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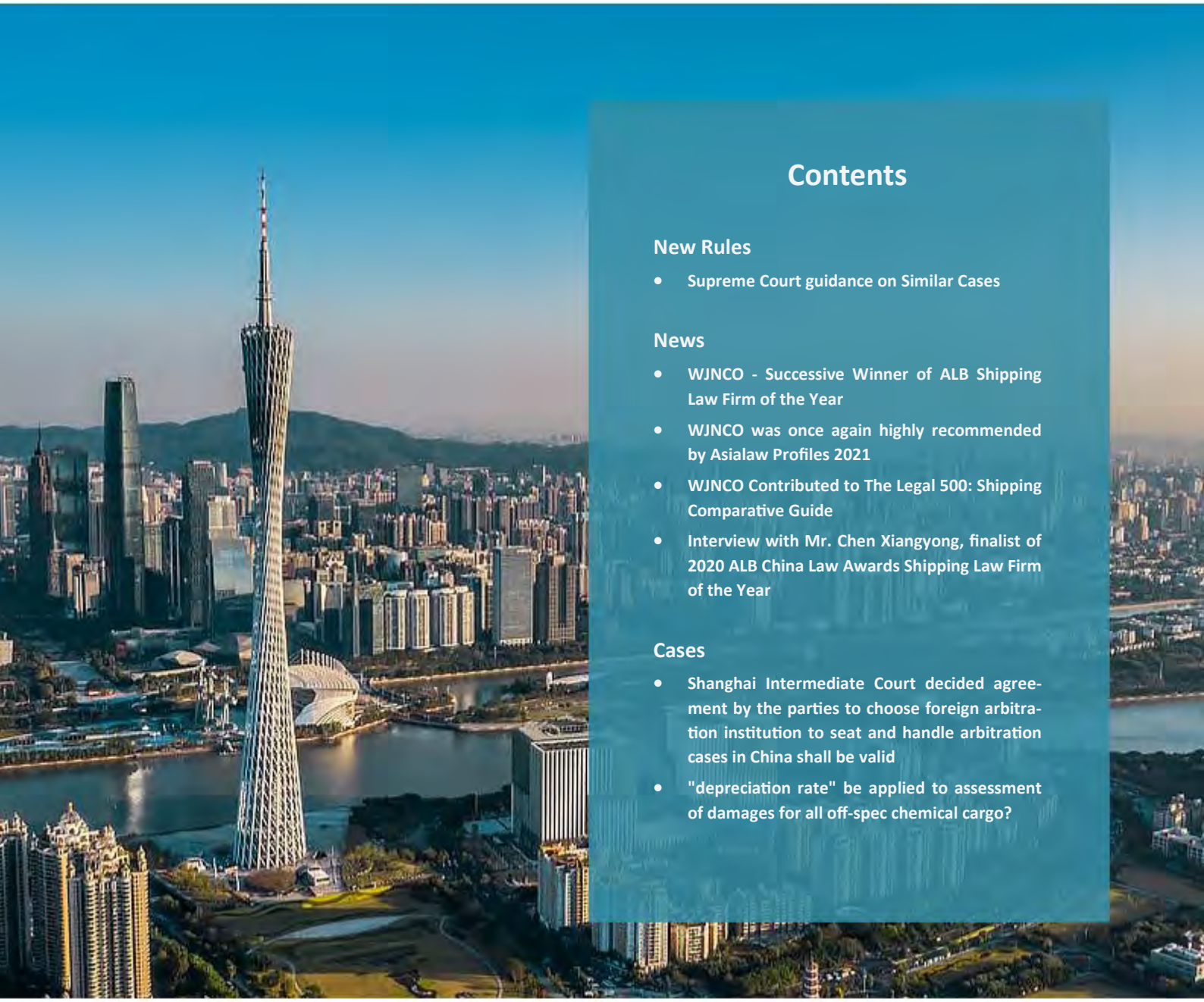
WANG JING & CO.

Maritime and Commercial Law Newsletter



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| New Rules

Case Law in China? A New Guidance on Search of Similar Cases comes into force in China

The PRC Supreme Court recently issued "*The Guidance of Strengthening Search of Similar Cases to Unify the Application of Law (Provisional)*" ("The Guidance"), which has taken effect since 31 July 2020.

"Similar cases" in the Guidance refer to the cases where court judgements have come into effect and which share similarity with pending cases in terms of basic facts, main disputes, application of law, etc.

