

MARITIME LAW NEWSLETTER

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CONTENTS

INDUSTRY NEWS	1
Chinese yard launched world's first LNG multipurpose general cargo vessel	1
Hong Kong initiated public consultation for cleaner energy policy	1
Wang Jing & Co. tops the Ranks in Chambers & Partners, Chambers Asia-Pacific 2014 Guide	2
ENVIRONMENT REGULATION	2
Hong Kong pushes China to co-establish Emissions Control Area	2
CASE UPDATE	3
Displaying Untrue Not Under Command (NUC) Signal Would Not Release Vessel's Liability to Comply With International Regulations for Preventing Collisions at Sea (COLREGS)	3
LEGAL ANALYSIS	4
Cargo Shortage Claims – Soybean Cases	4
PRC Supreme Court's Position to Forced Sale of Ships Arrested Securing Claims against Bareboat Charterers----Review and Prospect	8

INDUSTRY NEWS

Chinese yard launched world's first LNG multipurpose general cargo vessel

On 14 March 2014, China Water Transport Net reported that Tsuji Heavy Industries had recently launched the world first LNG fueled multipurpose general cargo vessel. Norlines and Rolls-royce co-designed the vessel and the design was the winner of the "Next Generation Ship Award" at Nor-shipping 2011.

The brand new launched vessel was an absolute green design as she relies purely on liquidated natural gas for propulsion. In contrast with the traditional diesel engine which burns heavy diesel, the fresh design can reduce CO₂ emission by 35 percent; NO_x emission by 95 percent while SO_x emission and particles (soot) from the fuel will be completely eliminated. Furthermore, the vessel was sophisticated in structure. To satisfy the multipurpose design, the yard has to build five refrigerated cargo holds on the second deck and bottom deck while other equipment was required to be installed on the first deck to facilitate container, bulk chemical and Ro-Ro carriage. Due to this is the very first design, the yard spent lengthy time in underwater outfitting as well as building and testing the refrigerated cargo holds. In order to deliver the vessel in time, Tsuji has constituted a dedicated team on technical and testing team, and the vessel was finally launched after two-year construction.

Back to late 2011, Tsuji won the contract to build the high tech vessel through fierce competition with more than 20 other world-class shipyards, including some prestigious yards from Germany, South Korea and Turkey. Tsuji Heavy Industries is a subordinate company of Jiangsu Fengli Group. The company is run by a Japanese management team and also kept a robust offshore team consisted of veterans from Singaporean prestigious companies such as Keppel. The strong management team may explain why the high-tech design was placed to Tsuji for building.

Hong Kong initiated public consultation for cleaner energy policy

On 19 March 2013, the Hong Kong government environment department issued a public consultation paper on the city's future fuel resources mix for electricity generation inquiring the public whether to significantly increase the natural gas consumption or to import electricity

from China Southern Power Grid Co. Limited (CSG) in order to meet the city's growing demand for electricity considering safety, reliability, cost and environmental performance etc.

Regarding energy sources to power Hong Kong in 2012, coal dominated the overall fuel mix (53%), followed by nuclear electricity imported from Daya Bay Nuclear Power Station (DBNPS) in the Mainland (23%), natural gas (22%), and oil and renewable energy (2%). Because coal is the most polluted energy resources, Hong Kong has not allowed power companies to build new coal-fired electricity generating units since 1997, and the current units will be phased out eventually in the future according to the government. However, the power demand of Hong Kong has been growing at an average rate of 1%-2% per annum in recent years. Therefore, plan must be carefully made ahead to meet the gap between demand and capacity.

To fill the gap left over by the retirement schedule of coal-fired electricity generating units, the authority concluded their plan with two options to select with. Plan A is to purchase 50% of Hong Kong's electricity demand from the Mainland with the remaining 50% to be generated locally. In Plan B, Hong Kong is to generate 80% of its demand locally, and the remaining 20% will be purchased from DBNPS.

In both Plans, Hong Kong will rely heavily on natural gas that 40% and 60% of the total electricity demand will be generated by natural gas in Plan A and Plan B respectively. The real consideration and difference are regarding the 30% of Hong Kong future electricity demand. Plan A covers this demand through purchase from Mainland CSG while Plan B keeps the 30% capacity locally at the expense of burning 50% more natural gas and consume the double amount of coal in comparison with the former plan.

Cleaner air is the top consideration for the proposed energy plan. To improve air quality, Hong Kong has made a lot effort. With respect to the legislation respect, from 2015 merchant vessels will be compelled by law to use bunker containing less than 0.005% sulphur while staying in Hong Kong waters, and power plants are obliged to reduce emissions gradually as the government has been progressively tightening up the statutory emission caps for SO₂, NO_x and RSP. Regarding Plan A, it seems to be the cleaner option that significantly reduces the consumption of coal and natural gas. However, Plan A will damage Hong Kong's local employment in comparison with Plan B. It is interesting to see how Hong Kong will decide upon those conflicting interests for its energy policy of the next ten years.

