UK P&I CLUB

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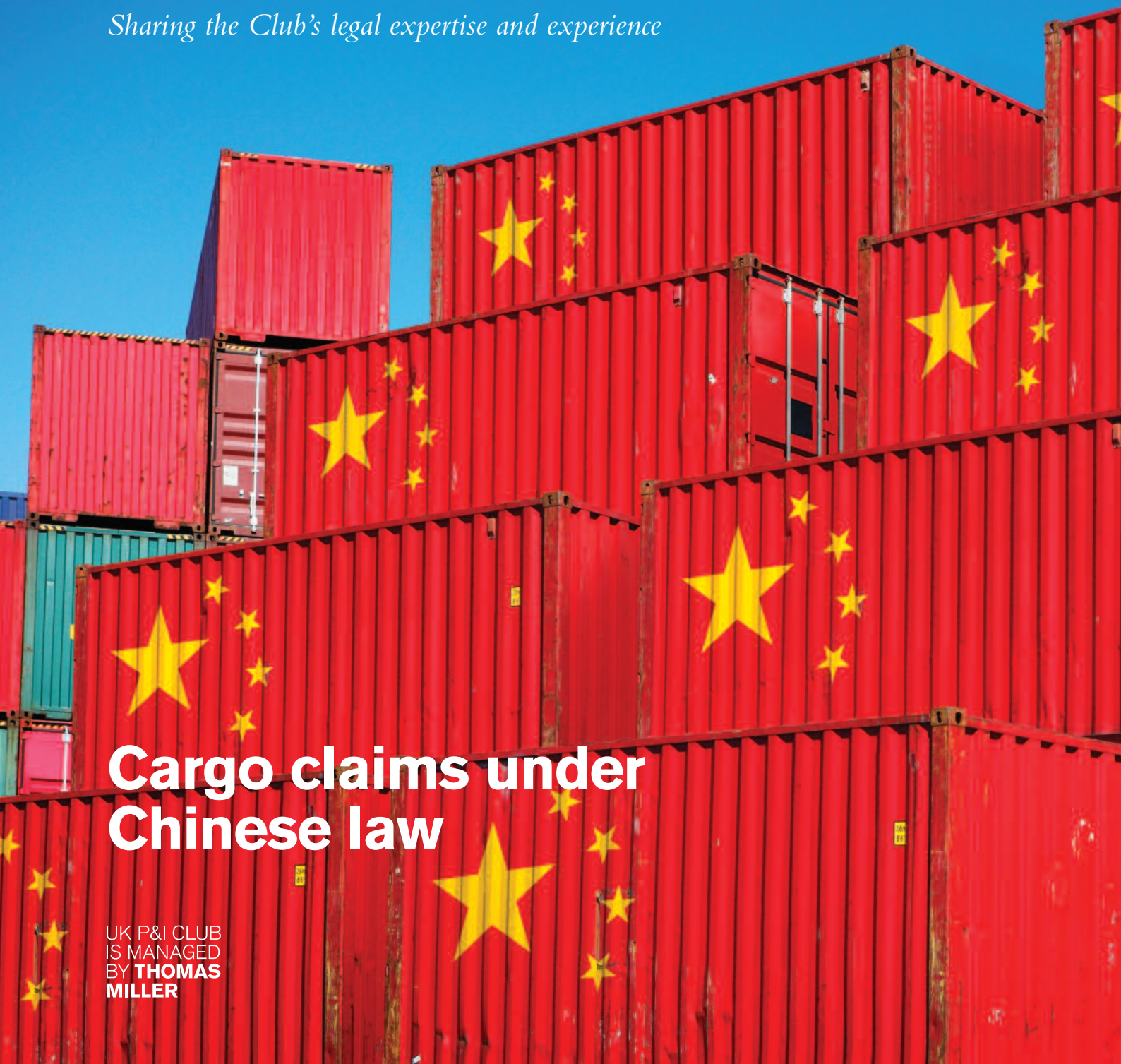

Cargo claims under Chinese law

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Sharing expertise

This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members.

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director, Chao Wu.