The Guidance set out main rules for searching similar cases in the following aspects:

A. What is the search sequence for "similar cases"?

According to Article 4 of the Guidance, search for similar cases shall follow a general sequence as below:

(1) Guiding cases rendered by PRC Supreme Court;

(2) Typical cases with effective judgments/rulings rendered by PRC Supreme Court;

(3) Reference cases with effective judgments/rulings rendered by Higher People's Courts;

(4) Other effective judgments/rulings issued by local courts or Higher People's Courts.

The Guidance further stipulates that except for the guiding cases, priority shall be given to cases occurred within the past three years, and if similar cases have been found in the preceding sequence, no further search is required.

B. When is search for similar cases required?

Article 2 of the Guidance prescribes that search for similar cases should be carried out when:

(1) An ongoing case is prepared to be submitted to the meetings of professional judges (chief judges) or the judicial committee for discussion;

(2) No judicial principles or if any the principle is unclear for considering an ongoing case;

(3) The court president or the division head requests for such search in line with their authority of trial supervision.

(4) Other situations required.

C. How to function the similar cases?

As per the Guidance, the courts **should** refer to similar **guiding cases** rendered by **PRC Supreme Court** when deciding an ongoing case, unless the guiding cases conflict with new laws, regulations and judicial interpretations or will soon be replaced by new guiding cases. Other cases, i.e. not the guiding cases, can be used as reference without mandatory requirements. In other words, the judges can decide whether or not to refer to other case precedents.

Where the litigating parties submit similar guiding cases during the litigation proceedings, the courts are now required to reply as to whether the submitted guiding cases will be considered when they issue judgments and to state reasons accordingly.

For other types of similar cases, the courts may respond by clarifying and explaining whether those case decisions will be followed.

Our comments

China is a codified-law country, following which, Chinese courts place less emphasis on judicial precedents than they do on the codification of laws. The courts usually adopt the approach of "establishing case facts by evidence— applying laws and regulations – making decisions" in case trial. On the contrary, in a common law country, their judges have more discretion and take active roles in improving laws by creating new precedents for future reference, rather than simply following the established laws.

Given characteristics of the codified law, written statutes and regulations as well as other legal codes shall be updated constantly, otherwise they will fall behind social changes and developments and cannot adapt to changing case circumstances. For instance, before the judicial interpretation regarding the Wechat evidence came into force, it was a highly controversial whether Wechat records can be used as evidence, which resulted in different results of cases of same type.

However, amendments to laws and judicial interpretations could hardly be faster than the rapid social development. In recent years, China has implemented some reforms to her judicial system, including issuing the PRC Supreme Court Provisions on the Guiding Cases in 2010 and the abovementioned Guidance, which seem to take steps forwards integrating her own "case law" into the State's rules of laws. In the long run, it is anticipated that the Guidance will emphasize the judicial credibility and the legal certainty so as to eliminate adjudicative inconsistency.

Nonetheless, it should be noted that the new tendency of China developing her own "case-law" does not mean that China will become a country of case law. A substantial difference is that the requirement for searching similar cases is not an independent source of law and will not be cited as legal grounds in Chinese court judgments. Such searching is merely an instrument to unify court judgments for cases with similar factual merits and application of laws. In this regard, although it is encouraging to see such reform, it remains uncertain whether the judges would actively and flexibly interpret the principle and reasoning set in the precedents to make a rAeasonable judgment or would simply adopt results of case precedents in order to avoid risk of inconsistency.

From a lawyer's perspective, the Guidance will enable lawyers to have a general understanding of the judgment ideas of similar cases, so as to reasonably design the litigation strategies and mitigate the litigation risk in order to protect clients' interests to the utmost. But obviously, the similar case search require lawyers to have a wider range of legal studies and research in order to correctly locate and utilize the precedents. The issue, however, remains that lawyers and other individuals may not be able to get access to the whole case database particularly for the older cases.

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| News

WJNCO - Successive Winner of ALB Shipping Law Firm of the Year

On 17 September 2020, the 17th **SSQ ALB China Law Awards** was grandly held at the Park Hyatt, Beijing. Upon invitation by the organizer, our Mr. Chen Xiangyong, Director & Managing Partner of WJNCO, attended the grand gala on behalf of the firm, along with representative of many renowned law firms at home and abroad.

During the grand gala, WJNCO was awarded "**Shipping Law Firm of the Year**", being winner of the same award for six successive years and for the ninth time since 2008.

