# Guangzhou Maritime Court
# Report on Trials 2018

# Preface

In 2018, the United States launched the '301 Trade Investigation' against China while the Sino-US trade war has gradually unfolded. The M/V "Peak Pegasus" loaded with RMB 136 million worth of soybeans rushed to Dalian Port from the United States, yet eventually failed to reach the terminal prior to the imposing of the 25% tariff. The M/T "Sanchi" carrying 111,300 tons of condensate oil collided with the M/V "CF Crystal" and sank, which cast a heavy shadow on the international shipping industry. The United States has restarted sanctions against Iran, and internationally renowned shipping companies such as Maersk Line and Mediterranean Shipping have announced termination of their operations in Iran. The apparent rise of unilateralism and trade protectionism as well as the increased uncertainty of policies arising therefrom have brought a major adverse impact on the global trade and the business environment, and have furthermore profoundly constrained the recovery and development of the international shipping industry. After the Baltic Dry Index (BDI) reached a phasic culmination of 1772 points in July 2018, then wave type fell and remained barely at around 1000 points.

In 2018, China focused on promoting a new round of high-level opening up. Hainan will build a free trade port in steps and phases, and speed up the exploration in building a free trade port with Chinese characteristics. The entry-exit inspection and quarantine department is formally incorporated into China Customs. Such integration will increase the efficiency of the customs clearance, reduce customs clearance costs, and improve the business environment. The world's longest cross-sea bridge, the Hong Kong-Zhuhai-Macao Bridge, was opened to traffic, and the effort of building the Guangdong-Hong Kong-Macao Greater Bay Area has fully promoted. Intelligent and intellectual production operations such as unmanned wharfs and unmanned ships continue to flourish, and are deeply integrated with the Internet of Things and cloud computing. In particular, the use of Blockchain technology in the shipping industry begins to emerge. The collaborative innovation and digital transformation of shipping carriers, port operators, logistics operators and customs agencies and their agents indicate good prospects and future development of the shipping industry in China.

On March 27, 2018, ZHOU Qiang, President of the Supreme People's Court, and HE Zhongyou, Member of the Standing Committee of the Guangdong Provincial Party Committee and Secretary of the Political and Legal Committee jointly unveiled the Guangzhou Base of the International Maritime Justice of the Supreme People's Court. On the same day, the Guangzhou Maritime Court held a judicial culture exhibition for Chinese and Portuguese-speaking countries. In November, it successfully hosted the 2018 Guangzhou Maritime Law Forum and the East Asian Maritime Law Forum. Over the past year, Guangzhou Maritime Court has adhered to President Xi Jinping's Thought of Socialism with Chinese Characteristics for a New Era as a guide, and continued to promote the maritime trial quality, and striven to provide strong judicial service for building the Guangdong-Hong Kong-Macao Greater Bay Area, as well as for the marine economic development in Guangdong and the international shipping center in Guangzhou. The quality of the trial tends to be better. Difficulties in the execution of judgement have almost been solved with significant positive results.

In 2018, on the basis of analyzing the causes and interpreting the risks, we put forward some suggestions and recommendations for problems relating to the creditor's registration procedures, freight forwarding, port warehousing, terminal leasing, fishery rights, marine ecological environment, maritime administrative litigation, non-litigation disputes, and execution procedures. It is compiled into this report to help the shipping market entities actively prevent risks, and to guide the maritime administrative organs to strengthen administration according to law, which will jointly make new contributions to the new development of the shipping industry in this new era.

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# I. General Information about the Maritime Trial

## (I) Overall Performance

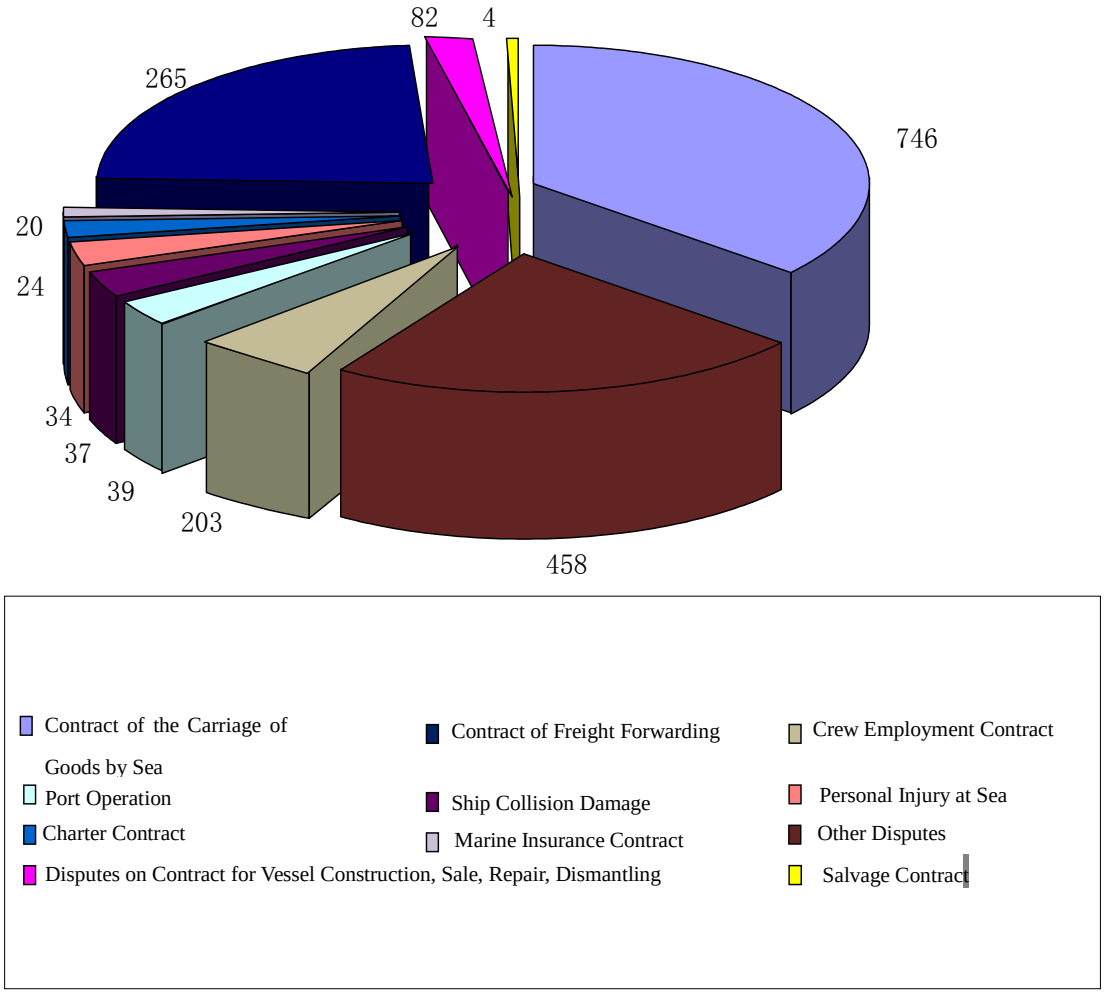
In 2018, the Guangzhou Maritime Court accepted 3,378 new cases (a year-on-year increase by 29.2%), and closed 3,263 cases (a year-on-year increase by 16.3%) with 535 cases pending (a year-on-year increase by 27.4%). The amount in controversy of the newly-received cases was RMB 23.71 billion in total with a year-on-year increase by 198.9%, and that of the closed cases was RMB 21.6 billion with a year-on-year increase by 209.8%. The annual case closing rate was 85.9%, and the ratio between cases accepted and closed was 96.6%.

### 1. Acceptance of Cases

Among the newly accepted cases, there were 1,946 cases at trial of the first instance, 1,124 applications for execution, and 308 procedures. Among those first-instance cases, there were 1,912 first-instance maritime cases and 34 first-instance administrative cases.

Among the first-instance maritime cases, there were 746 disputes over the contract of carriage of goods by sea (accounting for 39.0%), 265 disputes over the freight forwarding contract (accounting for 13.9%), 203 disputes over the contract for crew member employment (accounting for 10.6%), 82 disputes over contract for vessel construction, sale, repair and dismantling (accounting for 4.3%), 24 disputes over charter contract (accounting for 1.3%), 37 disputes over ship collision damage (accounting for 1.9%), 34 disputes over personal injury at sea (accounting for 1.8%), 39 disputes over port operation (accounting for 2.0%), 20 disputes over marine insurance contract (accounting for 1.0%), 4 disputes over salvage contract (accounting for 0.2%), and 458 other maritime disputes (accounting for 24.0%).

**Figure 1: Distribution of the First-Instance Maritime Case in 2018 (Unit: Case)**

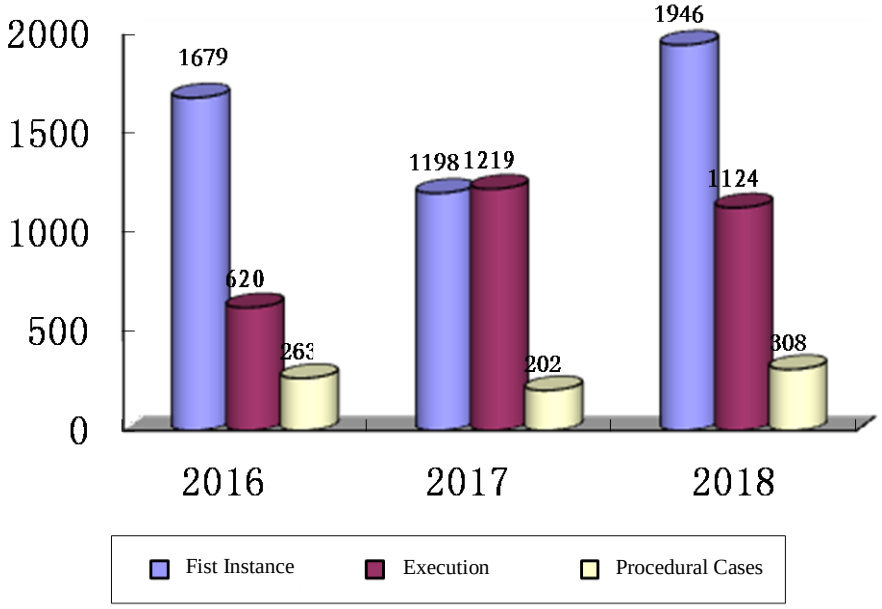



Among the 34 first-instance administrative cases, there were 11 cases relating to disagreement against administrative penalties, 10 cases relating to omission by the administrative organs, 4 relating to disagreement against administrative compulsory measures, and 9 other cases.