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Cargo claims under Chinese law

China has become a significant importer of goods, and Members often face claims advanced by shippers or consignees in China.

Although China has not ratified the Hague/Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules, elements of these conventions have been incorporated into the Chinese Maritime Code 1992 ("CMC"). These include provisions regarding the responsibilities, exemptions and limitations available to a carrier, the obligations of a shipper and the regulation of transportation documents drawn from the Hague-Visby and Hamburg Rules.

Chapter IV "Contract of Carriage of Goods by Sea" of the CMC is the main domestic law relevant to cargo claims in international sea transport. This briefing provides general guidance on the legal issues for the handling of cargo claims under Chinese law, and clarifies some issues that Members frequently experience under Chinese law.

Cargo shortage claim: CIQ reports vs other surveyors' reports

In cases of shortage claims, claimants in China will normally rely on the CIQ (China Inspection and Quarantine) certificate as proof or evidence of loss. Chinese Courts are reluctant to accept alternative evidence that differs from or contradicts certificates issued by a government body, such as CIQ. In this sense, it is extremely difficult to challenge a CIQ survey report and establish a case in favour of the owners/carriers. Additionally, Chinese Courts generally regard a "quantity unknown" clause as ineffective against a third party bill of lading holder or a cargo receiver. Owners/carriers are expected to deliver the quantity of cargo described in the bill of lading. Often there is little prospect of a short loading defence being upheld by Chinese Courts.

Possible defences to a shortage claim include:

- shortage caused by reasons for which the owner/carrier is not responsible. For instance, the "shortage" may be the result of the inherent vice of the cargo (which entitles the carrier to be exempted from liability under the CMC);
- a possible 0.5% trade allowance for bulk cargo, where such is acceptable to the Court or where the shortage can be attributed to different measurement methods;
- an argument of short loading at the port of loading according to a draft survey conducted by the ship and/or independent surveyor.

However, the burden of proof for arguing such defences is quite heavy. The carrier may be asked to provide consecutive and detailed ship records.

In 2006, the Supreme People's Court delivered a useful judiciary note. It concerned a case where there was a discrepancy between the tanker's ullage report and the receiver's shore tank survey report. The Supreme People's Court advised that the carrier's liability period is from manifold to manifold, and the tanker's ullage report should prevail over the receiver's shore figures – unless the ship's crew accept the receiver's report. Thus, unless the receiver's surveyor has taken ullage on board jointly with the ship, any shortage claims based only on shore figures will be rejected. In a recent case the Club was involved in, the Tianjin Maritime Court applied the same principle to a dry bulk cargo shortage. The decision was upheld by the Tianjin Higher Court (The "STX Horizon" [2015] JGMSZZ No. 117). This decision is encouraging for owners/carriers.

There appears to be no general rule in dealing with shortage claims. The claims need to be considered on a

case-by-case basis. Early notification to the Club or Club's local correspondent is always recommended so that a carrier's surveyor can be appointed to attend the CIQ's inspection to investigate and collect relevant evidence at an early stage on the carrier's behalf.

Cargo survey report

Carriers/owners are recommended to conduct pre-cautionary cargo surveys for those cargoes that frequently attract claims, and also where discrepancies or issues have arisen at load ports. Such surveys can be helpful to prevent inflated claims. Under Chinese law, once a clean bill of lading is issued and consigned to a third party, it becomes conclusive evidence as to the cargo condition/quantity on loading. Any evidence to the contrary will only be used by the claimants for their benefit. Therefore, where there has been a dispute over cargo quality/quantity at the load port, the cargo survey reports should not be given to the Chinese receivers as these will only be used against carriers.

Carrier's responsibility period

Under the Hague/Hague-Visby Rules, the carrier's responsibility is stated to be from tackle to tackle. Under the CMC, the period of the carrier's responsibility is not so defined.

For container cargo, the carrier's responsibility is stated to start from the time the carrier takes over the goods at the port of loading until the time when the goods are delivered at the port of discharge (port-to-port).

For non-container cargo, the carrier's responsibility starts from the time the goods are loaded onto the ship until the time the goods are discharged from the ship.