ALB China Law Awards is one of the world's most influential legal media. Its multiple awarding of "Shipping Law Firm of the Year" to WJNCO serves as the highest recognition of WJNCO's professionalism and excellence in legal service and acknowledgment of WJNCO's spirit of craftsmanship in exploration of shipping sector. WJNCO will continue to strive for perfection and forge ahead for greater achievements by adhering to top-level service standards in providing customers and the market with premium service.

Asian Legal Business is a top legal journal owned by Thomson Reuters and one of the world's most influential legal media, specializing in providing clients with the latest legal business information and ranking of law firms and in-house counsels. Its ranking service provides one of significant basis for client's selection of legal services.

WJNCO was once again highly recommended by Asialaw Profiles 2021

On September 17, 2020, Asialaw Profiles, a famous legal media, released its 2021 firm rankings of China legal service market.

asialaw PROFILES

According to the list, WJNCO was ranked twice in Top Ranked Law Firms: Aviation & Shipping field and Insurance field, and Senior Consultant Zhong Cheng was ranked in Top Lawyers for the above two fields. Once again, it highlights the outstanding market performance of WJNCO, as well as its profession and leading position in the fields of Aviation & Shipping and Insurance. WJNCO, as always, will give back to customers and the market with professional and first-class international legal services.

Asialaw Profiles focuses on the legal services market in the Asia Pacific region and provides a list of recommended law firms and lawyers in the corresponding legal and professional fields. The selection results are based on the objective data collected by Asialaw and customer feedback, and comprehensively consider the factors such as innovation,

transaction complexity and influence. It is one of the important references for clients to seek legal services.

★ **Recommended fields** ★

Highly Recommended filed:

Aviation & Shipping

Outstanding field:

Insurance

★ **Recommended lawyer** ★

Outstanding lawyer:

Zhong Cheng

Mr. **Zhong Cheng** has substantial experience in dealing with maritime issues (including matters regarding bills of lading, charter parties and maritime accidents) and issues relating to insurance (marine and non-marine), ship finance and international trading, and has particular expertise dealing with litigation and arbitration. Based on his extensive experience obtained from hundreds of hearings of maritime cases in Tianjin Maritime Court, Mr. Zhong has over the years focused his practice on insurance matters. He has represented numbers of large domestic and foreign insurance companies and shipping companies as well as individuals in disputes over carriage of goods by sea or insurance thereof, transportation of goods through coastal shipping or insurance thereof, hull insurance, builders risk insurance, protection and indemnity insurance, seller liability insurance, rejection risk insurance, and marine insurance fraud which has drawn great attention in the international shipping and insurance industry.

WJNCO Contributed to The Legal 500: Shipping Comparative Guide

The Legal 500: Shipping Comparative Guide 2019 has been live since November 2019. Through the great work of its initiator, The Legal 500 (a worldwide renowned legal market rating agency), the guide has been promoted on both The Legal 500 website as well as externally to In-House Counsel and the visibility of the guide has been ceaselessly increasing to the 4.6 million annual users of The Legal 500. **Mr. Chen Xiangyong, Mr. Wang Jun, Mr. Xu Jun and Mr. Dai Yi** of our firm were invited as the exclusive authors to compose "China: Shipping" section of the guide.

The aim of this guide is to provide its readers with a pragmatic overview of the law and practice of shipping law across a variety of jurisdictions. Each chapter of this guide provides information

about the current issues affecting shipping in a particular country and addresses topics such as state control, conventions, arrest/detention, bills of lading and limitation of liability, as well as insight and opinion on the most common issues in their respective country. “China: Shipping” section in a form of country-specific Q&A provides an overview of Shipping laws and regulations applicable in China.

The Legal 500: Shipping Comparative Guide embodies expert legal reviews and practical experiences in shipping law practising field under the world's main jurisdictions by inviting top maritime lawyers of each area to contribute the guide. As another evidence of acknowledgement of our strong service capability and outstanding business performance in the China shipping industry, Mr. Chen Xiangyong, Mr. Wang Jun, Mr. Xu Jun and Mr. Dai Y were honored to be invited this time. It’s worth noting that this team has also been consecutively invited to contribute to Chambers Global Practice Guides (GPGs) from 2018 to 2020.

For full article of The Legal 500: Shipping Comparative Guide“ China: Shipping”, please visit: https://www.legal500.com/guides/chapter/china-shipping/

Please contact us for details of other jurisdictions in The Legal 500: Shipping Comparative Guide 2019.

