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Chinese maritime law in 2023: a review

By Dr Liang Zhao

Admiralty – Auction sale of ship – Bill of lading – Dangerous goods – Deck cargo – Forum non conveniens – Freight forwarding – General average – Limitation of liability – Maritime Labour Convention – Multimodal carriage – Proportional liability – Subrogation – Unseaworthiness exemption – Warehousing of goods

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Chinese maritime law in 2023: a review

By Dr Liang Zhao, Institute of Maritime Law, Southampton Law School, University of Southampton

Introduction

This review provides an analysis of the significant decisions of the Chinese courts, in particular the Supreme People's Court of China, in 2023. It provides readers with insight into the judicial practice of maritime law over this period in Mainland China. The judgments relate to carriage of goods by sea, marine insurance, admiralty law and procedures. The source of these Chinese judgments is the database of China Judgements Online, People's Courts Case Database and recommended judgments from Chinese maritime judges and lawyers.

In 2023 China Judgements Online reported 3,492 maritime judgments, 71 of which were from the Supreme People's Court. In June 2024 the Supreme People's Court of China published typical maritime cases in China in 2023, one of which is included in this review.

All laws referred in this review are Chinese law, eg "Maritime Law" means the Maritime Law of the People's Republic of China.

Carriage of goods by sea

This section focuses on decisions on bills of lading and freight forwarding, which are the most common maritime disputes arising from the carriage of goods by sea. It also reviews one decision on dangerous cargo, one decision on the warehousing of port goods and one decision on multimodal carriage. There are no outstanding charterparty decisions from Chinese courts.

The case concerning the identity of the shipper, *MRF v Xingye*, discusses the concept of actual shipper in the Maritime Law and the legal status of a Chinese FOB seller. The identity of the carrier is reviewed with three judgments, *CPPI v NYC and Others*, *Combined Rich v Shanghai Ming Wah* and *Carria v Airway Express*, which illustrate the default rule and special rules for identifying the carrier. Delivery of goods without bill of lading is one of the most common disputes in Chinese maritime trials. On this subject, the judgments reviewed, *Carria v Airway Express*, *ALIC v Orient Star* and *Qingdao Yi A v Netherlands Yi B*, show the complexity in ascertaining the fact and applying foreign law in a dispute over the delivery of goods without a bill of lading. Two judgments are reviewed which examine the responsibility period of the carrier, including one for containerised goods, *Bertschi International v Shanghai Haihua*, and the other for non-containerised goods, *China Pacific Property Insurance v Endeavor BBG*. The deck cargo case, *CPPI v NYC and Others*, discusses the carrier's exemption for damage to cargo carried on deck.

The case on the issue of agent or carrier, *Houwen v OCO*, shows the special practice in Chinese maritime law that the freight forwarder may be considered the carrier and thus is regulated by the Maritime Law. The case examining the responsibilities of the principal, *CTS International Logistics v JBYT Machinery and Nanjing Buffalo*, shows the importance of drafting a clear clause for the scope

of responsibility. The case on the responsibilities of the freight forwarder, *Jinzhou A v Shanghai B*, indicates the reasonable responsibility recognised by Chinese courts, and the final case in this section, *Shandong A v Qingdao B*, discusses how to prove the loss for claiming the liability of the liable party.

The dangerous cargo case, *Quanzhou Antong Logistics v Tianjin Changxin Freight Forwarding,* analyses liquidated damage for dangerous cargo. The warehousing of port goods case, *Shanghai Fenjun v Cangzhou Huanghua*, discusses this complicated topic in a Chinese maritime trial, and the multimodal carriage case, *Ping An v Shanghai SK*, reviews the multimodal transport operator's liability for damage in a certain sector of transport under contract and the Maritime Law.

Bill of lading

Identity of shipper

The Maritime Law, article 42(3) provides a definition of "shipper" as follows:

> "(a) the person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier;
>
> (b) the person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea."

In *MRF International Logistics Co Ltd v Jiangsu Xingye Plastic Co Ltd (MRF v Xingye)*,[1] a dispute arose as to whether the Chinese FOB seller had become the shipper and was liable for the costs incurred at the port of destination because the goods could not be delivered.

In this case, Xingye sold goods to a foreign buyer on FOB terms. The foreign buyer appointed MRF as the freight forwarder for the shipment of the goods. MRF was registered as a non-vessel-owning carrier. MRF issued one set of three original order bills of lading in the capacity of carrier and sent the original bill of lading to Xingye. The foreign buyer paid MRF the freight for carriage of the goods.

When the goods arrived at the port of destination Xingye could not contact the buyer and failed to receive the remaining payment for the goods but kept the original bill of lading in its possession. As the goods were not collected from the port of destination for a long time, the actual carrier issued a bill for container demurrage charges, which MRF paid. MRF filed a lawsuit, requesting that Xingye pay the container demurrage charges and the corresponding interest. Xingye argued that the trade term used in the case was FOB and the foreign buyer should bear the obligation to conclude the contract for the carriage of goods by sea.

The court of first instance held that it could be presumed that the parties to the trade contract had reached an agreement on the signing of the contract for the carriage of goods by sea between Xingye and MRF as shipper and carrier. First, the FOB term does not restrict negotiation between the two trading parties to agree on the seller and the carrier to sign the contract of carriage of goods by sea. Secondly, the arrangement of transport matters between the two trading parties should be in line with the performance of the trade contract. Xingye acted as the shipper of the contract of carriage and held the original bill of lading, which is a manifestation of the agreement between the two trading parties on the right to retain the goods by the seller. Lastly, the foreign buyer's payment of the sea freight in question was the fulfilment of the obligation to pay the freight on behalf of the shipper Xingye. Therefore, the court of first instance held that Xingye's aforementioned behaviour had fulfilled the characteristics of a shipper under the contract for the carriage of goods by sea.[2]

Xingye appealed, claiming that it was the actual shipper who handed over the goods to the carrier and not the contractual shipper who entered into the contract for the carriage of goods by sea with the carrier, and that it was entitled to obtain and hold the bill of lading in question according to the provisions of the Provisions of the Supreme People's Court on Certain Issues concerning the Trial of Cases of Disputes over Marine Freight Forwarding (2020 Revision) (Freight Forwarding Interpretation), but this did not mean that it was subject to the shipper's obligation to pay the charges at the port of destination. The court of second instance pointed out that the court should accurately identify the shipper according to the conclusion and performance of the contract of carriage. First, Xingye was recorded as the shipper in the bill of lading as evidence of the contract for the carriage of goods by sea. Secondly, Xingye actually controlled the goods in question through the holding of the bill of lading. Therefore Xingye's appeal was dismissed.

[1] (2022) HMZ 644 (Shanghai High People's Court).

[2] (2021) H72MC 510 (Shanghai Maritime Court).

There are two types of shipper under China's law, which are called the contractual shipper and the actual shipper in the Freight Forwarding Interpretation. Under FOB trade, although the seller is not responsible for the transport, it usually becomes the actual shipper by delivering the goods. This provision can to a certain degree protect the interests of the Chinese seller in the form of FOB trade: for example, the Freight Forwarding Interpretation stipulates that the actual shipper has the right to request the freight forwarder to deliver the bill of lading, sea waybill, or other transport documents.[3] However, on the other hand, the shipper is liable for any loss suffered by the carrier caused by the shipper's negligence. This liability does not exclude the actual shipper, ie the Chinese FOB seller. Where the Chinese FOB seller requests the issue of a bill of lading and becomes the shipper, this kind of liability for damages has a contractual basis. Therefore, the Chinese FOB seller's request to issue a bill of lading and become the shipper is both a kind of protection and a kind of risk.

> According to *New Golden Sea* a Chinese FOB seller, whether as the actual shipper or recorded as the shipper of the bill of lading, is not liable for expenses incurred at the port of destination, while the carrier is entitled to claim from the contractual shipper

It should be noted, however, that *MRF v Xingye* is inconsistent with the judgment of the Supreme People's Court in *New Golden Sea Shipping Pte Ltd v China National Machinery Industry International Co Ltd*.[4] In this case, Haiyao purchased a batch of goods from China Machinery. New Golden Sea issued a bill of lading for the carriage of the goods. According to the bill of lading, China Machinery was the shipper, New Golden Sea was the carrier and Haiyao was the notifying party. The goods in question arrived at the port of destination, but no one collected the goods. The dispute of the case was whether China Machinery was the contracting shipper in the contract for carriage of goods by sea, and therefore should compensate New Golden Sea for the demurrage charge of the container in question. The Supreme People's Court held that, although China Machinery was recorded as the shipper on the bill of lading, the bill of lading was only the evidence of the contract of carriage, not the contract of carriage of goods by sea itself. It was found that China Machinery did not participate in the conclusion of the contract for the carriage of goods by sea, did not issue specific instructions to New Golden Sea in the performance of the contract of carriage, did not pay freight to New Golden Sea and was only the shipper who consigned the goods. In this case, the contract for the carriage of goods by sea was concluded with Haiyao, the carrier had the right to claim demurrage from the contractual shipper and there was no legal basis for New Golden Sea to request China Machinery to pay the demurrage.

According to the *New Golden Sea* case, a Chinese FOB seller, whether as the actual shipper or recorded as the shipper of the bill of lading, is not liable for expenses incurred at the port of destination, while the carrier is entitled to claim from the contractual shipper. From this point of view, it seems that the second instance judgment in *MRF v Xingye* may come to a different conclusion if there is a chance for a future retrial by the Supreme People's Court.

Identity of carrier

In addition to the identity of the shipper, the identity of the carrier is also a common legal issue in disputes concerning the carriage of goods by sea. In litigation based on the bill of lading, claims can only be raised against the carrier. Disputes over the identity of the carrier are particularly prominent in cases of bills of lading issued under charterparties. Three cases are illustrated below.

The first case deals with the default rule of carrier identification. In *China Pacific Property Insurance Co Ltd Beijing Branch v Kuaike Logistics Co Ltd, NYC Shipping Inc and Nanjing Ocean Shipping Co Ltd (CPPI v NYC and Others)*,[5] NYC Shipping was the shipowner, Nanjing Ocean Shipping was the ship manager and Kuaike Logistics was the freight forwarder. The vessel was time-chartered to a third party. The master of the vessel issued a bill of lading. The goods under the bill of lading were damaged. The cargo insurer was subrogated to claim against NYC, Nanjing Ocean and Kuaike Logistics for damages.

[3] Freight Forwarding Interpretation, article 8.

[4] (2021) ZGFMS 5588 (Supreme People's Court). For the full judgment, see [2022] 3 CMCLR 8.

[5] (2022) HMZ 146 (Shanghai High People's Court).

One of the disputes in the case was the identity of the carrier. The ship agent, acting on behalf of the captain of the vessel, issued a bill of lading. The bill of lading did not explicitly state the name of the carrier. The court of first instance pointed out that although the vessel had been time-chartered to a third party, in the absence of evidence to the contrary the captain's actions should still represent the owner of the vessel. In the absence of the name of the carrier, the bill of lading could be regarded as issued by NYC, the owner of the vessel. Therefore, NYC should be regarded as the carrier in the contract for the carriage of goods by sea as evidenced by the bill of lading.

> The default rule to identify the carrier in the absence of the actual name of the carrier is that the shipowner shall be regarded as the carrier if the bill of lading is issued by the master of the vessel

As for Nanjing Ocean, the court of first instance found that it was only the ship manager, and the vessel was owned and operated by NYC. Nanjing Ocean and NYC were different legal entities incorporated in different countries. The court of first instance pointed out that, although the shareholders and other personnel of the two partially overlapped, it did not constitute a mixing of legal entities. Therefore, Nanjing Ocean was not the carrier or the actual carrier.[6] The court of second instance upheld the findings and judgment of the court of first instance.

This case highlights two points. First, the default rule to identify the carrier in the absence of the actual name of the carrier is that the shipowner shall be regarded as the carrier if the bill of lading is issued by the master of the vessel. Secondly, the courts clarified the different legal personalities of different subjects, and the rule that the corporate veil cannot be lifted to mix the liabilities of different subjects in the absence of fraud or other violations of the law.

This default rule would be different in a case where the master issues a bill of lading under the instructions of the charterer. In *Combined Rich Co Ltd v Shanghai Ming Wah Shipping Co Ltd*,[7] Combined Rich entered into a contract with a buyer for the sale of washed bauxite. Ming Wah Shipping was the owner of the carrying vessel and Huaya Shipping was the charterer under a time charter. After the conclusion of the charterparty Huaya Shipping's agent issued a voyage instruction to the master of the vessel, stating that "the charterer and/or his agent shall have the right to sign the bill of lading on behalf of the master on the basis of the first mate's receipt without prejudice to this charterparty".

The master of the vessel issued a power of attorney authorising the agent of the charterer to sign the bill of lading on behalf of the lessee. The agent signed the bill of lading on behalf of the master of the vessel. The name of the carrier was not shown in the bill of lading. After the arrival of the goods, Huaya Shipping requested its agent to deliver the goods to a third party. Combined Rich claimed that it, as the bill of lading holder, had suffered loss, and that Ming Wah Shipping, as the carrier, should be liable for its loss.

The court of first instance held that, in the event that the carrier could not be identified from the contract of carriage, the carrier should be identified in conjunction with the issuance of the bill of lading and the relevant legal provisions.[8]

First, the court of first instance clarified that the Maritime Law does not provide that the carrier must have ownership of the ship when it enters into a contract of carriage with the shipper. Therefore, the issuance of the bill of lading by the master of the ship does not indicate that the shipowner must be the carrier. Secondly, if the shipowner provides sufficient evidence that it has not entered into a contract of carriage by sea with the shipper, and the master of the ship is not instructed by the shipowner to issue the bill of lading on its behalf, the shipowner should not be identified as the carrier. In such a case, the holder of the bill of lading may claim against the charterer as the carrier.

In this case the court of first instance identified the carrier as follows. First, the charterer was Huaya Shipping, and the master of the vessel issued the bill of lading on behalf of Huaya Shipping. Secondly, Huaya Shipping sent instructions

6 (2020) H72MC 1774 (Shanghai Maritime Court).

7 (2022) HMZ 643 (Shanghai Municipal High People's Court). This case is a "Reference Case" in the "People's Courts Case Database". The Reference Cases included in the "People's Courts Case Database" have reference and demonstration value for a trial of similar issues. When the people's courts at all levels refer to Reference Cases in hearing similar cases, they can use the judgment reasons and gist of the Reference Cases as considerations and reasons for the judgment of the current case, although they are not used as the basis for the judgment.

8 (2021) H72MC 473 (Shanghai Maritime Court).

to the master of the vessel, arranging for loading, discharge and other transport matters. Thirdly, the goods were delivered according to the instructions from Huaya Shipping. Fourthly, Ming Wah Shipping only received hire under the time charter; it did not receive freight under the bill of lading. In summary, the charterer, Huaya Shipping, was the carrier. The court of second instance affirmed the judgment of the court of first instance.

On appeal, Combined Rich argued that the carrier should not be identified on the basis of the charterparty, because the charterparty had not been validly incorporated into the bill of lading and it was not binding on Combined Rich. In this regard, the court of second instance held that the incorporation of the charterparty into the bill of lading and the identity of the carrier are two different issues, and the incorporation is not a prerequisite for identifying the carrier in the bill of lading. Whether or not the charter is validly incorporated will only have an impact on whether or not the holder of the bill of lading is bound by the terms of the charterparty; it will not change the fact of who entered into the contract of carriage with the shipper for the purposes of identifying the carrier.

The court of second instance summarised as follows:

> "... in the case of the master signing the bill of lading and the bill of lading does not clearly record or show the carrier, the shipowner has the burden of proof to prove who the carrier is, or he is not the carrier, and if he fails to do so, the shipowner can be regarded as the carrier."

This summary affirms the default rule that the owner of the ship is the carrier, but also allows the owner of the ship to prove that it is not the carrier, which is in line with the general rule of identifying the carrier.

If the bill of lading expressly states the name of the carrier, there should be no problem in identifying the carrier. However, the bill of lading may contain contradictory references to the carrier, which makes identification difficult. This difficulty was illustrated in *Shaoxing Carria International Co Ltd v Airway Express (Hong Kong) Ltd and Airway Express International Freight Forwarding (Shenzhen) Co Ltd Shanghai Branch (Carria v Airway Express)*.[9] In this case Airway Express issued a bill of lading for the carriage of the goods consigned by Shaoxing Carria. The bill of lading's header stated that HJM International was the carrier. The bill of lading was also issued with the words "For and on behalf of Airway Express (Hong Kong) Ltd as the Carrier". Shaoxing Carria claimed in the first instance that it was in possession of the original bill of lading, but upon enquiry it was found that the container in question had already been used for the operation of other voyages, which resulted in the payment of the cargo not being made to date. Shaoxing Carria claimed against Airway Express for the loss of the payment for the cargo.

The court found that Airway Express was the carrier, despite the fact that the bill of lading stated on the header that HJM was the carrier. It was found that the bill of lading was actually issued by Airway Express as the carrier, rather than the signing agent of HJM, and Airway Express itself was a non-vessel-owning carrier. It was also found that HJM authorised Airway Express for the business of export, but it did not include

[9] (2023) HMZ 377 (Shanghai High People's Court).

authorisation to issue the bill of lading. Therefore it was held that Airway Express, as the carrier, should be liable for the loss of payment for the goods.[10] The court of second instance upheld this judgment.

The court identified Airway Express as the carrier based on its act of issuing the bill of lading, its non-vessel-owning carrier status and the fact that its agency with HJM did not include authorisation to issue the bill of lading. In fact the act of issuing the bill of lading was not important; what was important was how it was issued. In this case, the bill of lading was issued by Airway Express (as the carrier), so Airway Express should be regarded as the carrier. Matters such as whether the issuer has non-vessel-owning carrier status and whether it is authorised to issue the bill of lading are not necessarily related to the identity of the carrier. The real question that needs to be answered is the contradiction in the acknowledgment, that is, whether the carrier should be the carrier stated on the header of the bill of lading or the carrier stated in the bill of lading issuance column. The court's decision confirms that the carrier stated on the bill of lading's issuance line should be the carrier.

Delivery of goods without a bill of lading

Delivery of goods without a bill of lading is one of the most common disputes in Chinese maritime judicial trials. A Chinese export seller, after delivering the goods and discovering that the carrier has already delivered the goods to the foreign buyer, will sue the carrier in Chinese courts for liability for delivery of goods without a bill of lading. The fact that the container containing the goods was emptied and put into operation on another voyage is usually prima facie evidence of delivery of goods without a bill of lading. The carrier may provide evidence to the contrary to prove that the goods remained in the warehouse and were not actually delivered. Whether or not there is a delivery of goods without a bill of lading is therefore a question of fact that needs to be ascertained by the court on the basis of the evidence.