There were 308 procedures, including 172 applications for registration and compensation of maritime claims (accounting for 55.8%), 79 applications for property preservation (accounting for 25.7%), 11 applications for declaration of citizen's death (accounting for 3.6%), 10 applications for the establishment of a maritime liability limitation fund (accounting for 3.3%), 3 cases related to maritime arbitration (accounting for 1%), 3 applications for maritime

injunction (accounting for 1%), and 30 other cases relating to maritime special procedures (accounting for 9.7%).

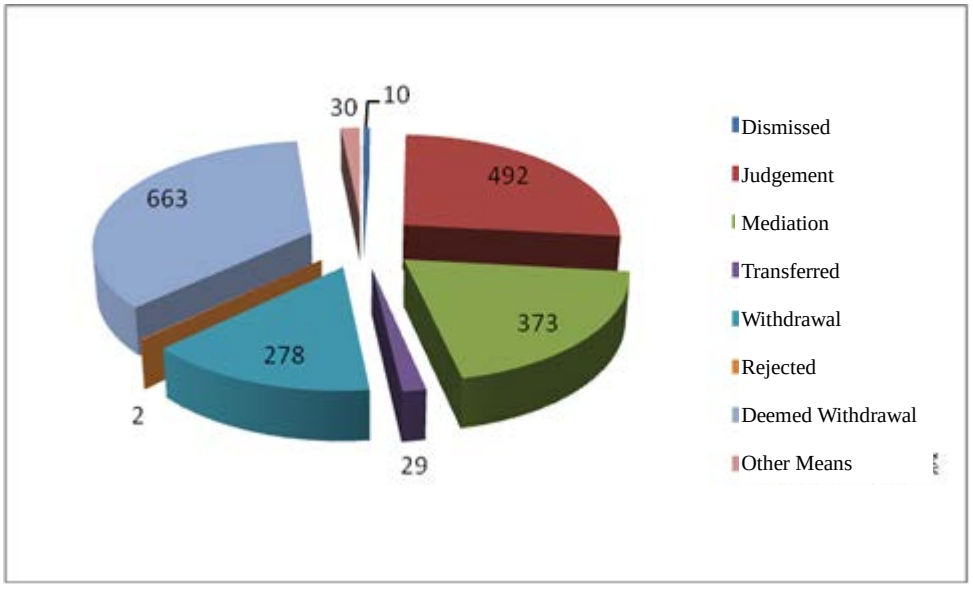
**Figure 2: Number of Cases Accepted in the Past Three Years (Unit: Case)**




## 2. Cases Closed

In 2018, 1,877 cases of first-instance (including old cases) were closed, of which 492 cases were closed with a judgment reandered(accounting for 26.6%), 663 cases were taken as *nol-pros* due to non-payment of litigation fees and other reasons (accounting for 35.9%), 373 cases were settled through mediation (accounting for 20.2%), 278 cases were withdrew by the plaintiff due to settlement by mediation and other reasons (accounting for 15.1%), 29 cases were transferred (accounting for 1.6%), 10 cases were dismissed (accounting for 0.5%), 2 cases were rejected (accounting for 0.1%), 30 cases were closed by other means (accounting for 2.3%).

**Figure 3: Means of Closing Cases of the First-Instance (Unit: Case)**




There were 1,106 applications for execution concluded in 2018 with a conclusion rate of 87.64% and the amount executed of more than RMB 1 billion. Special activities such as the 'Decision Winning 2018' and the 'Southern Guangdong Execution Storm' were carried out for promoting the efforts in execution. The actual annual conclusion rate of the execution was 42.2% with a decrease by 15.9% compared with that of the previous year. The success rate of the execution rate was 30.8% with a decrease by 16.6% compared with that of the previous year. The termination rate of execution was 31.2% with an increase by 2.2% compared with that of the previous year.

## (II) Characteristics of the Trial and Execution in 2018

In 2018, the number of cases accepted and closed by the Guangzhou Maritime Court increased significantly compared with that of 2017, but the number of cases on record of 2018 and 2017 is similar.

**1. The number of the first-instance cases has increased significantly.** In the year of 2018, among all the new cases, 1,946 first-instance cases were filed, which accounts for 57.6% with an increase by 63.1% year-on-year. Among all the cases closed, 1,877 first-instance cases were closed, which accounts for 56.6% with an increase by 42.1% year-on-year. The number of the

first-instance cases accepted and closed has increased sharply. The main cause was that the shipping economy was generally sluggish and it has been more defaults so that the shipping companies were under heavy debts which turn to be more willing to resolve disputes through litigation.

**2. Foreign-related and Hong Kong/Macao/Taiwan related cases account for a relatively large proportion.** There were 402 foreign-related and Hong Kong/Macao/Taiwan-related cases (including 369 foreign-related cases, 29 Hong Kong related cases, 2 Macao related cases and 2 Taiwan related cases) accepted, which accounts for 21.03% of the first-instance maritime cases accepted in 2018. Furthermore, there were 399 foreign-related and Hong Kong/Macao/Taiwan-related cases (including 355 foreign-related cases, 37 Hong Kong related, 3 Macao related and 4 Taiwan related) closed, which accounts for 19.41% of the first- instance maritime cases closed in 2018. As China's economic development has entered into a new status, and as the promotion of the policy of the Belt and Road Initiative, the implementation of the national strategy of Guangdong-Hong Kong-Macao Greater Bay Area and the acceleration of the construction of three free trade zones in Guangdong, the environment of shipping operators in Guangdong continues to be optimized so that foreign-related cases and Hong Kong/Macao/Taiwan-related cases still occur with high frequency.

**3. The number of newly accepted cases has increased substantially.** There were more major cases among those newly accepted with a total amount in controversy of RMB 23.71 billion. It has increased by RMB 15.78 billion compared with the total amount in controversy of last year (i.e. RMB 7.93 billion), a year-on-year increase of 198.9%. It is the largest amount since the establishment of the Guangzhou Maritime Court. The amount in controversy of cases closed in 2018 was RMB 21.6 billion, which has increased by RMB 6.97 billion compared with that of last year (i.e. RMB 14.63 billion), a year-on-year increase of 209.8%.

**4. The litigation service demonstration window has achieved initial results.** In accordance with the construction standards of the Litigation Service Center provided by the Supreme People's Court, the relevant facilities have been continuously improved. For instance, the filing window was increased from 20 square meters to 1,100 square meters. A dedicated service hall of more than 200 square meters was established. A pretrial mediation

studio for lawyers was established jointly with the Guangzhou Municipal Bureau of Justice.

**5. Disputes on the crew member employment contract have declined.** There were respectively 203 and 149 cases on disputes over crew member employment contract accepted in 2018 and 2017, while there were respectively 373 and 476 cases on such disputes accepted in 2016 and 2015. The reason is that on the one hand, a large number of disputes over crew member employment contract have been resolved through administrative mediation and pretrial mediation; on the other hand, the crew security system and safety supervision mechanism have been continuously improved, and the laws and regulations concerning the crew's labor protection and social security have been continuously improved, which makes vessel owners and operators pay more attention to protect the rights and interests of crew members.

**6. There are relatively more controversies in maritime administrative cases.** In 2018, 34 cases of maritime administrative cases (excluding administrative non-litigation review and application for enforcement) were accepted, a year-on-year increase of 240%, with new types of administrative bodies as the defendant and new categories of administrative cases. Among those 34 cases accepted, there were 22 maritime administrative cases had the administrative bodies in the eastern and western Guangdong area as the defendants, accounting for 64.7% of all maritime administrative cases. The main reason was that the propaganda of relevant laws and regulations still needs to be strengthened. Some administrative organs and parties concerned are prone to misunderstand the laws, regulations and policies. The substantive laws were still attached with more importance than the procedural law from time to time.

**7. The benefits of adopting diversified dispute resolution mechanism for maritime disputes begin to realize.** For the purpose of giving full play to the respective advantages of maritime justice and maritime arbitration in dispute resolution, the Memorandum of Understanding on the Establishment of a Mechanism for Entrusting Mediation in Maritime Disputes with the China Maritime Arbitration Commission was concluded. In 2018, two cases on the dispute over tax refunds for vessel exports were entrusted to mediations. In December 2018, the cooperation agreement with the

Guangzhou Lawyers Association on diversified resolutions of maritime disputes, so that more maritime disputes can be handled and resolved quickly, conveniently, fairly and harmoniously.

**8. The efforts of arresting and auctioning have achieved outstanding results.** The online judicial auction has achieved remarkable results with 102 vessels arrested and 43 vessels auctioned and sold successfully in accordance with the law. The total price amounts to RMB 316 million, of which the M/V "Emperor" was sold at a price of RMB 101 million in the e-commerce website of Taobao (hereinafter referred to as 'Taobao'). In 2018, a total of 73 auctions were completed in Taobao, with a total turnover of RMB 900 million, a turnover rate of 96.4%, and the premium rate of 92.2%.

## II. Participating in Maritime Litigation According to Law

—Issues and Suggestions for Claiming Rights through the Debt Registration Process

### (I) The Maritime Creditor's Right Applied for Registration which Is not Involved in the Vessel to be Auctioned may not be Supported by the Court.

The M/V "B" owned by Company A was compulsively auctioned by the court according to law. The crew member Party C submitted the application for registration of creditor's right to the court before the expiration of the announcement, applying for the registration of the crew's wages at the amount of RMB 50,000. The evidence submitted by the company showed that the wages during the period of Party C's provided in the M/V "B" was RMB 40,000, and the wages during the period of Party C's service in the M/V "D" which is also owned by Company A was RMB 10,000. The court found that the wages of RMB 40,000 related to the M/V "B" claimed by Party C falls within the maritime creditor's rights that can be registered, yet the wages of RMB 10,000 related to the M/V "D" claimed by Party C shall not be registered in the procedure of registering creditor's rights for the M/V "B" as it is not related to the M/V "B". Upon explanation, Party C withdrew his application for registration of the creditor's right for the wages related to the service on the M/V "D", i.e. RMB 10,000. Eventually, the court registered the wages of Party C for his service provided in the M/V "B" according to law.

