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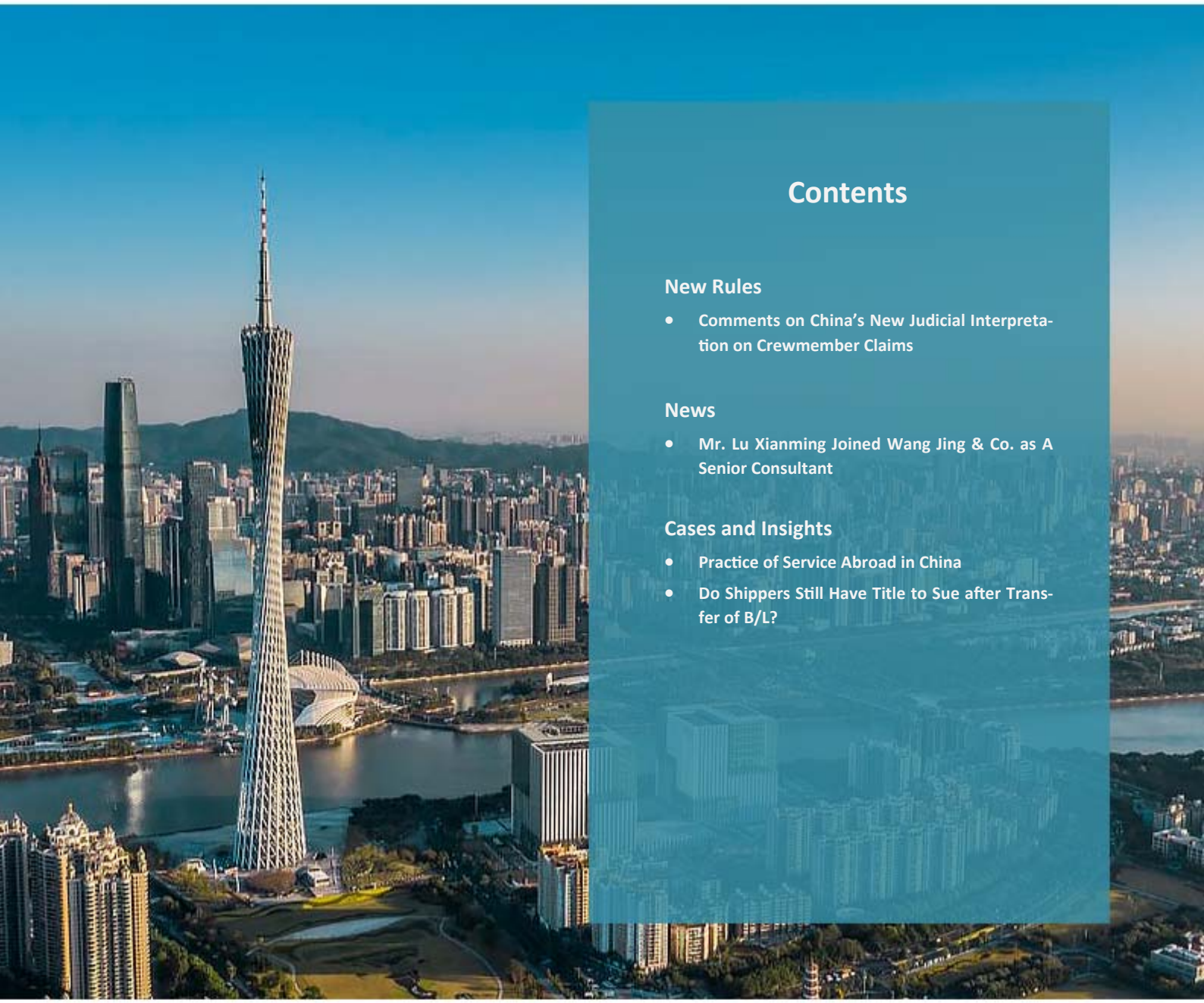
WANG JING & CO.

Maritime and Commercial Law Newsletter

New Rules



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| NEW RULES

Comments on China's New Judicial Interpretation on Crewmember Claims

Recently, the *Provisions of the Supreme People's Court on Several Issues Concerning Trial of Cases Involving Seaman-related Disputes* (hereinafter referred to as "the Judicial Interpretation") has been eventually finalized and formally published by the Supreme People's Court of China. Based on our understanding of the Judicial Interpretation, we hereby would like to share our comments on its substantial content and some legal issues involved.

