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Supreme Court's Opinions on 10 Typical Maritime Cases

1. Supreme Court reluctant to recognize the effect of C/P Arbitration Clause incorporated B/L

On 29 November 2012, the Fourth Civil Tribunal of the Supreme People's Court of the People's Republic of China issued a Letter of Reply [2012] MSTZ No.56 to Tianjin Higher People's Court's Request for Instructions on Effectiveness of the Arbitration Clause in the Case of Dispute over Contract of Carriage of Goods by Sea Between China Tiesiju Civil Engineering Group Co., Ltd. and Clementine Shipping Ltd. ([2012]JGMSTZ No.2), agreeing with the opinion of Tianjin Higher People's Court that the Arbitration Clause under the C/P involved has no binding effect upon the Plaintiff China Tiesiju Civil Engineering Group Co., Ltd (hereinafter referred to as "CTCE") who is the shipper under the B/L, so Tianjin Maritime Court has jurisdiction over this case, **for the main reasons as follows:** (1) there are no explicit Arbitration Clause on the front of the B/L involved, on which it is only remarked that the B/L is to be used with the C/P, and that freight is to be paid as per the C/P dated 10 November 2011. No words on the front of the B/L expressly indicate that the C/P Arbitration Clause has been effectively incorporated into the B/L and thus bind the shipper; (2) The C/P involved are entered into by Clementine Shipping Ltd. with the outside party Topsheen Shipping Group Limited, and CTCE is not a party to the C/P, so the Arbitration Clause under such C/P has no binding effect on CTCE.

2. Supreme Court clarifies the jurisdiction issue regarding the dispute over subject matter insured in transit and excludes the jurisdiction of the court where the subject matter insured is located.

In respect of the retrial case concerning dispute over objection to jurisdiction between PICC Property and Casualty Company Limited, Beijing Branch and Nanjing Yinhelong Wing Ship Co. Ltd. (Case No.: [2012]MTZ No.143), the Supreme Court holds that, as the subject matter insured belongs to goods in transit, it shall be applied to Article 25 of the *Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* which provides "for a lawsuit filed due to the dispute over an insurance contract, if the subject matter insured is a transport vehicle or the goods are in transit, the lawsuit shall be under the jurisdiction of the people's court at the place where the defendant resides, the place where the transport vehicle is registered, the place of

destination or the place where the insured accident occurs", other than Article 26 of the *Civil Procedure Law of the People's Republic of China (2007*) which provides "a lawsuit brought for insurance contract dispute shall be under the jurisdiction of the people's court located in the place where the defendant has his domicile or where the subject matter insured is located". This opinion excludes the jurisdiction of the court of the place where the subject matter insured is located (e.g. port of stoppage in transit, port of refuge, etc.), and prevents the chance to choose the court by changing the subject matter insured by the parties.

3. Supreme Court denies the effect of Arbitration Agreement on tort case between one party to the Agreement and a third party.

The case concerning fraud claimed by Xixiakou Shipyard against SPLIETHOFF and Wärtsilä Corporation Finland was updatedly reported in the 3rd Edition, 2013 and the 3rd Edition, 2014 of this Legal Newsletter. On the controversial jurisdiction issue, the Supreme Court in the Civil Ruling [2012]MTZ No.130 holds, after determining this case as a case of dispute over tort relating to ship equipment transaction, that the lawsuit filed by one party to an Arbitration Agreement against the other party and a third party on the ground of joint tort belongs to necessary joint action, while the Arbitration Agreement cannot bind the third party and neither of the two Arbitration Agreements involved can bind all the parties involved in this case, so Qingdao Maritime Court shall have jurisdiction over the dispute involved. This Ruling may offer a chance for a party to Arbitration Agreement to avoid arbitration by bringing a claim in tort.