In accordance with Article 111 of the *Special Maritime Procedure Law of the People's Republic of China* (hereinafter referred to as the *Maritime Procedure Law*), after the publishing of a public announcement of the maritime court concerning the order relating to the compulsory auction of a vessel, the creditors shall apply to register the creditors' rights relating to the vessel that is to be auctioned within the period of the public announcement. Where no registration is conducted by the expiration of the period of the public announcement, the right to the repayment of debt from the proceeds of the auction of the vessel shall be deemed as having been waived. According to the aforesaid provisions, the creditor's right that can be included in the maritime creditor's rights registration procedure are limited to 'the creditor's

right related to vessel subject to the compulsory auction', that is, the creditor's rights that cannot be attached to the vessel auctioned due to the compulsory auction by the court. Specifically speaking, it includes the maritime claims secured by the maritime liens, the lien of the vessel and the possessory lien of the vessel stipulated in the *Maritime Law of the People's Republic of China* (hereinafter referred to as the *Maritime Law*), and also includes the creditor's rights arising from provision of fuel and other materials to the vessel subject to compulsory auction. However, if the owner of the vessel or the bareboat charterer is subject to debts other than those arising out of the vessel being auctioned, it does not fall within 'the creditor's rights relating to the vessel being auctioned'. The burden of proof in the matter of the relevance between the creditor's rights and the vessel subject to the compulsory auction shall be borne by the applicant for the creditor's rights registration. If the applicant is unable to prove that the debts claimed is related to the vessel being auctioned, even if such claim is true, his or her application for registration of the creditor's rights without relevance to the vessel subject to the compulsory auction may not be supported.

We suggest that i. If a party has a claim relating to a particular vessel, regardless of whether the vessel is likely to be auctioned, the evidence in support of the relevance between the creditor's rights and the vessel shall be well kept in addition to getting a fixed number of the debts as much as possible as to prevent the possibility that the creditor's rights may not be confirmed through registration or affirmation litigation, and it may result in loss of rights to the repayment of debt from the proceeds of the auction of the vessel after the compulsory auction. ii. When a court, an arbitral institution, a mediation agency, or a notary public issues the legal document confirming the applicant's claim, if the creditor's right involves a particular vessel, it is appropriate to clearly identify the relevance between the creditor's right and such specific vessel in the factual part or the judgment (arbitration awards) so that the applicant can legally confirm the creditor's right in the creditor's right registration procedure involving such vessel and get repayment of the debts from the proceeds of the auction.

## (II) The Application for Registration of Creditor's Rights after the Expiration of the Announcement Period may not Be Supported.

The court issued the announcement of the first auction of the M/V "A" from March 27 to 29, 2018. Company C transferred the creditor's right of the M/V "A" in the amount of RMB 15.7 million to Company B. On May 29, 2018, Company B mailed an application for registration of the creditor's right to the court requesting registration to confirm the aforementioned creditor's right. The court held that the period of registration of the creditor's right arising from the M/V "A" expires on the sixtieth day from March 29, 2018, i.e. May 28, 2018. Company B submitted the application for registration of creditor's rights by mail on May 29, 2018. The date of application has exceeded the period stipulated by the law. It is determined that the creditor's right shall not be registered upon expiration of the period of the public announcement, and that Company B shall be deemed to have waived its right to repayment of debt from the proceeds of the auction or sale. Therefore, the creditor's right as applied for registration by Company B shall not be registered.

It is provided in Article 111 of the *Maritime Procedure Law* that after the publishing of a public announcement of the maritime court concerning the order relating to the compulsory auction of a vessel, the creditors shall apply to register the creditors' rights relating to the vessel that is to be auctioned within the period of the public announcement. Where no registration is conducted by the expiration of the period of the public announcement, the right to the repayment of debt from the proceeds of the auction of the vessel shall be deemed as having been waived. Furthermore, in accordance with Article 16 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Law Applicable to the Arrest and Auction of Vessels,* the period of application for the registration of creditor's rights expires upon the sixtieth day from the date of the last announcement of the vessel's auction at the time of the first auction. Pursuant to the aforesaid provisions, the creditors that are compensated in the auction and sale of the vessel at issue through the creditor's rights registration and proceedings of confirmation shall be those registered during the statutory period of application. If the creditor applies for registration of the creditor's rights in any time other than within the statutory period, such application for registration shall not be supported. The aforesaid period is a statutory period with no suspension or interruption of the statute of limitations. Once the specified period is exceeded, the applicant will lose the right to be compensated from the proceeds of the auction or sale of the auctioned vessel.

We suggest that creditors who are entitled to claims relating to a particular vessel must pay close attention to the dynamics of that particular vessel, especially the fact that whether the vessel was auctioned compulsorily by the maritime court. Because except that the known maritime lien, the vessel mortgagee and the owner of the vessel are notified by way of court notice, the notification to other maritime creditors is through newspapers or other news media as specified in Article 33 of the *Maritime Procedure Law*. The vessel auction announcement has the legal effect of presuming that the creditor is aware of or should be aware of the fact that the ship was auctioned and the time limit for applying for the creditor's rights registration. Even if the creditor fails to actually know the aforementioned facts concerning the vessel auction for some reason, it does not affect the effectiveness of the announcement. At present, when the Guangzhou Maritime Court auctions a vessel, in addition to publishing the announcement in the 'People's Court Newspaper' or a newspaper issued in a foreign country (auction of foreign vessels), it will also be published on the official website of the Guangzhou Maritime Court, the Ali Auction Judicial Platform, and the website of the foreign-related commercial maritime trial and other Internet media simultaneously. The relevant creditors should pay close attention to the aforementioned conditions of the vessel auction and exercise their rights in a timely manner.

## (III) The Application for Maritime Lien that has not Been Exercised in Time According to Law shall not Be Sustained.

The crew member Party A worked in the M/V "C" owned by Company B, and disembarked in July 2016. Company B owed Party A the wages in the amount of RMB 7,000 unpaid. In April 2017, Party A filed a lawsuit against Company B in court and claimed that Company B should pay the wage in the amount of RMB 7,000 and confirmed that such claim falls within the rights of maritime liens. In May 2017, the court made a judgment ordering Company B to pay Party A RMB 7,000 and confirmed that the aforementioned claims fall within the maritime liens. In the same month, the judgment came into effect. In January 2018, the M/V "C" was arrested by others and eventually auctioned because Company B owed debts to others. During the period of the announcement concerning the M/V "C", Party A applies for the registration of the creditor's rights, requesting confirmation the creditor's right of the wages in the amount of RMB 7,000, and confirmation that the

creditor's rights fall within the right of maritime lien so that the repayment may be prioritized. The court held that although the effective judgment confirmed the Party A enjoys the right of maritime lien for the M/V "C", Party A did not apply to the maritime court for the arrest of the M/V "C" within the statutory one-year period, and the maritime liens were eliminated because they were not exercised in time. Therefore, the court ruled and confirmed the amount of the crew member's wages which is RMB 7,000 for the service Party A has provided in the M/V "C", yet the application for maritime liens concerning the creditor's right is not supported.

Article 115 of the *Maritime Procedure Law* stipulates that with respect to the written judgment, order in writing, conciliation statement, arbitration award and document evidencing creditors' rights provided by the creditors to certify the creditors' rights, the maritime court shall, if ascertaining that the above-mentioned documents are true and lawful upon examination, make an order to have them affirmed. However, there is controversy in the practice of ascertaining legal instruments that are true and lawful and have been in force. We believe that the creditors hold legal instruments that are true and lawful which have entered into force still need to go through two procedures: debt registration and creditor recognition.

The procedure of the creditor's rights registration is based on provisions under Article 114 of the *Maritime Procedure Law*, which only involves a formalities review of the creditor's rights registration, while and the procedure of the creditor's rights confirmation is based on provisions under Article 115 of the *Maritime Procedure Law*, which involves examination of the amount and nature of the creditor's right. The latter is not only limited to the examination of authenticity, legitimacy and effectiveness of the legal document, but should also be combined with the examination of the facts upon issuing the legal document. As far as the case is concerned, the effective judgment confirms that Party A's rights to the amount of RMB 7,000 has maritime liens with regard to the M/V "C". However, based on the evidence provided by Party A, the maritime liens are generated in July 2016. In accordance with the provisions of Articles 28 and Article 29 of the *Maritime Law*, Party A does not exercise the maritime liens in a lawful manner, namely within one year of the maritime liens, and the maritime liens enjoyed by them are eliminated because they are not exercised in time.

We suggest that on account of the legal requirements for the exercise and realization of maritime liens, the parties to the maritime claims would better exercise the creditor's right through the arresting of the vessel that give rise to the right of maritime lien by the court within one year upon the date of the maritime lien despite of any effective judgement or ruling that confirms such right of maritime lien enjoyed by them. Once the statutory period is exceeded, the right of maritime liens of the parties will be eliminated due to failure to exercise them in a timely manner, and the creditor's right guaranteed by the maritime liens to be repaid from the proceeds of the vessel auction will be lost. Therefore, the parties to the maritime claims must have a clear understanding of the exercise and realization of maritime liens. The court or arbitration institution should also consider the litigation capacity of the parties and make necessary explanations to prevent failure of realizing the maritime liens due to the parties' misunderstandings thereof.