Interview with Mr. Chen Xiangyong, finalist of 2020 ALB China Law Awards Shipping Law Firm of the Year

陈向勇 CHEN Xiangyong
敬海律师事务所主任兼管理合伙人
Director and Managing Partner of Wang Jing & Co.

Conquering challenges with professionalism and focus

Established in the 1990s, Wang Jing & Co. has accumulated over 25 years’ experience in its core business area: maritime, and has built up the largest and international level maritime legal service team recognized by domestic and foreign counterparts. The team is made up of lawyers with years of experience in shipping logistics enterprises, maritime practice, maritime court adjudication, investigation and handling of maritime competent authority, or overseas litigation/arbitration agency.

Over the years, Wang Jing & Co. has successfully handled a large number of foreign-related litigation and arbitration business, involving bills of lading, leases, logistics, insurance, maritime fraud, ship construction, marine engineering, shipping finance, ship collision, marine pollution, etc. This year, Wang Jing & Co. was once again shortlisted for the 2020 ALB China Law Awards Shipping Law Firm of the Year.

In this interview, Mr. Chen Xiangyong, the Director and Managing Partner of Wang Jing & Co. shared with ALB about his observation on the industry, their classic case, successful experience and outlook to the future.

ALB： Congratulations on your shortlisting for the award of Shipping Law Firm of the Year! Would you please share with us your advantages and experience in the area?

Chen: We are honored to be named a finalist for the Shipping Law Firm of the Year by the Asian Legal Business.! Since our establishment, Wang Jing & Co. has been focusing in foreign maritime affairs. Wang Jing & Co. mainly focuses on the maritime field since its establishment, and our team has been cultivating the field for years, winning the trust and loyalty of many clients. Domestic and foreign shipping companies as well as their insurers and shipping-related customers are our main target audiences, and we provide them with services such as shipping finance and offshore engineering. Our strengths are primarily in team composition and management style. Thanks to our strong team composed of outstanding maritime lawyers and partners, as well as very experienced ship captains and marine consultants, we're able to provide the most professional and experienced services. With Guangzhou as the headquarters, we have set up branches in Shanghai, Tianjin, Qingdao, Xiamen, Shenzhen and Beijing since 2002, and implemented integrated management of corporate system. Whether geographically or professionally, we are able to maximize the interests of our clients as our primary goal, and quickly mobilize the most professional and efficient lawyers to respond to their needs.

In recent years, we comply with the national policy and actively safeguard the domestic customers to engage in "Belt And Road" business, handling a number of maritime disputes and domestic and international arbitration cases for Marine engineering enterprises under The China Communications Corporation, shipbuilding enterprises under the China Shipbuilding Industry Group, top three oil companies, and the most professional maritime rescue and salvage organizations, including the Peng Lai platform oil spill in Bohai Bay. Over the years, in the process of providing legal services for these top enterprises in the industry, we have been able to hone our professional ability, accumulated rich experience and high-quality customer resources.

ALB： What are the industry trends or changes in recent years? How do they affect the legal profession? How do you respond to them?

Chen: The global shipping industry has been in downturn since 2008, this year's pandemic and the international environment have made the situation even worse for maritime and international logistics business – the international trade volume decreases and countries take measures to control the spread of the pandemic – these all lead to tremendous impact on shipping. Clients tighten their budgets for legal services because of the downturn, bringing challenges to law firms in terms of incomes and team management. And this year, Mr. Wang Jing, the founding partner of the firm formally retired, while another partner decided to move to another firm. We need to respond quickly to adjust to these internal and external changes.

Mr. Wang Jun and I were selected by all partners to be the new executive managing partner and managing partner in last September. We began our tenure with unprecedented challenges for a law firm. First of all, we do our best to stabilize the team of lawyers, who are the key to the development of law firms. After communication with everyone, most of the partners and lawyers chose to stay, especially that none of the partners and lawyers in each branch office left, which greatly encouraged us. Secondly, we optimize the law firm management

and profit distribution rules, reaffirm the "professionalism, efficiency, sharing and inheriting" values, and put forward the vision of maintaining the international top level of traditional sea-related business and domestic top level in extending areas. We believe that when the external environment changes, we should maintain a professional and dedicated attitude, and should not give up the resources and advantages we have accumulated over the years because of the decline of the shipping market. Instead, we should work with our clients to provide them with more high-quality and efficient legal services. With our reputation and brand established in the market for many years, we have been able to maintain and even improve our business volume even when the epidemic has not completely subsided and normal exhibition industry cannot be carried out. Even in the face of market downturns and internal challenges, we are able to maintain a strong and leading position in the shipping legal services industry.