4. Shipowners fail to invoke exemptions under CMC because of fault in inspecting the water content of cargo before the voyage and maintaining ship's stability

In respect of the request from Shandong Higher People's Court for instructions on the case of dispute over contract of carriage of goods by sea between Yantai Foreign Trade Corp. Ltd. and Qingdao Jiahong International Logistics Co., Ltd.. (i.e. The M/V "Wen Qiao" wreck case), the Supreme Court issued a Letter of Reply [2011]MSTZ No.60, pointing out that regardless of absence of any certificates for water content of the cargo, M/V "Wen Qiao" did not take proper samples from the cargo involved (zinc ore powder), but merely adopted the simple method to inspect the water content of the cargo, which lead to the situation that the actual water content of the zinc ore powder cargo loaded onboard was as high as 19%, far higher than the standard required by the *Ministry of Transport of the People's Republic of China*

in its Provisional Regulations on Safety Administration on Refined Mineral Powders and Hydrous Mineral Products Carried by Sea that the general water content of water-refined mineral powders and water-soaked mineral products to be carried by cargo ship shall not exceed 8%, and prone to form free surface during the voyage which would reduce the stability of the ship and bring serious potential risks to safe navigation, and thus determining that the Master and the crew had faults in inspecting the water content of the cargo and maintaining the ship's stability, and that such faults are not one of the exemptions stipulated in Article 51.1 of the Maritime Code of the People's Republic of China (CMC), so the carrier can't invoke exemptions.

5. Insured's non-disclosure of the high moisture content of solid bulk cargos which is liable to liquefy leads to insurer's denial of liability.

In respect of the retrial case concerning dispute of contract of carriage of goods by sea between Shaoguan Qujiang Jiaxing Minerals Processing Factory (hereinafter referred to as "the Insured") and Yong An Property Insurance Company Ltd., Weifang Sub-branch (hereinafter referred to as "the Insurer") (Case No.: [2012]MSZ No.1502), the Supreme Court issued a Civil Ruling rejecting the application for retrial filed by the Insured and determining the Insurer is entitled to refuse to pay any indemnity. Such Ruling clarifies the determination on the following two issues:

(1) High moisture content of solid bulk cargos which is liable to liquefy belongs to the "material circumstance" provided for in Article 222.2 of the CMC in which the insured shall truthfully inform, rather than "the facts which the insurer has known of or the insurer ought to have knowledge of his ordinary business practice" mentioned in the same Article;

(2) As to how to determine whether "the material circumstances uninformed or wrongly informed of have an impact on the occurrence of such perils" as prescribed in Article 223.1 of the CMC in which the insurer is entitled to refuse to pay any indemnity, currently the Supreme Court adopts the general academic opinion that "as long as they are somehow casually related".

6. Claims in respect of removal of bunker spillage categorized by Supreme Court as "claims excepted from liability"

In respect of the retrial case between Shinhan Capital Co., Ltd. and MSA Jiangmen (M/V "ZEUS", Case

No.:[2012]MSZ No.212), the Supreme Court holds that, according to Article 20 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-induced Oil Pollution Damage* "if the vessel owner has taken measures such as floating, clearing off or eliminating the harm of the vessel which is sunken, grounded or in distress for the purpose of preventing pollution damage caused by non-persistent fuel oil carried by oil tankers or fuel oil carried by vessels other than oil tankers, the owner's claim for limiting its liability for the costs thereof under Chapter XI of the Maritime Law of the People's Republic of China shall not be upheld by the people's court", and Article 17.1 of the *Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims* "the maritime claims which may limit the liability as prescribed in Article 207 of the CMC do not include the claims raised from floating, removal, demolition or from making them harmless of the submerged, wrecked, stranded or abandoned ships, or from removal, demolition or from making them harmless of the cargo on board", **the "vessel" mentioned in such Articles refers to not only the hull, but also include the contents such as ship's apparels and bunkers; whether or not such contents separated from the hull due to the accident,** although the bunkers spilled from the M/V "ZEUS" (the wreck), it should be considered as a part of the vessel. Therefore, cleaning the spilled bunkers should be deemed as rendering harmless of the wreck, and the costs incurred therein shall not be subject to limitation of liability in accordance with Article 207 of CMC.

7. Supreme Court clarifies FOB seller who bears the risks and loss in the carriage of cargo has insurable interest.

The Supreme Court in its Letter of Reply [2014]MSTZ No.44 holds that, according to the Insurance Law of the People's Republic of China, insurable interest refers to a legally recognized interest owned by an insurance applicant in the subject matter insured. Subject to this provision, any insurance applicant who has a legal economic interest in the subject matter insured may have insurable interest. In this case, although the seller and buyer agreed on sale of goods on FOB terms, neither of the parties actually performed in strict compliance with the FOB terms: the cargo transportation insurance was paid by the seller, and after the cargo loss occurred during carriage, the domestic seller agreed with the buyer's request and deducted the cargo loss from the overall payment, that is, the buyer actually undertook the cargo loss during carriage. The actual performance amounts to a variation of the agreement between the seller and buyer under the FOB terms that the buyer buys cargo transportation insurance and the cargo risks are transferred to the buyer after the cargo passes across the shipside at the loading port was changed

by both parties, in other words, since the seller had actually undertaken the risks and loss of the cargo during carriage and has a legal economic interest in the cargo, it shall be deemed to have insurable interest in the cargo.