Overview

The Judicial Interpretation was issued on 27 September 2020, and comes into force on 29 September 2020. As expressly provided for in its Article 19, the Judicial Interpretation shall not be applicable to any case where the appeal court judgement have been rendered before its effective date but a retrial has been commenced upon application of any party or in accordance with trial supervision procedures. It means, as we understand, the Judicial Interpretation shall be applicable to ongoing cases which have been docketed with the courts before its effective date.

Enacted on the basis of recent maritime trials in China, the Judicial Interpretation aims at providing unified regulations on some disputable issues encountered in the judicial practice, such as how different legal relationships (including crew employment contract, labour contract and brokerage contract) relate to a crewmember should be identified, how a maritime lien should be confirmed, exercised and transferred, how crew wages should be structured and protected, whether a crewmember should enjoy protection of wages when he/she conducts any illegal activity, how the tort liability should be apportioned under an employment contract, how to coordinate the work-related injury insurance (WII) indemnity and civil compensation when work-related injury occurs, what is the applicable law for an employment contract with foreign elements and so forth. Undoubtedly, the Judicial Interpretation will give significant guidance to the Chinese courts in future trials, and is also helpful for the parties involving in handling crewmember's claims to understand more explicitly their respective rights and obligations and to duly exercise their rights.

Highlights

In the following paragraphs, we are going to comment on several articles of the Judicial Interpretation, to which we consider shipowners/P&I clubs should pay attention when they are involving in such claims.

Article 6 provides that, for a maritime claim secured by a maritime lien, if the crewmember only requests a confirmation that he or she is entitled to the maritime lien instead of arrest of the vessel on which the maritime lien arises, the request shall be supported. In accordance with Article 28 of the *Maritime Law of the People's Republic of China*, a maritime lien shall be exercised by arrest of the vessel on which the maritime lien arises. Thus, a maritime lien securing a crewmember's claim for unpaid wages or casualty should be exercised by applying with the competent maritime court for arrest of the vessel. However, in the judicial practice, crewmember's claims are usually in small amounts, largely out of proportion to the value of the vessels or the impact of arrest on the vessels. Requesting a maritime lien to be exercised by arrest of the vessel would not only over burden the crewmember, but also negatively impact the operation of the vessel. This Article separates the confirmation and the exercise of a maritime lien, allowing the crewmember to apply for confirmation of a maritime lien without applying for arrest of vessel.

If a shipowner is unable to pay any wages of a crewmember due to short-term financial difficulty, the Judicial Interpretation gives the shipowner a chance to negotiate a payment arrangement because the crewmember no longer

has to arrest the vessel to claim the maritime lien. This Article benefits both the crewmember and the shipowner, as the crewmember can have his/her claim secured, while the operation of the vessel would not be hampered.

Article 9 provides that in case a third party advances all or part of a crewmember's wages, repatriation expenses, or other remunerations under the employment contract when the shipowner failed to pay as agreed, the third party may be also entitled to the maritime lien. This Article obviously will have significant impacts on P&I clubs.

The 2014 amendments to the Maritime Labour Convention, 2006 ("MLC 2006") has taken effect on 18 January 2017. Thereafter, a ship to which MLC 2006 applies has to have a certificate issued by a financial security provider to prove that insurance or any other financial security has been put in place for the following liabilities: unpaid crew wages and repatriation expenses, as well as costs provided for in Regulation 2.5, Standard A2.5.2 and Guideline B2.5 of MLC 2006; compensations for death or long-term disability of any crewmember as provided in Regulation 4.2, Standard A42 and Guideline B4.2 of MLC 2006. So far, such certificates are usually provided by P&I clubs, which means the corresponding P&I club need to advance a crewmember's repatriation expenses and wages up to four months when abandonment of the crewmember occurs. In the previous judicial practice in China, it has been controversial whether the repatriation expenses and wages of a crewmember advanced by the P&I club could be preferentially repaid from the proceeds of auction of the vessel or not. There has been no uniform practice.

With the Judicial Interpretation, a P&I club, after having advanced the repatriation expenses and wages of a crewmember, may claim for confirmation or exercise of a maritime lien before a competent Chinese court, and may have preferential distribution from the proceeds of subsequent auction of the vessel. However, what calls for attention here is that the P&I club needs to conclude a written agreement with the crewmember requesting the crewmember to assign his/her entitlement to the P&I club when payment of the repatriation expenses and wages to the crewmember is effected. Besides, the maritime lien transferred to the P&I club is also limited by the one-year time bar. The claim for confirmation or exercise of the maritime lien should be filed to a competent Chinese court within one year after the wages and the repatriation expenses become due. Otherwise, the preferential right of repayment will be time barred.