What's more exciting, we are welcoming new members onboard. In 2019, Ms. Zhang Jing and Mr. Zhang Changtao joined our Guangzhou office and Shanghai office respectively, and are promoted to partners this year after working as consultants for one year per our rules. Ms. Zhang Jing has a wealth of experience in the maritime field, and handled many high-profile cases, including the well-known case of dispute over "Archangelos Gabriel" maritime salvage contract. She also serves as a mediator of the Mediation Center of Guangzhou Maritime Court, and an off-campus tutor of Guangzhou Maritime Institute. Ms. Zhang is a great asset to our firm in terms of the shipping legal services. Mr. Zhang Changtao is a senior lawyer with over ten years of practicing experience in the maritime industry. He is a highly-experienced formidable litigator proficient in dealing with shipping, insurance, international trade and business matters, and has also handled many corporate and labor dispute cases. He helps the firm improve the talent structure and diversify the lines of business.

We also invest in talent cultivation, training and promoting lawyers with outstanding performance. Ms. Qiao Jing has been working at our Shanghai office since 2007. She has profound legal knowledge and solid skills, and rich experience in dispute resolution. Her practice areas include insurance, corporation and international trade. She has extensive experiences in representing clients before the court, and some of the cases were tried at the Supreme People's Court and a number of higher people's courts of China. She also successfully handled many domestic and international arbitration cases. Ms. Qiao is promoted to a partner this year. We'll invest more in talent cultivation to help our lawyers with career development and meanwhile enhance the strength of the firm.

"Never compromising with service quality and always sticking to our standards" is our principle, and the foundation of the firm. Because of that, we have built strong rapport with our clients, and maintained good business and continuous development even in difficult situations.

ALB: What are your plans for the future development?

Chen: Before the Coronavirus outbreak, we started to talk with some foreign firms about the plans for cooperation and setting up joint venture. Some of them find the plans interesting because of our vast experiences in maritime and shipping fields, and our operation network in the coastal areas of China. They hope to draw on the strength of our brand and teams to enter and explore the markets in the

Greater China region. We'll soon resume those plans as the pandemic slows down. But we believe that there are still opportunities even the market is in a downturn. In the next year or two, we plan to focus on internal adjustments, training and cultivating our teams and making better knowledge management, to help the firm and our lawyers grow together and prepare ourselves for the future. I hope that, in post-pandemic time and when the global environment improves, our efforts will take us to a higher level, expand our presence in the maritime and shipping related business areas through strong collaborations and provide wider paths for our partners and lawyers.

[CASE SHARING]

In late 2018, the Marshall Islands-registered oil tanker EL ZORRO was struck by the Singapore-registered oil tanker ELLINGTON in Jiaxing sea area of Zhejiang Province in China. The ship hull of MT EL Zorro was ruptured and several hundred tons of base cargo oil carried on board spilled into sea. Owners of ELLINGTON and Owners of EL Zorro subsequently instituted lawsuits to claim for collision damage against each other before the Ningbo Maritime Court. Owners of EL Zorro further relied on the International Convention on Civil Liability for Pollution Damage to apply for setting up a CLC limitation fund. In addition to the inter-ship collision damage claims, the collision also resulted in various huge claims including claim for damage to onboard cargo, pollution prevention and cleanup costs claim raised by local SPROs in RMB amount of dozens of million, claims totaling nearly RMB200 million by the local marine and fishery administrative authorities for loss of fishery resources and for damage to local marine ecology. We were instructed by Owners of EL Zorro and their P&I Club to act on their behalf in dealing with all the aforesaid claims by litigation.