## III. Trial of Maritime Administrative Litigation According to Law —Some Thoughts on the Trial of Maritime Administrative Litigation

### (I) The Executive Organ of the Non-Litigation Administrative Indirect Enforcement

The Marine Bureau A made an administrative penalty decision on Company B for occupying the sea area without permit. Company B did not file an administrative reconsideration or an administrative lawsuit or fulfilled its obligations within the statutory time limit. Therefore, the Marine Bureau A applied to the court for enforcement of the decision. The decision includes ordering Company B to return the illegally occupied sea area and restore the original state of that sea area, and imposing a fine of RMB 2,178,000 which is 12 times of the payment for using the sea area during the time of illegal use. The court ruled after examination as follows: the administrative penalty decision made by the Marine Bureau A shall be granted. Company B shall return the illegally occupied sea area, restore the original state of that sea area within 10 days from the date of receiving of the ruling, and pay a fine of RMB 2,178,000 and an additional fine of RMB 2,178,000 to the court. If the Company B fails to perform the obligation to return the illegally occupied sea area and restore the original state of that sea area within the above-mentioned time limit, it shall be enforced according to law as organized and exercised by the Marine Bureau A. The resulting expenses incurred shall be borne by Company B. If Company B fails to fulfill the obligation to pay the fine within the above-mentioned time limit, the court will take enforcement measures in accordance with the law, and the resulting expenses will be borne by Company B. After the court's ruling of enforcement, Company B did not fulfill the obligation to dismantle the illegal structures. The Marine Bureau A restored the original state of the sea area and dismantled the illegal structures according to the court's ruling.

This case is a typical administrative non-litigation review and enforcement. The theory of the administrative law divides enforcement into 'indirect enforcement' and 'direct enforcement' according to whether the enforcement method (means) is to directly enforce the administrative decision. Direct enforcement includes the appropriation of deposits and remittances, auctions or the disposal of seized and detained property in accordance with the law.

Indirect enforcement includes replacing enforcement and enforcement penalties. The authority of direct enforcement of the administrative organ is stipulated by the *Administrative Enforcement Law of the People's Republic of China* (hereinafter referred to as the *Administrative Enforcement Law*) and other laws and regulations. The administrative bodies involved in maritime administrative cases generally do not have the authority of direct enforcement. According to the provisions of the thired paragraph of Article 46 of the *Administrative Enforcement Law*. After imposing administrative fines, the maritime administrative organ without the authority of direct enforcement within the jurisdiction of Guangdong Province shall apply to the Guangzhou Maritime Court for enforcement. In such cases, the decisions shall be enforced by the Guangzhou Maritime Court in accordance with the relevant procedures stipulated in the administrative litigation law upon examination and affirmative ruling of the enforcement.

According to the provisions of Article 50 of the *Administrative Enforcement Law*, where an administrative organ makes an administrative decision to require the party concerned to perform an obligation such as removal of obstruction or restitution, if the party concerned fails to perform it within the prescribed time limit, still fails to do so after being prompted and the consequences of it have endangered or will endanger the traffic safety, have caused or will cause environmental pollution or have damaged or will damage natural resources, the administrative organ may perform the obligation on behalf of the party concerned or authorize a third party which is not a party of interest to perform the obligation on behalf of the party concerned. This shows that the law has generally granted administrative organs the authority to adopt such indirect enforcement measures. Under the above circumstances, the administrative organs do not need to apply to the court for enforcement.

We suggest that when applying to the court for administrative enforcement, the maritime administrative organs should further clarify the body of the administrative enforcement and the scope of enforcement. The administrative counterpart shall be aware that the *Administrative Enforcement Law* has granted the authority of conducting indirect enforcement to the corresponding administrative organs, and it shall actively cooperate with such administrative organs to take measures to remove the obstacles and restore the original state.

## (II) The Problem of the Identification of the Entrusting Party of the Port Operation

Company A and Company B are engaged in freight forwarding business. The two parties signed an agreement on monthly settlement of the terminal fee, which stipulated that Company A is obligated to pay the terminal fee for Company B, and Company B is responsible for the operation according to the process as required by Company A. Company B should handle the terminal fee collection strictly following the detailed name and chemical name of the goods, yet Compnay A will not be responsible for the loss caused by any concealed dangerous goods. In March 2017, the employee of Company B delivered a shipment of goods with the name of hardware to the terminal. The Port Authority C has verified that the cargo is 20 tons of fireworks. It decided to impose a fine of RMB 200,000 on each of the two parties on the grounds that the dangerous goods violated the relevant regulations of the Ministry of Communications. Both Company A and Company B refused to accept the penalty and filed an administrative lawsuit to the court to revoke the aforesaid administrative penalty respectively. The court concluded that Company A was the entrusting party of the port operation who did not report the dangerous goods to the port operator truthfully, and committed the illegal act that should be punished. The administrative penalty on Company A imposed by the Port Authority C is legal and Company A's requests shall be rejected. Company B did not sign a contract with the port operator, which means it is not the entrusting party of such operation. Therefore, the decision of administrative penalties imposed on Company B by the Port Authority C shall be revoked.

Both cases were administrative proceedings brought against the punishment of the port administrative organ. One of the focuses of the dispute is to decide whether the administrative counterpart is suitable for the penalty, which eventually reflected in the identification of the entrusting party of the port operation. This is a typical problem of overlap of civil and administrative issues. The court not only refers to the relevant provisions of the Ministry of Communications, but also refers to the relevant provisions of the Contract Law. It considered the conclusion and performance of the port operation entrustment contract, and at the same time considered the parties' declaration of intention and legal status as well as other factors during the port operation process. The following rules have been established: the entrusting party of the

port operation should be identified according to the identity of the party who entered into the port operation entrustment contract. The actual handling of the container approach is not equivalent to the entrusting of the port operation.

We suggest that due to the widespread transfer of freight forwarders at sea transportation, the freight forwarders only earn the freight difference, and some freight forwarders are responsible for customs clearance, inspection, land transport, and access to the yard operations. Usually freight forwarders play various roles in the transportation of an order of cargo. It will be unreasonable and unnecessary if all the transport-related entities are punished as entrusting party of the port operation. In this case, the rules established in similar cases are focused on the port operation entrustment contract and supplemented by the declaration of intention of the parties. The meaning of the port operation entrusting party is defined appropriately and therefore identified the appropriate administrative penalty counterpart.

## IV. Maintain the Order of the Freight Forwarding Market According to Law

—Issues and Suggestions in Disputes on Maritime Freight Forwarding

### (I) Identification of Duty Agents in Disputes on Freight Forwarding

The sales person Party B of the export company (hereinafter referred to as "Company A"), contacted the employees of the freight forwarding company (hereinafter referred to as Company B) through the instant messenger Tencent QQ, and entrusted Company B to handle the freight forwarding for several shipments of goods exported to Doha, Qatar and other destinations. During the contact, the contact address and cargo loading address provided by Party B are consistent with the business registration address of Company A. Party B and the employees of Company B also signed an agreement on the freight settlement, confirming that Company A owes a freight of RMB 140,000 to Company B. According to the information obtained by the National Enterprise Credit Information Publicity System, Party B is one of the three major shareholders of Company A. The statement issued by Party B provided that according to company regulations, any contract, agreement or other important documents concerning the company's business shall be confirmed by affixation of the company's official seal and signed by the legal person. Contracts, agreements and other important documents as well as transactions without affixation with the company's official seal and the signature of the legal person shall be deemed as personal actions and shall have no connection with the company. The contents of this statement are not made public. Company B filed a lawsuit against Company A in the court for failure in payment of the arrears of freight. The court held that the evidence at hand support that Party B as the sales person of Company A has performed the act of duty related to his or her position. Such act has legal effect on Company A, and the maritime freight forwarding contractual relationship was established according to law between Company A and Company B. Company A was the entrusting party to the freight forwarding contract and has not paid relevant fees. Therefore, the court decided that Company shall pay the freight to Company B.

The rule about duty agent is the newly established in the *General Provisions of the Civil Law of the People's Republic of China* (hereinafter referred to as the

*General Principles of the Civil Law*) on the agency system. The duty agent refers to the person who holds a position in a legal person or an unincorporated organization and according to his or her authority performs civil legal act in the name of such legal person or unincorporated organization. In order to maintain the security of transactions and protect the interests of bona fide counterparts, this article also stipulates that the restrictions on the authorities of legal persons or unincorporated organizations shall not be a valid defense against any bona fide counterparts.

In this case, Party B acts as a duty agent to Company B. Despite that Company A has internal restrictions on the act of duties concerning affixation of the company's official seal and signature of the legal person, Company B as the counterparty of the transaction is not aware of such restriction and therefore shall not be limited by such internal restrictions. Therefore, Company A and Company B are subject to legal and effective freight forwarding contractual relationship as a result of Party B's act of duty. Company A shall pay Company B the arrears of freight.

We suggest that under the circumstances that communication in the freight forwarding business is increasingly based on electronic communication, relevant entities should try to obtain and retain the evidence in support of the true identity of the contact person of the other party including his or her relationship with the corresponding company so as to clarify whether the behavior of the contact person is an act of duty or an individual act. Furthermore, the instant messengers such as QQ, WeChat and the mobile telephone registration, etc. require the users to provide their real names. Therefore, it is possible to obtain the evidence concerning the true identity of the user and his or her relationship with the corresponding company. In the lawsuit, relevant entities should respond in good faith and consider the acts of duty performed by personnel objectively so as to prevent the waste of judicial resources caused by the application by the parties to the court for obtaining evidence.

## (II) The Liability of the Freight Forwarding Company for the Loss of Goods

Company A entrusted (with overall entrustment) the freight forwarding company ("Company B") to transport a shipment of aquatic products from

Shenzhen to the US customers. The two parties did not sign a written contract. Company B booked the cabin with a shipping company ("Company C") for the aquatic products involved. The bill of lading was provided by Company A to Company B through the instant messenger Tencent QQ. The chatting records showed the contents of 'Please wait for the electronic notice of the delivery'. After the goods arrived at the port of destination, they were taken away by the consignee. Company A claimed that Company B did not promptly inform Company C of the order waiting for the electronic notice of the delivery, causing the goods to be taken away at the port of destination without receiving the payment. Hence Company A brought a lawsuit against Company B in the court claiming compensation for the loss of the payment of goods. The court held that Company B lacked probative evidence that it had fulfilled the obligation to notify the carrier to wait for the release of the goods before the goods were taken, and therefore should compensate Company A for the loss of the payment of goods.