In the above-mentioned case of *Carria v Airway Express*, Shaoxing Carria claimed against Airway Express for delivery of goods without a bill of lading. The court of first instance pointed out that the container in question had been emptied and put into operation on other voyages, so it could be initially concluded that the goods had been delivered at the port of destination. Although Airway Express claimed that the goods were still in the warehouse at the port of destination and provided relevant statements, photos and videos to support this, the court took the view that the evidence was not sufficient to disprove the fact that the goods had been delivered. Thus it was held that Airway Express violated the contractual and legal obligations to deliver the goods with the original bill of lading and should be liable to Shaoxing Carria for the loss of the payment for the goods.

A Chinese export seller, after delivering the goods and discovering that the carrier has already delivered the goods to the foreign buyer, will sue the carrier in Chinese courts for liability for delivery of goods without a bill of lading

Airway Express appealed, arguing that it had not delivered the goods without a bill of lading and that the goods were still under its control. The court of second instance found that the goods in question had been cleared, and the destination warehouse was not a bonded warehouse, which could prove that Airway Express had lost control of the goods. Furthermore, the evidence submitted by Airway Express in the second trial was formed between HJM and the destination warehouse, and could not prove that the goods were still under the control of Airway Express. The appeal was dismissed.

A case also involving the burden of proof for delivery of goods without a bill of lading is *Anhui Light Industries International Co Ltd v Orient Star Transport (China) Ltd Ningbo Branch (ALIC v Orient Star)*.[11] This is a case where the carrier successfully proved that the goods were not delivered without a bill of lading. In this case Anhui Light Industries shipped a batch of shoes under a trade contract with a foreign buyer. Orient Star acted as the carrier and issued a bill of lading to Anhui Light Industries, which claimed that the goods had been delivered at the port of destination without the bill of lading. The main evidence submitted for the claim was the records of the movement of the containers in question, which proved that the containers had been withdrawn and put back into use or returned empty.

[10] (2022) H72MC 1187 (Shanghai Maritime Court).

[11] (2023) ZMZ 422 (Zhejiang High People's Court).

In this regard, the first instance court held that the container flow record was only the preliminary evidence to prove that the carrier had delivered the goods. Orient Star submitted photos of the goods at the port of destination, mail exchanges and the address of the warehouse. The court organised a remote video inspection of the goods by both parties to corroborate with each other, and it concluded that the goods were still stored in the warehouse.

In addition, Orient Star presented other evidence. First, after the goods in the container in question were picked up and stored in the designated warehouse, the original buyer still communicated with Anhui Light Industries about the payment for the goods in question, the delivery of the goods and other matters. Secondly, after the goods were stored in the warehouse, Orient Star asked Anhui Light Industries about the way of handling the goods and informing them of the expenses to be borne. Thirdly, after the goods were stored in the warehouse, the destination agent informed Anhui Light Industries of the time of collecting the containers and the costs; Anhui Light Industries also asked the destination agent about the costs incurred for the two containers and applied for a reduction of the costs. Last, in the course of the litigation, Orient Star indicated that Anhui Light Industries could go to the warehouse in the destination port to pick up the goods at any time and provided the name of the warehouse and contact information, but Anhui Light Industries indicated that it could not go to the destination port to confirm and pick up the goods. The court concluded that Orient Star had provided evidence to prove that the goods were still under its control, and Anhui Light Industries had so far failed to provide further evidence to rebut Orient Star's evidence. Therefore, the court of first instance dismissed Anhui Light Industries' claim.[12] This reasoning and conclusion was endorsed by the court of second instance.

It can be seen that the container flow record is prima facie evidence to prove that the carrier has delivered goods without a bill of lading. The carrier needs to provide evidence to the contrary to prove that it did not deliver goods without a bill of lading. In *Carria v Airway Express* it was clear that evidence such as bills, photographs and videos were insufficient to prove that the carrier still had physical control of the goods. In *ALIC v Orient Star* the carrier's evidence appeared to be sufficient and reasonable, not only from the carrier's point of view to prove actual control of the goods, but also from the point of view of the holder of the bill of lading to approve that it knew or should have known that the goods had not been delivered. These two cases show that the Chinese courts have made good use of the rules of evidence in respect of the delivery of goods without a bill of lading.

A container flow record is prima facie evidence to prove that the carrier has delivered goods without a bill of lading. The carrier needs to provide evidence to the contrary to prove that it did not deliver goods without a bill of lading

Article 7 of Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading (Delivery of Goods without Original Bills of Lading Interpretation) provide:

> "If a carrier is obligated to deliver the goods arrived at the port of discharge to the local authority in charge of customs or port according to the provisions of the laws of the place where the port of discharge is located stated in the bill of lading, the carrier shall not bear the civil liability for delivery of goods without any original bill of lading."

The courts applied these provisions in *Qingdao Yi A Co Ltd v Netherlands Yi B Co Ltd*.[13] In this case, Qingdao Yi A (the seller) and Company L (the buyer) entered into a contract of sale for the export of garlic from China to Brazil. Netherlands Yi B issued a bill of lading for carriage of the goods. The bill of lading stated that the shipper was Qingdao Yi A. After arriving at the port of destination, the goods were unloaded and registered in the Brazilian trade system, and then were picked up. Because the foreign buyer did not pay for the goods, Qingdao Yi A still held the bill of lading. Qingdao Yi A claimed that Netherlands Yi B delivered the goods without a bill of lading but Netherlands Yi B argued that, according to Brazilian law, the carrier had to deliver the goods to the local customs or port authorities, and could not control the delivery of the goods, and thus did not bear the responsibility of releasing the goods without a bill of lading.

12 (2022) Z72MC 1760 (Ningbo Maritime Court).

13 (2022) LMZ 1534 (Shandong High People's Court).

At the request of Netherlands Yi B, the Centre for Proof of Foreign Law of the East China University of Political Science and Law issued a Legal Opinion stating that, under Brazilian law, goods imported from a foreign country may only enter or leave a bonded port or port facility and the responsibility of the carrier ends when it delivers goods to the port entity. In addition Netherlands Yi B submitted civil judgment (2019) ZMZ 422 of the Zhejiang Provincial High People's Court to prove that, under Brazilian law, the carrier must deliver the goods carried to port to the local customs or port authorities.

The court of first instance found out that civil judgment (2019) ZMZ 422 identified the relevant Brazilian law of 2018. As there was no evidence that Brazilian law had been amended after 2018, the Brazilian law from 1 June 2020 to 31 May 2021 as identified in the Legal Opinion of the Centre for Proof of Foreign Law was able to corroborate that Netherlands Yi B satisfied the burden of proof that the carrier was required to deliver the goods to the Brazilian Customs or Port Authorities in accordance with the Brazilian law. However, the court of first instance pointed out that, in order to be considered exempt from the liability for releasing goods without a bill of lading, Netherlands Yi B should further prove that it had lost control of the goods after delivering them to the Brazilian port authorities. In this case Netherlands Yi B failed to prove that it had lost such control. The court of first instance held that it should bear the legal consequences of failing to prove its case.[14]

The court of first instance clearly identified Brazilian law but placed a further burden of proof on the carrier. In this regard, the court of second instance stated that Netherlands Yi B's responsibility for the goods ended with the delivery of the goods to the Brazilian port authorities and Netherlands Yi B was not in a position to take control of the goods. Netherlands Yi B did not have the opportunity or possibility to control the goods after they were handed over to the Brazilian port authorities. Therefore, the court of second instance held that Netherlands Yi B had satisfied the burden of proof for the loss of control of the goods, and the burden of proving that the carrier was still in control of the goods should be shifted to Qingdao Yi A. Qingdao Yi A had no further evidence to prove that Netherlands Yi B was able to control the goods. Therefore, the court of second instance held that Netherlands Yi B was not liable to Qingdao Yi A for delivering the goods without the bill of lading.

The court of second instance clarified the rules on the burden of proof under article 7 of the Delivery of Goods without Original Bills of Lading Interpretation, which reasonably balanced the burden of proof between the holder of the bill of lading and the carrier in respect of delivery of the goods when the goods must be delivered to the local customs or port authorities.

It should be noted, however, that the judgment in this case is different from the judgment of the Supreme People's Court in *Wenzhou Baililand Rubber Tire Co Ltd v Mediterranean Shipping Co SA*.[15] In this case Wenzhou Baililand claimed that it had suffered a loss of payment for the goods due to the defendant's delivery of the goods without a bill of lading. Mediterranean Shipping argued that, according to the law of the port of destination, all goods imported into Brazil are mandatorily delivered to the customs warehouse after they are discharged. The carrier does not intervene in the process of customs clearance and delivery of the goods. The Supreme People's Court held that, according to the Brazilian law before the amendment, the carrier could only deliver the goods to the local customs or port authorities. According to the new regulation, the consignee should take the original bill of lading to the shipping company to exchange it for the delivery note, and then take the goods with the certificate of delivery of the goods from customs after the customs clearance is completed. In the view of the Supreme People's Court the carrier did not lose control of the goods after they were delivered to customs at the port of destination under the new regulations. Therefore, Mediterranean Shipping did not prove that it could deliver the goods without the bill of lading according to the Brazilian law.

It can be seen that different Chinese courts have identified different applicable Brazilian law or interpreted Brazilian law in different ways. There is no way to verify the different application of Brazilian law in the two cases mentioned above. But the fact is that different courts have come to completely opposite conclusions as to the identification and application of Brazilian law. *Qingdao Yi A Co Ltd v Netherlands Yi B Co Ltd* was a judgment handed down by the court of second instance. It remains to be seen whether this judgment will be retried by the Supreme People's Court, or even overruled.

[14] (2021) L72MC 681 (Qingdao Maritime Court).

[15] [2020] ZGFMZ 171 (Supreme People's Court). For full judgment, see [2023] 2 CMCLR 33. This case is a "Reference Case" in the "People's Courts Case Database".

Responsibility period of the carrier

Article 46(1) of the Maritime Law provides that the responsibilities of the carrier with regard to the goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge. In *Bertschi International Freight Forwarding (Shanghai) Co Ltd v Shanghai Haihua Shipping Co Ltd*,[16] the courts defined the meaning of the carrier's period of responsibility for containerised goods.

> The Maritime Law provides that the responsibilities of the carrier with regard to the goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge

In this case the container in question had specific temperature requirements. When the consignee took delivery of the goods, it found that the container was not plugged in during the period in the yard at the port of discharge and the goods were damaged because the temperature of the container was not in accordance with the contract. Haihua Shipping argued that the container in question was not plugged in at the port of destination because the fleet commissioned by the consignor did not accurately pre-record the container information at the port of departure, which led to the container being recorded as an ordinary container in the manifest, which in turn led to the container not being plugged in after being unloaded at the port of destination.

The court of first instance did not accept Haihua Shipping's arguments. First, the fact that the consignor fleet filled in the information did not change the agreement between Bertschi and Haihua Shipping on the temperature of the container. According to the contract of carriage, Haihua Shipping was to keep the container plugged in for the whole period of carriage, and the destination port storage period was also within this period of its responsibility. Secondly, the container had been plugged in during the period of carriage by sea. This indicates that the carrier knew that the container in question needed to be connected to electricity and made corresponding arrangements. This action was not affected by the inaccuracy of the pre-recorded information. Therefore, the damage to the goods should be attributed to Haihua Shipping's negligence in the management of the goods. In conclusion the first instance court found that Haihua Shipping should be liable for the cargo damage occurred during its period of responsibility.[17] The court of second instance dismissed the carrier's appeal and upheld the judgment.

The case clearly reflects the carrier's liability for containerised goods during the period of responsibility. The carrier should properly and carefully load, remove, stow, carry, keep, care for and discharge the goods during its period of responsibility. As the court in this case said, that duty is not discharged by the shipper's manoeuvres in delivering the goods. The carrier's liability for the goods is the independent legal responsibility of the carrier and cannot be dependent on the shipper's acts and responsibilities.

For non-containerised goods, article 46 of the Maritime Law provides that the responsibility of the carrier covers

16 (2022) HMZ 1040 (Shanghai High People's Court).

17 (2021) H72MC 963 (Shanghai Maritime Court).

the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged. This should not prevent the carrier from entering into any agreement concerning the carrier's responsibilities with regard to non-containerised goods prior to loading onto and after discharging from the ship. *China Pacific Property Insurance Co Ltd Dalian Branch v Endeavor BBG Shipping Ltd*[18] was a case where the dispute was over non-containerised goods.

In this case, the plaintiff insured soybeans which were carried from Argentina to China by the defendant. The goods were discharged at the port and the Nanjing customs carried out a weight inspection. The result was that the weight of the goods was short by 282.702 mt. The insured therefore suffered a loss by shortage. After the plaintiff paid the insured for the shortfall, it obtained the right of subrogation within the scope of the claim and claimed against Endeavor BBG Shipping for the shortfall loss of the goods. Endeavor BBG Shipping argued that the unloading operation was arranged by the consignee, and it was beyond the carrier's period of responsibility.

The court of first instance held that Nanjing customs carried out the weight inspection of the goods on the shore immediately after the goods were unloaded from the ship. Therefore, the inspection results were sufficient to prove that there was a shortage of goods during the carrier's period of responsibility. Even if the unloading of the goods was arranged by the consignee, the consignee could obtain actual control of the goods only after the customs inspection and weighing. Therefore, it cannot be presumed that only the weighing of the goods before unloading the ship was within the carrier's responsibility period. Endeavor BBG Shipping did not provide evidence to prove that during the process of the goods crossing the ship's rail and weighing on the scale, there was a possibility of shortage of goods due to other reasons beyond the control of the carrier. Therefore, it was held that Endeavor BBG Shipping should be liable for the shortage of delivery.[19]

Endeavour BBG Shipping appealed. The court of second instance held that, under normal circumstances, the carrier is not responsible for any damage to or loss of the goods after they have been discharged from the ship. However, the goods were weighed on the shore immediately after they had been discharged from the ship. The result of the weighing reflected the weight of the goods at the time of discharge, which did not exceed the period of the carrier's responsibility. Therefore, the court of second instance dismissed the appeal.

It can be seen that the court regarded the period from the unloading of the goods, the delivery of the goods through customs inspection, to the delivery of the consignee as the carrier's period of responsibility. This understanding is reasonable because it is unlikely that the shortage occurs at the customs inspection stage; it more likely occurs during transport and unloading, and these two stages are within the carrier's responsibility period. However, if a loss or damage, not a shortfall, occurs during the customs inspection, there arises the question of whether this stage is still considered as within the carrier's responsibility period since this loss or damage is not a continuation of the responsibility for carriage or unloading the goods. There is no answer from this case because this was not within the facts of the case.

Deck cargo and carrier's exemption

Goods loaded on deck are subject to greater risk during sea carriage than if they were loaded in the hold. In this regard article 53 of the Maritime Law provides that: "In case the carrier intends to ship the goods on deck, he shall come into an agreement with the shipper or comply with the custom of the trade or the relevant laws or administrative rules and regulations". On the one hand, when the goods have been shipped on deck in accordance with these provisions, the carrier shall not be liable for the loss of or damage to the goods caused by the special risks involved in such carriage. On the other hand, if the carrier, in breach of these provisions, has loaded the goods on deck and the goods have consequently suffered loss or damage, the carrier shall be liable for the loss or damage.

In the above-mentioned case of *CPPI v NYC and Others*, the five tractor-trailers in question were loaded on the deck. The bill of lading clearly endorsed that the goods were stored in the open yard without shelter before loading, and the surfaces of the goods were scuffed, corroded and oiled. It also stated that the carrier was not responsible for stowage, lashing and fastening, and that the carrier would not be liable for damage to or loss of the goods on deck for any reason whatsoever. During the carriage the five tractor-trailers were damaged due to bad sea conditions and electrical fire. In addition to the issue of determining the identity of the carrier, discussed above, another dispute arising in the case was whether the carrier, NYC, was exempt from liability for the damage to the deck cargo.

[18] (2022) SMZ 1386 (Jiangsu High People's Court).
[19] (2021) S72MC 844 (Nanjing Maritime Court).

The court of first instance held that, in accordance with article 53 of the Maritime Law, NYC was not liable for loss of or damage to the goods due to the special risk of the goods being loaded on the deck. Based on the investigation report, the court found that the cause of the cargo damage was the exposure of the tractor-trailers to winds and sea waves while they were loaded on deck. Both the burn damage caused by the electrical short circuit and the structural damage to the vehicles were caused by the bad weather and heavy sea waves. The court concluded that the cargo damage was caused by the fact that the tractor-trailer cargo was loaded on the deck without any packaging or measures such as waterproofing, wave-proofing or measures to prevent a short circuit. The court therefore held that NYC should not be held liable for the damages. The court of second instance upheld the judgment.

In accordance with the Maritime Law, the carrier is indeed exempt from liability for loss of or damage to the goods due to the special risk of the goods being carried on deck. However, this exemption does not mean that the carrier can also be exempted from liability for violation of other legal provisions or contractual agreements. In this case the court pointed out that the damage was caused by the fact that the tractor-trailer goods were loaded directly onto the deck without any precautionary measures, but it did not point out whether the failure to take such measures was a violation of the legal provisions or the contractual agreement. It seemed to imply that, by agreeing to deck cargo, the shipper assumed all risks and losses of deck cargo. However if the shipper consents to the goods being loaded on the deck, this does not automatically or ipso facto relieve the carrier of its responsibility for deck cargo during the sea carriage. In this case it was not analysed whether taking preventive measures is the shipper's responsibility. If it was the shipper's responsibility, the carrier would be exempt from liability; otherwise, the carrier would be liable for the damage to the deck cargo.

> In accordance with the Maritime Law, the carrier is exempt from liability for loss of or damage to the goods due to the special risk of the goods being carried on deck. However, this exemption does not mean that the carrier can also be exempted from liability for violation of other legal provisions or contractual agreements

Freight forwarding

Agent or carrier

The freight forwarding contract is not stipulated in the Maritime Law but regulated by the Freight Forwarding Interpretation. When the freight forwarder is recognised as the carrier, the provisions of the Maritime Law relating to the carrier apply.

Shaoxing Keqiao Houwen Import and Export Co Ltd v Zhejiang OCO International Logistics Co Ltd[20] discusses the issue of the status of a freight forwarder, ie whether the freight forwarder is an agent or a carrier. In this case Houwen exported a batch of fabrics. OCO provided forwarding services and issued a bill of lading for the transport of the goods. The goods were transported to Vladivostok, Russia. Houwen learnt that OCO had already delivered the goods to the foreign customers and claimed that OCO should compensate it for the loss of payment.