Exemptions

CMC's treatment of a carrier's exemption is almost identical to that under the Hague/Hague-Visby Rules, subject to slight difference in wording.

According to CMC Article 51, a carrier shall not be responsible for loss or damage arising or resulting from: (1) fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship; (2) fire, unless caused by the actual fault of the carrier; (3) force majeure and perils, dangers and accidents of the sea or other navigable waters; (4) war or armed conflict; (5) act of the government or competent authorities, quarantine restrictions or seizure under legal process; (6) strikes, stoppages or restraint of labour; (7) saving or attempting to save life or property at sea; (8) act of the shipper, owner of the goods or their agents; (9) nature or inherent vice of the goods; (10) inadequacy of packing or insufficiency or illegibility of marks; (11) latent defect of the ship not discoverable by due diligence; (12) any other causes arising without the fault of the carrier or his servant or agent.

It is noteworthy that, unlike the Hague/Hague-Visby Rules, unseaworthiness does not have an "overriding" effect under the CMC. By virtue of Article 54 of the Code, where loss or damage is caused concurrently by unseaworthiness and an event entitling the carrier to be exonerated from liability, the carrier is still able to discharge its liability partially to the extent that such partial liability was a result of an exemption event.

The interpretation of such exemptions by Chinese Courts may not always be the same as under English law.

The Club was involved in a case in China involving a cargo of steel pipes where the markings on part of the cargo were illegible. This resulted in the receivers failing to take delivery of part of the cargo. Whilst the CMC contains an exemption from liability for illegibility of cargo marks, the Court held that the carrier could not avail himself of this exemption where he has not made any remarks regarding the illegible markings on the B/L. It is queried whether an English Court would necessarily have reached the same conclusion.

Burden of proof

The CMC, like the Hague/Hague-Visby Rules, requires a claimant to prove that loss or damage to the cargo was due to the carrier's fault. The carrier bears the burden of proof to bring itself within an exemption for such loss or damage. An exception to this principle is loss or damage caused by fire without the carrier's actual fault. Here, the burden of proof is on the cargo interests to show that the cause of the fire can be attributed to the carrier.

There is no provision in the CMC similar to Article IV (1) of the Hague/Hague-Visby Rules, which provides that the burden of proving the exercise of due diligence shall be on the carrier or other person claiming an exemption under this sub-article where the loss or damage has resulted from unseaworthiness.

Identification of carrier: a contractual carrier or an actual carrier

Modelled on the Hamburg Rules, the CMC provides for two types of carriers, namely the "carrier" and the "actual carrier." A "carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper. An "actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

The carrier may entrust the whole or part of the carriage to an actual carrier, but will remain responsible for the whole carriage, except where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier. The contract may further provide that the carrier shall not be liable for the loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. The actual carrier has the same responsibility and liability of the carrier for loss or damage to the cargo during the carriage performed by the actual carrier and enjoys the same limitations of liability and other defences available to the carrier. Where the carrier and the actual carrier are both liable, their liability shall be joint and several (CMC Article 60).

Delivery delays

Under the Hague/Hague-Visby Rules, liability for delay in delivery is not regulated. CMC is modelled on Hamburg rules in relation to delay liabilities.

Delay in delivery under the CMC refers to the situation where the goods have not been delivered at the designated port of discharge within the time frame expressly agreed upon. The carrier is liable for loss or damage to the goods caused by the delay due to the fault of the carrier, except where the delay has resulted from causes for which the carrier is not liable under the CMC (Article 50).

Furthermore, the carrier is liable for the economic losses caused by delay in delivery of the goods, even if no loss or damage to the goods has actually occurred, unless such economic losses are due to carrier's exemptions. The person entitled to make a claim for loss of goods may treat the goods as lost when the carrier has not delivered the goods within 60 days from the time for delivery as agreed between the parties.

Limitation of time

Under the CMC, the limitation period for claims against the carrier arising from the carriage of goods by sea is one year, counting from the day on which the goods are delivered or should have been delivered by the carrier. This is the same as under the Hague/Hague-Visby Rules; however, there is nothing in the CMC regarding the provision of an extension of time limit by agreement. The only way to protect the time limit is to commence legal proceedings within one year.

