Chinese Shipping Law Update

1 May 2015

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In this edition of the Dacheng Shipping Law Update, we introduce the newly published Interpretation of the Supreme Court of PRC on the Civil Procedure Law. The Interpretation has brought some changes which may have important effect on the civil and commercial litigation. We also introduce a judgment recently made by the Shanghai Maritime Court and its appeal court on the shortage claims in the log transport. The court's ruling on the validity of a "said to contain" clause on a bill of lading and the evidentiary value of a tally report is interesting.

Notable Changes Brought by the Supreme Court's Interpretation of the Civil Procedure Law

The Supreme Court's Interpretation Concerning the Application of the Civil Procedure Law ("2015 Interpretation") came into force as of 4 February 2015.

The 2015 Interpretation replaced the Opinions of the Supreme Court on Certain Issues Concerning the Application of the Civil Procedure Law which was promulgated on 14 July 1992 ("1992 Opinions").

The 2015 Interpretation is essentially a revision of the 1992 Opinions and a codification of the various judicial interpretations published by the Supreme Court since 1991 when the Civil Procedure Law ("CPL") came into force, but it does contain some notable changes (incl. clarifications).

Jurisdictional issues

Jurisdiction for wrongful preservation claims

According to the CPL as amended, a claimant may apply for preservation of the assets of the defendant in order to secure its claim. The preservation application can be made before the substantive action is brought. The claimant shall commerce substantive proceedings within 30 days of the preservation order.

It is possible that a preservation application will be found wrongful at the end of the day, e.g. where the claim for which the preservation was applied is eventually dismissed by the court. In such a case, the claimant will be liable for the losses suffered by the defendant as a result of the wrongful preservation.

Under the 1992 Opinions, the claim for wrongful preservation should be brought before the court which granted the preservation order. The jurisdiction of this court has been reserved in the 2015 Interpretation. In addition, if the substantive disputes have been submitted to a court for decision which is different from the one that ordered the preservation, the claim for wrongful preservation may also be brought before the trying court.

Floating jurisdiction clauses

Under the 1992 Opinions, a jurisdictional agreement will be held null and void if the agreement is floating in the sense that the parties have chosen two or more courts to decide their disputes. The 2015 Interpretation has changed the position: as long as the courts chosen by the parties have actual connection with the disputes, the agreement will be valid and the claimant has the option to choose any of the agreed courts to bring a suit.

Agreement for foreign jurisdiction

According to the CPL, the parties to a contract involving foreign elements may, by a written agreement, choose a foreign court to decide their disputes provided that the court so chosen has actual connection with the disputes. The 2015 Interpretation made it clear that the courts that may be considered having actual connection include the courts in the plaintiff's or defendant's domicile, or the places where the contract is performed or signed, or the place of the subject matter etc.

With regard to certain categories of contractual claims over which the Chinese courts will exercise exclusive jurisdiction, the parties are not permitted to choose a foreign jurisdiction. These claims include the disputes in relation to (1) real estate, (2) port operations, (3) inheritance, and (4) the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of natural resources contracts within China. However, it is to be noted the parties will be free to refer the aforesaid disputes to foreign arbitration.

Transfer of jurisdictional agreements

The judicial practice was not uniform as to whether the transfer of a contract (e.g. an assignment) will have the effect that the transferee should be bound by the jurisdictional agreement/ clause between the original parties. There is no express provision in the CPL. The 2015 Interpretation provides that a transferee shall generally be bound by the jurisdictional agreement of the transferred contract. However, if the transferee is able to prove that it is not aware of the jurisdictional agreement at the time of the transfer, e.g. because the jurisdictional agreement was contained in a separate document which has not been brought to its attention by then, it will not be bound by the jurisdictional agreement.