Houwen filed a lawsuit with the cause of action being a dispute over the freight forwarding contract. After the explanation of the court of the first instance, Houwen chose to file a lawsuit for a dispute over a contract for the carriage of goods by sea.[21] OCO denied its liability as the carrier. The court of first instance pointed out that OCO's act of issuing the bill of lading could prove that it had promised to carry the goods to the port of destination and deliver the goods according to the bill of lading holder's instructions. However, because Houwen's claim exceeded the one-year time limitation of action against the carrier (this issue is discussed below), the court of first instance rejected Houwen's claim.[22]

Houwen appealed. It argued that Houwen and OCO not only had a contractual relationship for the carriage of goods by sea, but they also had a contractual relationship for freight forwarding. Even if the court of first instance found that OCO should bear the liability as the carrier, this did not exempt the freight forwarder from liability as an agent under the freight forwarding contract. The court of second instance held that Houwen's appeal claim was not only logically incorrect, but also contradicted its first instance claim. It dismissed the appeal and upheld the judgment.

[20] (2023) ZMZ 402 (Zhejiang High People's Court).

[21] Article 4 of the Freight Forwarding Interpretation provides that "where a freight forwarding enterprise issues a bill of lading, sea waybill or other transport document in its own name in the course of dealing with maritime freight forwarding affairs, and the principal claims that the freight forwarding enterprise bears the responsibility of the carrier on that basis, the people's court shall support the claim".

[22] (2023) Z72CM 5 (Ningbo Maritime Court).

In this case, it is unknown why Houwen changed the cause of action, but the consequence of the change is obvious: the limitation period for the claims based on the contract for the carriage of goods by sea and the freight forwarding contract are different. The former involves a one-year limitation against the carrier under the Maritime Law; the latter is a three-year limitation against the agent under the Civil Code. If Houwen's action was based on a freight forwarding contract, it was not time-barred to claim against OCO as the agent. Although it was Houwen's choice to sue on the contract for the carriage of goods by sea, that choice was explained by the court. It was not found in the judgments how the court explained the cause of action to Houwen and how Houwen made its choice.

> Chinese civil procedure law requires a plaintiff to state a cause of action, but it does not provide that a plaintiff can assert only one cause of action

Furthermore, it is debatable whether Houwen could only choose one cause of action. Chinese civil procedure law requires a plaintiff to state a cause of action, but it does not provide that a plaintiff can assert only one cause of action. If Houwen is allowed to choose two causes of action, claiming that OCO is liable under the contract for carriage of goods by sea, and if not, claiming under the freight forwarding contract, then there would be no problem arising due to conflicting causes of action. Of course, the situation may arise where OCO is liable under both causes of action, but the liabilities under the two causes are different. At this stage it may be more reasonable for the court to make a further explanation and require Houwen to make a choice of cause of action, or to make an appropriate choice ex officio.

Principal's responsibility

In a freight forwarding contract the responsibility and liability of the principal and the freight forwarder are normally expressly agreed. This is important for controlling risks in the freight forwarding business, in particular when the business relates to third parties.

In *CTS International Logistics Corporation Ltd Nanjing Branch v JBYT Machinery Import & Export Co Ltd and Nanjing Buffalo Livestock Equipment Co Ltd*,[23] JBYT and Buffalo (Party A) and CTS (Party B) entered into a Freight Forwarding Agreement under which JBYT and Buffalo entrusted CTS to export goods. Article 2 of the agreement stipulated:

> "If the consignee does not pay the ocean freight and related expenses incurred at the port of destination after the arrival of the goods, Party A shall pay Party B the freight and related expenses within 30 days after the arrival of such goods."

The goods were not picked up after their arrival, and demurrage, stowage fee, overdue container charge and warehouse charges were incurred at the port of destination. After CTS paid the above expenses it sued JBYT and Buffalo for compensation.

The trial courts ruled that JBYT and Buffalo should pay CTS the relevant expenses incurred at the port of destination.[24] JBYT and Buffalo applied for a retrial, arguing that the relevant expenses incurred at the port of destination were not expenses incurred during the forwarding agency period. The shipper or consignor should be the responsible party for the expenses if the goods were not collected at the port of destination. The consignee did not pick up the goods and so it should be the consignee, not freight forwarder, who is liable for the expenses. Therefore, the expenses in dispute was not

[23] (2023) ZGFMS 917 (Supreme People's Court).
[24] (2021) SMZ 1985 (Jiangsu High People's Court).

a fee incurred during the agency period, and JBYT and Buffalo should not be liable for a fee incurred after the agency contract had been performed.

At the retrial it was held that the judgment of the original trial was not improper. First, under the agreement, JBYT and Buffalo undertook to pay CTS in the event the consignee did not pay the freight and the related expenses incurred at the port of destination. Therefore, the payment of related expenses by JBYT and Buffalo has a contractual basis. Secondly, CTS was not at fault in performing the freight forwarding contract. JBYT and Buffalo's application for a retrial was therefore rejected.

The case reflects the importance of an agreement on the scope of the principal's liability under the freight forwarding contract. The principal here argued that the scope of its responsibility was limited to the arrival of the goods at the port of destination, and the expenses arising from no one picking up the goods at the port of destination were outside the scope of its responsibility (an assertion which is in line with the general characteristics of the freight forwarding business). However, whether the principal is responsible for the goods-related expenses incurred at the port of destination also depends on the principal's responsibility as agreed in the agency contract. In this case the contract did not set out any condition of the principal's responsibility for the consignee's non-payment of the expenses. Therefore, the scope of the principal's liability extends to the stage of the consignee's picking up the goods at the port of destination. If the principal wishes to reduce the scope of its responsibility, it should clearly agree this in the agency contract; so, it should agree that the relevant costs incurred at the port of destination should be borne by the consignee and that the principal shall not bear the consignee's corresponding responsibility. There was no such agreement in this case.

Forwarder's responsibility

In a freight forwarding contract it is important to agree not only on the scope of the principal's responsibility, but also on a clear scope of the forwarder's responsibility. The interpretation of the responsibility clause should not only be in line with the content of the contract itself, but also with a reasonable method of interpretation.

In *Jinzhou A Machinery Component Co Ltd v Shanghai B International Freight Agency Co Ltd*,[25] Jinzhou A and Shanghai B entered into a Freight Export Agency Agreement. The agreement stated that Shanghai B was to act as an agent for Jinzhou A to handle the booking and loading of export goods, customs clearance, inspection, warehousing, inland transport, port collection and other related business as agreed by both parties, and Shanghai B was to perform the relevant service obligations in accordance with the FIATA[26] Standard (Model) Rules. Rule 6.1.2 of the FIATA Rules provides:

> "The Freight Forwarder is not liable for acts and omissions by third parties, such as, but not limited to, Carriers, warehousemen, stevedores, port authorities and other freight forwarders, unless he has failed to exercise due diligence in selecting, instructing or supervising such third parties."

The truck carrying the goods in question was involved in an accident, resulting in damage to the goods. Shanghai B subsequently waived the freight charges and shipped the goods by air free of charge for Jinzhou A. Shanghai B exempted subsequent freight charges of the goods in question and promised to continue to exempt the freight charges to compensate Jinzhou A. Jinzhou A sued Shanghai B for the loss of the goods after the exemption of the freight charges.

In a freight forwarding contract it is important to agree not only on the scope of the principal's responsibility, but also on a clear scope of the forwarder's responsibility. The interpretation of the responsibility clause should not only be in line with the content of the contract itself, but also with a reasonable method of interpretation

The court of first instance found that Shanghai B was not at fault in selecting, instructing and supervising the carrier. The court took the view that Shanghai B's agreement to compensate Jinzhou A's loss by reducing or exempting the freight charges could not be equated with acceptance of liability for Jinzhou A's loss of the goods.[27]

25 (2023) LMZ 1881 (Liaoning High People's Court).

26 International Federation of Freight Forwarders Associations.

27 (2023) L72MC 653 (Dalian Maritime Court).

Jinzhou A appealed, claiming that Shanghai B failed to review the qualifications of the road carrier at the time of selection, and failed to inform Jinzhou A of the carrier's transport situation in a timely manner. It argued that although Shanghai B submitted the carrier's licence and the driver's licence of the Mexican transport company, it failed to submit the company's transport qualification certificate, annual inspection certificate and even failed to review the company's insurance status regarding carriage of cargo.

> Remedies taken by a party after a breach of contract has occurred, including compensation as well as waiver of costs, do not imply an admission of liability, unless the party admits liability

The court of second instance held that since Shanghai B had submitted the relevant information on the Mexican road carriers, Shanghai B had fulfilled its obligation to select, instruct and supervise the third party under the freight forwarding contract and FIATA Standard Rules. In the absence of evidence from Jinzhou A to prove that Shanghai B was at fault in its conduct of freight forwarding activities, and proof that there was a causal relationship between the fault and the loss of the goods, it was impossible to conclude that Shanghai B was at fault for the loss of the goods. Therefore Jinzhou A's appeal was dismissed.

This judgment is a good illustration of two important legal issues that are common in the freight forwarding business. First, remedies taken by a party after a breach of contract has occurred, including compensation as well as waiver of costs, do not imply an admission of liability, unless the party admits liability. Therefore, the claiming party still bears the burden of proof that a breach of contract has occurred, and the damages caused by the breach. Secondly, freight forwarders bear reasonable contractual obligations, not absolute ones. For example, in this case the freight forwarder only chooses the carrier with appropriate qualifications. It does not need proof of the carrier's additional qualifications, for example a carrier's insurance certificate. The extra requirements are beyond the freight forwarder's reasonable responsibility. This judgment on the freight forwarder's responsibility appropriately balances the rights and interests of both the principals and freight forwarders.

Loss and liability

If the principal claims that the agent is liable for losses arising from a breach of the freight forwarding contract, the principal needs to prove that it has suffered losses as a result of the breach of contract. The agent may raise the defence that the agent has not suffered any loss, for example that the principal has received payment for the goods. This occurred in *Shandong A Co v Qingdao B Co*.[28]

In this case, Shandong A entered into a freight forwarding contract with Qingdao B. Qingdao B acted as agent for Shandong A in exporting its goods. Shandong A claimed that Qingdao B was liable for loss of the goods. The trial courts held that Shandong A had received payment for the goods in advance and therefore suffered no loss.[29]

28 (2023) ZGFMS 2867 (Supreme People's Court).
29 (2023) LMZ 212 (Shandong High People's Court).

Shandong A applied for a retrial, claiming that: (1) Shandong A suffered loss of the goods; (2) the trial courts confused the relationship between the contract of sale and the contract for maritime freight forwarding, and wrongly set off the payment for the goods received in advance by Shandong A against the liability for breach of contract by Qingdao B; and (3) Shandong A's specific losses included: (a) the purchase cost of the lost goods at an early stage; (b) the cost of replenishing the goods to the buyer; and (c) the cost of developing the client, the reduction in profit due to the loss of the client, and other various losses such as attorney's fees, litigation costs, freight forwarding costs, etc.

The retrial court pointed out that Shandong A should prove that Qingdao B's breach of contract had caused losses. According to the facts ascertained, Shandong A had received payment for the goods from the buyer prior to shipment. The company's alleged loss in replenishing the goods had not yet actually occurred. Meanwhile, the trial judgments did not deprive Shandong A of its right to claim compensation for the actual loss incurred thereafter. Therefore, Shandong A's application for a retrial was dismissed.

This case dealt with important issues of loss and liability. It was not unreasonable for the courts to set off the price of the goods in the sale contract against the loss caused under the freight forwarding contract. When the goods were lost, the potential loss was the value of the receivable or the goods. Since Shandong A has already received the payment for the goods, there was no actual loss incurred for the loss of the goods. If Shandong A's claim was upheld, Shandong A could be doubly compensated. Of course, Shandong A may subsequently incur related losses, such as restocking the goods or refunding the purchase price. However, as the courts stated, the judgments did not deprive Shandong A of the right to claim compensation for actual losses incurred thereafter.

In addition, Shandong A asserted three specific losses. Those losses were completely different from the loss of goods as claimed earlier: they were not specific losses for the loss of goods, but other related losses. The related losses cannot be equated with the payment for the goods received by Shandong A. Therefore, the aforementioned reasons in the judgments should not be applied to those losses. If Shandong A could prove that those losses occurred and that they were caused by Qingdao B's breach of the freight forwarding contract, its claim should be upheld. But this point was not discussed in the judgments of this case.

Dangerous goods

The transport of dangerous goods by sea carries a high level of risk, and therefore carriers generally provide for an amount of compensation for damage caused by dangerous goods. When damage caused by such goods occurs, the carrier may claim compensation from the responsible party based on the agreed amount of liquidated damages. When the damage occurred is lower than the agreed liquidated damages, the responsible party may claim that the agreed liquidated damages are higher and thus ask the court to adjust them. Article 585(2) of the Civil Code states:

> "Where the sum of damages agreed upon is lower than the actual damages incurred, the People's Court or an arbitration institution may increase the amount upon the request of a party; where the sum of damages agreed upon is excessively higher than the actual Damages incurred, the People's Court or an arbitration institution may reduce the amount upon the request of a party."

The transport of dangerous goods by sea carries a high level of risk, and carriers generally provide for compensation for damage. When damage caused by such goods occurs, the carrier may claim compensation from the responsible party based on the agreed amount of liquidated damages

In *Quanzhou Antong Logistics Co Ltd v Tianjin Changxin Freight Forwarding Co Ltd*,[30] Changxin concealed dangerous goods, causing loss to Antong, and so Antong claimed that Changxin should pay compensation according to the liquidated damages stipulated in the contract. Changxin claimed that the liquidated damages for the concealment of dangerous goods in the case were excessively higher than Antong's actual loss and requested the court to adjust them. Changxin argued that in terms of contract performance, 12 of the 17 containers of goods which were

[30] (2023) ZGFMS 1241 (Supreme People's Court).

the subject of this case had arrived at the destination, and so Antong's contractual role of collecting freight had been achieved. In terms of actual loss, Antong had not been subjected to administrative fines or third-party recovery for transporting the goods in question, nor had it suffered any other relevant damage to its interests.

The court of first instance held that Changxin had fulfilled its burden of proving that the agreed liquidated damages were higher than Antong's actual losses, and that Antong should provide corresponding evidence to prove that the liquidated damages were reasonable. Since Antong did not succeed in proving this, the trial court found that the agreed liquidated damages were higher than Antong's actual loss and should be adjusted. The court of first instance took into account factors such as contract performance, the carrier's losses, costs and the specific amount of liquidated damages agreed upon and, in addition to the scope of adjustment of liquidated damages stipulated in the law, further considered the special characteristics of the transport of dangerous goods in the case and made corresponding adjustments to the liquidated damages.[31]

With regard to the adjustment of the liquidated damages, Antong applied for a retrial. It stated that, according to China's legislative guidance and the opinion published in the Supreme People's Court's Guiding Case No 166,[32] when a party violates an agreement with subjective malice and seriously violates the principle of good faith, its claim for reducing the liquidated damages should not be supported. In this case Changxin knew that the goods were dangerous, but still made multiple consignments, which was a danger to public safety. In this case, Changxin's subjective malice was obvious, but it still applied for a reduction in liquidated damages. If this claim was allowed, this would encourage the parties to violate the principle of good faith by committing a malicious breach of contract, which would be inconsistent with the principle of good faith determined by civil law norms. When the breaching party's behaviour seriously violates the principle of good faith, the court should not support a claim for a reduction in the liquidated damages.

Furthermore, Antong argued that the trial judgment's negative assessment of the punitive function of the liquidated damages for non-declaration of dangerous goods would encourage shippers to conceal dangerous goods, resulting in an "imbalance of interests" between the breaching party and the contracting party. The default penalty for non-declaration of dangerous goods has both compensatory and punitive functions, and its punitive function is indispensable to the maintenance of maritime safety and the protection of marine ecosystems. This case does not involve liquidated damages in the general commercial field, but rather it involves liquidated damages in relation to production safety and ecological and environmental protection, and the amount of the relevant liquidated damages is in line with industry practice.

> When a party violates an agreement with subjective malice and seriously violates the principle of good faith, its claim for reducing the liquidated damages should not be supported

As to whether the liquidated damages were agreed to be too high, the Supreme People's Court as the retrial court applied article 584 of the Civil Code, which states that where a party fails to perform its obligations under the contract or its performance fails to satisfy the agreement, thereby causing losses to the other party, the amount of compensation for losses shall be equal to the losses caused by the breach of contract. The retrial court held that the agreed liquidated damages exceeding 30 per cent of the damages determined in accordance with the article 584 of the Civil Code can generally be considered to be "excessive" as provided for in article 585(2) of the Code. Based on this, the trial court found that the agreed liquidated damages in the case were excessively higher than Antong's actual damages and should be adjusted, which was also not obviously improper. The retrial court therefore rejected Antong's application for a retrial.

The Civil Code does give the court discretion to adjust the liquidated damages, but as the retrial court stated:

> "If the parties request the People's Court to reduce the liquidated damages, the court shall take the damages stipulated in article 584 of the Civil Code as the basis, and take into account the performance of the contract, the degree of fault

[31] (2023) MMZ 519 (Fujian High People's Court).
[32] *Beijing Changlong Weiye Trading Co Ltd v Beijing Urban Construction Group Co Ltd* (2017) J0106MC 15563 (Beijing Fengtai District People's Court).

of the parties and other factors, and weigh the damages in accordance with the principles of fairness and good faith, and make a judgment."

In this case, it seems that the courts only considered the basis of loss as stipulated in article 584 of the Civil Code but did not reflect on the degree of fault of the parties, which is related to the principle of good faith. The principle of fairness could not be realised if the degree of fault of the parties and the principle of good faith were not taken into account. In addition, although the punitive function of liquidated damages for concealment of dangerous goods is questionable, the Supreme People's Court's Guiding Case No 166 should be given a certain amount of respect and consideration. In this case, the breaching party concealed dangerous goods, an action which should be regarded as subjective malice which was contrary to the principle of good faith. Its request to reduce the liquidated damages claim should therefore not be supported.

Warehousing of port cargo

Issues concerning the warehousing of port cargo have resulted in increasingly controversial and complex disputes in China's maritime courts in recent years. In *Shanghai Fenjun New Energy Technology Co Ltd v Cangzhou Huanghua Port Steel Shipping & Forwarding Co Ltd*[33] the Chinese courts analysed complex issues and reached a decision by analysing the relationship between the trade contract, the custody contract and the contract of carriage.

In this case, Fenjun entered into a purchase contract with Baoxu, and Baoxu entered into a contract with Gunkuang, entrusting Gunkuang with the purchase of the goods. The goods were loaded at the port of Padang, Indonesia, to arrive at the port of Huanghua, China. A contract of entrustment was signed between Gunkuang and Agency Company for the port operation and storage of the goods. Agency Company and Steel Logistics Company signed an agency contract to agree that Agency Company would entrust Steel Logistics Company with the port operations and storage of the goods (the warehousing contract).