Additionally, a Supreme People's Court judicial interpretation (Fashi [1997] No.3) provides that the one-year time bar under the CMC (Article 257) should also apply to a carrier's claim against the shipper in relation to carriage of goods by sea. The time limit starts counting from the date when the carrier knows or should have known that their rights have been infringed.

Members are advised to take note that under Chinese law, a one-year time bar is also applicable to container demurrage claims against the shipper, as this is likely to be different from the position in many other jurisdictions. The time limit starts counting from the day after the free-time expiration date.

The CMC also defines other time limits for maritime claims:

- 90 days for a recourse claim against a third party by a person against whom a claim has been made (normally the owner or carrier). Time will count from the day on which the person claiming for the recourse settles the claim or the day a copy of a court's acceptance of the claim against that person is served (Article 257).
- one year for claims regarding sea stowage and general average (Articles 260 and 263).
- two years for passenger claims (Article 258), collision claims (Article 261), salvage claims (Article 262), marine insurance claims (Article 264) and charter party disputes (Articles 257 and 258).
- three years for claims regarding compensation for oil pollution damage, counting from the day on which the pollution damage occurred (Article 265).
- One year to enforce a maritime lien (Article 29).

Limitation of liability for cargo claims

Regarding carriage of goods by sea, the carrier's liability for the loss or damage to the goods is limited to an amount equivalent to 666.67 SDR per package or other shipping unit, or 2 SDR per

kilogramme of the gross weight of the goods lost or damaged, whichever is the higher. This is the same as under the Hague Visby Rules.

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or other shipping units enumerated in the bill of lading as packed in such article of transport is deemed to be the number of packages or shipping units. If not so enumerated, the goods in such article of transport shall be deemed to be one package or one shipping unit. Where the article of transport is not owned or supplied by the carrier, such article of transport is to be counted as one additional package or one shipping unit, for the purpose of calculating the limitation.

The liability of the carrier for the economic losses resulting from delay in delivery of the goods is be limited to an amount equivalent to the freight payable for the goods so delayed. Where the loss or damage to the goods has occurred concurrently with the delay in delivery thereof, the applicable limitation of liability for the carrier will be that as provided for loss or damage to the goods.

Even if the cargo claim is brought on the basis of tort, the limitation of carrier's liability still applies.

Choice of law and jurisdiction clauses in bills of lading and charter parties

Choice of law clause

The CMC contains provisions in relation to foreign-related maritime claims (Chapter XIV). Article 269 explicitly provides that unless otherwise provided by law, parties may agree upon the applicable law to a contract. Where parties have not made a choice of applicable law, the law of the country having the closest connection with the contract shall apply. Therefore, a choice of law clause under the bills of lading will be respected under Chinese law. However, it is noteworthy that similar wording of Article III (8) of the Hague/Hague-Visby Rules is incorporated in Article 44 of the CMC, which provides that any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that violates the provisions of Chapter IV "Contract of Carriage of Goods by Sea" of the CMC shall be null and void.

Article 10 of the Law of Choice of Law 2010 provides that where parties choose a foreign law as the applicable law of their contract, such foreign law shall be provided by parties and shall be determined by a Chinese Court, an arbitral authority or an administrative authority. In a situation where the foreign law cannot be determined or where there is no relevant provision in the chosen law, the law of China may apply at the discretion of the Court. Acceptable proofs of foreign law include statutes, judicial decisions, expert evidence and legal literatures. However, Chinese Courts seem inconsistent on whether the relevant foreign law should be provided.

One example of failure to provide proof of foreign law can be found in the decision of *Bondex Logistics Co., Ltd v. Yantai Zhonglian Industries Co., Ltd* ([2013] LMSZZ No. 7). In this case, a set of bills of lading was issued in relation to a container of cargo shipped to Los Angeles, US. The terms on the back of the bills of lading provided that American law should be applicable for disputes arising under the bills of lading. Yantai Zhonglian Industries claimed non-delivery of the cargo under the bills of lading.