With over one year's preparation, the Ningbo Maritime Court convened an online hearing in March 2020 to first consider and adjudicate the collision liability apportionment between the two vessels and subsequently had trials on the cargo damage claim and the pollution damage claims. According to the official report by the Ningbo Maritime Court, this has been the very first case to deal with persistent oil pollution damage claims by going through the CLC limitation proceedings in the history of China's judicial practice since China has acceded to the International Convention on Civil Liability for Pollution Damage. Moreover, as the case involves two foreign vessels, it will be significant reference to future trial on similar cases and contribute to China's establishment of a maritime judicial trial center.

| CASES

Shanghai Intermediate Court decided agreement by the parties to choose foreign arbitration institution to seat and handle arbitration cases in China shall be valid

Introduction: The PRC Supreme Court once explicitly affirmed in the *Longlide*[1] case in 2013 that arbitration agreement stipulating an ex-territorial arbitration institution to seat and handle arbitration case inside China was valid. In recent years, by following Supreme Court's pro-arbitration approach, all PRC courts would endeavor to validate arbitration agreement and value the parties' autonomy for arbitration. The decision issued by Shanghai Intermediate Court is a remarkable sign for Shanghai to encourage foreign arbitration institutions to run arbitration business locally with judicial assurance.

I. Case Background

In August 2012, Daesung Industrial Gases Co., Ltd. ("Daesung") and Praxair (China) Investment Co., Ltd. ("Praxair") entered into a Takeout Agreement where Article 14 provides:

"14.1 This Agreement shall be governed by the laws of the People's Republic of China.

14.2 With respect to any and all disputes arising out of or relating to this Agreement, the Parties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes ***shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai****, which will be conducted in accordance with its Arbitration Rules. The arbitration shall be final and binding on both Parties."*

In February 2013, Daesung Guangzhou, a company incorporated and existing under the PRC laws, took over from Daesung of all its obligations and rights to Praxair by entering into an Addendum to the Takeout Agreement.

In March 2016, due to disputes over performance of the Takeout Agreement, Daesung and Daesung Guangzhou initiated arbitration proceedings against Praxair before the Singapore International Arbitration Center ("SIAC") in Singapore, but Praxair challenged SIAC's jurisdiction. SIAC later dismissed the challenge on the grounds that 1) the Takeout Agreement provides for SIAC arbitration whilst Shanghai was only a venue for the arbitration hearing; 2) the validity of the arbitration agreement shall be governed by Singapore law because PRC law excludes foreign arbitration institution from hearing arbitration in China; thus the arbitration agreement was invalid.

In 2018 the High Court of Singapore rejected the jurisdiction challenge raised by Praxair, who in turn filed an appeal with the Court of Appeal of Singapore in 2019. The Court of Appeal overruled the decisions by SIAC and the High Court of Singapore and held that Shanghai was the seat of arbitration and the legal effect of arbitration agreement shall be determined by PRC courts.

II. Shanghai Intermediate Court Decision

In January 2020, Daesung and Daesung Guangzhou lodged an application before the Shanghai Intermediate Court to request for confirming validity of the arbitration agreement under the Takeout Agree-

ment. After trial, the Shanghai Intermediate Court ruled that the arbitration agreement was valid, following which, disputes arising out of the Takeout Agreement shall be subject to SIAC arbitration by following its arbitration rules and the arbitration seat shall be Shanghai, China.

In response to the viewpoint that the PRC Arbitration Law prohibits the parties from choosing foreign arbitration institutions to handle arbitration case in China, the Shanghai Intermediate Court expressed that the SIAC-administered arbitration should be considered as institutional arbitration instead of *ad hoc* arbitration to which China made reservation when acceding to the New York Convention; meanwhile, the PRC Supreme Court once confirmed in their Reply Letter concerning the *Longlide* case that as long as an arbitration agreement complied with requirements under Article 16 of the PRC Arbitration Law, namely: i) express agreement for arbitration; ii) specific matters for arbitration; and iii) agreement for a specific arbitration institution, it shall be determined as valid.

III. Comments

The Shanghai Intermediate Court reaffirmed validity of the arbitration agreement where a foreign arbitration institution was chosen for having the disputes arbitrated with seats in China by following the Supreme Court's position in the *Longlide* case.

It should be noted that the Shanghai Intermediate Court also acknowledged that the PRC Arbitration Law initially legislated was not comprehensive and it did not clarify whether it was legitimate for foreign arbitration institutions to run arbitration cases in China. Through Supreme Court's guidance, the Shanghai Intermediate Court made a breakthrough decision, affirming PRC courts' position to try protecting the parties' agreed intention for arbitration. This is also a positive and open signal to foreign arbitration institutions which intend to expand arbitration services in China and offers judicial protection to them to run arbitration matters in China.

Foreseeably, how to enforce arbitration awards made as per the Shanghai Intermediate Court Decision may also give rise to arguments. Immediate questions include (a) whether an arbitration award rendered by a SIAC in Shanghai would still be recognised as a "non-domestic award" and its enforcement should be made through the New York Convention; or (b) whether the PRC courts may take it as a domestic award and enforce the same under the domestic legal regime.