Article 14 addresses the issue of crew wages when any illegal operation is conducted. This Article provides that a crewmember's claim for wages and other renumerations for embarkation, service on board and repatriation shall be supported if the crewmember conducts any illegal activity due to fraud or under duress. However, the claim shall be dismissed if the shipowner could prove that the crewmember participated in the illegal activity voluntarily and knowingly. Under this Article, even if a crewmember participated in an illegal activity (for instance, smuggling) and was subject to investigation and forced repatriation from Chinese authorities, he/she would still be entitled to claim for wages and other remunerations against the shipowner if the activity was conducted due to fraud or under duress. In the case that the shipowner refused to make such payment, the P&I club would need to advance the wages, repatriation expenses and other renumerations as per the certificate it issued. If the crewmember conducted the illegal activity voluntarily and knowingly, then his/her wages and other renumerations would be unclaimable and the P&I club would be free from advancing any wages or repatriation expenses in the case of forced repatriation of the crewmember.

Article 15 provides that the shipowner's defence of liability against a crewmember shall be supported if the shipowner could prove the crewmember had fault in his/her work-related injury or damage. It is a principle of Chinese law that employers shall undertake compensation liability for employees' personal injury caused by the employment regardless of whether employers are at fault or not ("no-fault liability"). This Article clarifies that the shipowner's liability should be reduced proportionally if the crewmember is at fault. However, the burden of proof here is on the shipowner, and failing to discharge the burden of proof will still cause full liability on the shipowner.

According to *Interpretation of Supreme People's Court of Some Issues Concerning Application of Law for Trial of Cases on Compensation for Personal Injury 2003*, compensation for a crewmeber's personal injury caused by a third party during employment may either be claimed against the third party or against the employer. The employer may, after having made the compensation, recover against the third party.

The shipowner's liability for disability or death of a crewmember due to unexpected illness needs to be further

distinguished. The shipowner would be liable if the unexpected illness of the crewmember was caused by his/her service on board. In the practice, however, even if the illness completely concerned the crewmember's personal health condition and was irrelevant to his/her service on board, certain compensation may still be put on the shipowner by Chinese courts based on the principle of fairness.

Under the principle of fairness, if neither party is at fault for the injury/death of a crewmember, and it would be against the principle of fairness if no compensation is made to the injured/deceased, Chinese courts may ascertain a liability apportionment between the parties on the basis of the principle of fairness. In this scenario, such "liability" is in fact not compensation liability but a kind of reasonable payment. In the Chinese judicial practice, usually courts are inclined to sympathize with the deceased and try to help the family of the deceased to obtain some payment as possible as they can. In such case, the payment level will usually range from 30%-50% of the compensation amount calculated in accordance with the law.

Article 16 elaborates on the relation between WII indemnity and civil damage compensation when work-related injury of a crewmember occurs. In the practice, a Chinese seafarer sent to work abroad may have a labour contract with the domestic manning agent and an employment contract with the foreign shipowner. This Article entitles an occupationally injured crewmember to claim not only WII indemnity but also tort compensation from the foreign shipowner. It means the crewmember may get WII indemnity and the injury compensation from the shipowner simultaneously. However, this Article also provides that the medical costs already covered by WII shall not be claimed against the shipowner again.

Accordingly, for a Chinese crewmember injured on board who has WII procured domestically by the manning agent, the shipowner may request the domestic manning agent to try their best to assist the crewmember and his/her families in WII indemnity application. Although disability compensation and living expenses for dependents will still be claimed against the shipowner, if work-related injury can be ascertained in China, most of the medical costs would be covered by the WII and thus no longer claimable against the shipowner. In that case, the shipowner and the P&I club will not need to undertake any medical costs spent on the crewmember.