Wang Jing & Co. tops the Ranks in Chambers & Partners, Chambers Asia-Pacific 2014 Guide

With the recently published Chambers Asia-Pacific 2014 guide, Wang Jing & Co. has secured our position as the premier Shipping & Insurance Firm in China, Ranking in Band1 in both categories. The firm was also acknowledged for its Shipping Litigation work in the Asia-Pacific Region.

As a full service law firm, Wang Jing & Co. was also ranked for the Corporate and Commercial work for PRC firms, reflecting our growing Corporate and Commercial practices.

In addition, to the Firm rankings, individual lawyers were also ranked, with Mr. Wang Jing ranked as Eminent Practitioner for both Shipping & Insurance categories. Mr. Chen Xiangyong, Wang Hongyu and Song Dihuang were also ranked for shipping with Insurance rankings to also include Zhong Chen and Xu Jianfeng. Mr. Zhao Shuzhou was also ranked for Corporate and Commercial for the PRC.

The full ranking can be found at:
www.chambersandpartners.com/guide/asia/8

Chamber & Partners are a well respected industry leader and has been ranking the best law firms and lawyers since 1990, covering 185 jurisdictions throughout the world. The Chambers Asia-Pacific recognise the work of national and international law firms across the region on the basis of various research. Wang Jing & Co. is proud to receive such rankings from Chambers & Partners.

ENVIRONMENT REGULATION

Hong Kong pushes China to co-establish Emissions Control Area

As reported by 21CBH on 18 February 2014, Hong Kong officials visited Beijing lobbying on the formation of the Pearl River Delta Emissions Control Area (ECA). The ECA was proposed as early as late 2012, but no material step has been made since then. It seems that the ECA may not be established in a short time, and further issues needed to be worked out through cooperation by both sides.

Only a few days after 2014 Chinese new year's holiday, Hong Kong Environment Department officials fled to Beijing despite the severe smog there to meet senior officials of PRC Ministry of Communication. The visit was aimed at

establishing the first Asian ECA, the Pearl River Delta ECA. The proposed ECA will cover the Pearl River Delta, including Hong Kong and its nearby area of Canton. Upon establishment, ships entering into the area must switch to low sulfur fuel.

Back to 22 October 2012, Hong Kong environment undersecretary Christine Loh Kung-wai had expressed that the HK government was determined to set up an emissions control area for ships in the Pearl River Delta. It would be the first such region in Asia and the third in the world. According to the figures released by Civic Exchange, a think tank founded by Loh, within the Pearl River Delta region Hongkongers account for 75 per cent of deaths attributed to sulphur dioxide in ships' emissions. The analysis showed that setting up an ECA could reduce those deaths by 91 per cent. Loh furthered that the government was already discussing with the Guangdong government regarding the use of eco-friendly fuel in port.

About three months later on 16 January 2013, the chief executive of Hong Kong, C Y Leung had pledged to introduce "green transport" in the city on his maiden policy addressed by introducing a number of environmental protection measures. Leung stressed the importance of improving air quality through both roadside and ocean shipping. "The emissions of ocean-going vessels at berth accounted for about 40% of their total emissions within Hong Kong waters," Leung warned. He furthered Hong Kong was "stepping up our efforts with the Guangdong Provincial Government in exploring the feasibility of requiring ocean-going vessels to switch to low-sulphur diesel while berthing in Pearl River Delta ports".

Leung's green shipping policy was welcomed by both the Mainland and Hong Kong side. An official from neighbouring Shenzhen Port told a journalist from Sinoship News, "We have been making efforts in energy conservation and emissions reduction. We have updated some port facilities into more eco-friendly ones. The ECA would require a joint effort, and we are looking forward to it." An official from Guangzhou Port commented, "Although we have not got any notices from the government, this is a good thing for both sides. Building a green port is also our goal, and we have the responsibility and obligation to respond to the government's call to build a green port, and to establish a low-carbon economy".

Although Leung's green shipping policy was welcomed by some stakeholders, the Hong Kong officials' recent Beijing trip shows that certain issues are still pending solution. Three challenges can be expected for setting up the ECA. Firstly, the issue is whether the bunker suppliers can and would like to supply low-sulphur bunker. The second issue is regarding the shipowners' attitude towards the green bunker move. Thirdly, it is required to evaluate the impact of ECA upon competitiveness of ports within Pearl River Delta.

Regarding the first issue, oil import and crude refining within

PRC are controlled by three major state-owned oil companies, i.e. Petro China, Sinopec and CNOOC, and marine bunker supply is dominated, if not monopolized, by CHIMBUSCO, a joint venture owned by Petro China and COSCO. It seems that further time is needed for these bunker suppliers to switch to low-sulphur supply.