At the same time, Fenjun and Steel Logistics Company signed a "Port Long-Term Operation Contract" entrusting Steel Logistics Company to provide port operation services. Steel Logistics Company formed a "Single Vessel Operation Plan" in which the "cargo owner" was stated as "Fenjun Company".

Gunkuang notified Agency Company of the pick-up of the cargo, and Agency Company then claimed the pick-up from Steel Logistics Company. Steel Logistics Company then informed Fenjun of Agency Company's claim for the pick-up. Fenjun indicated that it could not deliver the goods. Subsequently the parties negotiated, but no agreement was reached on the delivery of the goods. Fenjun initiated the present litigation to claim delivery of the goods.

The court of first instance identified the disputes in the case as concerning: (1) the legal relationship between the parties; and (2) to whom Steel Logistics Company should deliver the goods. The court of first instance analysed the legal relationship between Steel Logistics Company, Agency Company and Fenjun. First, Agency Company and Steel Logistics Company had a contractual agency relationship for port operations and cargo storage. At the same time, Gunkuang and Agency Company had established a contractual relationship of entrustment in respect of the goods in question. Gunkuang was the principal and Agency Company was the agent.

Secondly, although Fenjun and Steel Logistics Company signed the Port Long-Term Operation Contract, it cannot be inferred from this that Agency Company, as the freight forwarder, imported the goods with Fenjun as the principal. The court of first instance pointed out that with the development of economy, bulk cargoes are frequently traded in transit, and the same shipment of goods may involve multiple contracts of sale and purchase in domestic trade after importation, or there may be more than one intended buyer. In this case, multiple buyers or multiple intended purchasers in the transaction chain will consult the shipping agent or freight forwarder of the shipment for information on the arrival of the goods, port charges and agency fees. The fact that the freight forwarder communicates with the relevant parties and even collects the port charges from the ultimate buyer or intended buyers under the authorisation of his principal cannot lead to the conclusion that the freight forwarder has entered into a contractual relationship of entrustment with these relevant parties. Although the "Single Vessel Operation Plan" signed by the employee of the forwarder and the "cargo owner" was "Fenjun Company", the principal of the port cargo operation and the depositor of the warehousing contract had nothing to do with the owner of the goods. Therefore, the court of first instance held that the evidence submitted by

[33] (2022) JMZ 1111 (Tianjin High People's Court).

Fenjun did not prove that it had established a contractual relationship of entrustment with Steel Logistics Company in respect of the goods.

On the basis of the above analysis, the court of first instance made a judgment as to whom Steel Logistics Company should deliver the goods. First, according to article 402 of the Contract Law (now article 925 of the Civil Code), where the mandatory enters into a contract in its own name with a third party within the scope of authorisation of the mandator, and the third party is aware of the agency relationship between the mandatory and mandator at the time of the contract, the contract binds the mandator and the third party directly. The court of first instance stated that there was no evidence in the case to prove that Steel Logistics Company knew who the Agency Company's principal was when it entered into the agency contract for the storage of the goods with the Agency Company. According to the principle of privity of contract, the warehousing contract binds Agency Company and Steel Logistics Company only. Therefore, the court of first instance held that Steel Logistics Company should perform its contractual obligation to deliver the goods to Steel Logistics Company or a person designated by it.

Secondly, article 403(1) of the Contract Law (now article 926(1) of the Civil Code) provides that where a third party is not aware of the agency relationship between the mandatory and mandator at the time the mandatory enters into a contract in its own name with the third party, and the mandatory fails to perform its obligations to the mandator for reasons attributable to the third party, the mandatory shall disclose the third party to the mandator, who may thus exercise the mandatory's rights against the third party, except where the third party would not have entered into the contract had it been aware of the mandator at the time of the contract. The court of first instance pointed out that Gunkuang claimed delivery of the goods from Agency Company on the basis of the contract of entrustment with Agency Company, and that Gunkuang was entitled to exercise Agency Company's right to claim delivery of the goods from Steel Logistics Company due to the non-delivery of the goods by Steel Logistics Company. The court of first instance held that Steel Logistics Company should deliver the goods to Gunkuang or its nominee.[34]

The court of second instance dismissed Fenjun's appeal and upheld the judgment of first instance court. First, the court of second instance affirmed the decision of the court of first instance that Steel Logistics Company should deliver the goods to Gunkuang. Secondly, the court of second instance further explained the difference between a warehousing contract for storage and a contract for transfer of ownership of goods. It pointed out that a warehousing contract is a contract for services rather than a transfer of ownership of goods. The custodian only takes possession of goods on behalf of the depositor, which does not confirm the ownership of the goods. The depositor with whom the custodian establishes a contractual relationship is not restricted to the owner of the goods, and the custodian is only required to deliver the goods to the depositor or to the person designated by the depositor in accordance with the contract. Furthermore, the court of second instance held that Baoxu did not obtain ownership of the goods when the goods had not yet been delivered, and Fenjun, as Baoxu's downstream buyer, did not have the right to claim the return of the original goods from Steel Logistics Company in accordance with the provisions of article 26 of the Property Law (now article 227 of the Civil Code).[35]

This case clarified two important issues. First, delivery of goods stored at port should be carried out according to the warehousing contract. As stated by the court of first instance, bulk cargoes are frequently traded en route, and multiple buyers or intending buyers in the trading chain may consult the shipping agent or freight forwarder of the cargo for information on arrival of the cargo at port, port charges and agency fees. It cannot be concluded that the freight forwarder has established an entrustment contractual relationship with these parties

[34] (2022) J72MC 225 (Tianjin Maritime Court).

[35] Article 227 of the Civil Code provides that where a third party has taken possession of movable property prior to the creation or transfer of the property right thereto, the person bearing the duty of delivery may transfer the right to request the third party to return the movable property in lieu of delivery.

merely because of the communication of information or the payment of port charges. Secondly, the court compared a contract of custody with a contract for the transfer of title. This comparison appropriately illustrates the nature of the delivery obligation under a warehousing contract, which, like the delivery of goods under a bill of lading, derives from a contractual agreement rather than rights and obligations based on ownership of the goods. This case illustrates that a document under a contract of custody, such as a warehouse receipt or a bill of lading, which is known as a "document of title" in English law, is a document of right claiming delivery of the goods, not a document of title to prove ownership of the goods.

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In this case, because the plaintiff did not obtain the ownership of the goods, it could not claim the right of return of the goods. This raises a question: if the plaintiff claims the right to return the original goods based on the ownership of the goods according to the law, judicial judgment or contract, can this right prevail over the depositor's right to claim the delivery of the goods under the warehousing contract? This question was answered in *China Railway Material Harbin Logistics Co Ltd v Sinochem International Corporation*.[36] The courts in this case pointed out that, on the one hand, the warehousing contract does not presuppose that the depositor is the owner of the warehoused goods, and the port operator did not have the legal obligation to identify the owner of the warehoused goods when signing the warehousing contract. The warehouse receipt holder had the right to take delivery of goods from the port operator. On the other hand, where the identity of the owner of the goods is inconsistent with the holder of the warehouse receipt, the owner of the goods has the right to take delivery of the goods. The judgment in this case has clarified that the right of the owner of the goods to claim the return of the goods has priority. The judgment is in line with the general principle of the priority of property over debt. This case also indicates the risk that the holder of a warehouse receipt has in claiming delivery of the goods. This risk can be controlled by agreed terms in the sale or other relevant contracts.

Even if there is no related party claiming rights based on ownership of the goods, the warehouse keeper may still be confronted with requests for delivery of the goods by different related parties on the basis of different documents. In *China Railway Materials Import & Export Co Ltd v Fuzhou Songxia Wharf Co Ltd*[37] Xinhai Metallurgical Co entered into a trade contract with China Railway Co. Xinhai Metallurgical Co handed over the goods to Songxia Wharf Co for safekeeping by entering into a warehousing contract with Songxia Wharf Co. However, China Railway Co obtained a bill of lading for the goods in question from the carrier. This meant that the carrier, after actually delivering the goods to Xinhai Metallurgical Co, made an indication that the goods should be delivered to China Railway Co. In this case, the Supreme People's Court held that, based on the privity of the contract, Songxia Wharf Co should fulfil its contractual obligation to return the goods to Xinhai Metallurgical Co or the person designated by it, rather than a third party outside the contract, ie China Railway Co, unless the goods in custody had been taken by preservation or enforcement measures in accordance with the law. Regarding the fact that China Railway Co was in possession of the bill of lading, the Supreme People's Court pointed out that the possession of the bill of lading could not ipso facto give it a right superior to Songxia Wharf Co's right of lawful possession of the goods in question based on the contract, nor could it ipso facto extinguish the contractual obligations incumbent on Songxia Wharf Co. When Songxia Wharf Co delivered the goods, it should still rely on the warehousing contract with Xinhai Metallurgical Co.

These above cases illustrate the rights of the parties in disputes over contracts for the warehousing of cargo at port, and the priority of those rights based on different legal relationships.

[36] (2019) ZGFMS 3187 (Supreme People's Court). This case is a "Reference Case" in the "People's Courts Case Database".

[37] (2019) ZGFMS 3119 (Supreme People's Court).

Multimodal carriage

Article 104 para 1 of the Maritime Law provides that a multimodal transport operator shall be responsible for the performance of a multimodal transport contract or the procurement of the performance, and shall be responsible for the entire transport. Article 105 further provides that if loss of or damage to the goods has occurred in a certain section of the transport, the provisions of the relevant laws and regulations governing that specific section of the multimodal transport shall be applicable to matters concerning the liability of the operator and the limitation thereof. This is the statutory liability of the multimodal transport operator under the Maritime Law, but the liability does not exclude the contractual liability for breach of contract.

In *Ping An Property & Casualty Insurance Co Ltd Shanghai Branch v Shanghai SK International Logistics Co Ltd*,[38] Wuxi A Co and Shanghai SK signed the "International Transportation Entrusting Agent Agreement", which stipulated that: (1) Wuxi A entrusted Shanghai SK to handle the logistics services and freight forwarding business under the agreement; (2) Shanghai SK was to monitor the whole journey of the goods, ie from the time of picking up the goods to the time of Wuxi A's receipt of the goods; and (3) during this period of transportation, if the goods were lost or damaged, Shanghai SK was responsible for providing compensation in accordance with the actual value of the goods. The goods were transported from Shanghai, China to Dudhari, India via sea and road transport, and the loss of the goods occurred in the land transport section after discharge of the goods. The issue in dispute is an assessment of Shanghai SK's liability for the damage which occurred during the land transport.

The court of first instance held that although Wuxi A and Shanghai SK entered into an agency agreement, Wuxi A and Shanghai SK actually concluded a multimodal carriage contract, with Wuxi A as the shipper and Shanghai SK as the multimodal transport operator. The court of first instance found that, since the loss of the goods in question occurred in the course of the land transport in India, the Indian law regulating local road transport should be applied. However the Indian law could not be proved, and therefore Chinese law applied in this case. According to the relevant Chinese civil law, if the land carrier proves that the damage to or loss of the goods was caused by force majeure, the nature of the goods themselves, reasonable wear and tear, or the fault of the shipper or consignee, it shall not be liable for loss or damage. In this case, there was no evidence that could prove the existence of the above exclusion of the carrier's liability. The court of first instance held that Shanghai SK should be liable for the loss of the goods which occurred during the land transportation.[39]

Shanghai SK appealed, arguing that it should not be liable for compensation for the entire amount in the absence of faulty behaviour, and that its liability should be determined by applying the provisions of article 105 of the Maritime Law for liability and limitation of liability. The court of second instance held that the agency agreement clearly stipulated that if the goods are lost or damaged during the period of transportation, Shanghai SK would be responsible for compensation according to the actual value of the goods. The court of second instance pointed out that this agreement was not contrary to the provisions of the law and was legally binding on both parties. Therefore, in the absence of evidence to prove the existence of exemptions from liability, Shanghai SK should be liable for the damage to the goods that occurred in the course of the transport.

Although the court of second instance upheld the judgment of the court of first instance, the legal bases for determining the liability were different. The court of first instance held that article 105 of the Maritime Law should be used as the legal basis for determining liability. This view ignored the agreement between the parties on the liability for breach of contract. The court of second instance pointed out that the court of first instance's application of article 105 of the Maritime Law was inappropriate. Because there is no statutory limit of liability for road transport carriers, Shanghai SK bore the full responsibility for the damage to the goods, which was the same as the result of the application of the agent agreement by the court of second instance. That is why the court of second instance upheld the judgment of the court of first instance.

However, if the parties do not agree on liability in the contract, it is possible to apply article 105 of the Maritime Law as the legal basis for determining liability. In *Evergreen Marine (Singapore) Pte Ltd v First Insurance Co Ltd*,[40] the Supreme People's Court ruled that the liability and the limit of liability of a multimodal transport operator should be governed by the relevant provisions of the law regulating the mode of transport in the section, but that the provisions of the law do not apply to the issue of limitation of action. The limitation of action should be determined according to the applicable law to the contract.

38 (2023) HMZ 87 (Shanghai High People's Court).

39 (2022) H72MC 686 (Shanghai Maritime Court).

40 (2018) ZGFMZ 196 (Supreme People's Court). For full judgment, see [2022] 4 CMCLR 34.

Marine insurance

This section of this Review analyses decisions on issues concerning policy holders, open cover, proportional liability, the unseaworthiness exemption, oil pollution insurance and subrogation. The concept of a "policy holder" is special in Chinese insurance law. The case examined here on this issue, *Tiansheng v Donghai*, will help in understanding this concept, compared with the concept of the "insured". The case on open cover, *Shanghai Bamian v China Pacific Property Insurance*, provides an excellent analysis of the subject. Proportional liability for loss concurrently caused by both insured risks and excluded risks is a special practice used by Chinese courts, and the case on proportional liability, *Shengxing v Continent Insurance*, shows a liability approach which is different from that of English common law. The unseaworthiness exemption cases, *Zhoushan Minglun v PICC Property and Casualty*, *Cangzhou Bohai v PICC Property and Casualty* and *Tiansheng v Donghai*, indicate the understanding of unseaworthiness and causation issues in Chinese judicial practice. The oil pollution insurance case examined here, *A Port Service v B Shipping and C Insurance*, discusses the victim's direct claim against the insurer, although the judgment may not provide an appropriate understanding of Chinese law. The subrogation case discussed here, *CPPI v NYC*, illustrates the complex of business and a lesson from an unsuccessful claim by the insurer.

Policy holder

The Insurance Law, article 10 para 2, provides that "a policy holder means a party who enters into an insurance contract with an insurer and is obligated to pay premiums under the insurance contract". Article 12(5) provides that "an insured means a person whose property, life or body is covered by an insurance contract and who is entitled to claim the insurance benefits. A policy holder may be an insured". Because the two can be the same person, the policy holder and the insured often appear side by side in the Insurance Law. However, there is no clear distinction between them in respect of the rights and obligations in the Insurance Law. In the Maritime Law, there is no concept of the policy holder. This makes the legal status and rights and obligations of the policy holder in marine insurance uncertain.

In *Ningbo Tiansheng Shipping Co Ltd v Donghai Marine Insurance Co Ltd (Tiansheng v Donghai)*,[41] China Merchants Bank and Tiansheng entered into a "Ship Finance Lease Contract", which provided that Tiansheng would sell the vessel *Tian Sheng 18* to China Merchants Bank for the purpose of raising funds, and at the same time would lease back *Tian Sheng 18* for bareboat financing. It was agreed in the contract that Tiansheng should be responsible for arranging insurance for the vessel and bear the insurance premium, and the insurance contract should list China Merchants Bank as the first beneficiary and Tiansheng as the policy holder. In the event of the occurrence of an insured incident, Tiansheng was to immediately notify China Merchants Bank and the insurance company in writing of the occurrence of the insured event and carry out an inspection and claim.

In the Maritime Law, there is no concept of the policy holder. This makes the legal status and rights and obligations of the policy holder in marine insurance uncertain

Tiansheng submitted an insurance proposal to Donghai Insurance. Tiansheng was named as the policy holder and the insured in the proposal. Donghai Insurance subsequently issued a marine insurance policy to Tiansheng, which also stated that Tiansheng was the policy holder and the insured. Subsequently, Tiansheng applied to change the name of the insured in the marine insurance policy from Tiansheng to China Merchants Bank. Donghai Insurance issued a new marine insurance policy to Tiansheng, which stated that the insured was China Merchants Bank.

Tian Sheng 18 was damaged in a collision. Tiansheng refused to accept Donghai Insurance's proposal of the payment of a lump sum in compensation. Donghai Insurance then issued a notice of refusal to pay compensation. Tiansheng claimed against Donghai Insurance for compensation, and China Merchants Bank was the third party in the litigation. Donghai Insurance argued that Tiansheng was not the insured under the insurance contract and Tiansheng had no right of action as the policy holder of the insurance contract.

The court of first instance held that Tiansheng, as the operator of the vessel, was entitled to claim compensation from Donghai Insurance based on the insurance contract.[42]

41 (2021) EMZ 1160 (Hubei High People's Court).

42 (2018) E72MC 1386 (Wuhan Maritime Court).

The court of second instance upheld the judgment of the first instance court and concluded as follows. First, based on the insurance proposal submitted by Tiansheng to Donghai Insurance and the marine insurance policy issued by Donghai Insurance with China Merchants Bank as the insured, there was a contractual relationship between Tiansheng and Donghai Insurance in respect of the vessel *Tian Sheng 18*. In addition, as the operator of the vessel, Tiansheng enjoyed the legally recognised rights of operation and possession of the vessel and therefore, it had the insurable interest in the vessel when the collision occurred.

Secondly, the law does not expressly provide that the policy holder is not entitled to claim compensation from the insurer. In fact, the loss of the vessel *Tian Sheng 18* and the third party's loss due to the fault of the vessel *Tian Sheng 18* had been paid by Tiansheng. If China Merchants Bank claimed against Donghai Insurance for compensation, there would be no corresponding evidence to effectively support its claim because Tiansheng actually suffered loss. More importantly, when Tiansheng proposed to change the insured from Tiansheng to China Merchants Bank, Donghai Insurance, as a professional insurance company, did not inform or remind Tiansheng of the legal consequences of this change. The court of second instance held that Donghai Insurance's defence was clearly contrary to the original intention and goodwill of Tiansheng and Donghai Insurance by entering into the insurance contract, and was also contrary to the legislative purpose of the Insurance Law.