Article 17 in its Paragraph 2 provides that when there is no law application clause in the employment contract between the crewmember and the shipowner, the application of laws of the place from the crewmember was sent or the shipowner's principal place of business or the vessel's flag state should be approved. To make the shipowner's liability to the crewmember under a Seafarer's Employment Agreement ("SEA") more specific and predictable, the applicable law shall be specified and such agreement shall be effective under the Chinese law. However, if a crewmember commences litigation against the shipowner in China, the party who asserts application of a chosen foreign law should bear the burden of proof to prove the content of such chosen law. Otherwise, Chinese courts may directly apply Chinese law to ascertain liabilities on the ground that the burden of proof is not met.

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Yongli joined Wang Jing & Co. in 2009 and became a partner of Wang Jing & Co., Qingdao office in 2017. He specializes in maritime and admiralty law, ocean engineering, international trading, property insurance and liability insurance disputes.

| NEWS

Mr. Lu Xianming Joined Wang Jing & Co. as A Senior Consultant

We are pleased to announce that **Mr. Lu Xianming** has rejoined Wang Jing & Co. as senior consultant in the Beijing and Shanghai offices.

Xianming was trained in Wang Jing & Co. and worked in the firm's Guangzhou and Shanghai offices from 2000 to 2008. He then joined Stephenson Harwood and had worked in its various Asian offices, focusing on ship finance and other finance work. He set up Wei Tu Law Firm in 2014 which later entered into association with Stephenson Harwood.

Xianming's experience covers asset finance, general banking and finance. He advises banks, leasing companies, shipowners and shipyards on PRC-related issues of ship financing, ship leasing, shipbuilding and other relevant transactions in the maritime sectors. He also handles other general banking and financing matters.

After rejoining Wang Jing & Co., **Xianming** will focus on banking and finance work in the Beijing and Shanghai offices. His addition will be a perfect match to the firm's prime shipping practice, which has seen an organic expansion to area of ship finance and other asset finance in recent years.

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| CASES AND INSIGHTS

Practice of Service Abroad in China

Service Abroad of judicial documents is similarly knotty in many jurisdictions including China. In this article, we will summarize various channels for Service Abroad under China's legal regime and present our comments. For avoidance of misunderstanding, the Service Abroad referred to hereunder is confined to judicial documents in civil and commercial cases.

Channels available and our comments

1. Hague Convention (Central Authority channel), if the State where the parties to be served are domiciled (hereinafter referred to as the "State") is also a contracting party.

2. International Treaty concluded between China and the State (if the State is also a contracting party to the Hague Convention, the International Treaty shall be prevailing).

3. Diplomatic channel

Comments on Channels 1-3:

As normal procedures for service through Central Authority channel and diplomatic channel, documents to be served with certified English translations (or translation in the official language of the State) shall be prepared and then circulated as follows:

Chinese Intermediate Court—Higher Court—Supreme Court—Chinese Ministry of Justice/ Ministry of Foreign Affairs—State's Central Authority/ Ministry of Foreign Affairs—State's courts—Parties to be served.

Thereafter proof of service shall be returned to Chinese courts following the same route.

Service as per International Treaties may have some special arrangements but basically follows similar procedures as Central Authority channel and diplomatic channel.

Apparently service through the aforesaid channels are rather complicated and time-consuming. Normally it will take 1~2 years to complete one service but with a low success rate of no more than 30%. As such, these channels are usually not the first choice for the Courts and the Claimants to adopt.

4. Local lawyers authorized to accept court service

It is the most common practice for foreign litigating parties to appoint Chinese lawyers to accept court service and to participate in litigations if they intend to vigorously defend claims before Chinese courts. Chinese law requires Power of Attorney (POA) to be notarized and legalized in the State before submitted to Chinese courts. In the presence of POA acceptable to Chinese courts, the local lawyers are in position to accept court service on behalf of foreign parties.

5. Representative offices, branches and business agents in China authorized to accept court service

It is also widely adopted, but in many cases foreign parties only have subsidiaries in China instead of registered representative offices or branches.

Chinese law does not stipulate whether local subsidiaries can accept service on behalf of their foreign parent companies. However, in practice the Chinese courts usually hold that the subsidiaries can be recognized as representative offices since the subsidiaries have very close connections with their foreign parent companies and usually conduct business subject to instructions of parent companies.

Another issue is that there is no interpretation of "business agent" under Chinese laws and regulations. It remains arguable whether an appointed local agent can be deemed as a "business agent" of the foreign party to be served. The prevailing view in China is "NO" because normally the local agent is appointed to handle specific matters only and does not have full authorization including accepting court service.