In this connection, we note in one recent similar case, Guangzhou Intermediate People's Court rendered a ruling [(2015)SZFMSCZ No.62] on 6 August 2020 where the arbitration award made by ICC arbitration tribunal in Guangzhou was recognised as an award involving foreign element and the parties concerned should apply to a PRC courts for enforcement in accordance with the domestic legal regime rather than the New York Convention. It remains to be seen whether the Shanghai Intermediate Court will adopt the same viewpoint and position at the enforcement stage. We will continue to follow up and comment.

1. Case Number: (2013) Wan Min Er Ta Zi No. 00001

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"Depreciation rate" be applied to assessment of damages for all off-spec chemical cargo?

In recent months, alleged off-spec cargo disputes are increasingly emerging in Mainland China. How to legally assess the reasonable losses/damages arising therefrom has drawn great attention especially from cargo underwriters and ship's interests, whilst it is also a main controversial issue during the Chinese court proceedings.

Generally principles for assessment have been set by the PRC Supreme Court in their decisions in respect of MT "Golden Tiffany" [Case No. (2013) Mintizi No. 6] to the effect that the assessment should refer to the reasonable depreciation rate and the CIF price agreed under the cargo sales contract. By applying these principles, fluctuation of the market price will not be taken into account during assessment. To put it in another way, assessment by only reference to difference between the actual resale price and the CIF price or the market value of sound cargo at the material times should not be permissible because the difference may be possibly caused by fluctuation of market prices, which is not claimable according to Article 55 of the PRC Maritime Code.

Linked to this, the Supreme Court determined that the "depreciation rate" shall be applied to ascertain the reasonable loss amount by applying the following formula:

(Market price of sound cargo at the destination port - Resale price of damaged cargo)/Market price of sound cargo."

However, it remains arguable as to whether the "depreciation rate" should be applicable to all off-spec cargo claims irrespective of how the cargo was finally disposed of. In particular, whilst there is almost no doubt that the above "depreciation rate" formula should be applied in cases where the off-spec cargo was resold by the cargo interests as a way of disposal, the dispute rests on whether it should be applicable to all claims where the cargo was otherwise disposed of, such as production for original purpose after necessary remedial operations. In addition, it is not indisputable whether the cargo interests were obligated to disclose information concerning cargo disposal for assessment on reasonable losses/damages or whether they could raise claims by directly relying upon the appraised depreciation rate without consideration/ disclosure of final usage of the off-spec cargo.

The following case, as handled by this firm and considered by Shanghai Maritime Court for first instance trial and later by Shanghai Higher People's Court for the appeal, have discussed and responded to the above issues to a certain extent.

I. Case Background

In May 2018, M/T "A" laden with 1,000 tons of Styrene Monomer ("SM") and 2,000 tons of Monoethylene Glycol ("MEG") departed from Taiwan to Quanzhou Port, Mainland China. On 9 May 2018, the discharging operation was completed and on 18 May when transferring MEG from the shore tank to the end users by truck, the Consignees alleged that the UV Transmittance of MEG cargo in the shore tank was found to be off-specification.

In May 2019, the Cargo Insurers acquired the subrogated rights and filed a claim against the Owners of M/T "A" before Shanghai Maritime Court for the alleged cargo off-spec. They quantified the claim amount based on "depreciation rate" as assessed by the third party but did not disclose the final car-

go usage. In addition, the Cargo Insurers also applied to the court for judicial appraisal in respect of the reasonable depreciation rate of the off-spec cargo during the court hearing.

II. Defence by Carriers on determination of the reasonable loss amount

On a strictly WP basis, we defended on behalf of the Carriers that disclosure by the claimants of the actual cargo usage/treatment should be an important prerequisite for determining the reasonable loss amount. If the off-spec cargo was used for original purpose/production after necessary treatments, only necessary additional treatment costs are claimable and the "depreciation rate" principles should not be applicable. In this connection, we submitted that the "depreciation rate" would only be applicable in situations where the off-spec cargo was finally resold /auctioned for the following reasons:

1. According to the general principles determined by the Supreme Court, the depreciation rate should be quantified by reference to the reasonable auction/resale price and the market price of sound cargo. Therefore, the rate was actually determined by the relevant facts rather than by any theoretical appraisal/assessment. It followed that any depreciation rate assessed by third party was unreliable and illegitimate.