With respect to the shipowner's attitude, it seems that owners, especially owners of Mainland coastal vessels, may be reluctant to accept the fuel cost increase which would be brought up by establishing the ECA. According to the test held by the Hong Kong environment department, fuel cost would rise by 0.93 HK dollar per liter if vessels use bunker containing 0.005% sulphur instead of burning bunker containing 0.5% sulphur. Regarding the cost rise, the Hong Kong environment department argued that the cost will reduce with the expansion of using of low-sulphur bunker for the reason of economy of scale, and the FOB Singapore price difference between the two bunker was only 0.02 HK dollar per liter. However, due to the oil industry is tightly controlled by Chinese state-owned companies, Mainland vessel owners can hardly enjoy the economy of scale brought up by importing cheaper Singapore's product. Thus, within a short time, it can be expected Mainland owners may be not willing to pay for the green bill.

Thirdly, the fuel cost rise may give a disadvantage to ports within Pearl River Delta and may also damage the competitiveness of corporations using these ports. Industries may be lured to transfer to places outside the ECA and thus damaged the local employment.

Despite the obstacles underway, on 16 January 2014 the Hong Kong government has vowed to mandate oceangoing vessels' switch to low-sulphur fuel when berthing at Hong Kong from 2015 and Hong Kong became the first Asian port to take such initiative. However, such initiative can receive little fruit if the Mainland did not take steps at the same time. During the last decade, Hong Kong has been declining as the shipping hub of South China and increasing vessels switched to neighboring Yantian port of Shenzhen which is 13 km to Hong Kong but only charges 1/3 of Hong Kong's port handling fees. Back to the Mainland, "We are to declare war on pollution, such as what we did on poverty", Premier Li Keqiang said on 5 March 2014 at the opening of the annual meeting of parliament. The air pollution and smog have long been seen on the headlines of media. It is interesting to see how the hot-button social issue will be solved by the two sides. It can be expected that co-establishing the first Asian ECA will be a powerful weapon in Premier Li's war against pollution.

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CASE UPDATE

Displaying Untrue Not Under Command (NUC) Signal Would Not Release Vessel's Liability to Comply With International Regulations for Preventing Collisions at Sea (COLREGS)

On 22 February 2012, there was a major collision between vessel MM and ZH off Hong Kong. The investigation has come to a conclusion, and now we think it is the time to review and share this case. Hopefully, similar cases can be avoided in the future through learning this tragic incident.

When vessels approached ports before schedule, growing numbers of seafarers, in breach of the COLREGS, like to use NUC signals while drifting off ports and terminals awaiting orders. Nearly every world's major port has seen such wrongful conduct where local authorities criticize this lazy habit and urge seafarers to comply with the COLREGS. In the collision between MM and ZH, ZH used NUC signals during their 12 hours waiting for berth. Their aim is straight. Through displaying NUC signals, other vessels would believe that ZH is a vessel in difficulty, and therefore the burden will be solely upon other vessels to take measures to avoid collision. The Master of ZH ordered his crew to display NUC signals through the vessel's Automatic Identification System (AIS) and to exhibit NUC shape on the vessel's mast. Half an hour before the accident when the Chief Officer came to take the control of the vessel, he expressed no objection to the NUC signals. Neither did other crew members that were in the wheel house at the time of the accident. Before the incident, the duty officer, the Chief Officer, was speaking with the sailor about his prospective retirement life without noticing the deteriorating visibility and approaching MM. The Master was walking around the wheel house, and he also did not recognize the risk of collision with MM. Two minutes before the accident, the Chief Officer heard the whistle of MM and asked the Second Officer what was the sound signals for NUC vessels. The Second Officer replied that there is no such signal as provided by COLREGS. Seconds before the accident, another prolonged blast was heard by all those in the wheel house but it was too late to avoid the collision.

Regarding MM, the vessel had been steering at about 17.5 knots by auto pilot until the collision happened. About 22 minutes before the accident, the Chief Officer sighted a fishing vessel narrowly cleared MM's starboard at a distance of only about 150 meters. At that time, there were dozens of radar targets, including ZH, lying ahead near MM's planned route. The Chief Officer's attention was heavily attracted by the nearby fishing vessel traffic. Although ZH was detected on the radar, the Chief Officer thought ZH was a fishing vessel, and he paid no special attention to it. About 19

minutes before the accident, as per the instruction of the Master, the Chief Officer started to execute Restricted Visibility Check List at the table. At the same time, he instructed the duty sailor to go outside the wheel house for watching the fishing vessels at MM's port side. Two minutes later, the visibility continued to deteriorate, and the Chief Officer ordered the duty sailor to sound fog whistles as per COLREGS. The sailor did so and MM had since then been sounding at an interval about 1 minute one prolonged blast. Afterwards, the Chief Officer once again ordered the sailor to check the fishing vessel on the vessel's port side. The sailor did so again failed to see anything due to the heavy fog. He reported the same to the Chief Officer and then came to the radar finding ZH was ahead at only 4 miles. He reported his finding but the Chief Officer only replied he was noted and continued his job of Restricted Visibility Check List. Seconds before the accident, the sailor shouted "a ship in front" but it was too late to avoid the collision.