Regulations about evidence

Standard of proof

It is a general principle that the party who alleges is obliged to provide evidence to prove it. According to the 2015 Interpretation, a judge will accept a fact proved if the evidence adduced by the alleging party makes him or her believe that there is "high probability" that the fact exists. The opposing party is permitted to adduce rebuttal evidence, and if such evidence will have the effect of making the judge feel unable to ascertain whether or not the alleged fact exists, the alleged fact would be deemed not proved. It is submitted that, in effect, the alleging party should produce evidence which is able to prove a probability of more than 75%.

The position prior to the 2105 Interpretation was considered to be somewhat unclear which was that where there are competing evidence from the two sides, the court should, having taken into account all the circumstances of the case, judge whether the evidential force of the evidence adduced by one of the parties is "obviously larger" than that of the other side, and if so, the evidence with the larger evidential force should be accepted. Some judges considered that the standard of proof required was only a probability over 50%, but some other judges considered that a higher probability was required e.g. over 75%. The 2015 Interpretation was purported to

clarify the positions.

However, a higher standard of proof will be imposed on any allegations of fraud, duress, malicious conspiracy, or the existence of an oral will or donation. According to the 2105 Interpretation, the court will treat the alleged facts proved only where it can be sure that there is no reasonable doubt as to the existence of the fact.

Affirmation of truth by witnesses

Factual witnesses will be required by the 2015 Interpretation to sign an affirmation of truth before giving oral testimony in court. Any witness who refuses to sign the affirmation of truth will not be allowed to give oral testimony.

In order to ascertain the facts, the court may call any of the parties to the proceedings (either an individual party or the representative of a legal person party) to attend the court to give evidence. The court may require the person who is to give evidence to sign an affirmation of truth, and if he/she refuses to sign it the court may draw adverse conclusion on the relevant facts alleged by that party.

Sanctions for late evidence

According to the Supreme Court's evidence rules, a court will normally set a deadline for adducing evidence, and if the parties would fail to adduce evidence before the deadline, the court will shut out the late evidence. This could be harsh if strictly applied. The position was relaxed in the 2015 Interpretation which deals with late evidence as follows:

a. If the lateness was intentional or due to gross negligence of a party, the court will reject the evidence, unless the evidence is related to a "basic fact" of the case. In case the evidence is admitted, the court shall reprimand the party for the delay and/or impose a fine.

b. If the lateness was not due to intent or gross negligence, the court shall admit the evidence but may reprimand the party for the delay.

c. The other party may request the late party to pay for wasted costs including travelling, lodging, witness expenses etc.

Expert evidence

There are generally two types of expert evidence under Chinese law, the first is the appraisal opinions and the second is expert opinions. An appraisal of an issue that requires special expertise may by applied by the parties or sought by the court on its own volition. In comparison, an expert opinion is only to be provided by the parties with permission of the court.

According to the 2015 Interpretation, a party may apply the court to call one or two experts to present on its behalf the opinions about any issue which requires special expertise. Any such application should be made before the time limit for adducing evidence expires.

It is provided in the 2015 Interpretation that the opinions submitted by the experts should be deemed as the statements of the party calling them. In this sense, an expert opinion is not treated under Chinese law as "independent" or "impartial" (though it is still

important not to have a partisan look). Accordingly, the 2015 Interpretation provides that the expenses for obtaining an expert opinion is the party's own costs to be borne by itself.

Preservation of property

Counter security

According to the 2015 Interpretation, depending on the stage in which an application for property preservation is made, the counter security required for the preservation application may differ. In a pre-trial application, counter security will generally be required and the amount of the counter security will be equal to the claim amount. The court may however reduce the amount or even waive the counter security in exceptional cases e.g. if the claims are for unpaid wages.

If the application for preservation is made in the course of a trial, it will be the court's discretion whether or not counter security should be provided, and if required, in what amount, all depending on the circumstances of each case, but in practice it is expected that the courts will not readily relax the requirement of counter security.

An application for preservation of property may also be made after a party has obtained a favorable judgment but before the court is required to take actions to execute the judgment. In the circumstances, the court will probably not require counter security for the application.