In accordance with the provisions of Article 10 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Marine Freight Forwarding,* where a client claims against a freight forwarder for compensation on the ground that the freight forwarder causes losses to the client during handling marine freight forwarding transactions, the people's court shall uphold such claim, unless the freight forwarder can prove that it has no fault. This provision indicates that the liability for damage caused by the freight forwarder is subject to the principle of presumption of liability, which means the freight forwarder shall be presumed to be at fault and shall assume liability for breach of contract according to law if the freight forwarder fails to prove that it is not at fault for breach of contract at issue, provided that the client (entrusting party) can prove that the freight forwarder has constituted breach of the contract. In this case, the obligation of waiting for the indication of delivery by electronic notice from Company A fell on Company B. For the fact that the goods at issue were taken away at the port of destination without notice, Company B failed to provide evidence in support that Company A had issued an order to deliver the goods by electronic notice and constituted a fault for the loss of the goods. Company B shall be liable for breach of contract and compensate Company A for the loss of goods.

We suggest that the freight forwarder as the trustee should carefully perform the fiduciary duty for the benefit of the entrusting party, comprehensively track the export and transportation of the goods, and report the handling of the entrusted issues to the entrusting party in a timely manner. At the same time, it is necessary to pay attention to retaining relevant evidence of fulfilling the fiduciary duty according to the contract, so as to avoid the huge liability for damages due to lack of key evidence when any dispute arises.

## (III) The Issue of Determining the Payment of the Container Detention Charge Incurred at the Port of the Destination

Company A entrusted Company B to forward a shipment of garments from Guangzhou to Mozambique. After accepting the consignment, Company B booked the cabin with the shipping company ("Company C"). The consignor specified in the consignment bill issued by Company A to Company B was "Company A", and the consignor specified in the original bill of lading issued by the agent of Company C was "Company D". After the goods arrived at the port of destination, no one picked up the goods and was auctioned by local customs. Company C notified Company B that Company B and Company D as the consignors shall be responsible for the container detention charge incurred at the port of destination and required Company B to provide detailed information of Company D. Company B then notified Company A of the aforesaid fact about the container detention charge and also required for detailed information about Company D. However, Company A did not reply, nor did it provide any information about Company D to Company B or Company C. In the end, Company C required Company B to assume the container detention fee, and Company B has paid according to the bill issued by Company C. Company B then initiated a lawsuit in the court against Company A on the ground that it has not been reimbursed by Company A with regard of the container detention fee it has prepaid. The case went through the first and second instance proceedings as well as the retrial. It was finally decided in the effective judgment that although the consignor on the bill of lading was Company D, the bill of lading was issued based on the booking requirements of Company B, and the contractual relationship as indicated by the bill of lading shall not affect Company C's claim against the actual consignor, namely, Company B. Therefore, Company C has the right to choose to claim the container detention fee against Company B instead of Company D. Company B may claim against Company A for compensation of

such container detention fee it has prepaid afterwards based on their freight forwarding relationship. Such claim shall be sustained considering the supporting evidence in this case.

The freight forwarding contract is a non-gratuitous commission contract. The freight forwarder acts as the consignee. In the case of carriage contractual relationship between the freight forwarder and the carrier, if the freight forwarder cannot assume responsibilities to the carrier due to reasons caused by the consignor, the freight forwarder shall be obliged to disclose the information of the consignor to the carrier. The carrier then may choose to claim its right against either the freight forwarder or the consignor. However, the carrier cannot change the opposite party once decided. In this case, the container detention fee incurred at the port of destination may be claimed by Company C against the consignor specified in the bill of lading, i.e. Company D, or the actual consignor of the shipment in question, i.e. Company A. Nevertheless, Company C chose to claim against Company B on the grounds that firstly Company B and Company A were subject to freight forwarding contractual relationship, and secondly Company B failed to provide information about the consignor specified in the bill of lading, i.e. Company D, and to disclose Company A to Company C. Company B then claimed compensation against Company A resulting in the dispute of this case.

We suggest that with regard to the containers detention charge incurred by the unclaimed goods at the port of destination, when facing the claim brought by the carrier, the freight forwarder shall promptly disclose the consignor to the carrier, but not necessarily limited to the consignor specified on the bill of lading. The freight forwarder shall clarify the relationship of consignment and disclose to the carrier the consignor that has the actual relationship of consignment with the carrier. The carrier may choose the object of its claim preventing litigation exhaustion as a result of otherwise claiming compensation for prepayment against the actual consignor.

## V. Preserving the Market Order of the Port Storage in Accordance with the Law

—Issues and Suggestions in Disputes over the Port Warhousing Contract

### (I) The Determining of the Ownership of the Subject Matter of the Storage Contract when the Subject Matter in Question Fall within the Indefinite Things

In a port warhousing dispute, three companies, Company A as the depositor, Company B as the depository, and Company C as the supplier, signed a port warhousing contract and a three-party warhousing agreement, which stipulated that Compnay B provides 10 of its own oil tanks for storing the mixed aromatic diesel fuels supplied by Company A. and the amount of storage shall be accorded to the amount specified in the dilivery notice issued by Company B. Company A had purchased the mixed aromatic diesel fuels from Company C for five times, which delivery location was all in the oil warhousing of Company B. Company B had issued 6 oil delivery notices. Furthermore, Company A also signed the sales contracts with Company D and Company E for the purpose of selling the mixed aromatic diesel fuels. After that, Company A intended to pick up the goods in storage from Company B by the oil delivery notice. Company B couldn't deliver the goods but confirmed the oil delivery notice held by Company A and its obligation to deliver 34,055.132 tons of mixed aromatic diesel fuels to Company A. Company A requested the court to confirm its ownership of the 34, 055.132 tons of mixed aromatic diesel fuels stored in the 10 tanks of Company B. The court held that it was not sufficient to determine the mixed aromatic diesel fuels in dispute were relatively specific to the extent that they could be distinguished from other similar goods oil tanks. Therefore, without exclusion of claims from other parties, the court decided Company A did not have the ownership of the mixed aromatic diesel fuels in the tanks involved as it claimed.

In accordance with the provisions of Article 26 of the *Property Law of the People's Republic of China*, prior to the establishment and transfer of the right to use a movable property, if the third party possesses the movable property according to law, the person with the obligation to deliver may instead transfer the right to claim the return from the third person possessing the

movable property. Company A obtained 34, 055.132 tons of mixed aromatic diesel fuels by indicated delivery, which means Company A obtained the right to claim for the return the aforesaid goods. The right to claim for return property by the transferee is based on the creditor's right arising out of the contractual relationship between the transferee and the third party. The mixed aromatic diesel fuels fall within the indefinite things. The mixed aromatic diesel fuels of Company A have been mixed in the oil tanks owned by Company B which not only stored the goods provided by Company A. The waihousing contract involved also stipulates that the plaintiff (Company A) has the right to pick up the goods but not the right to claim ownership thereof. Pursuant to provisions of Article 387 of the *Contract Law of the People's Republic of China* (hereinafter referred to as the *Contract Law*), the warehousing certificate is the proof for delivery the stored goods. Therefore, the collection notice is only the proof for collecting the stored goods but not the proof of ownership. Company A's claim for ownership of the mixed aromatic diesel fuels in the tanks involved cannot be sustained.

We suggest that with regard to the port warhousing contractual relationship, if the goods to be delivered to the depository for storage are refined oil which fall within indefinite movable property, such goods may be mixed with other indefinite movable property as stored by other depositors, which may result in mixed storage and mixed delivery. In this regard, the depositor should attach great importance to the agreement on the exclusive use of special tanks in the contract of receipts, and also pay attention to clearly record the specific tank number and corresponding quantity of the storage. It is important to specify the ownership of the goods to be stored as definitely as possible so that it can be distinguished from other similar goods in storage.

## (II) The Determining of the Scope of Responsibility of the Guarantee Established for the Warhousing Contract

In a warhousing contract, Company A, Company B and Company C successively signed four warhousing contracts, which stipulated that Company B assumes the expenses, and Company C provides a number of oil tanks for the storage of the mixed aromatic diesel fuels provided by Company A. Company D and Company E issued a letter of guarantee to Company A which indemnify Company A from any loss due to sale, mortgage, seizure or transfer of the 33, 680.131 tons of mixed aromatic diesel fuels stored in the

oil tanks of Company C, any cost and expenses incurred by failure to timely release the goods to Company A (at temporary interest rate of 10% per annum), and any economic loss of market changes, compensation for breach of contract for downstream customers and various expenses incurred in handling related matters. Company D and Company E agreed to be jointly and severally liable therefor. Then Company A requested to collect the goods from Company C. Company C issued a letter of commitment to Company A and Company B, confirming that 33680.131 tons of mixed aromatic diesel fuels under the above four contracts have been deposited in the tanks owned by Company C, and Company A due to its own fault. Company A requested the court to order Company D and Company E to jointly compensate for the loss of the above goods and the relevant interest (calculated based on 10% per annum). The court held that the liability of payment of the interest by Company D and Company E as the guarantors is beyond the scope of the liability of Company C as the principal debtor. Therefore, Company D and Company E shall not assume the liability of the interest of 10% per annum as provided in the guarantee contract.

This case mainly involves the determining of the scope of the contractual responsibility under the contract of storage of goods. The guarantee contract is collateral contract, and the liability of guarantee is collateral guaranty. Based on the principle of subordination, the scope of liability of the guarantor shall not exceed the scope of liability of the principal debtor. Otherwise, the creditor may obtain benefit from the guarantor that it cannot obtain from the principal debtor, and the guarantor may not be able to get recovery from the principal debtor with regard to such additional liability. In this case, the warhousing contract is the principal contract with no agreement on the interest rate of 10% per annum for liability of Company C. The guarantee contract concluded via the letter of guarantee by Company D and Company E is a collateral contract, and the statement about 'at temporary interest rate of 10% per annum' indicates that this is not a certain calculation standard. In accordance with the principle that the scope of liability of guarantee shall be limited to the scope of liability of the principal debt, the scope of the liability sustained by Company D and Company E to Company A shall not exceed the scope of liability sustained by Company C to Company A.

We suggest that the depositor to the warhousing contract should pay close attention to the scope of the liability of guarantee as determined by the

guarantee contract, and accurately understand the provisions of Article 21 of the *Guarantee Law of the People's Republic of China* that 'unless otherwise stipulated in the guarantee contract'. It is important to clarify as much as possible in the warhousing contract as the principal contract the scope of liability of the depository upon breach of contract, so as to protect the rights and interests to the greatest extent, and avoid the situation that the scope of the guarantee liability exceeds the scope of the principal debt.