The accident shows that abuse of NUC signals is not only against the COLREGS but also does little help for collision prevention. According to Rule 3(f) of the COLREGS, a "vessel not under command" is unable to maneuver in accordance with the Rules because some exceptional circumstance and is unable to keep out of the way of other vessels. The exceptional circumstance means main engine breakdown and likewise. However, waiting for berth by no means shall be considered as exceptional. At the material time, ZH was a power-driven vessel rather than NUC vessel. Therefore, ZH should have complied with the responsibilities as provided in Rule 18 of the COLREGS. ZH should not have used the NUC signals but show the appropriate lights and shapes according to Rule 23, 24, 25 and 26 of the COLREGS. Furthermore, according to Rule 35 of the COLREGS, in restricted visibility ZH should have sound at intervals of not more than 2 minutes two prolonged blasts in succession with an interval of about 2 seconds between them. MM also has fault and she did not maintain a proper look-out. However, consideration must be given to the fact that there were dozens of vessels ahead of MM, and ZH had not sounded fog whistles as per the COLREGS.

The accident should be noticed by shipowners, operators and all the seafarers that inappropriate use of NUC signals can result in severe collision. According to the COLREGS, vessels are not entitled to display NUC signals while drifting off ports and terminals awaiting for berth and must act as per responsibility of power-driven vessels prescribed in the Regulations.

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LEGAL ANALYSIS

Cargo Shortage Claims – Soybean Cases

Background

China, the world's biggest soy buyer, imported a record volume of soybeans in 2013 as the crushing industry continued to expand capacity to meet rising domestic demand for food oil and protein. According to General Administration of Customs, China imported 63.38 million tons of soy in 2013, a rise of 8.6 percent from 2012.

United States is China's biggest soy supplier followed by Brazil and Argentina. The soy trade across the Pacific creates huge logistic demand. It needs more than 1,000 Handysize and Handymax ships, the most widely used bulk carrier with a DWT range from 35,000 to 60,000 tons, to carry those cargos from America to Chinese coast.

In the past decades, we have handled many cases where the cargo receivers claim for short delivery. And Chinese maritime courts have developed different opinions regarding how to decide upon those claims.

Soybean Shortage Claim Cases

Data Source: Wang Jing & Co

Year & Vessel	Fact & Claim
2003 Talisman	Brazil Soy Claim shortage 329.6 MT [0.523%] Claim dismissed by GMC
2007 Red Tulip	Argentine Soy Claim shortage 181.3 MT [0.312%] Claim dismissed by the Courts
2009 Avra	Argentina Soy, Claim Shortage 319.4 MT [0.485%] Settlement reached
2011 MV DP	Argentina Soy, Claim Shortage 649 MT [0.983%] Settlement reached
2012 MV AS	Argentina Soy, Claim Shortage 416 MT [0.630%] Settlement reached
2012 MV CO	US Soy, Claim Shortage 326 MT [0.560%]

	Settlement reached
2012 Maritime Hareshino	US Soy, Claim Shortage 299.2 MT [0.503%] Claim upheld by the Courts
2012 MV NF	Uruguay/Argentina Soy, Claim Shortage 710.33 MT [1.057%] Settlement reached
2012 Guangzhou Green Oil vs BOC Insurance	Argentina Soy, Claim Shortage 294 MT [0.446%] Judgment
2013 PICC Beijing vs Tianjin Port No.5 Stevedoring Co., Ltd.	This is a recent non-soy case. South Africa Concentrate Claim Shortage 5306 MT [6.928%] Judgment
2013 MV G	Brazil Soybean, Claim shortage 338.62 MT [0.535%] On going
2013 MV IK	Brazil Soybean, Claim shortage 1035.1 MT [1.568%] On going

Issues

Shortage claims are normally based on a comparison of CIQ draft survey/shore scales figure and bill of lading figure, which was usually ascertained by shore scales at the port of loading.

The difficulty starts at the port of loading. It is widely known by the shipping industry that in some areas, such as Argentina and Brazil and Certain notorious ports, like Constantza in Romania, shippers and/or customs would insist on bills of lading and sometimes mate's receipt being issued based on the shore figures. For instance, under Argentine law, the shippers are entitled to choose whether to use shore scales or a draft survey to ascertain outturn quantities of import cargoes. In practice, Masters would be in a dilemma when shippers pressed to insert in the bill of lading shore scale figures and these are higher than the figures ascertained by draft survey. If he accepted the shore figure, it would be likely the owner will encounter cargo shortage claims and vessel detainment at the port of discharge. If he refused, it was highly likely her vessel would be detained immediately detained at the port of loading. Therefore, as a compromise, the master usually will accept the shore figure and issue letter of protest at the same time. And sometimes in order to settle the issue, the ship and cargo interests may jointly invite an independent surveyor to conduct an additional draft survey at the port of loading.