Duration of preservation

In accordance with a Supreme Court judicial interpretation in 2006, an order for freezing bank accounts will expire in 6 months, an order for preservation of movable properties will expire in one year and an order for preservation of immovable properties will expire in two years. Renewal applications have to be made before the expiry date and the renewed duration will not exceed one half of the corresponding original durations.

The 2015 Interpretation has extended the durations, and the length for the preservation of bank accounts, movables and immovables are now respectively one year, two years and three years.

Proceedings for realizing security interests

The CPL contains two articles relating to the realization of security interests. These are general provisions only and the 2015 Interpretation have purported to set out the details.

The 2015 Interpretation expressly provides that the security interests referred to in the CPL include the security rights arising out of mortgage, pledge and lien. The application for realization of the security interests may be made by the security interests holders (creditors) or the other parties including the debtors.

An application should be made to the court where the property is located or where the security interests is registered. With regard to the pledge of bills of lading or warehouse receipts etc. the application can also be made to the court where the pledgee is domiciled. With regard to the security interests in the maritime field, the competent court will be the maritime court in whose jurisdiction the property is located or where the security interests is registered.

A written application with supporting documents shall be submitted to the court for examination. It is submitted that the court's examination should be limited to a formal one instead of a substantive review of the materials. In case the respondent makes an objection to the application, the court has to make a decision as to whether the objection should be dismissed forthwith in which case it may proceed to make an order for the sale of the relevant property, but in case it finds that there is real dispute it shall discontinue the realization proceeding and request the parties to commence substantive proceeding to resolve their disputes.

The Orient Hope Case - shortage claims in log transport

Background

Jiangsu Wanlin Modern Logistics Co. Ltd ("Wanlin") entered into a sales contract with Itochu Shanghai Ltd ("Itochu Shanghai"), under which Wanlin agreed to purchase 5,800 MBF (±15%) Canadian logs from Itochu Shanghai. The unit price was on the basis of MBF. Itochu Shanghai entrusted Itochu Corporation ("Itochu") to purchase the logs from eight Canadian suppliers, and were carried by MV Orient Hope from New Westminster, Canada for discharge at Lianyungang, China.

Black Ship Line S.A. ("Black Ship") was the owner of MV Orient Hope. At the material times, the vessel was chartered out to Kawasaki Kisen Kaisha Ltd ("K Line") under a time charter. K Line concluded a voyage charter with Itochu for the carriage of the cargo. According to the voyage charter, the owners thereunder (i.e. K Line) were not responsible for either the tally operations or the quantity of the cargo.

Eight to order bills of lading were issued and the total number of pieces of logs (in the 8 bills) was 29,469 pieces, and the total volume was 5,862.91 MBF. The following statements were also inserted into the bills of lading:

> *"Said to be…", "said to contain …"*

> *"All terms and conditions, liberties and exceptions of the charter party including the law and arbitration clause are herewith incorporated."*

> *"All deck cargo carried at Charterer's risk and expense. Owners not responsible for discoloration, crack, friction and/ or any loss or damage howsoever caused."*

> *"Owners shall not be responsible for number of pieces and quantity stated in Bills of Lading."*

Upon arrival of the vessel at the discharge port, China United Tally Co., Ltd. Lianyungang Branch conducted the tally of the logs discharged. It was found by the tally that there was a shortage of 720 pieces of logs. CIQ had also conducted an inspection but somewhat strangely Wanlin had not applied to the CIQ for the issuance of an inspection report.

The cargo underwriter, PICC Shanghai, having paid Wanlin and obtained the right of subrogation,

brought an indemnity claim for the shortage against both K Line and Black Ship (collectively, the carrier) before the Shanghai Maritime Court.