Thirdly, the third party, China Merchants Bank, clearly stated in the Declaration of Confirmation of Rights that the insurance rights in this case should be vested in Tiansheng, and the entire insurance compensation in the case could be paid directly to Tiansheng. In the view of the second instance court, the behaviour of China Merchants Bank had constituted a transfer of rights, and Tiansheng was entitled to claim for compensation under the insurance contract from Donghai Insurance.

Fourthly, the vessel *Tian Sheng 18* was previously involved in a ship collision and Tiansheng, based on the same vessel insurance contract, submitted a claim to Donghai Insurance. Donghai Insurance, after reviewing the claim, actually paid compensation to Tiansheng. The court of second instance held that Donghai's actual payment of the claim had objectively proved that Tiansheng was entitled to claim the insurance benefits under the insurance contract.

The result of the judgment is appropriate for balance of interests between the parties in this case, but the reasons for the judgment are questionable.

First, the policy holder may enter into an insurance contract with the insurer and become the insured. However, when the insured is changed from the policy holder to a third party, it is not appropriate to continue to consider the policy holder as a party to the insurance contract. In addition, the policy holder may have an insurance interest, but having an insurance interest does not necessarily mean that he has the right to claim compensation from the insurer.

Secondly, the fact that the law does not expressly provide that the policy holder has no right to request insurance compensation from the insurer does not indicate that the policy holder may have the right to request compensation. When the third party has replaced the policy holder as the insured, the policy holder is no longer a party to the insurance contract and its rights cannot be acquired automatically even though there is no legal prohibition. The policy holder's collision liability to other parties only proved that it had some interest in the vessel in question, but it does not mean that it has the right to receive any insurance compensation.

More critically, the court held that when Tiansheng proposed to change the insured from Tiansheng to China Merchants Bank, Donghai Insurance was obliged to inform or advise Tiansheng of the legal consequences of such a change. However, neither the Insurance Law nor the Maritime Law provides for such a statutory obligation. Nor did the judgment explain whether this was a contractual obligation. The court held that Donghai Insurance's defence was contrary to the original intention and goodwill of parties when entering into an insurance contract and contrary to the legislative purpose of the Insurance Law. It is questionable whether the performance of a commercial contract should consider the original intention and goodwill. Nor is it the legislative purpose of the Insurance Act to compensate non-insured persons.

Thirdly, the court held that the Statement of Confirmation of Rights submitted by China Merchants Bank constituted a transfer of rights. Whether the statement constitutes a transfer of rights depends on the language used in the statement. The confirmation of rights is not a clear indication of the transfer of rights. As for the language of the statement, the original text was not quoted in the judgment. The court even took the view that according to the Statement of Confirmation of Rights, Tiansheng should be considered the insured of the insurance contract. There is no legal basis or reasoning for this view.

Fourthly, the second instance court held that Tiansheng had the right to claim for the insurance benefits because Donghai Insurance had actually paid compensation to Tiansheng in a previous claim. However, the fact that it was once paid does not mean that it must be paid thereafter. Donghai Insurance's previous payment may have been erroneous, and if Tiansheng was not entitled to claim, it should return the benefits. Donghai Insurance may compensate previous damages to the vessel for a business purpose only, no matter whether Tiansheng had a right of claim. It does not imply recognition of Tiansheng's right of claim.

Although the result of the judgment is fair, the question that arises is that if the policy holder is not the insured but has the right to claim against the insurer, how could the insurer pay the insurance compensation if both the policy holder and the insured (if they are different, such as in this case) claim against the insurer? This legal issue should be resolved in future judicial practice.

In fact, the dispute in this case could have been easily resolved by China Merchants Bank suing Donghai Insurance directly, without having to participate in the litigation as a third party. If China Merchants Bank did not wish to file a lawsuit, it could have assigned its insurance rights to Tiansheng, which would have acquired the right to claim compensation from the insurer. Alternatively, Tiansheng could have been added as the insured in the insurance contract before the accident, then both China Merchants Bank and Tiansheng as co-insureds could claim against the insurer for insurance compensation.

> If the policy holder is not the insured but has the right to claim against the insurer, how could the insurer pay the insurance compensation if both the policy holder and the insured (if they are different, such as in this case) claim against the insurer? This legal issue should be resolved in future judicial practice

Open cover

Open cover is a type of insurance policy where, in maritime terms, the insurer provides cover for all goods to be shipped during the term of the policy. Article 231 of the Maritime Law provides for this, stating that an insured may conclude open cover with an insurer for goods to be shipped or received in batches within a given period. Article 233 provides that the insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The items to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount. In addition to the above statutory form of contract and the insured's duty of notification, the parties may also agree on the conditions for the formation of a contract of insurance under the open cover and the period of liability of the insurer.

In *Shanghai Bamian Trading Co Ltd v China Pacific Property Insurance Co Ltd Shanghai Branch*,[43] the parties to an open cover contract had different understandings of the relevant provisions, which were fully and properly interpreted by the courts. In this case, Bamian Trading and CPPI Shanghai concluded an open cover for goods carried by sea. Clause 13 stipulated that the insured must send the insurer a transport declaration list (stating name, quantity/weight of the goods, value of the goods, means of transport, invoice/bill of lading number, date of shipment, place of origin, destination, etc) in writing by email or by fax prior to the departure of the goods. On receipt of these details, the insurance contract comes into effect and the insurer automatically underwrites the goods and issues the corresponding policy at the request of the insured.

The cargo in question was loaded on 20 June 2020 and sailed from the port of shipment in Indonesia on 21 June. The vessel ran aground on the same day. Bamian Trading entered into a salvage contract, and the cargo was in due course salvaged. Bamian Trading claimed compensation for the costs of salvage from CPPI Shanghai.

CPPI Shanghai argued that the plaintiffs were not entitled to claim compensation for the salvage costs. First, according to clause 13 of the open cover, the insurance contract came into effect when the condition that "the insured must declare the goods before shipment" was fulfilled. Bamian Trading declared the goods on 24 June 2020, but the goods in question were shipped on 20 June 2020. Therefore the insurance contract did not come into effect. Secondly, even if the insurance contract came into effect, the insurance contract would not be retroactive, and both the effective date of the insurance contract and the commencement of the insurance liability would be 24 June 2020.

The trial courts found that the insurance contract in question entered into force on 24 June 2020 and that the insurance liability began on 20 June 2020.[44]

> The main reason to use the open cover is to simplify the complex process of insurance and avoid omission of insurance, while the insurer can obtain a stable income from premiums. It is mutually beneficial and win-win cooperation for both parties to the insurance contract

The trial courts analysed the contract from various perspectives, including the purpose of the contract, the course of dealing, good faith and shipping practice, and held that an insurer who has accepted an insurance proposal without discovering the insured's late declaration of voyage at the time of underwriting shall no longer claim that the insurance contract is not in force or is invalid. The courts analysed the five perspectives as follows.

First, the courts examined the purpose of the contract. The main reason to use the open cover is to simplify the complex process of insurance and avoid omission of insurance, while the insurer can obtain a stable income from premiums. It is mutually beneficial and win-win cooperation for both parties to the insurance contract. The open cover in this case is an obligatory open cover, and avoidance of underinsurance should be one of its contractual purposes. Based on this contractual purpose, the insurance industry is generally of the view that the insured's bona fide misstatements, omissions and delays should be permissible and correctable.

Secondly, the courts discussed the course of dealing. Between 2018 and 2020, when CPPI Shanghai accepted

[43] (2023) ZGFMS 1120 (Supreme People's Court).

[44] (2021) H72MC 1229 (Shanghai Maritime Court); (2022) HMZ 702 (Shanghai High People's Court).

declarations for shipments of goods, it never required Bamian Trading to submit bills of lading to review the time of shipment of the goods. Bamian Trading claimed that there were 18 occasions on which the declaration of the voyage was later than the time of shipment of the goods. Since none of the 18 shipments were lost or damaged, there was no dispute between the parties. Bamian Trading therefore was acting reasonably in its reliance on the course of dealing according to the normal underwriting process.

Thirdly, the courts analysed the case from the perspective of good faith. From the above course of dealing, CPPI Shanghai, on the one hand, claimed that the timing of the voyage declaration was sufficient to affect the validity of the insurance contract. On the other hand, in the underwriting process in the past, it never paid attention to or examined the time of shipment of the goods. It took a laissez-faire attitude towards the insured's delay of the voyage declaration, which contradicts the arguments in this case. CPPI Shanghai collected insurance premiums without any risk and claimed that the insurance contract was invalid once the risk event occurred, which should be considered a type of moral hazard.

Fourthly, the courts considered the case from the perspective of shipping practice. Article 233 of the Maritime Law stipulates that "the insured shall immediately notify the insurer when he knows that the goods insured under the open cover have already been shipped or arrived". This provision is concerned more with operational matters, and also takes shipping practice into full consideration, which is reasonable. In shipping practice, there may be a long chain of transport and a long chain of trade, such as the case in question. It is in line with shipping practice for the insured to be able to obtain precise information only after the goods have been shipped, and it would be onerous to require the insured to make a voyage declaration before the goods are shipped.

Fifthly, the courts discussed the issue of contractual performance. Although Bamian Trading objectively did not make a voyage declaration before the shipment of the goods, CPPI Shanghai did not underwrite the shipment carefully, but accepted it and issued the corresponding insurance policy. Bamian Trading had paid the insurance premium. Even if the conditions of the insurance contract have not been fully fulfilled, if one party has fulfilled its main obligation and the other party has accepted it, it should be considered that both parties have removed the conditions and the contract has come into effect.

Accordingly, the courts held that the insurance contract in question came into effect on 24 June 2020, ie the date on which Bamian Trading had made the declaration of the voyage, as set out in the insurance policy.

Next, with regard to the period of insurance liability, the trial courts took the view that the time of entry into force of the insurance contract was not necessarily the same as the time of the commencement of insurance liability. Article 10 of Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes states:

> "In case neither the insurer nor the insured knows that the insurance object has suffered any loss in an insurance accident when the insurance contract is concluded, or the insurance object could not possibly suffer any loss in the accident insurance, the effectiveness of the insurance contract shall not be affected."

Therefore, the courts pointed out that if an insured event occurs before the conclusion of the insurance contract, the insurance liability will inevitably commence earlier than the effective date of the insurance contract. The existence of "retroactive insurance" is a special feature of marine insurance.

Even if the conditions of the insurance contract have not been fully fulfilled, if one party has fulfilled its main obligation and the other party has accepted it, it should be considered that both parties have removed the conditions and the contract has come into effect

In addition, article 14 of the Insurance Law stipulates that the insurer shall begin to undertake the insurance liability from the time agreed upon in the contract. Therefore, the parties to the insurance contract may agree that the insurance liability begins earlier than the time when the insurance contract is established and comes into effect. The courts pointed out that it cannot simply be assumed that the insurance liability must begin after the insurance contract comes into effect.

In this case, the insurance liability period was "warehouse to warehouse" and the date of sailing was "according to the bill of lading". The insurance clause stated that "warehouse-to-warehouse" liability was to take effect from the time when the insured goods left the warehouse or storage premises at the place of shipment. The bill of lading was issued on 20 June 2020, so it can be ascertained that the insurance liability commenced on 20 June 2020.

CPPI Shanghai applied for a retrial. The retrial court upheld the decisions of the trial courts and rejected CPPI Shanghai's application for a retrial.

This case is a good example of the interpretation of a contractual clause in accordance with the law. It also answers some important legal questions about open cover insurance. When the legal consequences of a late declaration of the voyage were unclear in the open cover, the Chinese court interpreted the agreement that "the insured must make a declaration before the shipment of the goods in order for the insurance contract to take effect" as meaning that the insured should make a declaration in a timely manner in accordance with the law. When there is a delay in the declaration of voyage but the insurer has accepted the insurance, if the insurer cannot prove that the insured has intentionally omitted to declare the voyage, selectively declared the voyage, made up the declaration after the known insured event or other obvious dishonest circumstances, the delay in the declaration of voyage is allowed to be corrected in good faith, and the insurer shall not claim that the insurance contract has not entered into effect. Of course, the insurer may expressly agree on the consequences of late declaration of a voyage in the open cover, so as to determine the validity of the insurance contract and define the insurance liability of the insurer.

Proportional liability

Article 216 of the Maritime Law provides that a contract of marine insurance is a contract whereby the insurer undertakes, as agreed, to indemnify the loss to the subject matter insured and the liability of the insured caused by perils covered by the insurance against the payment of an insurance premium by the insured. From the definition of a marine insurance contract, it can be seen that a loss or damage suffered by the insured must be caused by the perils covered by the insurance. If a loss is caused by both the insured risk and excluded risk, a question arises whether the insurer should bear the liability. Neither the Maritime Law nor the Insurance Law provides answers to this question. Judicial practice in China adopts the approach of proportional liability for the answer.

In *Huangshi Shengxing Shipping Co Ltd v China Continent Property & Casualty Insurance Co Ltd Fujian FTZ Pingtan Branch (Shengxing v Continent Insurance)*,[45] the vessel *Yuan Hai 9* was insured by Continent Insurance for all risks of coastal inland waterway vessels with additional separate loss insurance for propellers, rudders, etc. According to the terms and conditions of the insurance policy for the vessel, the insured liabilities included the loss of the vessel caused by gales of Force 8 or above, the cost of salvage, etc, while the exclusions included the breakdown of machinery and the separate loss of propellers, rudders, and other facilities and equipment, etc. The vessel suffered an accident during the voyage and incurred a series of losses and expenses. The cause of the accident was both the failure of the rudder system, and a typhoon. The rudder failure was an excluded risk in the insurance contract, but the typhoon was a covered risk.

[45] (2023) ZGFMS 673 (Supreme People's Court).

The trial court found that the two causes of the incident – the ship's rudder failure and the encounter with the typhoon – co-existed and were intertwined. Considering the relationship between the two causes and the loss resulting from the accident, combined with the fact that the vessel needed to spend RMB500,000 on towing fees before it was hit by the typhoon, and more than RMB3 million after the typhoon, the court decided that the typhoon's impact on the loss caused by the accident exceeded that of the ship's rudder failure, and ultimately decided that Continent Insurance was liable for 85 per cent of the towing and salvage costs.[46]

> A loss or damage suffered by the insured must be caused by the perils covered by the insurance. If a loss is caused by both the insured risk and excluded risk, a question arises whether the insurer needs to bear the liability. Neither the Maritime Law nor the Insurance Law provides answer to this question

Continent Insurance applied for a retrial. The retrial court held it was not improper for the trial court to determine the insurer's liability proportionally and discretionarily according to the degree of influence of each cause on the losses. Continent Insurance's application for retrial was dismissed.

This case continues the practice of Chinese courts that insurers shall bear proportional liability for damage to the subject matter insured caused by both covered and excluded risks. The judgment made accurate findings of fact and analysed the primary and secondary causes of the accident in a reasoned manner. However, there is always a lack of legal basis for the proportional liability approach, as Chinese law does not provide for this issue. This approach differs from the English common law view that insurers are not liable for damage to the subject matter of insurance caused by both covered and excluded risks. Although the Chinese approach lacks a legal basis, it is considered more reasonable from the point of view of equity and justice.

Unseaworthiness exemption

Article 244 of the Maritime Law provides that unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from the unseaworthiness of the ship at the time of the commencement of the voyage, except where under a time policy the insured has no knowledge of the unseaworthy condition of the vessel. The statutory exclusion of liability is limited to the unseaworthiness of the ship at the commencement of the voyage and does not extend to the period after the commencement of the voyage. Whether or not a ship is seaworthy is a question of fact, which needs to be proved by evidence. Such evidence may include a certificate of seaworthiness of the ship or accident reports issued by the maritime administration. In order for the insurer to be exempt from liability, in addition to proving that the ship is unseaworthy it must also prove that the unseaworthiness is the cause of the accident and damage.

In *Zhoushan Minglun Dangerous Goods Transportation Co Ltd v PICC Property and Casualty Co Ltd Zhejiang Pilot Free Trade Zone Marine Insurance Centre Business Department*,[47] the court gave a judicial interpretation of "unseaworthiness of the ship at the time of the commencement of the voyage". In this case, the minimum safety manning certificates of the vessels *Minglun 1* and *Minglun 7* stated that the vessels met the safety manning requirements as long as the crew was no less than the number and rank listed: one master, one sailor on duty and one engineer. Minglun, the owner of the vessels, issued an insurance proposal to PICC to insure the vessels against all risks of coastal and inland waterway marine insurance. The exclusion of liability stipulated that the insurance would not compensate for any loss, liability and expense caused by the unseaworthiness of the insured vessel.

With a typhoon approaching, Minglun anchored the vessels at a terminal to avoid the adverse conditions and instructed the crew to strengthen defensive measures to prevent damage from the typhoon. The crew of *Minglun 1* and *Minglun 7* completed operations to reinforce cables and close hatches, and then took duty on another vessel, *Dejin 17*. Despite these precautions, the cables on both *Minglun 1* and *Minglun 7* broke, and the vessels drifted out to sea. Minglun sought compensation from PICC for the loss of the vessels.

[46] (2022) EMZ 474 (Hubei High People's Court).

[47] (2022) ZMZ 992 (Zhejiang High People's Court).

The court of first instance ruled that, according to the exclusion clause in the insurance contract, *Minglun 1* was unseaworthy because it did not have a full complement of competent crew members, and so the insurer was entitled to refuse to pay the claim.[48]

In the appeal, the second instance court pointed out that the insurer's non-liability for unseaworthiness as stipulated in the Maritime Law is only limited to "at the time of the commencement of the voyage". It was explained that "commencement of the voyage" refers to the sailing ship, not the ship at anchorage. The term "unseaworthiness of the insured vessel" in the insurance contract should be consistent with the provisions of the Maritime Law. In this case, when the incident occurred *Minglun 1* was at the anchorage to avoid the windy conditions. The vessel should not be deemed unseaworthy even though the crew had been evacuated. PICC submitted to the court a series of laws and regulations on the provision of adequate and appropriate crew. The court of second instance pointed out that these provisions concerned the management of the crew, and could not influence statutory criteria for determining the ship's seaworthiness under the Maritime Law. Therefore, the judgment of first instance was incorrect, and the court of second instance ordered PICC to pay compensation under the insurance.

When an insurance contract only stipulates a ship's unseaworthiness as a condition for exemption from liability, Chinese courts will not interpretate the meaning of seaworthiness as being to require the ship to be seaworthy during the whole voyage. It is worth noting that the provision in the Maritime Law on the seaworthiness exemption has a proviso, that is: "unless otherwise agreed in the insurance contract". That is to say, the insurer's exemption from liability for seaworthiness requirements is the minimum requirement. The parties can agree on seaworthiness requirements in a different way, which would still be valid.