The Shandong Higher Court, as the court of appeal, found that the appellant failed to submit any proof of the relevant provisions under the applicable American law and therefore, the applicable law could not be ascertained by the Court. On this basis, the Court decided that Chinese law should apply to the dispute.

In contrast, in a Ningbo Maritime Court's decision ([2013] YHFSCZ No. 636), Japanese law was applied to a bill of lading claim without the defendant providing any proof of the relevant provisions under Japanese law. In this case, the vessel loaded the plaintiff's cargo of steel in Japan and the plaintiff was the lawful holder of the bills of lading. The cargo was discharged in Korea, but subsequently misdelivered to another party. The plaintiff possessed the bills of lading and claimed against the defendant carrier for compensation.

Ningbo Maritime Court decided that under Chinese law, the parties can choose the law applicable to the contract. The defendant provided the Chinese translation to the back clause of the bill of lading and intended to prove that Japanese law should apply to this case. Under Japanese law, the carrier has no liability regarding the loss or damage to the cargo before loading or after discharging. The plaintiff contended that Chinese law should apply to this case.

During the proceedings, the defendant did not provide any proof of the relevant Japanese law provisions. However, the trial judge independently researched the content of the relevant Japanese law and made his decision in accordance with Japanese law.

Arbitration agreement

Articles 16 to 18 of the Chinese Arbitration Law 1994 set out the general principles regarding arbitration agreement.

Article 16 of the Chinese Arbitration Law provides that an arbitration agreement can be either an arbitration clause in the contract or a separate written arbitration agreement made before or after the dispute arose. A valid arbitration agreement must contain (1) an expression of intention to apply for arbitration, (2) the matters for arbitration, and (3) a designated arbitration commission.

If an arbitration agreement does not contain any provision concerning the matters for arbitration or the arbitration commission, or such provisions are not sufficiently clear, the parties may reach a supplementary agreement to clarify the position. Where such a supplementary agreement is not made, the arbitration agreement will be regarded as invalid

by a Chinese Court. A judicial interpretation by the Supreme People's Court on Arbitration Law (Fashi [2006] No.7) further explains this point. An arbitration agreement which only provides the applicable arbitration rules is invalid unless the parties reach a supplementary agreement or the arbitration commission can be ascertained from the arbitration rules. An arbitration agreement which contains more than one arbitration commission or which only provides the place of arbitration is invalid unless the parties can subsequently agree a designated arbitration commission or if there is only one arbitration commission at the agreed place.

On the basis of the above, it appears that an arbitration clause in a bill of lading will be recognised by a Chinese Court if: (1) the clause is clearly printed on the bill of lading (not simply incorporated into the bill of lading); (2) the wording of the clause clearly provides for all disputes under the bill of lading to be referred to arbitration; and (3) the place of the arbitration and the applicable arbitration rules are clearly specified.

China is a contracting State of the New York Convention 1958. Therefore, in most circumstances, a foreign arbitral award will be recognised and enforced by the Chinese Courts, so long as it is effectively made in a contracting State. By virtue of Article V of the Convention, where recognition or enforcement of an arbitration award is sought, the law deciding whether the arbitration agreement is valid or not should be the law of the place where the arbitration award is made.

Jurisdiction clause and foreign judgements

Part Four of the Chinese Civil Procedure Law as amended in 2012 provides for civil procedures involving foreign elements. The provisions of this Part shall be applicable to any civil litigation involving foreign elements within the territory of the People's Republic of China. The amended Civil Procedure Law removed the requirement that parties to a contract with foreign elements may only choose the

jurisdiction to which the concerned contract is actually connected. However, in practice, Chinese Courts are still inclined to seize jurisdiction on the basis that China is the jurisdiction with the real or closest connection to the claim; see *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* ([2015] EWCA Civ 401).