Judgment of Shanghai Maritime Court

The main issue is whether the carrier could exempt liability for the alleged shortage by reliance on the statements in the bills of lading that (1) the quantity was "said to be" or "said to contain", and (2) the owners were not responsible for the loaded quantity. The court held, among others, that the carrier was entitled to make a note in the bill of lading, such as "said to be" or "said to contain", only where there was no reasonable means to check what was loaded on board. There was no evidence in this case that the quantity of the logs loaded on board cannot be checked and ascertained by the carrier.

The carrier had also purported to rely on the terms in the voyage charter which exempted the responsibility of K Line for the loaded quantity. The court rejected the argument on the ground that the terms were not successfully incorporated and had no binding force on the consignee. The court pointed out that the clauses in the bill of lading dealing with responsibility for deck cargo, namely "All deck cargo carried at Charterer's risk and expense. Owners not responsible for discoloration, crack, friction and/ or any loss or damage howsoever caused." and "Owners shall not be responsible for number of pieces and quantity stated in Bills of Lading" were agreements between the owners and the charterers/shippers and they cannot protect the carrier from the claim made by the consignee.

It is important to note that the court did not accept the tally report as sufficient evidence of the shortage. As usual, the tally report only recorded the pieces of logs discharged. The tally company did not conduct any inspection of the volume of the logs either in cubic meters or MBF. Whilst the CIQ had inspected the volume of the logs, but no report was submitted by Wanlin/ subrogated underwriters. The court found that the sale contract was based on MBF, so was the commercial invoice. Further, the customs declaration only referred to the volume of the cargo in cubic meters, and no shortage was reported during the customs declaration.

The court held that the piece count was only a supplementary means of measurement. According to the provisions of the sale contract, the commercial invoice and the way in which the customs was declared, the decisive means of measurement should be the volume, either in cubic meters or MBF. Further, Wanlin's failure to obtain a CIQ report showing the volume of the logs discharged and its declaration to the customs without reporting any shortage would also prevent them from making the shortage claim. In consequence, Shanghai Maritime Court dismissed the claim.

The appeal court judgment

PICC Shanghai appealed to the Shanghai Higher Court. The appeal court upheld the judgment of Shanghai Maritime Court but on one point it had reached a different conclusion, i.e. regarding the validity of the "said to contain" clause.

The appeal court held that the clause was valid because it was unreasonable to require the carrier/ master to measure or scale the logs upon loading. So

consignee. It is noted that the different holding of the appeal court on this point did not affect the overall outcome of the judgment.

Comments

One of the issues in this case is, broadly speaking, the validity of an unknown clause on a bill of lading. Under Chinese law, the carrier has the obligation to ensure that the cargo information is accurately stated on a bill of lading. To a good faith transferee of the bill of lading, the statements on the bills of lading are conclusive evidence. According to the Maritime Code, if the carrier has observed any inaccuracy between the statements and the actual conditions of the cargo (incl. weight and quantity etc.), or it has suspicion of any such inaccuracy, or it has no reasonable means of checking the conditions of the cargo against the statements on the bill of lading, it may clause the bill of lading accordingly.

However, as can be seen from the judgment of the Shanghai Maritime Court, the insertion of a clause like "said to contain" will not necessarily protect the carrier from claims made by the consignee. The carrier has the positive obligation to check if the statements on the bill of lading are accurate. It is a matter of reasonableness, and the Shanghai Maritime Court and its appeal court have reached different conclusions as to whether the carrier was able to check the pieces of the logs loaded.

It should be borne in mind that unknown clauses in a bill of lading are generally held invalid as against a good faith consignee by Chinese courts. The appeal court's holding in this case is by no means representative and will not necessarily be followed by other courts.

Whilst it is normal for logs to be measured and/or priced on the basis of volume (in cubic meters or MBF), piece count is also widely employed in practice. The courts' conclusion in this case that a tally report alone is insufficient evidence of shortage is not entirely without surprise. It is possible that the courts' conclusion had been affected by the fact that the consignee had failed to obtain the CIQ report which should have set out the inspection results of the volume of the logs discharged.

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