In addition, Chinese courts will make judicial judgment on whether a ship is seaworthy or not, rather than relying solely on administrative regulations or administrative reports, which reflects the independence of the judiciary. In *Cangzhou Bohai New Area Jiada Shipping Co Ltd v PICC Property and Casualty Co Ltd Tianjin Branch*,[49] Jiada Shipping was the owner and operator of the vessel and was responsible for the vessel being compliant with the appropriate technical standards and state of management at the time of navigation. The vessel was issued a certificate of seaworthiness, before being involved in a capsizing or sinking accident. The main dispute in terms of insurance was whether the accident was caused by the unseaworthiness of the vessel.

A certificate of seaworthiness is a document issued by the ship inspection authority. Ships sailing within China are required to hold this certificate, but it cannot be inferred from this that all ships holding such a certificate are seaworthy. The Chinese courts have reached a consensus that the seaworthiness of a ship is a question of fact rather than a question of whether it holds a certificate of seaworthiness

It was found that the direct causes of the accident were the absence of fastening devices for the cargo hold covers, and the failure to seal and inspect the cargo holds in accordance with the applicable regulations before the vessel commenced the voyage. The court of first instance held that the vessel was unseaworthy at the time of navigation and the insurer was not liable for compensation.[50]

Jiada Shipping applied for a retrial, claiming that the certificate of seaworthiness issued to the vessel in question proved that vessel was seaworthy. The retrial court upheld the decision of the court of first instance and dismissed Jiada Shipping's application for a retrial.

A certificate of seaworthiness is a document issued by the ship inspection authority. Ships sailing within China are required to hold this certificate, but it cannot be inferred from this that all ships holding such a certificate are seaworthy. The Chinese courts have reached a consensus that the seaworthiness of a ship is a question of fact rather than a question of whether it holds a certificate of seaworthiness.

48 (2021) Z72MC 2246 (Ningbo Maritime Court).
49 (2023) ZGFMS 2154 (Supreme People's Court).
50 (2022) YMZ 1097 (High People's Court of Guangdong Province).

The next issue concerning seaworthiness is causation. In the above-mentioned case of *Tiansheng v Donghai*, the Chinese court analysed the causal relationship between the unseaworthiness of the ship and the occurrence of the accident in order to determine the liability of the insurer. In this case, the vessel was involved in a collision during the period of insurance, causing damage to the vessel. The draft of the vessel was 11.58 m at the bow and 11.80 m at the stern, while the draft of the vessel at the time of the accident was 12.00 m at both the bow and stern. At the time of the collision, the vessel was carrying 48,810 tonnes of cargo, which exceeded the reference tonnage of 48,336 tonnes by 474 tonnes. The insurer argued that the vessel was unseaworthy due to overloading and that it should therefore be exempt from liability.

The court found that although the vessel exceeded its full load draft, according to the conclusions of the investigation report of the Maritime Safety Administration on the cause of the accident, the overdraft of the vessel was not directly related to the collision. At the same time the insurer did not submit any valid evidence to refute the conclusion of the Maritime Safety Administration. Therefore, the court held that overloading could not be a valid reason for the insurer to be considered exempt from liability.

The complex nature of ship management and ship navigation determines that seaworthiness should be a relative concept. A prudent shipowner is obliged to ensure that its ship is in a seaworthy state, but when it comes to providing insurance compensation for a specific accident, the causal relationship between the unseaworthiness of the ship and the occurrence of the insured accident must be proved. In this case, it is only when there is a causal relationship between the state of unseaworthiness and the occurrence of the insured accident that unseaworthiness can be the reason for the insurer to be considered exempt from liability to pay compensation.

Oil pollution insurance

Ship oil pollution damage insurance is a type of liability insurance whereby the insurer pays for oil pollution damage caused by the insured ship. According to article 8 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases involving Disputes over Compensation for Vessel Oil Pollution Damage (Vessel Oil Pollution Interpretation), in the event that a victim seeks compensation from the insured vessel for oil pollution damage, the insurer of a ship shall not assert its defence against the shipowner under the insurance contract to deny its liability to the victim unless the shipowner has intentionally caused the oil pollution damage. The purpose of this provision is to protect the rights and interests of the victims of oil pollution.

In *A Port Service Co Ltd v B Shipping Co Ltd and C Insurance Co Ltd*,[51] the court applied the relevant provisions of the Vessel Oil Pollution Interpretation. In this case the owners of the insured vessel were originally B Shipping and Guo X Meng, and later the name of the co-owner Guo X Meng was changed to Guo Meng. When the insured vessel was involved in an accident, A Port Service was sent to the affected area to carry out emergency decontamination work. Emergency decontamination costs were incurred, so A Port Service sued B Shipping, Guo Meng and C Insurance for joint and several liability.

C Insurance argued that there was no insurance contract between it and the plaintiff. The insured vessel had been transferred and the identity of its owner was changed before the accident, but C Insurance had not been notified and had not given its written consent to this name change, and so the insurance contract had been automatically terminated in accordance with the law and insurance terms.

The court of first instance held that B Shipping and Guo Meng should pay A Port Service the costs incurred, and that C Insurance should be liable to pay compensation for the costs within the scope of its insurance liability.[52] C Insurance appealed. The court of second instance dismissed the appeal and upheld the judgment.

The court of second instance held that although the insurance contract would be automatically terminated in the event of a change in the owner of the insured vessel, there was no evidence that the oil pollution damage in question was caused by the intentional act of the vessel owner. C Insurance's argument on its special agreement with the shipowner against A Port Service was inconsistent with article 8 of the Vessel Oil Pollution Interpretation.

Article 8 of the Vessel Oil Pollution Interpretation aims to protect the interests of the person who suffers oil pollution damage. However, the prerequisite of the application of the provision is the existence of a contract of insurance between the insurer and the insured. If no insurance contract exists, or if the insurance contract is terminated, it means that there is no insurance in the event of oil pollution damage, and there is no question of the liability of the insurer for such damage.

[51] (2022) MMZ 1402 (Fujian High People's Court).
[52] (2021) M72MC 488 (Xiamen Maritime Court).

In this case, the insurer claimed that the insurance contract had been automatically terminated. It is a question of the existence or non-existence of the insurance contract, and it is not a defence against the shipowner. Without the existence of an insurance contract, there was no question of the so-called insurer's defence. Therefore, this judgment is not in accordance with article 8 of the Vessel Oil Pollution Interpretation.

Subrogation

Article 252 of the Maritime Law provides that where the loss of or damage to the subject matter insured within the insurance coverage is caused by a third party, the right of the insured to demand compensation from the third party shall be subrogated to the insurer from the time the indemnity is paid. Thus, the prerequisites of the insurer's right of subrogation are the payment of insurance compensation to the insured and the insured's rights against the third party. If the insurer pays the indemnity to the insured but the insured does not have a right of claim against the third party, the insurer cannot be subrogated to claim against the third party.

In *CPPI v NYC and Others*, mentioned above, the bill of lading in question recorded the shipper as Sinopec Zhongyuan Petroleum Engineering Ltd (Engineering Ltd) and the consignee as Sinopec International Petroleum Service Corporation Chad Branch c/o CNPC International (Chad) Co Ltd (International Chad). The insured under the insurance contract was Sinopec Zhongyuan Petroleum Engineering Ltd Overseas Engineering Ltd (Overseas Ltd), which was also the branch office of the shipper and the actual consignee under the bill of lading. The goods under the bill of lading were damaged due to adverse sea conditions and combustion of the cargo. CPPI, the insurer of the damaged goods, paid compensation to the insured, Overseas Ltd, and claimed against the carrier.

The trial courts pointed out that CPPI's right of suit depends on whether its insured, Overseas Ltd, had such a right against the insurer. It was found that the bill of lading had been passed on to the consignee, and that the goods had arrived at the port of destination and were collected. Therefore it was held that the shipper or the consignee should have the right to claim against the carrier for the damage to goods. In this case the consignee recorded in the bill of lading was International Chad, and the shipper was Engineering Ltd; neither of which was the insured, Overseas Ltd. The courts pointed out that although the above parties may have an affiliation or relationship with each other, they are legally independent. There is no evidence to support that Overseas Ltd had obtained the transfer of rights from the shipper or the consignee of the bill of lading, and there is no evidence to support that Overseas Ltd had filed the lawsuit on behalf of them. Therefore it was held that CPPI did not ipso facto have the right of subrogation to claim against the carrier for the damage to the goods under the bill of lading.

The case illustrates that only if the insured has a claim against the third party, the insurer has a right of subrogation after the payment of compensation against the third party. Even if a third party had caused the insured to suffer damages, it is necessary to prove that the insured had a claim against the third party. The court made it clear that the insured and other parties, such as the shipper and the consignee, were legally independent, despite the fact that they might be affiliated or related. This independence prevents the insured from obtaining a right of action against the carrier. Affiliated companies may obtain the insured's right of action against the carrier by way of authorisation or assignment of rights, but merely proving that the insured has suffered actual damage does not automatically give the insured a right of action against the carrier. Of course, if the insured acquires the right of property in the goods and is thus entitled to claim against the carrier for liability in tort, the insurer may be subrogated to claim against the carrier for the liability in tort.

Admiralty law

This section of this review analyses judgments on admiralty law. It includes one case on the limitation of liability, *A Port Service v B Shipping*, and one case on the Maritime Labour Convention, *Yanghuanmei v Hefei Xuhai Ship Service*. The limitation of liability case shows the scope of maritime claims which are subject to limitation under the Maritime Law, which is different to the scope under the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC). The Maritime Labour Convention case proves the good implementation of the Convention in Chinese judicial practice.

Limitation of liability

Article 207 of the Maritime Law provides:

> "... with respect to the following maritime claims, the person liable may limit his liability in accordance with the provisions of this Chapter, whatever the basis of liability may be:
>
> (1) Claims in respect of loss of life or personal injury or loss of or damage to property including damage to harbour works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom;
>
> (2) Claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;
>
> (3) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;
>
> (4) Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability in accordance with the provisions of this Chapter, and further loss caused by such measures."

The scope of limitation of liability for maritime claims under this provision is different from that under the LLMC. This was analysed by the Chinese courts in *A Port Service Co Ltd v B Shipping Co Ltd and C Insurance Co Ltd*, cited above.

In this case, A Port Service was assigned to carry out emergency decontamination work in the sea area of the sunken vessel and incurred emergency decontamination expenses. It sued B Shipping, Guo Meng and C Insurance for joint and several liability. B Shipping argued that the decontamination costs were a claim subject to limitation of liability as stipulated in article 207(4) of the Maritime Law and should be compensated on a pro rata basis together with other civil claims within the scope of the maritime liability fund.

The court of first instance held that A Port Service's claim was an unlimited claim. The court of second instance dismissed the appeal and upheld the judgment. The court of second instance held that the Maritime Law provides for a limitation of liability regime for maritime claims, which is built on the 1976 LLMC, but does not incorporate article 2(1)(d) and (e) of the Convention, ie: "(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship; (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship". Therefore, after the sinking of the (non-tanker) vessel, the anti-fouling and decontamination measures taken to avoid the pollution caused by the fuel oil loaded on board included raising the vessel, removal, destruction and the rendering harmless as mentioned above, and the anti-fouling and decontamination costs incurred as a result were not considered part of the limited claim.

This case reflects the significant difference between the Maritime Law and the LLMC in terms of the limitation of liability regime for maritime claims. As a result, for oil pollution damage caused by an accident involving a non-tanker vessel, the party responsible for the oil pollution may be liable under the Maritime Law to a greater extent than under the LLMC. This also reflects the characteristics of the Maritime Law which encourages the removal of oil pollution and protects the interests of victims of oil pollution in such cases.

Maritime Labour Convention

China has acceded to the Maritime Labour Convention 2006. Relevant Chinese law and regulations have been adjusted and improved accordingly in accordance with the Convention. In judicial practice Chinese courts have applied the Convention to safeguard the rights and interests of seafarers.

In *Yanghuanmei and Others v Hefei Xuhai Ship Service Ltd and China Life Property & Casualty Insurance Co Ltd Wenling Branch*,[53] the crew of the vessel suffered personal injury and death, and the parties to the case disputed the applicable law on damages and the proportion of liability to be attributed to the owner of a domestic vessel. The court of first instance found that the case was one of domestic personal injury compensation, and so did not apply the Maritime Labour Convention 2006. Instead it decided liability based on the Maritime Law and the Crew Regulations.[54]

China has acceded to the Maritime Labour Convention 2006. Relevant Chinese law and regulations have been adjusted and improved accordingly in accordance with the Convention. In judicial practice Chinese courts have applied the Convention to safeguard the rights and interests of seafarers

The trial court, on the evidence of the deceased crew member's hospital records, concluded that the main cause of death should be considered as due to the crew member's existing physical condition. After giving full consideration to the facts, including timely medical treatment, advance payment of the medical expenses by the shipowner, the ship's working environment and the early evening shift pattern which may have affected the crew member's physical state, the trial court made the discretionary decision that the shipowner should bear 30 per cent of the responsibility for the damages incurred, including medical expenses, death compensation, travelling expenses, funeral expenses and compensation for moral damages.

The crew applied for a retrial, claiming that: (a) the trial court judgment had erred in its application of the law by finding that the case was one of domestic personal injury compensation and that the Maritime Labour Convention 2006 was not applicable. Instead this case should have given priority to the application of the Maritime Labour Convention 2006, which is formally in force in China, and which applies not only to ships on international voyages but also to ships on domestic trips; and (b) according to the Maritime Labour Convention 2006 and the relevant provisions of the Crew Regulations, the funeral expenses and medical expenses should be borne in full by the insurance company and the crew's employer.

The retrial court held that, in the absence of evidence to prove that the vessel in question was not one of the ships excluded from the application of the Maritime Labour Convention 2006, it was inappropriate for the trial court to hold that the Maritime Labour Convention 2006 did not apply on the sole ground that this was a domestic personal injury case.

Regarding the liability of the shipowner, the retrial court referred to regulation 4.2 of the Maritime Labour Convention 2006 – "Shipowners' liability" – which states that its purpose is: "To ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment". The retrial court found that the liability decided by the trial court was not obviously inappropriate. The retrial court pointed out that even if the Maritime Labour Convention 2006 had been applied in this case it would not have led to a conclusion regarding liability significantly different from the finding in the trial judgment.

In addition, the applicant for retrial also claimed that the respondent should bear all funeral and medical expenses in accordance with article 22 of the Crew Regulations. Article 22 provides:

> "If a crew member is ill or injured during his work on board a ship, he shall be given timely medical treatment; if a crew member is missing or dead, the crew member's employing organisation shall make timely and proper preparations for the aftermath of the incident."

[53] (2023) ZGFMS 1507 (Supreme People's Court).
[54] (2023) ZMZ 593 (High People's Court of Zhejiang Province).

> China, as a member of the Maritime Labour Convention 2006, has fulfilled its responsibilities under the Convention in terms of law and judicial practice. In accordance with the Convention and its own crew regulations, crew members can receive the casualty relief and compensation as required by the Convention

The retrial court interpreted that this article only emphasises timely treatment and does not specify the proportion of responsibility for the relevant costs. It was found that, after the crew member became ill, the ship contacted the marine search and rescue centre in time, arranged for a temporary port of call for medical treatment, and also advanced more than RMB100,000 for surgical and medical expenses. The retrial court held that the employer had fulfilled its obligations as stipulated in the article and there was no violation of the above law. Therefore, the application for retrial was dismissed.

This case shows that China, as a member of the Maritime Labour Convention 2006, has fulfilled its responsibilities under the Convention in terms of law and judicial practice. In accordance with the Convention and its own crew regulations, crew members can receive the casualty relief and compensation as required by the Convention.

Maritime procedure

This section reviews judgments dealing with issues such as limitation of action, auction sale of a ship, general average adjustment and the doctrine of forum non conveniens.

Regarding limitation of action, the case dealing with a claim against a carrier, *CPPI v NYC and Others*, shows the application of the one-year time bar in special proceedings. *Houwen v OCO*, the case on presumed delivery, discusses the understanding of the commencement of the one-year time bar in a dispute over the delivery of goods without a bill of lading. The case on a marine insurance claim time bar, *Yizheng A Shipping v China United Life Insurance*, analyses the date of the insured event for the commencement of two-year time bar in a marine insurance claim. *Shenzhen Petroglory v Taiping Property Insurance*, on interruption of the limitation of action, shows the flexible application of the law in judicial practice when protecting the interests of the insured.

The auction sale of a ship case, *Hangyuan Shipping Agency v Gorgonia Di Navigazione*, discusses important issues of the nature of an auction sale and an unregistered claimant's rights against the proceeds of the sale. The general average judgment case of *Shengxing v Continent Insurance* indicates the reluctance of Chinese courts to decide a general average adjustment. The final case analysed in this section, *Singapore A Shipping v Liberia B*, examines good practice of the doctrine of forum non conveniens in Chinese judicial practice.

Limitation of action

Claim against the carrier

Article 257 of the Maritime Law provides that the limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counted from the day on which the goods were delivered or should have been delivered by the carrier.

In the above-mentioned case of *CPPI v NYC and Others*, the cargo insurer in question was subrogated to claim for damages against NYC, Nanjing Ocean and Kuaike Logistics. NYC was the owner of the vessel, Nanjing Ocean was the manager of the vessel and Kuaike Logistics was the freight forwarder.

The plaintiff initially only claimed against Kuaike Logistics and Nanjing Ocean as defendants but did not mention NYC in the claim. The plaintiff applied to add NYC as a defendant to be jointly and severally liable for damages alongside Kuaike Logistics and Nanjing Ocean. It was found that the goods in this case were delivered to the consignee at the port of destination on or about 22 September 2019, which was also the date on which the goods were jointly inspected by all parties. The investigation report showed that, on 24 October 2019, the consignee's transport agent notified the investigator that the damaged tractor-trailers had been transferred.

> In cases where the carrier is not identified, it is safer to sue all parties in the carrier relationship. Of course the cost of litigation will increase as a result, but this is preferable to missing the deadline

The court held that the limitation period for the parties to the contract to claim against the other party should have expired on 22 September 2020 and not later than 24 October 2020 at the latest. The plaintiff only added NYC as the defendant on 12 November 2020, and there was no evidence to prove that the plaintiff or the insured had previously filed a lawsuit or arbitration against NYC, nor was there evidence to prove that NYC had previously agreed to compensate the plaintiff or the insured. Furthermore, Kuaike Logistics and Nanjing Ocean would not be jointly and severally liable to compensate NYC for the damage. Therefore, it was held that the plaintiff's action against NYC was time-barred.