## (III) The Issue of Appending Parties in the Dispute on Warhousing Contract

In a port warhousing dispute, Company A, Company B and Company C concluded a three-party agreement on warhousing. Company A purchased oil from Company C and deposited them in the oil tanks owned by Company B. During this period, Company B and Company D signed a tank lease contract to lease some of tanks to Company D, which involved tank field where the oil of Company A was stored. Company A intended to collect the goods from Company B, yet Company B cannot deliver the goods. At this time, Company E, CHEN and HAN issued a guarantee to Company A, which agree to be jointly and severally liable for the loss caused by Company B for failure to deliver the goods to Company A. Company A brought a lawsuit only against Company B claiming for the liability for breach of contract. Company B applied to the court for appending Company C, Company D, Company E, CHEN and HAN as parties in the lawsuit. The court held that Party B's application for appending parties lacked of factual and legal basis and rejected its application.

It is a case concerning dispute on warhousing contract. The subject of the rights and obligations under the contract involved are Company A as the depositor and Company B as the depository. The dispute in this case arises from the performance of the warhousing contract. Company C, Company D, Company E, CHEN and HAN are involved in this case with certain degrees of correlation with the facts of purchase and sale, storage etc. However, the object of liability as claimed by Company A as the plaintiff is Company B without connection with other parties. Company B's argument that the finding of the facts involved may be adversely affected without appending Company C and Company D as a third party and appending Company E or CHEN and HAN as the defendants in this case lack of factual grounds.

Furthermore, the purpose of fact finding is not a legal ground for appending any party in a proceeding.

The appending of parties in a proceeding is subject to the condition that whether the party to be appended is a necessary party to a joint claim or a third party without independent right of claims. In the case of dispute on the warhousing contract, there are generally several civil subjects closely related to the facts involved. The plaintiff usually only selects one of the links in the chains of relationship relating to the contract of storage to the court, and the defendant often wants to clarify the true and complete links of the transaction chain so as to relieve their responsibility. When determining whether to append a party, the court shall first determine the facts of the case relating to the litigants and then examine the facts strictly pursuant to the provisions of paragraph 2, Article 56 and Article 132 of the *Civil Procedure Law of the People's Republic of China* (hereinafter referred to as the *Civil Procedure Law*) so as to decide whether the statutory conditions of appending parties in the proceeding are satisfied and avoid erroneously appending any party, with the normal market transaction order and the legitimate rights and interests of the parties protected appropriately.

## VI. Standardize the Legal Relationship Relating to Terminals According to Law

—Issues and Suggestions in Terminal Lease and Operation

### (I) Proper Custody of the Leased Object by the Terminal Leasee

An insurance company ("Company A") and Company B entered into an annual package insurance contract. Company B and Company C concluded a warehouse lease and service contract stipulating that Company B leases its bonded warehouse No. 1 to Company C and Company C is responsible for maintaining the warehouse and the ancillary facilities, and that Company C shall assume liabilities for losses which it has caused to Company B. After Company B handed over the warehouse involved to Company C, Company C carried out cold storage installation on the warehouse. A fire broke out in the warehouse during the construction. The fire department determined that the cause of the accident was a short circuit in the warehouse. Company A entrusted the assessment company to conduct an investigation and assessment, and filed a subrogation claim against the lessee, Company C, after paying insurance claims of RMB 3.59 million to Company B. The court ruled that Company C shall compensate Company A for the insurance claim in the amount of RMB 3.59 million and the interest thereof.

In accordance with the provisions of Article 222 of the *Contract Law*, the contract between Company B and Company C clearly stipulates that Company C has the obligation to maintain the warehouse and auxiliary facilities involved in the case, and Company C is responsible for the losses it has caused to Company B. Therefore, Company C shall be liable for damages caused by fire to Company B. Pursuant to provisions of paragraph 1, Article 60 of the *Insurance Law of the People's Republic of China* stipulates, when the occurrence of the insured event results from the loss or damage to the subject matter of insurance caused by a third party, the insurer may, from the date when indemnity is paid to the insured, exercise by subrogation the right of the insured to demand indemnification against the third party up to the amount of indemnity paid. Company A has paid the insurance indemnity to Company B, and has obtained the subrogation right according to law. Its request against Company C to pay for the loss of insurance claim and interest should be sustained.

We suggest that when companies such as logistics companies lease terminals or terminal facilities, before conclusion of the lease contract with the lessor, it is necessary to inspect the durable years and load-bearing of the leased object in order to avoid assumption of liabilities for damage caused by poor durability or improper use. In addition, after the lessee obtains the consent of the lessor, it shall also strengthen the supervision and management of the construction company and the construction site when renovating and constructing the leased object.

## (II) The Responsibility of the Terminal Operator for Failure in Obtaining the Port Operation Permit

A vessel is jointly owned by an individual, Party A and a company, Company B, with a share of 49% and 51% respectively. It is actually operated by Party A and is affiliated under the name of Company B. The vessel wrecked when the stone powder was unloaded at the terminal of Company C causing two deaths and sank. The Maritime Safety Administration found through investigation that the terminal was operated for loading of such light tonnage vessel for the first time. There was neither effective communication contact established nor any risk prevention and emergency measures for the operation agreed before the loading. Therefore, it was determined that both parties shall be equally accountable for the accident involved. Party A filed a lawsuit, requested Company C to pay 50% of the damages such as maintenance costs and repay the death compensation repaid by Party A for Company C. Company B was notified as a joint plaintiff to participate in the lawsuit, yet waived all rights relating to the vessel and all rights relating to the vessel shall be exercised by Party A. Company C has no objection to the occurrence of the accident and the expenses of receiving the relatives of the deceased by Party A, but denied other losses, and filed a counterclaim against the loss of the terminal operation, requestedParty A to make compensation and Company B to bear the joint and several liability. The court held that Company C should compensate Party A for the loss including the cost of vessel maintenance costs, etc., but rejected other claims of Party A and the counterclaims of Company C.

In accordance with provisions of paragraph 1, Article 22 of the *Law of the People's Republic of China on Ports*, whoever intends to operate a port shall

submit a written application to the port administration authority for a port operation permit and register with the department for industry and commerce in accordance with law. Company C failed to obtain the port operation permit so that the terminal does not have operation conditions. The goods were improperly loaded. The shore failed to neither conclude and implement any safety production management agreement, nor clarify and the requirements of stowage plan. Company C is at fault and should assume liability for tort. In accordance with the provisions of Article 26 of the *Tort Law of the People's Republic of China* (hereinafter referred to as the *Tort Law*), where the victim of a tort is also at fault as to the occurrence of harm, the liability of the tortfeasor may be mitigated. Company A was also at fault with regard to the improper loading of goods, the failure of the shore in conclusion and implementation of the safety production management agreement and the requirements of stowage plan. In addition, Company B's safety management of the vessel was also not in place, which may diminish the responsibility of Company C. Based on the extent of their fault, the plaintiff and the defendant shall be equally accountable. Since Company B indicated that the vessel is actually owned by Company A, Company A shall have the right to request all the compensation related to the vessel. The loss due to suspension of the operation of the terminal claimed by Company C in the counterclaim shall not be sustained, because it did not obtain a port operation permit and was not competent to operate according to law.

We suggest that the terminal operator engaged in port operations should obtain a port operation permit and apply for industrial and commercial registration, and at the same time ensure that the terminal has the corresponding operating conditions. If the operator does not obtain the operation permit but is actually engaged in terminal operations, it is at fault and its claim of losses related to terminal operations may not be supported.

## (III) The Return of the Leased Object in the Original State

Port Company A and Company B entered into an agreement stipulating that Company A will provide space for installing the unloading equipment for powdery goods at the terminal for Company B, and provide space for the construction of tanks on the north side of the land area of Company A. It is also agreed that Company B shall clean up its temporary constructions if the two parties agree not to renew the lease or terminate the contract. Because of

Company B failed to make relevant payment, Company A filed a lawsuit requesting Company B to dismantle the machinery and equipment installed on the terminal, return the terminal to Company A and pay for the rent and utilities. The court held that the equipment on the terminal involved in this case were found without corresponding certificate of property right, and Company A failed to prove that such equipment were installed or owned by Company B. It was decided that Company B paid for the rent and utilities and returned the terminal site to Company A, but rejected other claims of Company A.

In accordance with provisions of Article 235 of the *Contract Law,* the lessee shall return the leased object at the expiration of the lease term. The leased object returned shall be maintained in its after-use state as contracted or in conformity with its nature. In this case, Company A required Company B to dismantle the equipment installed on the terminal site, yet failed to prove that the equipment to be dismantled is installed or owned by Company B. The equipment involved in its claim cannot be specified. Therefore, the court rejected such claim of Company A due to ambiguous requests.

We suggest that the lessee and the lessor to the lease contract of the terminal should give priority to resuming the terminal to a normal usable state so as to reduce loss due to idleness, provided that there is no conflict between the lessee and the lessor on the fact of returning the terminal site yet only some disagreement on the status of the returned terminal site. If both parties are unable to decide through negotiation which party is responsible for cleaning up the site, the lessor can clean the site and put the terminal into use as soon as possible. The costs incurred thereby can be solved by other means. Upon conclusion of the terminal lease contract, it is critical to set terms and conditions concerning the return of the terminal. During the performance of the lease contract, it is also important to follow the agreements so as to avoid unnecessary risk.