In one of our ongoing cases, we managed to persuade a Maritime Court to serve court papers for the procedural ship auction proceedings upon the Defendant's local shipping agent; but whether this approach can be widely accepted by other Chinese courts shall be subject to further tests.

6. Postal channels

Undoubtedly, postal channels should be a simple and efficient way for Service Abroad. It is also stipulated in article 10 of the Hague Convention that service by postal channels are acceptable. However, several contracting parties including China have made a reservation to article 10, refusing to accept Service Abroad by postal channels.

Despite this, Chinese law stipulates that if the State's domestic law allows court service by postal channels, then Chinese courts can apply postal channels in Service Abroad to that State.

The practical difficulty is how to find out if postal service is permitted by the State's domestic laws. Some hold that if the State is a contracting party to the Hague Convention and did not make a reservation to article 10, then it will be recognized that postal service is accepted by the State and Chinese courts may proceed the Serve Abroad by postal channels. However, the State may refuse, in accordance with the reciprocity principle, Chinese courts to serve legal documents on persons in the State by postal channels as China had made a reservation to article 10 of the Hague Convention.

In practice, Chinese courts may serve by courier the court papers including writ of summons to foreign parties to schedule a forthcoming hearing, without prior investigation on whether postal channels are permitted by the State. Validity of such service may be questionable but it can at least "inform" the foreign parties that there is a lawsuit against them in China and push them to appoint lawyers to participate in the proceedings.

7. Service by facsimile and email

Electronic channels are also efficient to effect Service Abroad. In recent years the Chinese courts are actively making attempts with electronic service in domestic cases but it is seldom applied to effect Service Abroad.

It could be due to Chinese courts' main concerns that it is difficult to verify whether the facsimile number and/or email address provided by Claimants can truly reach the party to be served and that without a response or returned Acknowledgement Receipt it is hard to prove that the service is successful.

8. Direct service

Chinese law permits direct service upon foreign parties only when the legal representative in charge of the company (including the president, CEO, director etc.) can be located in China, but in real practice this approach is basically unworkable since it is difficult to locate such person in charge and to prove their identities, occupations and connections with the company to be served.

9. Service upon Ship Master

This is a special approach to effect court service of maritime cases and has been widely adopted in actual practice

with good results.

Court documents that can be served on the Master are: (1) ship arrest order, (2) maritime injunction order and evidence preservation order, and (3) court writ or similar court papers (provided that Master is not the Claimant in those court cases).

Even if a Master refuses to accept court service, the judges may leave the court papers on board the ship and it will be deemed as a successful service.

It is worth noting that judgments/rulings to conclude substantive proceedings shall not be served upon the Master and shall be served upon Defendants through other channels.

10. Public Notice

If Service Abroad is unsuccessful after having been tried with all aforesaid approaches, the court may serve legal documents by posting a public notice on social media for a period of three months. Thereafter the service will be deemed as completed and valid.

Public notice may be the best channel for service when the party to be served cannot be located or intentionally refuses to accept court service. However, this approach is strictly restrained and shall not be adopted until all other approaches as discussed above have been tried and proven to be unworkable, including Hague Convention, International Treaty and diplomatic channels. Except for the public notice, there is no requirement on applicable sequence for other service channels. That is, service by public notice shall be the last resort for Courts/Claimants to tackle the service difficulties.

Conclusion

Various channels are available for Service Abroad under Chinese law but currently it is still not easy to resolve the practical difficulties if the opponent cannot be located or intentionally refuses to accept court service, particularly under the present circumstances where Chinese courts are very cautious with effecting service by email.

There is a tendency that some Chinese courts prefer to expedite litigation proceedings by effecting service through postal channel, in spite of whether the State's domestic law permits service by postal mail or not. We tend to the view that validity of court service in such way remains arguable and it will further give rise to legal risks if the summoned party does not respond to the proceedings.

We therefore suggest it as advisable to seek Chinese law advice immediately after court papers are received no matter how these court documents have been served, for the purpose of avoiding legal risks and finding the best way to proceed. We will keep you updated of developments on this issue and are pleased to provide comprehensive advice when necessary.

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Do Shippers Still Have Title to Sue after Transfer of B/L?

The *China Maritime Code* provides definition of "shipper" by referring to that inside the *United Nations Convention on the Carriage of Goods by Sea 1978*, yet the issue whether shippers still have the title to sue after transfer of B/L is not explicated by either of them. Accordingly there have been different understandings on this issue. Some hold that the shipper's title to sue shall be transferred together with B/L, whilst the other view that there are two contracts between the shipper and the carrier, namely the fundamental carriage contract and the B/L. The shipper, after transfer of B/L, may have lost the title to sue under B/L, but shall still have the title to sue on basis of the fundamental carriage contract.