Upon vessels' arrival at Chinese port, the discharged

quantity would be ascertained by China Entry-Exit Inspection and Quarantine Bureau (CIQ) surveyors either through draft survey or shore scales. Cargo shortage claims would arise when the bill of lading figure was higher than the CIQ figure which bears heavy evidential effect in the eyes of Chinese Maritime Courts. Some courts, such as Guangdong Courts, has held owners liable for 0.5% shortage of bill of lading figure, which can be reasonably recognized as unavoidable inaccuracy of the draft survey while Shanghai Maritime Court and other courts generally accept the owner's 0.5% inaccuracy defense

Claim, defense and the Court's position

Claim and evidence

As before mentioned, the shortage claim is based on that CIQ draft survey figure is less than the bill of lading figure. The claim would be the difference between the two figures which ranges from 0.312% to 1.568% of the bill of lading quantity according to the case summary table above. Therefore, with respect to the carriage of 60,000 MT's soybean at the price of about 600 USD per ton, a normal claim amount would be about 0.11 to 0.56 million USD.

Usually, consignee/bill of lading holder may adduce evidences as follows:

1. Trade Documents
 - 1.1 Sales Contract
 - 1.2 Commercial Invoice
 - 1.3 Bank Notice of Payment/Acceptance of the Letter of Credit
 - 1.4 Original Bills of Lading
 - 1.5 Custom Declaration Slip
2. Cargo Documents
 - 2.1 Weight Certificate at the Port of Loading
 - 2.2 Certificate of Quality at the Port of Loading
 - 2.3 CIQ Weight Certificate
 - 2.4 CIQ Quality Certificate
3. Others
 - 3.1 LOU issued by P&I Clubs

Sales Contract

Cargo Quantity Clause

Usually, it is agreed as "60,000 metric tons, 10% more or less at seller's option and at contract premium" and "Weight to be final as per certificates issued by FOSFA/GAFTA approved independent surveyor at buyer's option at the port of loading, to be final and strictly binding on both parties".

Cargo Quality Clause

Usually it is agreed as "quality to be final as per certificates issued by Cotecna or Schutter (or other FOSFA Approved Surveyors) at port of loading, to be final and strictly binding on both parties"

Payment Clause

The payment is usually effected through Letter of Credit and the final amount payable under the L/C is often interrelated with the bill of lading quantity, CBOT future price, cargo quality tested by FOSFA approved laboratory and Interest rate agreed by the parties.

Weight Certificate

At port of loading, soybeans are usually loaded by conveyor belts and normally cargo quantity would be ascertained by weighing of the cargo on automatic scales. Weight certificates would be issued proving that the weighing process was supervised by the FOSFA/GAFTA approved surveyor as agreed.

Certificate of Quality

Cargo would also be sampled by the agreed FOSFA/GAFTA approved surveyor for testing quality. The items of tests include protein, oil content, moisture, etc. The certificates of quality normally show the sampling method and seal number of samples, test items, method and result. The moisture content is usually tested according to AOCS. Ac 2-41.

Defense and Evidence

Owners would usually rebut the shortage claim for four defenses.

Firstly, CIQ's figure is inaccurate because the ship constant is abnormal in comparison with other datum of previous and after voyages.

Secondly, the cargo is not short discharged because

the accuracy of draft survey is $\pm 0.5\%$ and the "shortage" is actually difference in measurement.

Thirdly, the cargo is short loaded at the port of loading according to draft survey conducted by the ship-side and/or independent surveyor.

Fourthly, the "shortage" is resulting from inherent vice of the cargo that moisture would evaporate and dry content would reduce during the voyage.

Normally, evidence can be adduced by the owners as follows:

1. Survey Report Issued by the P&I surveyor
2. Documents collected on board by the P&I surveyor
 - 2.1 Mate's Receipts
 - 2.2 Cargo Manifest
 - 2.3 Stowage Plan
 - 2.4 Draft Survey Report issued by independent surveyor at the port of loading
 - 2.5 Ship's Particulars
 - 2.6 Letter of Protest
 - 2.7 Draft Survey Report issued by P&I surveyor at the port of discharge
 - 2.8 Tally Receipt at the port of discharge
 - 2.9 Draft survey sheet conducted by crew members at the port of discharge
3. Expert Appraisal Report (if applicable)
4. Statement of the Master (if applicable)
5. Draft survey records in other voyages before and after the material voyage (if applicable)

Court's position on owner's defenses

According to the current legal practice, it is extremely hard to challenge the CIQ's draft survey report and establish a case in favor of the owners. Following, we would explore owners' four defenses in more details and summarize the difficulties may encounter in the court.