## VII. Regulate the Legal Relationship Related to Fishing According to Law

—Issues and Suggestions in the Employment Contract, Claims and Assignment Involving Fishing

### (I) Identification of Employment Relationship and Partnership

In a dispute over personal injury liability, Party A and Party B went fishing together on a fishing vessel without proper permits owned by Party B. The fishing vessel capsized and sank due to collision with a sand carrier. As a result, Party A and Party B fell into the water at the same time. While Party A was receiving treatment in the hospital, Party B signed a compensation agreement with the sand carrier which stipulated that the sand carrier shall be liable for the damage of the fishing vessel, medical expenses and lost wages, in the amount of RMB 200, 000, and that the medical expenses and lost wages of Party A shall be borne by Party B. After Party A was discharged from the hospital, it claimed against Party B for compensation of lost wages, medical expenses and disability in the amount of RMB 320,000 on the grounds of the employment relationship between Party A and Party B. However, Party B argued that it only provided the fishing vessel and went fishing together with Party A. They were subject to the partnership with shared the work, benefits and risks. Party A cannot claim compensation based on employment relationship. The court held that because there was no written agreement between Party A and Party B on the way of fishing. Party B provided vessels and fuel for the fishing work for both Party A and Party B. Party A is entitled to a third of the catch. No income for Party A if they didn't go fishing or couldn't catch anything. Therefore, Party A and Party B had established a partnership.

When determining whether there is an employment relationship, we should first find out whether there is an employment contract between the parties. In the absence of an employment contract, in principle, it should be determined on the basis of 'control theory' and according to the following criteria: i. the employer determines the employee's appointment and dismissal; ii. the equipment and tools are provided by the employer, and the employer has the control over the equipment and tools; and iii. the specific work of the employee is inseparable from the employer's business. Furthermore, the

grounds for determining the partnership is whether the relationship lies in the collaboration of human resources, which is mainly reflected in i. the partners reached a consensus as the basis for the establishment and existence of the partnership; ii. the partners jointly make investment; and iii. the partners participate in business decision-making and daily business activities. In this case, where Party A failed to prove that Party B controls, directs or supervises the method, time and place of fishing work, it is not appropriate to determine that there was an employment relationship between Party A and Party B just because Party B provided the tools or got extra paid for the work.

We suggest that in order to protect the legitimate rights and interests of the crew of small fishing vessels, a written agreement should be made on the cooperative production mode so that there is supporting evidence in case of any disputes on determining whether the parties thereto are subject to an employment relationship or a partnership.

## (II) Identification of the Subject Claiming Compensation against the Fishery Mutual Insurance Association

In a dispute on the marine insurance contract, according to the certificate of mutual insurance and the clauses on the back involved, Party A as a member of the Fishery Mutual Insurance Association (Party C) had purchased the fishermen's personal accident insurance for the crew members including Party B as the insured with agreements on mutual insurance liability of personal injuries suffered by the insured in accidents. It was agreed Party C will compensate the insured with the rate determined according to the brief standards of the premium rate of personal accidents multiplying the mutual insurance fund for personal accidents. However, there was no clear beneficiary clause. Party B suffered a personal injury in an accident as working on the vessel. Party A filed a lawsuit against Party C after making compensation for the personal injuries to Party B, claiming that Party A as a member had the right to apply for the mutual insurance funds according to the marine insurance contract. At the same time, Party B claimed that as the insured under the marine insurance contract and it should have the right to claim the insurance indemnity against Party C due to injuries suffered during the stint on the fishing vessel, and applied to join the litigation as a third party. The court held that Party B is not a member of the mutual insurance association and does not have the qualification to apply for compensation,

while Party A is a member who has already purchased the fishermen's personal accident insurance in the mutual insurance association, and is the proper subject that has the right to claim compensation from the mutual insurance association.

The Fisheries Mutual Insurance Association is a non-profit corporate legal person registered in the civil affairs department and is not a commercial insurance institution under the insurance law. It organizes fishing vessel owners and fishery producers to participate in mutual insurance by payment of membership dues, and jointly assume the economic losses incurred by accidents. The purpose is to improve the anti-risk capacity of the fishery industry and ensure the smooth progress of the fishery production instead of to obtain maximum commercial profits. The marine insurance contract concluded between Party A and Party C in this case falls within the unnamed contracts. The 'insured Party B' as specified in the certificate of mutual insurance is not directly applicable or applies analogically the definition of the 'insured' as provided in paragraph 5, Article 12 of the *Insurance Law*. The parties shall exercise their rights and perform their obligations in accordance with the certificate of mutual insurance and the mutual insurance clause on the back. The back clause stipulates that only the member is the subject that shall have the right to apply for compensation to the mutual insurance association and to which the mutual insurance association is obliged to make compensation. The injured crew member in this case had received compensation from the vessel owner based on the employment relationship, and the vessel owner obtained the corresponding compensation from the mutual insurance association as a member, which is consistent with the nature and principle of the marine insurance contract.

We suggest that the definition of the 'beneficiary' and the 'insured' as well as other relevant concepts be specifically explained in the terms of the mutual insurance contract, in order to better protect the rights of the members and fend off the risks of the industry. It is important to prevent unequal rights and obligations enjoyed and borne by the members due to applying analogically the relevant provisions of the Insurance Law.

## (III) Determination of the Nature of the Distribution Agreement on Oil Difference Subsidy

In a dispute on vessel ownership, Party A argued against Party B that according to the mediation agreement concluded by and between them in 2012, Party B was required to distribute the oil price difference subsidies in the amount of RMB 300, 000 odd accumulated from 2006 to 2011 in respect of the fishing vessel involved. Party B argued that the mediation agreement was signed under coercion and was invalid as the content violated the provisions of Article 3 and Article 4 of the *Interim Measures for the Administration of Special Subsidy Funds on the Refined Oil Prices in Fishery*, and that the mediation agreement falls within the bestowal contracts. It is stipulated by law the donor can withdraw the bestowal before the transfer of the right to the property. Party B decided to withdraw the bestowal due to difficulty in production and business operation. Therefore, Party B filed a counterclaim against Party A, arguing that the mediation agreement concluded by and between them was invalid, and requested Party A to reimburse Party B the amount of RMB 8, 000 which was paid by Party B under compulsion. The court held that the mediation agreement confirmed the owner of the fishing vessel involved was changed from Party A to Party B on November 15, 2004, and agreed that Party B promised to pay part of the fishery refined oil subsidy that it can legally receive to Party A. The mediation agreement is a legal and effective bestowal contract. The donor shall have the right of withdrawal prior to the transfer of the right to the property. The court rejected all the claims of Party A and Party B.

The *Interim Measures for the Administration of Special Subsidy Funds on the Refined Oil Prices in Fishery* promulgated by the Ministry of Finance and the Ministry of Agriculture in 2009 are departmental administrative regulations. The mediation agreement does not violate any prohibitive laws and administrative regulations, which is legal and effective and conforms to the nature of the bestowal contract. According to the first paragraph of Article 186 of the *Contract Law*, the donor has the right to withdraw the bestowal without any reason before the transfer of the right to the property according to his or her own will. After the donor withdraws the bestowal, the rights and obligations of the parties to the contract are eliminated, and the recipient shall not have the right to request the delivery of the property. The claim Party B clearly stated in the lawsuit that the request to withdraw the bestowal and not to preforming the obligation of monetary payment as stipulated the mediation agreement involved is in compliance with the laws and regulations, should be permitted.

We suggest that when the ownership of the fishing vessel changes, it is necessary to make detailed written agreement on the method and time limit for distribution of the special subsidy funds on the refined oil price. The vessel owner is the object of the subsidy policy and the recipient of the refined oil price subsidy. The law does not prohibit the disposal of the subsidy funds obtained or may be obtained. If the owner of the fishing vessel voluntarily promises to transfer the fishery refined oil price subsidy to be obtained in the future to another party without payment, the agreement shall have the legal effect as a bestowal contract, and therefore the donor shall have the right to withdraw the bestowal before the transfer.

## VIII. Protect the Marine Ecological Environment According to Law —The Determination and Liability of Joint Infringement in Marine Environmental Damage

### (I) The Res Judicata of the Effective Criminal Judgment on Civil Public Interest Litigation

A, a staff of the Bureau of Ocean and Fishery Bureau, when patrolling in the waters under the relevant jurisdiction found that the M/V "H" dumped the waste in an embankment suspected of committing a crime. According to the investigation by the public security organs, during the period of July and August 2016, PENG and others delivered and dumped the waste produced by the paper mill from the terminal to the embankment using an excuse of heightening and strengthening the embankment, which caused great environmental pollution. After appraisal and evaluation, the relevant economic losses caused by the environmental pollution were about RMB 3.86 million, and the ecological restoration cost was about RMB 3.75 million. PENG, HE, FENG and HE were charged with criminal responsibility for committing environmental pollution. A filed a civil public interest lawsuit against PENG and the others requesting them to jointly compensate for losses related to marine environmental pollution. The People's Procuratorate of Z City supported in this lawsuit as the supporting party. The court ruled that the defendants PENG, HE, FENG and HE shall be jointly liable for the ecological restoration costs and economic losses, totaling more than RMB 7.8 million, and the compensation shall be handed over to the national treasury to repair the damaged ecological environment.

This case is the first case of civil public interest litigation in the marine environment supported by the procuratorate after the revision of the *Civil Procedure Law* on June 27, 2017. The trial of the case is conducive to crack down on the dumping of waste in the waters of the Pearl River Estuary and the Guangdong-Hong Kong-Macao Greater Bay Area, and enhance the public awareness of environmental protection and the concept of environmental law. It is significantly meaningful in building a beautiful China, fight the battle of pollution prevention and control, and serve the construction of the Guangdong-Hong Kong-Macao Greater Bay Area. The criminal cases related to the environmental pollution involved in this civil litigation were heard in the people's court of Z City. The aforesaid four

people, including PENG, were sentenced to fixed-term imprisonment and fined for the crime of environmental pollution. After assuming criminal responsibility, the polluters must also assume civil liability according to law. This case is a civil public interest lawsuit filed by the department that exercises the power of ocean supervision and administration. Because of the principle of 'criminal actions prior to civil actions' in dealing with crossed cases of criminal law and civil law, this case involves the determining the plaintiff's qualification, the scope of the res judicata of the criminal judgment, the joint infringement, and the environmental damage.

In recent years, the people's courts have tried more and more crossed cases of civil law and criminal law. With regard to the environmental civil public interest litigation, the plaintiff or the public interest litigant brought a civil lawsuit usually after the criminal case has been initiated or concluded, and thus the court of the civil litigation was passively chose to apply the principle of 'criminal actions prior to civil actions'. This involves the problem of the res judicata of the criminal judgment in the case of environmental torts. According to the provisions of Article 93 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (hereinafter referred to as the *Interpretation of the Civil Procedure Law*), the facts confirmed by the people's court in the effective ruling and judgement need not be proved by the parties, unless the parties provide evidence to the contrary overturning the facts. The 'ruling and judgement' as referred in this provision certainly includes the effective criminal ruling and judgement.

