippers involved in the international carriage of a cargo by sea to a Chinese port will have to adjust their current operating rules. The final compensation and costs will be passed back to the Chinese consignee. Things come full circle and go back to square one.