This case indicates that an additional action against a liable party cannot be traced back to the time of the original action. Therefore, in cases where the carrier is not identified, it is safer to sue all parties in the carriage relationship. Of course the cost of litigation will increase as a result, but this is preferable to missing the deadline. The case also has a special feature, in that the original party sued and the additional party sued do not assume joint and several liability, so the limitation of action for the additional party sued does not apply to the original party sued. If the original and additional parties are jointly and severally liable, does the limitation of action against the additional party apply to the action against the original party? This question has yet to be answered in judicial practice.

Presumed delivery

In *Houwen v OCO* the one-year limitation of action time limit against the carrier also involved the issue of the commencement of the limitation of action and the determination of delivery of the goods. Houwen claimed that OCO had delivered the goods to a foreign customer and OCO should compensate for the loss of payment for the goods. (The legal issue in this case regarding the delivery of goods without a bill of lading has been discussed above.) Houwen contended that the one-year limitation of action period should start from the date when OCO finally informed it that the goods were still at the port of destination. OCO argued that the one-year limitation of action should run from the date on which the goods were or should have been delivered.

As the parties could not prove the date of delivery, the court of first instance found that – considering the voyage time which was about one week, plus the time for unloading the goods to the customs warehouse at the port of destination, as well as the vessel stopping at other ports during the voyage – the date on which the goods should have been delivered should be considered as not later than the end of September 2020. The court of first instance referred to article 50(4) of the Maritime Law which provides that the person entitled to make a claim for the loss of goods may treat the goods as lost when the carrier has not delivered the goods within 60 days from the delivery date. The court of first instance concluded that Houwen could claim that the goods had been lost at the latest from 1 December 2020 and that the one-year limitation of action would expire on 1 December 2021. Even with the addition of one month for customs clearance, the one-year limitation of action would have expired in January 2022. Before the expiry of the limitation of action period Houwen did not file a lawsuit, and did not prove that OCO agreed to return the goods for shipment, transshipment or compensation for the loss of the goods, which may lead to the interruption of the limitation of action period. Therefore, it was held that Houwen's claim in January 2023 was time-barred.

Houwen appealed, arguing that the court of first instance was wrong in holding that the limitation period for Houwen's claim expired in January 2022. First, in this case there was no delivery of the goods, and the starting point of the limitation of action cannot be determined. Secondly, article 188(2) of the Civil Code stipulates that the limitation period begins to run from the date when a person knows or ought to know of the infringement of their rights and the identity of the liable person. On 31 May 2022 OCO denied the delivery of the goods and stated that the goods were in the process of being cleared at

the destination port. Therefore, the starting point of the limitation period should be the day after 31 May 2022. Accordingly, Houwen's claim was not time-barred.

The court of second instance held that the goods involved in this case had not been delivered, so the date on which they should have been delivered should be examined. Based on the date of issuance of the bill of lading, the normal voyage period and the provisions of the Maritime Law, it was found that Houwen could claim that the goods had been lost from 1 December 2020 onwards at the latest. Accordingly, the one-year limitation of action would expire before 1 December 2021. The court of second instance therefore dismissed the appeal and upheld the judgment of the court of first instance.

It is questionable whether it is appropriate to calculate the date on which the goods should have been delivered for limitation of action if the carrier argued that the goods had not been delivered. If the delivery of the goods without a bill of lading is a fact, the limitation period should be calculated from the date of actual delivery of the goods; if the goods remain undelivered during the litigation, then there is no loss of goods without a bill of lading, and the limitation of action for loss is not available. In this case, the court did not ascertain whether the goods were delivered without a bill of lading, so it could not calculate the limitation period from the date of actual delivery of the goods but could only presume the date on which the goods should have been delivered based on the law and facts. However, this presumption was based on the fact that the goods could not be delivered, such as in the case of loss of goods. If the goods had not been delivered, as in the case of OCO's argument that the goods were still in customs clearance at the port of destination, there should be no presumption of delivery.

In addition, for the one-year limitation period provided for in the Maritime Law, the starting date on which the carrier delivers or should have delivered the goods should be the date on which the person claiming the right knows that delivery has been made, or has not been made but should have been made. It would be grossly unfair to the cargo claimant if the limitation of action were to be calculated from the date on which the goods were delivered without a bill of lading or from the date on which the goods should have been delivered but the cargo claimant does not know the date. If the presumptive date of delivery of the goods is used to calculate the limitation period of one year, the carrier could delay announcement of the goods, thus causing the cargo claimant to miss the limitation period.

As in this case, the court held that the claimant could claim that the goods had been lost from 1 December 2020 onwards at the latest, which meant that the carrier was presumed to have actually delivered the goods without a bill of lading by this date. But OCO indicated on 31 May 2022 that the goods were still in the process of being cleared at the port of destination. Therefore, in a case such as this where the cargo claimant does not have knowledge of the delivery, time should start to run from the date when the claimant knew or should have known of the delivery of the goods without a bill of lading, or the goods were lost. The general civil limitation of action rule in the Civil Code does not contradict the limitation of action rule in the Maritime Law and should be applied to actions against the carrier in the carriage of goods by sea.

Date of insured event

Article 264 of the Maritime Law provides that the limitation period for claims with regard to a contracts of marine insurance is two years, counted from the day on which the peril insured against occurred. In *Yizheng A Shipping Co Ltd v China United Life Insurance Co Ltd Yangzhou Central Branch*,[55] the court interpreted the phrase "the day on which the peril insured against occurred".

In this case the insured vessel was involved in an accident in December 2014. The wreckage of the vessel was cleared on 30 June 2017. Maritime Safety Administration served the certificate of liability, and the insured filed an action on 18 September 2018 claiming that the insurer was liable for compensation. The insurer argued that this claim was barred by the limitation of action requirements. The trial court determined that the date the ship wreckage was cleared, 30 June 2017, was the date of the insured event and ruled that the insurer was liable.[56]

The insurer applied for a retrial, arguing that: (1) the vessel in question grounded in December 2014, and the insured reported a claim for compensation so it already knew that the accident had occurred, and so the limitation period should be calculated from that point onwards. The claim in September 2018 was clearly beyond the limitation period; and (2) the Supreme People's Court and the Hubei High People's Court's relevant judgments explicitly used the term "the day on which the peril insured against occurred" as the starting point for determining the limitation period.

The retrial court rejected the arguments. It pointed out that the insured was in a state of uncertainty as to whether its rights under the insurance contract had been infringed upon before the Maritime Safety Administration served the certificate of liability on the insured. Any claim before the certificate lacked the necessary factual basis for claiming its rights through litigation. The retrial court upheld the decision of the trial court on the starting point of the limitation period in this case.

It can be seen that Chinese courts interpreted the phrase "the day on which the peril insured against occurred" in a flexible way. Although, as stated by the court, the insured was in a state of uncertainty before the investigation of the accident was concluded by the maritime authority, this did not prevent the insured from claiming its rights against the insurer. The certificate of liability issued by the maritime administration is evidence for ascertaining the facts and determining liability, but it is not the necessary statutory basis for this process. In the absence of an administrative determination, the court still has the authority to ascertain the facts and determine liability. The court may refer to the determination, or even not adopt it, but is not incapable of making a judgment. The fact that it may take a long time for both the insurer and the court to ascertain liability and determine the loss does not prevent the insured from filing a claim against the insurer. Uncertainty of damage or liability should not be a factor affecting the limitation of action for insurance indemnity actions.

Interruption of limitation of action

The limitation period for insurance actions may be affected if the insurer does not accept or settle the claim within two years from the date of the insured's claim for compensation from the insurer. The insurer may argue that the limitation period had expired for actions brought after two years from the date of the insured accident, but the insured may argue that the limitation period was interrupted after the insured filed a claim with the insurer. This issue arose in *Shenzhen Petroglory Shipping Group Co v Taiping Property Insurance Shenzhen Branch*.[57]

In this case the insured claimed compensation from the insurer after the insured event. The insurer commissioned an adjuster to conduct an on-site survey and requested the insured to submit additional claim documents, but did not notify the insured of its refusal to pay the claim. The insurer refused to pay the claim in a pre-court meeting and argued that the insured's claim was beyond the limitation period.

The trial court found that the insurer commissioned a public appraisal company to investigate the scene, requested the insured to submit additional claim materials, but failed to give a timely notice of refusal of claim. The trial court held that the insurer's behaviours constituted an interruption of the limitation of action period.[58]

The insurer applied for a retrial, arguing that there was no interruption of the limitation period in this case. Article 267 of the Maritime Law provides that "the limitation of time shall be discontinued as a result of bringing an action or submitting the case for arbitration by the claimant, or the admission to fulfil obligations by the person against

[55] (2022) EMS 5925 (Hubei High People's Court).
[56] (2021) EMZ 401 (Hubei High People's Court).
[57] (2023) ZGFMS 2323 (Supreme People's Court).
[58] (2022) YMZ 1031 (Guangdong High People's Court).

> The limitation period may be affected if the insurer does not accept or settle the claim within two years from the date of the insured's claim for compensation. The insurer may argue that the limitation period had expired for actions brought after two years from the date of the insured accident, but the insured may argue that the limitation period was interrupted after the insured filed a claim with the insurer

whom the claim was brought". It was wrong to consider the insurer's behaviour as an admission to fulfil its obligations. It was also inconsistent with statutory rules defining an interruption of the limitation period under the Maritime Law.

The retrial court noted that the insured reported the accident to the insurer and filed a claim immediately after the accident in this case, and that the insurer did not send a notice of refusal to pay the claim before the insured sued the insurer. Therefore, it was appropriate that the trial court found that the limitation period had been interrupted by the insurer's agreement to fulfil its obligations. The retrial court dismissed the insurer's application for retrial.

It is questionable whether the insurer's behaviour could be understood as admission of liability. In this case, the insurer's failure to send a notice of refusal after the insured had filed a claim could only mean that the insurer had not made a timely approval of the insured's request for compensation. The insurer might still, at a later date, send a notice of refusal. The failure to send a notice of refusal could not be a presumption that the insurer had agreed to accept the claim for compensation. In fact, the insurer made its refusal to pay compensation in the pre-court meeting, so there was no interruption by the insurer's agreement to fulfil its obligation.

The insurer shall be liable for the insured's loss if it delays sending a notice of refusal to the insured. This is not related to the limitation period. Article 23 of the Insurance Act provides that the insurer shall, after receiving a claim from the insured, determine the matter without delay. If the insurer fails to fulfil its obligation in a timely manner then, in addition to paying the insurance benefits, the insurer shall compensate the insured for any damage incurred. Thus, the insurer's failure to approve the insurance claim in a timely manner only results in the loss caused by delay if the insurer is liable for compensation. It does not imply that the insurer agrees to compensate the insured upon receipt of a request for compensation.

In Chinese judicial practice, the process undertaken by the insurer of dealing with claims may be regarded as an "the admission to fulfil obligations". In *Zhao Diancang and Others v PICC Property and Casualty Co Ltd Wenzhou Branch*,[59] the insured vessel ran aground on 6 November 2003. After the accident, the insured notified the insurer and took a series of salvage measures as instructed by the insurer. The insurer requested a claim in writing in June 2005. After receiving the claim report, PICC Wenzhou requested the insured to contact the salvage unit, and then contacted the salvage unit to prepare a salvage plan and budget report. After the report was made, PICC Wenzhou requested its superior unit to commission an insurance adjuster. After failing to rescue the stricken vessel, Zhao Diancang filed a lawsuit on 21 November 2006 requesting that PICC Wenzhou pay compensation. PICC Wenzhou argued that the case had already passed the two-year limitation period. The trial court and the court of second instance held that, after the accident, PICC Wenzhou's series of actions constituted "the admission to fulfil obligations" and an interruption of the limitation period in the Maritime Law.

It can be seen that Chinese courts may make a judgment that the insurer presumptively agrees to perform its obligations, thereby protecting the interests of the insured by interrupting the limitation period. However, this remains an uncertainty that requires a judgment on the basis of the facts of the case. In fact, such protection can be obtained from general civil law rules. Article 195 of the Civil Code provides that under any of the following circumstances, the limitation period is discontinued, and thereby runs again from the date on which the discontinuing events occur or when the relevant procedure is complete: (1) the right holder claims for performance against the duty bearer; (2) the duty bearer agrees to perform the duty; (3) the right holder brings an action or applies for arbitration; or (4) other circumstances with the same effect as bringing an action or applying for arbitration.

[59] (2007) ZMSZ 110 (Zhejiang High People's Court).

Comparing the provisions of the Maritime Law, it can be seen that the events constituting an interruption of the limitation period in the Maritime Law are the same as those of (2) and (3) in the Civil Code, with the additional events of (1) and (4) present in the Code. In terms of the application of law, if there are different provisions in the Maritime Law and the Civil Code, the special provisions of the Maritime Law shall apply. However, events (1) and (4) in the Civil Code are not different from those of the Maritime Law.

> In the case of a marine insurance claim, the limitation period may be interrupted under the Civil Code when the insured claims compensation against the insurer

As a general law, events (1) and (4) of the Civil Code should be applicable in the case of interruption of the limitation period, which is not different from, but complementary to, those provisions in the Maritime Law. Therefore, in the case of a marine insurance claim, the limitation period may be interrupted under the Civil Code when the insured claims compensation against the insurer. It does not require the presumption of the insurer's consent to performance by reference to specific circumstances. The application of the Civil Code is in line with the applicable rules of general law and better protects the interests of the insured in terms of the limitation of action.

Auction sale of ship

Article 111 of the Special Maritime Procedure Law provides that, after announcement of the maritime court's order for the forced auction of a ship, the creditors shall, within the time limit announced, apply for registration of their claims pertaining to the ship to be auctioned. Creditors who fail to register their claims before expiry of the said time limit period shall be deemed to have abandoned their rights to be satisfied from the proceeds of the auction. Article 119 provides that the proceeds from auction of a ship and interest thereon, or the limitation fund for maritime claims and interest thereon, shall be distributed at the same time. In distributing the proceeds from the auction of a ship, the legal costs to be borne by the party liable, expenses incurred in order to preserve the ship or to procure its auction and to distribute the proceeds from the auction, as well as other expenses incurred in the common interest of the creditors, shall first be paid out of the proceeds from the auction. The balance, after satisfaction of the debts, shall be refunded to the former shipowner or the person establishing the limitation fund for maritime claims.

It raises a question whether creditors who had not applied for registration of claims in relation to the auctioned ship could claim the balance of the money after the ship had been auctioned to satisfy their debts. The question was answered by the court in *UniCredit Leasing SpA v Hangyuan Shipping Agency Ltd*.[60]

In this case, Gorgonia was the ship manager and operator of the vessel; UniCredit Leasing and Mediocredito

[60] (2022) HMZ 184; [2024] 1 CMCLR 4 (Shanghai High People's Court).

Italiano were the co-owners of the vessel. Gorgonia entered into a shipping agency contract with Hangyuan Shipping Agency. Hangyuan Shipping Agency was responsible for the supply of materials and spare parts, port calls and transfers, and change of crews when the vessel called at the ports within the Chinese region, as well as the payment of related expenses. Hangyuan Shipping Agency did not receive agency fees due and claimed against the manager and owner of the vessel for payment of the agency fees.

Meanwhile, another court issued a civil judgment in another case, under which the vessel had been successfully sold at a judicial auction by the court and handed over to the buyer. The auction price of the vessel was used to settle all the registered maritime claims and the remaining amount was withdrawn to the court.

Hangyuan Shipping Agency did not apply for the registration of claims during the auction notice period. The question in this case was whether Gorgonia could claim the agency fees from the remaining amount of the auction price.

The court of first instance found that Hangyuan Shipping Agency's request for the provision of goods or services for the operation, management, maintenance and repair of the vessel was a maritime claim in which Hangyuan Shipping Agency was entitled to apply for the arrest of the vessel. Therefore, Hangyuan Shipping Agency had the right to participate in the distribution of the auction price of the vessel.

The court of first instance noted that Hangyuan Shipping Agency had not applied for the registration of claims during the auction announcement period. The court pointed out that article 111 of the Special Maritime Procedure Law concerns procedural provisions. The legal consequence of Hangyuan Shipping Agency's failure to register its claim within the statutory period is that it lost the procedural right to participate in the distribution of the proceeds of the ship auction and interest thereon together with other maritime claimants who have registered their claims. However, its corresponding substantive right to be satisfied by the auction price of the vessel had not been extinguished. Therefore, if there was a surplus of the auction price of the vessel, Hangyuan Shipping Agency was entitled to claim its loss from the surplus. The court of first instance held that Hangyuan Shipping Agency's claim should be satisfied to the extent of the residual amount of the auction price of the vessel.[61]

However, the court of second instance rejected the view of the court of first instance. The second instance court found that whether or not there was a surplus of the ship auction proceeds did not affect the determination of the deemed waiver of the right. The court of second instance pointed out that the registration of claims, as an important procedure in the ship auction, was aimed at urging the maritime claimants relating to the auctioned ship to make timely claims, and to be given the opportunity to be fairly compensated as much as possible, so as to effectively protect their claims.

The court of second instance interpreted article 111 of the Special Maritime Procedure Law as not making any distinction as to whether or not there is any surplus in the ship auction proceeds. Hangyuan Shipping Agency could have participated in the compensation resulting from the auction proceeds of the vessel through a registration of claims. The basis of this right is granted by the Special Maritime Procedure Law, which is statutory in nature, but it cannot be concluded that the vessel was used as a security for the realisation of Hangyuan Shipping Agency's claim.

> In an auction sale of a ship, not only is the ownership of the ship changed, but also all the rights that can be claimed against the ship are extinguished

The court of first instance held that Hangyuan Shipping Agency had a security interest in the vessel and its substantive right to be paid under the guarantee of the auction price of the vessel was not extinguished even if it did not participate in the distribution of the proceeds. The court of second instance pointed out that there was no legal basis for such conclusions.

The second instance court held that, after the auction procedure was completed, Hangyuan Shipping Agency's right to participate in the distribution of the auction proceeds and to be compensated was extinguished. It was explained that this right was one-time, irreversible and did not change regardless of whether there was a surplus of the auction price.

61 (2019) H72MC 2341 (Shanghai Maritime Court).

The court of second instance further clarified the legal nature of the residual amount resulting from the ship auction. It pointed out that the judicial auction of a ship, as different from the sale of a ship in general, is considered a special sale in maritime litigation. In an auction sale of a ship, not only is the ownership of the ship changed, but also all the rights that can be claimed against the ship are extinguished.

In this case, although there was some money remaining after the auction, in the view of the second instance court the money was no longer burdened with any debt; its nature had been changed from auction proceeds to the original shipowner's general property without liability. The nature of the money is not changed whether the money has been returned, whether it is preserved in the court or in the bank account of the original shipowner or has been commingled with other property of the original shipowner. If this were not the case, unregistered creditors could have different rights depending on the timeliness of the return of the remainder of the auction money, preservation or otherwise, and the legal rights of the original shipowner would change as a result. This uncertainty in the relationship of rights and obligations is not consistent with the purpose of the vessel auction regime in the Special Maritime Procedure Law.