Challenge CIQ Weight Certificate

Generally, Chinese courts are reluctant to find fact which would be different or against the conclusion made by government bodies such as CIQ. If the judgment showed fact different from CIQ Certificate, it would mean CIQ was wrong and certain personnel would be punished. Thus, only in some rare and extreme cases, the court did finally rule differently.

To further explain, we cite the case *MV NF* which was handled by us in 2012. In this case, it can be said that there is significant deficiency regarding the draft survey conducted by the CIQ surveyors. However, the court is still reluctant to find the actual discharged cargo quantity which is likely to be

different from the number revealed in the CIQ Weight Certificate.

In the *NF*, the problem is regarding the calculation of the ballast water in cargo hold No. 4 at final draft survey. When the two CIQ surveyors came on board *NS*, the vessel was still pumping sea water into Cargo Hold No.4. To accurately read the depth of ballast water and ascertain the quantity of ballast water, one way is to make sounding through sounding pipes or wait until ballast water filled the whole Cargo Hold. However, the CIQ surveyors refused to take those two methods despite the Master's strong protest. Instead, the surveyors ascertained ballast water through reading the meter ruler printed on the bulkhead. Afterwards, the cargo receiver claimed short delivery of 710.33 MT's cargo amounting to 1.057% of bill of lading quantity.

The cargo receiver suited the owner in front of Guangzhou Maritime Court. The claimant relied on CIQ Weight Certificate to prove the quantity discharged from the vessel. However, according to the Weight Certificate, the quantity of cargo was ascertained through shore scales despite CIQ had conducted the draft survey.

We addressed to the court the deficiency of CIQ draft survey and submitted that the Shore Scale Weight Certificate cannot prove shortage occurred within the carrier's period of responsibility as prescribed in Chinese Maritime Code. The court expressed that CIQ was government body, and their Weight Certificate was persuasive. The court furthered it was difficult for them to find the fact which would be different from CIQ's Weight Certificate. The case was finally settled after court mediation.

Inaccuracy Defense

Regarding the defense of $\pm 0.5\%$ accuracy of draft survey, the recent two cases show that there were different opinions within the maritime courts. Guangzhou Maritime Court and Guangdong Higher Court currently refuse to accept $\pm 0.5\%$ defense while the same is generally accepted by other maritime courts such as Shanghai Maritime Court and Tianjin Maritime Court. To clarify, it is useful to have more detailed analysis regarding two recent cases as follows.

Case 1: Guangzhou Green Oil vs BOC Insurance

Fact

The plaintiff Guangzhou Green Oil was the buyer and receiver of a cargo of Argentina Soybeans. The defendant BOC Insurance was the marine cargo insurer of the shipment.

When the cargo arrived at Guangzhou, the quantity discharged was only 65,636 MT according to CIQ Weight

Certificate while the bill of lading recorded that 65,930 MT's cargo had been loaded on board. At the port of loading, the moisture rate of the cargo was 11.57% according to the FOSFA approved surveyor. At Huangpu, the moisture rate was 10.7% according to the CIQ quality test. The cargo receiver claim shortage of 294 MT against the insurer under the cargo insurance policy. However, the insurer refused the claim, and the case was lodged in front of Guangzhou Maritime Court.

Defense and the Courts' Position

The cargo insurer raised two defenses, i.e. $\pm 0.5\%$ inaccuracy defense and moisture evaporation defense. However, both defenses were refused by Guangzhou Maritime Court and Guangdong Higher Court.

The courts' reasoning can be summarized as follows. Regarding the finding of facts with respect to shortage, the courts held that although inaccuracy of measurement always exists and is unavoidable, the quantity evidenced by CIQ Weight Certificate shall be held as the "true quantity discharged" subject to that the CIQ has carried out the survey as per the regulation.

Regarding the $\pm 0.5\%$ inaccuracy defense, the courts rejected the defense as it was agreed in the cargo insurance policy that "the policy covers shortage liability till the port of discharge, weight discharged to be final as per CIQ weight certificate".

The court further expressed its opinion with respect to whether the carrier/insurer shall be granted 0.5% allowance. The court's principle was that the carrier/insurer shall always pay and only in some exceptional circumstances will be illegible for exemption from liability. The courts stated that considering China was the top importer of major cargo such as grain, iron ore and coal it is more advisable to protect the interest of the cargo receiver.

Regarding the moisture evaporation defense, the courts held that the defense should not be upheld due to the moisture rate was tested according to different standards, in Argentina as per FOSFA standard and in China as per Chinese statutory standard.

Case 2: PICC Beijing vs Tianjin Port No.5 Stevedoring Co., Ltd.

Fact

The plaintiff PICC Beijing was the marine cargo insurer of a shipment of South African Concentrates. The defendant Tianjin Port No.5 Stevedoring Co., Ltd., following referred as Tianjin No.5 Stevedore, was the stevedore who unloaded and transfer the cargo from the vessel to the warehouse of Tianjin

Port.