2. Should the off-spec cargo was actually restored to on-spec by way of distillation/extraction/mixing and blending, the reasonable claim amount was the restoration costs in accordance with laws. In the circumstances, there was no need to determine the depreciation rate.

3. As to the claimants' application for judicial appraisal of "the depreciation rate", likewise we raised objections on the ground that the depreciation rate was in nature a case fact rather than any theoretical assessment/appraisal. Given the claimants failed to disclose the actual usage/treatment of the off-spec cargo, it was legally impossible to determine the principles/formula for assessing the reasonable claim amount and thus the said judicial appraisal was not operable and of no practical significance.

III. First instance judgement

Shanghai Maritime Court, the court of first instance, accepted most of our defence in their judgment: "As regards the claim amount…six months have passed since occurrence of the accident but the claimants failed to disclose the actual treatment/disposal of the alleged damage cargo till now… Further, the resale price of the damaged cargo and the market price of the sound cargo at the destination port were unclear…the depreciation rate assessed by the third party was neither conclusive nor objective…Therefore, the claimants failed to prove the reasonableness of their claim amount."

IV. Court of Appeal decision

By disagreement to the above judgement, the claimants filed an appeal to Shanghai Higher Court but the appeal was dismissed on the grounds (inter alia) that:

"As a matter of Chinese law, the claimants should, and theoretically be able to clarify process of handling/ disposal of the damaged cargo so as to determine the reasonable losses/costs. However, up to the second instance trial, the claimants still failed to provide any evidence to the appeal court to prove

the relevant facts". "The claimants argued that the loss amount should be determined according to the depreciation rate provided by the third party. However, it was difficult for the court to accept it on grounds that such a depreciation rate was merely an estimate by the third party based on documents provided by the claimants without any investigation/survey from the public market. More importantly, the estimate was not consistent with normal assessments on the depreciation rate."

Turning to the claimants' application for appraisal, the appeal court decided that it was necessary as the claim amount should be determinable by reference to the difference between the actual cargo value before and after use of the cargo or to the reasonable restoration costs after the claimants disclosed relevant information/facts of the cargo disposal.

V. Our comments on loss assessment

1. The depreciation rate was not always applicable. It shall depend upon the actual cargo handling/ disposal by the cargo interests in every case.

In the aforesaid case precedent, the first instance court once again confirmed general principles determined by the Supreme Court for the depreciate rate assessment on off-spec cargo claims. It was also confirmed that the depreciation rate should be only applicable to the off-spec cargo when it was resold for loss mitigation. Specifically, it could be reasonably inferred that if the cargos was used for original or common purpose after the cargo had been restored to on-spec by necessary treatments, the appreciation rate should not be applicable for assessment on loss/costs.

Moreover, both courts of first and second instance decided that the cargo interests and claimants should take the burden to prove the actual cargo treatment/disposal before the court could determine the legitimate assessment principle for quantifying the reasonable loss/cost amount.

2. The depreciation rate should be determined based on relevant facts rather than by any theoretical appraisal of third party.

In the said case, the court of appeal Shanghai Higher Court made it clear that judicial appraisal of the depreciation rate was not necessary as the rate should be referred to the actual/reasonable resale cargo value and that of the sound cargo (both of which are objective and facts rather than any theoretical appraisal).

In light of the above, it may be settled that calculation of depreciation rate is a mathematical issue based on objective facts and data by applying the formula determined by the Supreme Court instead of a technical issue requiring theoretical evaluation or judicial appraisal. More importantly, in the absence of actual cargo treatment/ disposal methods, and without the actual sale price, the purely theoretical estimation of the depreciation rate is groundless and incredible, and shall not be accepted by the Chinese court.

VI. Conclusion

In our views, great significance of the aforesaid case precedent lies in specifying an important premise for the Supreme Court's acceptance of cargo depreciation rate in the "Golden Tiffany" case; that is, it is necessary for the cargo interests/claimants to prove/clarify the actual treatment/ disposal of the alleged off-spec cargo before the court can consider the reasonable approach of loss assessment. It is

therefore suggested that the ship interests require the cargo interests/claimants to clarify the detailed/exact cargo disposal process before they put forward any claim/loss amount by reference to other approaches/principles.

We are pleased to provide our detailed advice if you have any queries about any aspect of off-spec chemical cargo claims in similar nature.

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