In practice, un-unified trial standards will not only undermine the authority of justice, but also give rise to unpredictable litigation risks even in similar cases, which will aggravate litigation burdens on parties and waste litigation resources.

This article will discuss the issue whether the shipper, after transfer of a negotiable B/L, still has the title to sue against the carrier on contractual basis and reason to prove the author's answer as "No".

1. Provisions under Chinese law

According to Article 78 of the *China Maritime Code*, after the B/L is transferred by the shipper, rights and obligations of the carrier and the consignee or the B/L holder shall be subject to the B/L terms and conditions. This provision gives the consignee and the B/L holder the right to sue the carrier on basis of the B/L. However, the *China Maritime Code* does not specify whether the shipper, after transfer of B/L, still has the title to sue the carrier.

Article 71 of the *China Maritime Code* provides that: *"A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.*" Accordingly, a B/L shall be deemed as documentation for taking cargo delivery and the carrier must deliver the cargo to the original B/L holder. Meanwhile, it is commonly held in theory that a negotiable B/L may be regarded as evidence of title to cargo. Accordingly, the B/L holder shall have the title to cargo. Thus, when a negotiable B/L is issued, the B/L holder shall have the right to both taking cargo delivery and claiming the title to cargo evidenced by the B/L.

It therefore can be seen that:

First of all, the *China Maritime Code* explicitly provides that the B/L holder shall acquire the right to take delivery of cargo whilst the shipper will lose such right after transfer of B/L. It is obviously illogical that the shipper who has no right to take delivery of cargo still has the title to sue the carrier.

Secondly, a B/L can also be regarded as evidence of title to cargo. When property rights are infringed, the one who has the title to sue shall be the owner of the property, i.e. the B/L holder. From such perspective, after a B/L is transferred by the shipper, the title to cargo shall be simultaneously transferred and the right to raise cargo claim against the carrier shall be transferred accordingly.

Besides, in accordance with the above Article 71 of the *China Maritime Code*, it is for sure that the B/L holder has the right to sue the carrier. Considering a B/L serves as the evidence of title to cargo as well as the documentation for taking cargo delivery, even if the B/L holder has not paid the cargo price yet, in judicial practice the B/L holder's

claim against the carrier is always supported by courts. The reason why the shipper also files claim against the carrier is usually that they did not receive the cargo price under sales contract. If the shipper is allowed to keep the title to sue against the carrier after transfer of B/L, it is obviously unfair to the carrier as they will have to face duplicated claims from both the shipper and the B/L holder.

2. Provisions under English law

The *China Maritime Code* has modeled on relevant conventions to produce its provisions. Thus, foreign laws and conventions may be referred to for seeking solution to the issue over the shipper's title to sue after transfer of B/L.

The title to sue under B/L is laid out in Section 2 of the *Carriage of Goods by Sea Act 1992* of the UK ("COGSA"). Provision 2(1) of the COGSA provides that: "*Subject to the following provisions of this section, a person who becomes (a) the lawful holder of a bill of lading…, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.*" Apparently, the COGSA expressively grants the B/L holder the title to sue.

Provision 2(5) of the COGSA stipulates that: "*Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage…*" This provision suggests that the shipper will lose all rights under the carriage contract after transfer of B/L, namely by transferring B/L, the shipper also transfers the title to sue under carriage contract to the new B/L holder.

In the circumstances, if the shipper suffers actual loss, what will be remedies available to them? Provision 2(4) of the COGSA gives solutions by stipulating that "*Where, in the case of any documents to which this Act applies, (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.*" That is to say, even if the shipper suffered actual loss, as the B/L has been transferred, only the B/L holder has the title to claim for such loss. In that scenario, it shall be deemed that the B/L holder, who does not suffer loss, is filing the claim on behalf of the shipper. Although the shipper can only count on the B/L holder for compensation of their loss in such arrangement, this may be the only way to avoid duplicated claims against the carrier.

By explicit provisions, the issue of the shipper's title to sue after transfer of B/L can be resolved and different trial results for similar cases can be avoided under the COGSA. The B/L system under English law has its reasonableness after centuries of development and tests through experiences. It may serve as a reference for legislating Chinese law in solving similar issues.