On 25 April 2011, MV "E. R. Brandenburg" arrived Tianjin with her cargo of South African Concentrate. The bill of lading recorded 76,614 MT's cargo had been loaded. According to the CIQ Weight Certificate, 76,586 MT's cargo (-28 MT, -0.03%) was discharged from the vessel. According to the shore scale weighting, the quantity discharged was 71,392.52 MT (-5,221.48 MT, -6.815%). According to the warehouse scale weighting, the quantity entered into the warehouse was 71,279.96 MT (-5,534.04 MT, -6.962%). The cargo insurer paid the insurance claim and filed the subrogation claim against the Tianjin No.5 Stevedore in front of the Tianjin Maritime Court.

The cargo insurer submitted that the difference between CIQ figure and warehouse scale figures showed that the cargo was short delivered. The stevedore rebutted the claim by adducing the port CCTV records, trucks GPS records, police investigation report and other evidence to prove that there was no shortage occurred during the unloading operation and transit to warehouse. The court held that Tianjing No.5 Stevedore should not be liable for the alleged shortage because the defendant's evidence was stronger than the plaintiff's.

The court reasoned that various factors would influence the accuracy of draft survey such as vessel's data accuracy, errors in reading vessel's draft, errors in testing the density of sea water etc. The court furthered that evidence showed that Tianjing No.5 Stevedore had kept a proper management and supervision system over the whole operation and the police concluded that there was no pilferage occurred after investigation. Therefore, the court finally concluded that there was no shortage occurred and Tianjing No.5 Stevedore was not liable.

Short loading and moisture evaporation defenses

Chinese courts generally hold "quantity unknown" clause as ineffective against third party bill of lading holder or cargo receiver and insist owners to deliver cargo as per bill of lading quantity. Thus, there is little prospect for the short loading defense to be upheld by Chinese courts.

Regarding the moisture evaporation defense, the courts accepted the defense in the old case *Talisman and Red Tulip*. However, as mentioned before in the case *Guangzhou Green Oil vs BOC Insurance*, recently the courts would not accept such defense because it was held as inappropriate to compare the moisture rate tested as per different standards at the port of loading and discharge.

Summary and Comments

It is widely accepted by the maritime courts that inaccuracy exists and is inevitable technically in the draft survey.

According to recent cases, Guangzhou maritime court would hold the carrier liable for shortage less than 0.5%, which can be reasonably held as resulting from draft survey inaccuracy. However, other maritime courts such as Shanghai and Tianjin Maritime court have different view regarding the same issue. According to Guangzhou Maritime Court, while inaccuracy was inevitable, it was advisable to hold the CIQ Weight Certificate figure amounting to true quantity. It was further held by the Guangzhou Maritime Court that carrier should be liable for shortage less than 0.5% considering protection of cargo interests.

To minimize the risk of shortage claim, the key issue is regarding CIQ Weight Certificate which is extremely hard to challenge in front of Chinese Maritime Courts. Carrier shall fully cooperate with the CIQ surveyors in order to obtain the most accurate draft survey result.

In defending the shortage claim in the future, it seems that traditional defenses are useless in front of Guangzhou Maritime Court. It may be advisable to raise the *de minimis* rule, which means that the law does not concern itself with trifles to defend the future cases. Regarding the court's decision between cargo and ship interests, it may be useful to address to the court the indemnity clause in the charter party proving that the court was apportioning liability between cargo seller and buyer rather than between carrier and cargo receiver. And if owners can acquire a cargo quality report in which the moisture rate was tested according to Chinese statutory standard, it can help to persuade the courts to believe the shortage was actually caused by moisture evaporation.

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PRC Supreme Court's Position to Forced Sale of Ships Arrested Securing Claims against Bareboat Charterers----Review and Prospect

Background

Before Special Maritime Procedure Law of the People's Republic of China took into force in 2000 (SMPL 2000), three judicial interpretations were issued by the PRC Supreme Court to regulate forced sale of ships. They are the Provisions regarding Arrest of Vessels before Litigation 1986 (Arrest Interpretation 1986), Provisions regarding Maritime Courts Arrest of Vessels before Litigation 1994 (Arrest Interpretation 1994) and Provisions regarding Maritime Courts Auction of Vessels to Pay Debts 1994 (Sale Interpretation 1994).

According to the Arrest Interpretation 1986, the court can only arrest the vessels registered owned by the opponent. Then the range of vessels subject to arrest was expanded by the Arrest Interpretation 1994 according to which the court can arrest vessels operated or chartered by the opponent. The SMPL 2000 repealed the Arrest Interpretation 1986 and Interpretation 199. Regarding the Sale Interpretation 1994, the Supreme Court also scheduled to repeal it as expressed in the Maritime Trial Working Conference 2012 held by the Supreme Court. And according to Article 29 of the Consulting Draft of Provisions of the Supreme People's Court on Several Issues Concerning Arrest and Forced Sale of Vessels which was issued on November 2013 (Consulting Draft 2013), it was confirmed that the Sale Interpretation 1994 would be repealed after entry into force of the Provisions.