For contractual disputes, Chinese Courts only have exclusive jurisdiction over contracts concerning operation of Chinese-foreign joint ventures or Chinese-foreign cooperative exploration and development of the natural resources in China. For other contractual disputes, the parties may agree on the jurisdiction without restrictions. Nevertheless, Chinese Courts are reluctant to uphold pre-printed jurisdiction clauses (whether to arbitrate or to litigate) on the basis that such a clause may be regarded as unfair and unconscionable.

A foreign judgement may be recognised and enforced in China under an international or bilateral treaty to which China is a party or, in the absence of such a treaty, upon the principle of reciprocity. The International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunker Convention), to which China is a party, contain provisions of mutual recognition and enforcement of foreign judgements amongst party states. China has concluded bilateral treaties with Russia and very few other countries under which judgements shall be mutually recognised and enforced.

Pursuant to Article 282 of the Civil Procedure Law as amended in 2012, where a Chinese Court finds that the foreign judgement violates the basic principles of Chinese law or the public interests of China, the Court will reject any recognition and enforcement of that foreign judgement.

Thus, there is a risk that a foreign judgement on cargo claim may not be enforceable in China.

RECOMMENDATIONS

Arrest of ship

Chinese law in relation to arrest of ship is modelled on the Arrest of Ship Convention 1999. The Chinese Maritime Procedure Law (Article 21) sets out 22 types of claims under which the relevant ship may be arrested by the claimants. Amongst all these claims a ship may be arrested for claims arising from any agreement relating to the carriage of goods or passengers on board the vessel and loss or damage to or in connection with goods carried on board the vessel. Therefore, carriers/owners should be aware of the risk of arrest of a ship in the situation where a cargo claim is raised in China.

The time limit for arresting a ship is 30 days. Where the claimant does not start legal proceedings or arbitration within the time limit, the ship will be released or the security provided will be returned. Where legal proceedings or arbitration is commenced within 30 days of the arrest or the arrest is made in the course of legal proceedings or arbitration, this time limit will not apply.

Security and counter security

The Maritime Procedure Law (Article 18) provides that the ship will be released where securities are provided by the respondent or upon the request of any party on justifiable grounds. The Article only provides that the Maritime Court shall release the vessel in a timely manner with no detailed time line. In practice, the quickest release ever achieved was within 24 hours upon the provision of a valid security.

The form and amount of security provided by the respondent may be agreed between the parties. Where no agreement can be reached, the Maritime Court will determine the amount. Security may be provided in the form of cash, guarantee, mortgage or pledge. Security provided by the respondent may be presented either to the Maritime Court or to the claimant. Guarantee provided by foreign institutions may be acceptable by Chinese Courts only if the foreign guarantee is notarised or re-guaranteed by a Chinese financial institution.

Chinese Courts do not accept IG Club LOUs as good security. The UK P&I Club has a facility in place with domestic insurers – China Re and PICC – to issue acceptable securities in China on behalf of the Club's Members.

Upon receipt of an application for a ship arrest, the Maritime Court will require the claimant to provide counter security, failing which, the application will be rejected. The only exception for counter security is in respect of claims for seamen's wages and personal injury claims. The form and amount of the counter security is to be determined by the Maritime Court. The amount of the counter security will be based on the loss likely to be sustained by the respondent due to the claimant's wrongful arrest. According to the Judicial Interpretation on Ship Arrest and Judicial Sale (Fa Shi (2015) No. 6), the amount of counter security is arrived at on a consideration of the costs and expenses to be incurred in the maintenance of the ship during the arrest, the loss of use of the ship during the arrest, and the costs of providing security to release the ship.

This requirement for a counter security may pose difficulties for cargo receivers who wish to arrest a ship. Chinese cargo underwriters, however, have no such difficulties because their corporate LOUs are deemed adequate counter securities for ship arrests.

Recommendations for Members

If Members face claims by shippers or consignees in China, Members are recommended to consider the following points:

- Chinese Courts tend to protect Chinese receivers' rather than carriers' interests.
- Early involvement and investigation is always recommended, as well as using full efforts in collecting evidence at an early stage.
- Where it is clear that the cargo liability cannot be avoided, an amicable settlement of the claim is recommended to avoid the complicated and costly litigation process in China. ■

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