3. Provisions under the Rotterdam Rules

During the course of drafting the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* ("Rotterdam Rules"), there has been a systematic design in relation to the shipper's title to sue. Chapter 13 of the draft version in 2001 specifically provides that:

"*13 Right of Suit*

13.1 Without prejudice to article 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:
(i) the shipper; or
(ii) the consignee; or
(iii) any third party to which the shipper or the consignee has assigned its rights; depending on which of the above persons suffered the loss or damage in consequence of a breach of the contract of carriage; or

(iv) any third party that has acquired rights under the contract of carriage by legal subrogation under the applicable national law.
In case of any passing of rights as referred to under (iii) or (iv) above, the carrier is entitled to all defenses and limitations of liability that are available to it under the contract of carriage and under this Instrument towards such third party.

13.2 In the event that a negotiable transport document is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it is the party that suffered loss or damage in consequence of a breach of the contract of carriage. If such holder did not suffer the loss or damage itself, it shall be deemed to act on behalf of the party that suffered such loss or damage.

13.3 In the event that a negotiable transport document is issued and the claim against one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage."

In line with the above 13.2, in the event that a negotiable B/L is issued, the holder is entitled to sue the carrier without having to prove that he has actually suffered loss. If the B/L holder did not suffer any loss, he shall be deemed to act on behalf of the party that suffered such loss. This provision is similar as that of the above the COGSA, maybe it was borrowed from the COGSA.

However, what is different from the COGSA is that the above 13.3 gives the title to sue to someone rather than the B/L holder, provided that such person can prove that he actually sustained loss due to the carrier's breach of contract whilst the B/L holder did not suffer such loss.

The above 13.3 is obviously trying to solve the issue of the shipper's title to sue after transfer of B/L. If the shipper who suffered actual loss is not allowed to claim against the carrier, it will benefit the B/L holder who did not sustain loss, leaving the shipper no remedies. Although the shipper may find remedy under the design of 13.3, there is still the intractable contradiction, i.e. as 13.2 already gives the B/L holder the title to sue, duplicated claims against the carrier will be inevitable if the shipper is also allowed to keep the title to sue after transfer of B/L.

If the claims filed by the shipper and the B/L holder are heard in the same country where the draft convention is applicable, courts within that country might coordinate to avoid duplicated compensations. However, international carriage usually involves different countries. If claims by the shipper and the B/L holder against the carrier are considered in different countries applying the draft convention, both claims can be supported by courts of different countries. However, as the acknowledgement and enforcement of foreign judgment are commonly difficult, it is very hard to reconcile judgments issued by courts in different countries. As a result, the carrier will have to undertake duplicated compensations for the same loss.

In this regard, the COGSA's provisions where the shipper has no title to sue after transfer of B/L can effectively prevent duplicated claims against the carrier. In comparison, provisions of the COGSA make more sense.

It could be due to defect in the design of title to sue, the above draft provisions are not adopted in the final version of the Rotterdam Rules. It is only mentioned in Rule 57 of the final version of the Rotterdam Rules that "*When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person…*"

Comparing with the COGSA, the stipulations of the Rotterdam Rules on this issue appear to be more general.

First, Provision 2(1) of the COGSA makes it clear that transfer of B/L amounts to transfer of all rights of suit under B/L, whilst Rule 57 of the Rotterdam Rules, albeit providing that transfer of B/L means transfer of all rights under B/L, does not clarify if the title to sue is also transferred.

Secondly, Provision 2(5) of the COGSA explicitly stipulates that the shipper will be deprived of all rights under B/L after transferring B/L. Rule 57 of the Rotterdam Rules, however, does not define consequences of transfer of B/L, i.e. whether the shipper can keep the title to sue after transfer of B/L.

Clearly, draft provisions similar to the COGSA were left out of the final version of the Rotterdam Rules since the acceding countries did not reach agreement on the title transfer issues, pending for solutions by domestic laws in relevant countries.

4. It is appropriate for Chinese courts to make a unified finding that the shipper shall not have the title to sue after transfer of B/L.

The author is of the view that the solutions stipulated by the COGSA on B/L transfer are reasonable, which may effectively avoid duplicated claims against the carrier.