In summary, the second instance court held that the law had already provided a guaranteed path of redress for ship-related claims, ie participation in the distribution of compensation through the registration of claims and confirmation of rights. In the present case, Hangyuan Shipping Agency did not exercise its rights in accordance with the procedural requirements stipulated in the law, and thus lost the opportunity. Although this was unfortunate, the law does not stipulate that there would be additional compensation in this case. It was suggested that Hangyuan Shipping Agency could only claim the ship agency fee from the contractual principal based on the contract, but it was not entitled to claim supplementary liability from the shipowner for the claim.

The judgment of the second instance court in this case provides a good clarification of the legal nature of ship auctions and the auction money in maritime procedural law. It highlights the importance of registering rights in judicial auctions. The case is of guiding significance for maritime judicial practice in the ship auction procedure.

General average adjustment

Article 88 of the Special Maritime Procedure Law provides that, with respect to general average, the parties may either mutually agree to entrust average adjusters with the adjustment, or directly bring an action in a maritime court. In dealing with an unadjusted average dispute, the maritime court may entrust average adjusters.

In the above-mentioned case of *Shengxing v Continent Insurance*, the vessel was involved in an accident and a general average was declared. The shipowner filed a claim for compensation from the ship's insurer. The insurer denied liability and argued that, even if it was liable, it would only be liable for the amount of general average that was to be shared in accordance with the terms of the ship's insurance policy.

In the insurance policy, the first paragraph of clause 2, "II. General average, Salvage and Rescue", stated:

> "This insurance shall be responsible for compensating for the general average that should be borne by the insured vessel in accordance with the relevant laws or regulations. Unless otherwise agreed in the contract, the general average shall be adjusted in accordance with the Beijing Adjustment Rules."

The second and third paragraphs stated:

> "In the event of an insured accident, the insurance shall be responsible for compensating the insured for the necessary and reasonable rescue or salvage expenses and salvage remuneration paid by the insured for taking rescue and salvage measures to prevent or reduce losses. However, the cumulative maximum amount of compensation for the sum of the three expenses of general average, salvage and rescue shall be limited to not exceeding the insured amount."

Clause 9 stated:

> "In the event of a marine casualty to the insured ship, where the common safety of the ship, cargo and freight parties is involved, the insurer shall only be responsible for the proportionate share of the value of the rescued ship to the total value of the rescued ship, cargo and freight parties in respect of the compensation for the costs of salvage, salvage and salvage remuneration."

The trial court analysed the first and second paragraphs of article 2 and found that the insured could choose to

claim for the portion of the ship's share of the general average and also choose to claim for reasonable costs of salvage or rescue, but the total amount of the claim should not exceed the insured amount.

The insurer argued that the loss should be compensated according to the proportion of general average in accordance with clause 9 of the insurance. The trial court found that, due to the professional and independent nature of the determination and calculation of general average, it was not appropriate for the court to make a ruling of whether or not the loss was subject to general average or make a judgment on the apportionment of general average before the issuance of the report on the adjustment. Furthermore, given that the case was not a dispute over general average, it was not possible for the court to decide whether the accident in question did involve the common safety of the ship, the cargo and the freight parties, and how the responsibility of each party should be apportioned. Therefore, the trial court held that it was not appropriate to directly apply clause 9 to make a judgment in this case, but rather to make a judgment on the claim for insurance compensation as set out in clause 2 para 2 of the vessel's insurance.

The insurer applied for a retrial, claiming that the trial court ignored the fact that the vessel had declared a general average after the accident, received a general average bond and initiated a lawsuit for a general average dispute. It was an error in the application of the law that the trial court did not directly apply clause 9 of the ship's insurance policy.

The retrial court rejected the application for retrial. The retrial court held that the interpretation of the insurance clauses in the trial court was in line with the general understanding of the terms of the contract.

The case reflected a complex procedural issue in maritime trial proceedings, which were complicated by the fact that the insurance contract provided for both salvage cost compensation and general average compensation. The court refused to consider general average, thus denying the insurer's contractual right to be responsible only for the apportionment of the general average of the insured vessel according to clause 9 of the insurance contract. As the court said, the case was not a dispute over general average, but the court relied on the relevant provisions of the Special Maritime Procedure Law on disputes over general average. Since the ship declared general average and the adjustment rules were agreed, the insured should carry out the general average adjustment and claim for insurance compensation from the insurer according to the adjustment. If the insured did not make a general average adjustment, it would mean that it did not prove the insured loss it suffered. The court should not, under such circumstances, apply the maritime procedural law on general average and order the insurer to bear the full liability.

Forum non conveniens

Article 282 of the Civil Procedure Law, as amended in 2023, provides that when a People's Court accepts a foreign-related civil case, upon an objection to jurisdiction raised by the defendant, it can dismiss the action and order the plaintiffs to bring the case to a more convenient foreign court if it meets all the following requirements: (1) the basic facts of the dispute did not take place within the territory of the People's Republic of China; it is apparently inconvenient for the People's Court to try the case and the parties to participate in the litigation; (2) there is no agreement between the parties that the case should be subject to the jurisdiction of the People's Court; (3) the case is not subject to the exclusive jurisdiction of the People's Court; (4) the case does not involve the sovereignty, safety or the public interest of the People's Republic of China; and (5) it is more convenient for a foreign court to try the case. After the action is dismissed, if a foreign court refuses to exercise its jurisdiction over the case, or fails to take necessary measures to try the case, or is unable to conclude the case within a reasonable period and the party files the case again before a People's Court, the Chinese court should accept the case. This is the doctrine of forum non conveniens in Chinese law. Prior to this, Chinese courts applied similar provisions of the doctrine of forum non conveniens in the Judicial Interpretation of the Civil Procedure Law.

In *Singapore A Shipping Co Ltd v Liberia B Co*,[62] the doctrine was well applied. In this case, the vessel A, owned by Singapore A Shipping, collided with the vessel B, owned by Liberia B while it was at anchor and refuelling. The hull of vessel A was severely damaged. As a result, Singapore A Shipping applied to Ningbo Maritime Court for pre-litigation arrest of the vessel B and subsequently filed a lawsuit requesting Liberia B to compensate for ship A's repair costs and other losses in the sum of US$3.6 million. During its defence Liberia B filed a jurisdictional objection, arguing that it was not convenient for the Ningbo Maritime Court to have jurisdiction over and hear the case, and requested that the lawsuit be dismissed and Singapore A Shipping be advised to file a lawsuit in a more convenient court in Singapore.

[62] (2023) ZMXZ 102 (Zhejiang High People's Court). This case is a typical example of a maritime trial published by the People's Supreme Court in 2023.

> Article 282 of the Civil Procedure Law provides that when a People's Court accepts a foreign-related civil case, upon an objection to jurisdiction raised by the defendant, it can dismiss the action and order the plaintiffs to bring the case to a more convenient foreign court

Ningbo Maritime Court rejected Liberia B's jurisdictional objection. The court pointed out that Ningbo was the first place of arrival of the vessel B after the collision, and Ningbo Maritime Court had jurisdiction over the case as it had arrested the vessel upon the application of the parties concerned. The court considered the following factors: one of the shareholders of Singapore A Shipping was a Chinese citizen;[63] the vessel was repaired in China; the main evidence related to the collision loss were formed in China; and China Reinsurance Co issued a guarantee for the release of the arrested vessel B and agreed to be under the jurisdiction of the court of the People's Republic of China. Therefore Ningbo Maritime Court held that the trial of the case by the Chinese court was conducive to ascertaining the loss and enforcing the judgment. Furthermore, vessel B left Singapore waters directly after the collision and was not subject to a maritime investigation in Singapore. It was not more convenient for the Singapore court to hear the case, and so Liberia B's jurisdictional objection was rejected.[64] Liberia B appealed. Zhejiang High People's Court dismissed the appeal and upheld the first instance decision.[65]

The courts of first and second instance, in reviewing the jurisdictional objection, correctly applied the doctrine of forum non conveniens and comprehensively considered the availability of evidence, the degree of convenience in the execution of the judgment as well as the relevance to China and other factors. This case is good reference for the implementation of the Civil Procedure Law as amended in 2023 on how to apply the doctrine of forum non conveniens to foreign-related maritime disputes in Chinese courts.

Conclusion

In the maritime judgments delivered by Chinese courts in 2023, carriage of goods by sea and marine insurance continued to be the main areas of maritime disputes in Chinese judicial practice. The Chinese maritime disputes contained both common issues (eg identity of carrier under English law) and special issues that occurred only under Chinese law (eg identifying the shipper).

China is reforming its Maritime Law. Time will tell whether the special issues will continue when the Chinese Maritime Law is reformed.

63 This was a factor of doctrine of forum non conveniens in the Judicial Interpretation of the Civil Procedure Law. This factor has been removed in the Civil Procedure Law as amended in 2023.
64 (2023) Z72MC 307 (Ningbo Maritime Court).
65 After the case entered the substantive trial stage, the two parties reached a settlement agreement under the organisation of the Ningbo Maritime Court. Singapore A Shipping applied for the withdrawal of the lawsuit, which was granted by the court.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED

Judgments analysed in this Review

A Port Service Co Ltd v B Shipping Co Ltd and C Insurance Co Ltd (2022) MMZ 1402 (Fujian High People's Court)

Anhui Light Industries International Co Ltd v Orient Star Transport (China) Ltd Ningbo Branch (ALIC v Orient Star) (2023) ZMZ 422 (Zhejiang High People's Court)

Bertschi International Freight Forwarding (Shanghai) Co Ltd v Shanghai Haihua Shipping Co Ltd (2022) HMZ 1040 (Shanghai High People's Court)

Cangzhou Bohai New Area Jiada Shipping Co Ltd v PICC Property and Casualty Co Ltd Tianjin Branch (2023) ZGFMS 2154 (Supreme People's Court)

China Pacific Property Insurance Co Ltd Beijing Branch v Kuaike Logistics Co Ltd, NYC Shipping Inc and Nanjing Ocean Shipping Co Ltd (CPPI v NYC and Others) (2022) HMZ 146 (Shanghai High People's Court)

China Pacific Property Insurance Co Ltd Dalian Branch v Endeavor BBG Shipping Ltd (2022) SMZ 1386 (Jiangsu High People's Court)

Combined Rich Co Ltd v Shanghai Ming Wah Shipping Co Ltd (2022) HMZ 643 (Shanghai Municipal High People's Court)

CTS International Logistics Corporation Ltd Nanjing Branch v JBYT Machinery Import & Export Co Ltd and Nanjing Buffalo Livestock Equipment Co Ltd (2023) ZGFMS 917 (Supreme People's Court)

Huangshi Shengxing Shipping Co Ltd v China Continent Property & Casualty Insurance Co Ltd Fujian FTZ Pingtan Branch (Shengxing v Continent Insurance) (2023) ZGFMS 673 (Supreme People's Court)

Jinzhou A Machinery Component Co Ltd v Shanghai B International Freight Agency Co Ltd (2023) LMZ 1881 (Liaoning High People's Court)

MRF International Logistics Co Ltd v Jiangsu Xingye Plastic Co Ltd (MRF v Xingye) (2022) HMZ 644 (Shanghai High People's Court)

Ningbo Tiansheng Shipping Co Ltd v Donghai Marine Insurance Co Ltd (Tiansheng v Donghai) (2021) EMZ 1160 (Hubei High People's Court)

Ping An Property & Casualty Insurance Co Ltd Shanghai Branch v Shanghai SK International Logistics Co Ltd (2023) HMZ 87 (Shanghai High People's Court)

Qingdao Yi A Co Ltd v Netherlands Yi B Co Ltd (2022) LMZ 1534 (Shandong High People's Court)

Quanzhou Antong Logistics Co Ltd v Tianjin Changxin Freight Forwarding Co Ltd (2023) ZGFMS 1241 (Supreme People's Court)

Shandong A Co v Qingdao B Co (2023) ZGFMS 2867 (Supreme People's Court)

Shanghai Bamian Trading Co Ltd v China Pacific Property Insurance Co Ltd Shanghai Branch (2023) ZGFMS 1120 (Supreme People's Court)

Shanghai Fenjun New Energy Technology Co Ltd v Cangzhou Huanghua Port Steel Shipping & Forwarding Co Ltd (2022) JMZ 1111 (Tianjin High People's Court)

Shaoxing Carria International Co Ltd v Airway Express (Hong Kong) Ltd and Airway Express International Freight Forwarding (Shenzhen) Co Ltd Shanghai Branch (Carria v Airway Express) (2023) HMZ 377 (Shanghai High People's Court)

Shaoxing Keqiao Houwen Import and Export Co Ltd v Zhejiang OCO International Logistics Co Ltd (Houwen v OCO) (2023) ZMZ 402 (Zhejiang High People's Court)

Shenzhen Petroglory Shipping Group Co v Taiping Property Insurance Shenzhen Branch (2023) ZGFMS 2323 (Supreme People's Court)

Singapore A Shipping Co Ltd v Liberia B Co (2023) ZMXZ 102 (Zhejiang High People's Court)

UniCredit Leasing SpA v Hangyuan Shipping Agency Ltd (2022) HMZ 184; [2024] 1 CMCLR 4 (Shanghai High People's Court)

Yanghuanmei and Others v Hefei Xuhai Ship Service Ltd and China Life Property & Casualty Insurance Co Ltd Wenling Branch (2023) ZGFMS 1507 (Supreme People's Court)

Yizheng A Shipping Co Ltd v China United Life Insurance Co Ltd Yangzhou Central Branch (2022) EMS 5925 (Hubei High People's Court)

Zhoushan Minglun Dangerous Goods Transportation Co Ltd v PICC Property and Casualty Co Ltd Zhejiang Pilot Free Trade Zone Marine Insurance Centre Business Department (2022) ZMZ 992 (Zhejiang High People's Court)

First and second instance judgments of cases analysed in this Review

A Port Service Co Ltd v B Shipping Co Ltd and C Insurance Co Ltd (2021) M72MC 488 (Xiamen Maritime Court)

Anhui Light Industries International Co Ltd v Orient Star Transport (China) Ltd Ningbo Branch (ALIC v Orient Star) (2022) Z72MC 1760 (Ningbo Maritime Court)

Bertschi International Freight Forwarding (Shanghai) Co Ltd v Shanghai Haihua Shipping Co Ltd (2021) H72MC 963 (Shanghai Maritime Court)

Cangzhou Bohai New Area Jiada Shipping Co Ltd v PICC Property and Casualty Co Ltd Tianjin Branch (2022) YMZ 1097 (High People's Court of Guangdong Province)

China Pacific Property Insurance Co Ltd Beijing Branch v Kuaike Logistics Co Ltd, NYC Shipping Inc and Nanjing Ocean Shipping Co Ltd (CPPI v NYC and Others) (2020) H72MC 1774 (Shanghai Maritime Court)

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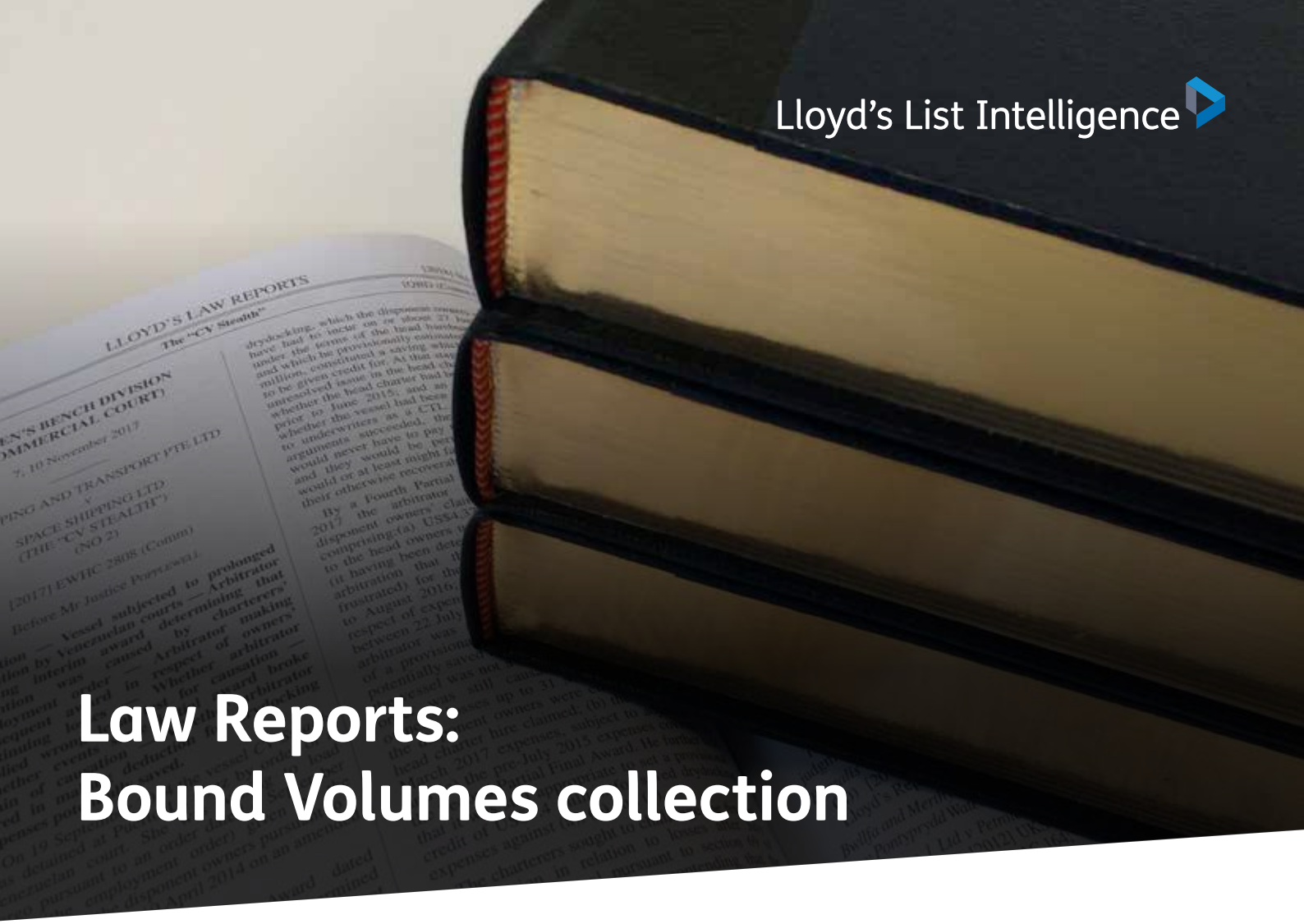

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