Therefore, there is real impact of the effective criminal judgment on the trial of civil cases. The key to the problem is the extent to which the scope of the res judicata of the criminal judgment should be limited. We suggest that the scope of the res judicata of the effective criminal judgment for the environmental infringement should not be overestimated nor underestimated. It is necessary to balance the efficiency and fairness of the judiciary keeping the balance between saving the judicial resources and protecting the rights of the parties.

## (II) Determination of Joint Infringement in Pollution of Marine Environment

In the aforementioned cases, the effective criminal judgment has determined that PENG, HE, FENG and HE violated state regulations, who arbitrarily dumped and disposed of toxic and hazardous substances and polluted the environment. They had jointly committed crimes of environmental pollution. In the court, another defendant, YUAN, argued that his behavior of delivering the waste paper was only the performance of the contract of carriage and did not cooperate with the dumping of the waste paper, and thus was not an infringer.

Joint infringement includes joint intentional infringement and joint negligence infringement. The criteria of committing a joint infringement are lower than that of a joint crime (under the law of the People's Republic of China, joint crime only includes joint intentional crimes). Based on the principle of 'determination of less serious offence by referring to serious offence', under the circumstances that the aforesaid 4 people including PENG and the others have committed joint crimes, they may be deemed to constitute a joint infringement according to the provisions of Article 93 of the *Interpretation of the Civil Procedure Law*. Although YUAN was not determined as an accomplice of environmental crimes by the criminal judge, the plaintiff provided evidence that he had carried delivered a vessel of waste to the embankment and dumped half of such waste, which actually constitutes assistance to the dumping of waste. It is determined that YUAN is also a joint infringer of the environmental infringement. In accordance with provisions of Articles 8 and 65 of the *Tort Law*, the court found that PENG and the other four defendants constituted joint infringement and are jointly and severally liable for environmental damage in this case.

Due to the differences in the standard of proof, the burden of proof, and the exclusion of evidence in civil and criminal cases (such as higher standards of criminal cases), the effective criminal judgment may not determine an actor as a joint offender of a crime, which does not prevent it from being identified as a joint infringer in civil cases. Even if the perpetrators who had provided assistance, help and other actions for environmental pollution may be exempted from criminal responsibility or administrative responsibility because their illegal acts are minor and less harmful, they may also be subject to civil liability for environmental damage. At the same time, according to the provisions of Article 187 of the *General Principles of the Civil Law* and Article 4 of the *Tort Liability Law*, if an infringer shall assume administrative or criminal

responsibility for the same act, it shall not affect its assumption of the civil liability. Furthermore, if the infringer's property is insufficient to bear full responsibility, the liability for infringement shall be borne first. It is difficult for the infringer's defense that he had been fined in the criminal cases or the administrative cases which constitutes double punishment to obtain support in judicial practice.

## (III) Scope and Liability of Compensation for Marine Environmental Damage

Disputes involving pollution of the marine environment are new types of cases accepted by the people's courts in recent years. Marine environmental damage often lacks of direct, specific and quantifiable calculation standards, which requires people with specialized knowledge to make appraisal opinions. After the pollution incident occurred in this case, the appraisal agency conducted an appraisal and assessment of environmental damage. The assessment report made by the agency is an evidence in criminal cases and has been accepted by the people's court of Z City as the basis for the determination of the facts.

In the trial of this case, the person who made the assessment report appeared in court to accept the inquiry, and the appraisal agency also provided a written reply on the questions raised by the collegial panel and the parties. The five defendants challenged the assessment report but failed to provide sufficient evidence to the contrary. The court basically adopted the assessment report. However, when determining the ecological restoration cost including the cost and expense of collecting and transferring disposable waste and the waste disposal, the waste gummed paper of 200 cubic meters that has not been unloaded from the M/V "H" was included. However, the part of such waste gummed paper has been disposed of by YUAN. Therefore, the court will deduct such cost from the total amount of the ecological restoration cost.

In this case, the environmental pollution behaviors carried out by PENG and other four defendants continued to occur for a certain period of time. The defendant YUAN only participated in an act of dumping. While determining that it constituted a joint infringement, the court would, according to the principle of fairness, limit YUAN's liability to the extent of environmental damage in which it participated. Therefore, YUAN in this case was jointly and

severally liable for damages within the scope of 200 cubic meters of waste involved in the dumping. Accordingly, the court finally found that PENG and other four people had committed a joint infringement and shall assume joint liability, and that limited YUAN's liability for compensation to the damage corresponding to 200 cubic meters of waste, and that the ecological restoration cost, economic losses and other losses shall be calculated according to the corresponding proportion.

## IX. Advance the Enforcement Procedures According to Law

Issues and Suggestions on Vessel Auction and Price Allocation in Execution

### (I) The Issue of Sale without Base Price after the Vessel Auction Failed

In the execution concerning a vessel repair contract dispute, the court auctioned the vessel owned by the person subjected to execution. The vessel was not sold after the first auction, the second auction, and the sale, no one responded to the price. The applicant of the execution refused to take the vessel for the debt. In the process of execution, the court investigated the property of the person subjected to execution according to law. There was nothing available for the execution in the bank account, vehicle, securities, equity, and network finance of such party. The applicant applied for the court to re-evaluate and auction the vessel. After obtaining the consent of more than two-thirds of the creditors, the court sold the vessel at a price lower than 50% of the evaluation price, and the transaction was completed quickly with a closing price higher than that in the second auction.

In accordance with the provisions of the second paragraph of Article 28 of the *Provisions of the Supreme People's Court about Auctioning or Selling off Property by the People's Courts in Civil Execution*, as to the property unsuccessfully auctioned and sold, and the execution applicant or other executing creditors refused to accept the property for offsetting debt, the people's court shall unseal or unfreeze the property and return to the person subjected to execution, except when other execution measures may be taken concerning the property. The term 'other execution measures' stipulated in this paragraph may include compulsory management as well as reinitiating evaluation, auctions and selling without base price, etc. based on market price changes by the court of execution. In this case, it has been half a year since the previous auction failed, and the overall shipping market has warmed up, and the vessel price has risen sharply, so that the vessel can be sold successfully.

According to Article 14 of the *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Arrest and Auction of Vessels,* where the vessel still fails to be auctioned, under statutory conditions, the execution applicant and the registered creditors is entitled to choose to sell the vessel without base price. We suggest that if the vessel failed to be sold at the first

time, the execution applicant may try to obtain the consent of the creditors with more than two-thirds of the creditor's rights whose registration has been accepted concerning the selling of the vessel at a price lower than 50% of the appraised price, so as to maximize the possibility of a successful vessel disposal.

## (II) On-Site Delivery after the Vessel Auction

In the case of a charter contract dispute, the person subjected to execution refused to perform the effective judgment and there was no other property available for execution. The court arrested and auctioned the vessel owned by the person subjected to execution according to law which was in the custody of by the original crew of the vessel arrested. After the vessel was auctioned successfully, the court and the bidder went to the vessel's berth for delivery. However, the person subjected to execution ordered the staffs to obstruct the enforcers with violence and resisted to hand over the vessel. As the staffs' above behabior, the court decided to impose a 15 days' of judicial detention on the staffs, QIU and HE according to law.

In the on-site handover after the transaction of the vessel, there are often personnel on board claiming that the vessel owner owed the crew wages, vessel repair fees, docking fees, etc., and obstructing the handover of the vessel. According to provisions of Item (5), Item (6), Paragraph 1, Article 111, and Paragraph 2, Article 115 of the *Civil Procedure Law*, such acts constitute acts of impairing the civil proceedings. If they still refuse to cooperate after explanation by the court, the court may impose fines and detentions on the principal leading person in charge or the persons directly responsible. If they constitute a crime, the court will investigate for criminal responsibility according to law.

We suggest that the vessel owner and the vessel custodian should conscientiously perform the management responsibility for the vessel during the seizure. The abnormal situation should be reported to the court in time and handled in accordance with the court's instructions to ensure the safety of the vessel during the seizure. Disputes on the remuneration of the custodian and the employment contract with the vessel owner shall be confirmed by legal procedures, which shall participate in the distribution of

the vessel's auction funds according to law. No one shall obstruct handover of the vessel, or refuse to execute the court's instructions of delivery.

## (III) The Problem of Priority Compensation for Vessel Employees in the Seagoing Vessel Auction

In the execution for the dispute on financial loan contract, the court auctioned the seagoing vessel of the person subjected to execution according to the application by the bank. During the public announcement, some crew members provided the conciliation statement as evidence of the crew's wages in the application for the creditor's registration and participated in the allocation of auction funds. At the creditors' meeting, the bank proposed that the conciliation statement did not clarify the nature of the rights to crew's wages, and disagreed that the crew's wages should be compensated prior to the bank's mortgage loan. After repeated explanation by the court, the negotiations were still unsuccessful. The court ruled on the distribution plan of the vessel auction according the order of compensation as stipulated the *Maritime Law* and other relevant laws.

It is provided in Article 22 of the *Maritime Law* that the following maritime claims shall be entitled to maritime liens: (i) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labor laws, administrative rules and regulations or labor contracts. In the course of the trial, given the limitation of the crew's claim and the legality by the conciliation statement, it is generally not appropriate to determine the maritime liens in the letter of mediation. Nevertheless, during the execution, where it has been ascertained that the crew is actually working on the seagoing vessel, the person subjected to execution actually owes the crew's wages, and the crew has taken measures such as filed an application for arresting the vessel, etc. within the statutory time limit, then the aforesaid claims of the crew members shall be entitled to maritime liens in accordance with the law.

We suggest that at the creditors' meeting on the distribution of the vessel's auction funds, each creditor should negotiate from the perspective of rationality, integrity, and law, and try to reach a compensation agreement through consensus so as to shorten the distribution cycle and complete the

distribution as soon as possible without unnecessary and meaningless time consumption and cost.