In accordance with the provisions of the *China Contract Law* about transfer of rights, the creditor, once transfers a right, shall no longer enjoy it. Although the Rotterdam Rules only generally provides that transfer of B/L means transfer of rights, if China joins the Rotterdam Rules, based on provisions of both the Rotterdam Rules and the *China Contract Law*, it can be concluded that the shipper shall lose all rights under B/L after transfer of B/L, inclusive of the title to sue. However, China have not acceded to the Rotterdam Rules so far and the issue of the shipper's title to sue after transfer of B/L still cannot find explicit legal grounds to stand in China.

In judicial practice in China, some courts grant the title to sue to the shipper after transfer of B/L aims at protecting the shipper's interests, due to their concerns that after transfer of B/L, the shipper may lose not only the cargo price but also the title to sue under B/L.

As a matter of fact, the courts' concern involves two separate issues under sales contracts and carriage contracts respectively. The cargo price issue can totally be solved under sales contracts, whilst the issue of title to sue is a matter under the carriage contracts. Terms of CIF or FOB are usually adopted by Chinese shippers in export trading. Under these terms, the risks of cargo during transportation shall be transferred to the buyer when the cargo passes the ship's rail. That means the buyer shall undertake the risks during carriage. Even if the cargo sustains damage during transportation, the shipper, as the seller, will still be entitled to claim the cargo price from the buyer based on the sales contracts. The shipper's right therefore can be fully protected and it is unnecessary for the shipper to seek remedies based on the carriage contracts. That being said, in practice, under CIF or FOB terms, some shippers still voluntarily agree to undertake the risks during transportation. In that case, the risk transfer agreements under CIF or FOB terms are dropped and the shippers will no longer be able to claim the cargo price based on sales contracts when cargo damage occurs during transportation. In the circumstances, it is totally the seller's waiver of protection over risk transfer provided by trade terms that causes such predicament. Thus, it is unreasonable for risks under sales contracts to be transferred to the carrier under carriage contracts. As such, it is unnecessary for the shipper to keep the title to sue under carriage contracts after transfer of B/L because the shipper, as the seller, can totally transfer the risks in transportation to the buyer by adopting the standard CIF or FOB terms in sales contracts.

The problem of inconsistent findings in similar cases in Chinese judicial practice has drawn attention from the Supreme People's Court of China ("Supreme Court"). To achieve the goal of "similar judgments in similar cases", the Supreme Court issued the *Guiding Opinions of the Supreme People's Court on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation)* ("Guiding Opinions"), stating that similar cases shall be retrieved for reference in case of no clear or consistent judgment principles. If there is guiding precedent issued by the Supreme Court, judgment principles set up by such case shall have legal binding force. If there is no such guiding precedent, similar cases shall be retrieved in trial court level order from high to low. Although judgment principles set up by these similar cases do not have legal binding force, the Guiding Opinions says judgment principles established by courts of higher level in similar cases shall be taken into consideration. This is the way that the Supreme Court is trying to get "similar judgments in similar cases".

The Supreme Court has not nominated any guiding precedent in relation to the issue of the shipper's title to sue after transfer of B/L. There is a similar case heard by the Supreme Court before, where Minmetals International Nonferrous Metals Trading Company ("Minmetals") sold a shipment of cargo to Toyota Tsusho Corporation ("Toyota") and Hainan Tonglian Shipping Company ("Tonglian") transported the cargo as the actual carrier. Minmetals as the shipper, transferred the original B/L to Toyota, the consignee. Toyota took cargo delivery against presenting original B/L. Dispute arose because wrong cargo was discharged from the vessel. After compensating Toyota, Minmetals filed a claim

against Tonglian based on the B/L. The Supreme Court held in the final judgment that, after Minmetals transferred the B/L, the shipper's rights and obligations under the B/L were all transferred to the B/L holder Toyota, including the title to sue. Therefore, it shall be Toyota who had the title to sue under the B/L, not Minmetals.

The above case set up a judgment principle that the shipper will no longer have the title to sue under B/L after transferring a negotiable B/L. Although such principle does not have legal binding force, before Chinese law lays out clear rules in this regard, Chinese courts shall take it as a reference and make similar findings as requested by the Guiding Opinions, so as to keep principles for adjudicating such kind of cases consistent.

It will certainly be the most preferable for the issue of the shipper's title to sue after transfer of B/L to be determined by explicit legal stipulations. Currently, amendment to the *China Maritime Code* has been put on agenda. Hopefully the revised *China Maritime Code* will provide clear guidance on this issue.

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