The Issue

The issue is that while the court can arrest vessels bareboat chartered by the opponent according to Article 3 of Arrest Interpretation 1994, however the vessels cannot be sold because the court can only force to sell the vessels registered owned by the opponent according to Article 1 of the Sale Interpretation 1994. The conflict was still not resolved by SMPL 2000, which supersedes the Arrest Interpretation 1994. Article 12 of SMPL 2000 prescribes that the court can preserve the "property" owned by the opponent. Furthermore, according to Article 23 and Article 29, the court can arrest and force to sell the opponent bareboat chartered vessels. The law is still not clear whether bareboat chartered vessel can be sold.

The Supreme Court's Position

Regarding the conflicting issue, the Supreme Court's position can be tracked back to 2012. In the Maritime Trial Working Conference 2012, Judge Liu Guixiang, President of the fourth law court of Supreme People's Court, expressed that the court can force to sell all the arrested vessels including those opponent bareboat chartered vessel in accordance with Article 29 of SMPL 2000. This position was followed by the maritime courts in different degrees.

In March 2013, the Supreme Court held a forum regarding the Arrest and Auction of Ships Related Issues at Guangzhou and further discussed the issue. The preliminary view of the Supreme Court was that the court can force to sell the opponent bareboat chartered vessel but the registered owner can rebut upon the nature of creditor's right and maritime lien.

However, the Supreme Court's position was different eight months later. According to Article 3 of the Consulting Draft 2013, "in the case where vessels are arrested due to the bareboat charterer's liability for maritime claim, maritime claimants could apply to auction the vessel in order to

settling the debt according to Article 29 of SMPL 2000. However, the before provisions shall not prejudice other maritime claimants to exercise their rights against the registered owner".

The public consultation was closed on 15 December 2013. However, for the sake of prudence, the Supreme Courts has been consulting shipping law practitioners since March 2014.

Analysis and Comments

China is not a country to International Convention on the Arrest of Ships 1999 (Arrest Convention 1999). However, SMPL 2000 was drafted concerning the Convention.

According to paragraph (3) Article 3 of the Arrest Convention 1999, "the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship". The provision can be viewed as reconciliation between common law systems and civil law systems as well as balance between shipping interest countries and cargo interest countries. It left space for the contracting countries to regulate the issue in its own domestic law and Article 3 of the Consulting Draft 2013 is such domestic law in China. It can be said that Article 3 of the Consulting Draft 2013 is in line with the aim of the Arrest Convention 1999. And it can solve the difficulty in the current practice that after arresting the bareboat charterer's vessel the court can neither release nor auction the vessel.

From the respect of domestic law, demise charter is a specific charter form under Chinese Maritime Code. The nature of demise charter has fundamental distinction with other forms of charter. The demise charter operates as a lease of the ship pursuant to which possession and control passes from the owners to the charterers whilst other charter forms, primarily comprising time and voyage charters, are in essence contracts for the provision of services. In the duration of the charter, the demise charterers are the de facto "owners" of the vessel, they employed the master and crew and through them they have possession of the vessel. Therefore, when the court arrested the vessel, the demise charterer shall be liable up to the limit of the vessel's value. If the vessel was auctioned later, the registered owner could seek indemnity according to the demise charterparty.

In the forum held by March 2013, the preliminary view concluded by the Supreme Court was similar with the law of Norway. According to Article 93 (4) of Norwegian Maritime Code, the range of vessels subject to arrest must be ascertained through reference to the enforceable assets prescribed in Norway Judicial Enforcement Act, i.e. Article 7 (1) and Article 11(4) of the Act. In another word, in most cases the court cannot arrest the vessel demise chartered by the opponent. However, there is an important exception which allows arrest and forced sale when the claim was

secured by one of the maritime lines prescribed under Article 53 of Norway Maritime Code. Similarly, the Supreme Court's preliminary view is similar that if the maritime claim was protected by maritime liens the court may reject the registered owner's opposition and auction the vessel.

However, the Supreme Court's position is different eight months later when the Consulting Draft 2013 was issued. The Supreme Court then took an approach more like English law as provided under Article 21 of High Court Act 1981. Forced sale of demise chartered vessel was allowed without prejudice to the rights of other creditors. The result would be more balanced that the claimant had to consider whether there exist other creditors whose debt ranks before his, such as the right of the bank who was the mortgagee and supplied finance for the ship.

It is estimated that the Consulting Draft 2013 will be finally approved and enter into force within 2014. After entry into force, it may be needed to amend Article 111 of SMPL 2000 concerning Article 3 of the Consulting Draft. According to Article 111 of SMPL 2000, the creditors may register with the court "debts relating to the vessel". In order to avoid future conflict, it is advisable for the Supreme Court to further define the range of "debts relating to the vessel" and clarify whether it only means maritime claims or it includes other civil and commercial debt.

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