8. Claims in respect of GA contribution under marine insurance contract construed as marine insurance contract dispute and subject to two-year time bar.

In its Letter of Reply [2012]MSTZ No.17 to the query raised by Tianjin Higher People's Court in its Request of Instructions on Issues of Application of Law on Time Bar for the Case of Dispute over Marine Insurance Contract Between The Steamship Mutual Underwriting Association (Bermuda) Limited (Club) and PICC Property and Casualty Company Limited, Xiamen Branch (PICC Xiamen), i.e. whether the time bar of the claims in respect of GA contribution under marine insurance contract shall be applied to the time bar of the claims in respect of GA contribution as prescribed in Article 263 of CMC or the time bar of claims with regard to marine insurance contracts as prescribed in Article 264 of CMC, the Supreme Court holds that, Club's requesting PICC Xiamen to undertake GA contribution on the basis of the marine insurance contract shall be defined as a dispute over marine insurance contract, and thus this case shall be subject to two-year time bar as provided in Article 264 of CMC. The Supreme Court also holds the circumstance that the insured failed to claim for its rights against the insurer due to absence of GA adjustment report shall be categorized as "other causes preventing the claims from being made" as provided in Article 266 of CMC, and therefore suspension of the time bar shall be established, The counting of the time bar shall be resumed when the cause of suspension no longer exists, that is, from the date on which the GA adjustment report was issued.

9. Loss of profit arising out of time consumption during the negotiation for repair recoverable in ship collision claims

In respect of the retrial case concerning dispute over compensation between Shanghai International Port (Group) Co., Ltd., Shanghai Hudong Container Wharf Co., Ltd., and Hyundai Merchant Marine Co., Ltd., KSF 6 International SA with regard to Panama ship "Modern Unity"'s contact with Berth No.4 and Bridge Crane No.8112 of Shanghai Waigaoqiao Phase-4 Terminals, after examination, the Supreme Court holds that, after the accident occurred, the negotiation between the infringing parties and the aggrieved parties on follow-up issues, such as the plan of inspecting and repairing the bridge crane and choice of

manufacture, comply with the due procedures in handling with the accident, and the **reasonable time consumption** and the loss of profit thus arising during the negotiation period have causal relationship with the occurrence of the accident, so Hyundai Merchant Marine Co., Ltd. and KSF 6 International SA shall be liable for the loss of profit during the negotiation period. **However, it's worth noting that, the parties shall bear their own liability for the loss of time caused by their passive delay. Therefore, we hereby kindly suggest shipowners and Clubs take positive measures to deal with such kind of disputes.**

10. Supreme Court gives strict construction on application of "public policy" in reviewing the recognition and enforcement of foreign arbitration awards.

In respect of Tianjin Higher People's Court's Request for Instructions on Application of Western Bulk Pte Ltd for Recognition and Enforcement of the English Arbitration Award"([2011]JGMSTZ No.4), the Supreme Court issued a Letter of Reply [2012]MSTZ No.12, agreeing with Tianjin Higher People's Court's conclusion that recognition and enforcement of the English Arbitration Award shall be refused on the ground that the constitution of the arbitration tribunal violates the law of the country where the place of arbitration is located, but meanwhile holding that relevant determinations made by Tianjin Higher People's Court in the course of inference lack sufficient factual basis, amongst which the Supreme Court points out that that "public policy" prescribed in Article V.2(b) of the New York Convention shall be construed and applied strictly: **Recognize and enforcement of a foreign commercial arbitration award may not be refused by invoking the provision in respect of "public policy" unless such recognition and enforcement will imperil the fundamental social public interests of China such as violating the fundamental legal principles of PRC law, infringing state sovereignty, endangering state security and public security, violating good customs, etc**..