Guangzhou Maritime Court

Report on Trials

2020

Preface

2020 was an extraordinary year in the history of the People's Republic of China. The year witnessed the country's efforts in completing the building of a moderately prosperous society in all respects and attaining a decisive victory in the fight against poverty. It was also the year China made successful conclusion of the 13th Five Year Plan. However, the outbreak of COVID-19 has sent the world economy into a severe downturn, disrupted production, and caused a contraction in international trade. In UN's "World Economic Situation and Prospects", in 2020, the world economy shrank by 4.3 per cent, over two and half times more than during the global financial crisis of 2009. Marine shipping, the artery of the global trade and a barometer for the global economy, was facing severe impact of the epidemic, which was evidenced by the shrinking demand, shipment delays, shipping space shortage, and continuous rise of freight rates. The global shipping supply chain was stuck in a deep recession.

In 2020, facing the challenging international environments and the complicated domestic work relating to reform, development and stability, especially the shock of COVID-19, under the firm leadership of the Party Central Committee with Comrade Xi Jinping at its core, China has made major strategic achievements in the response to COVID-19, and achieved positive results in the epidemic prevention and control and in the advancement of the economic and social development. According to the data released by the National Bureau of Statistics, China's GDP in 2020 exceeded 100 trillion yuan, increasing by 2.3% in comparable prices compared with 2019, making a tremendous progress in the overall national strength. China is also pursuing higher-standard opening up, as is evidenced by the *Master Plan for the Construction of Hainan Free Trade Port* issued by the State Council, a momentum to boost the development of free trade port, and the *Opinions on Accelerating the Construction of Tianjin as An International Shipping Hub in North China* jointly released by the National Development and Reform Commission and the Ministry of Transport, with a view to promoting positive interplay between domestic circulation and international circulation. In the 2020 Xinhua-Baltic International Shipping Centre Development Index, Shanghai has ascended to the top three international shipping centers for the first time.

In 2020, following the guidance of the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era and focusing on administrating justice for the people and maintaining judicial fairness, Guangzhou Maritime Court has been pioneering in building itself into an international maritime judicial center and offering its wisdom and strength in supporting the advancement of the Belt and Road Initiative and the Greater Bay Area, in supporting Shenzhen in constructing the socialist pilot demonstration area of Chinese characteristics and Guangzhou in regaining vitality and scoring new achievements in four aspects which aim at improving its city functions, cultural strength, service industry, and international business environment, and in supporting the rollout of the province's new development model featuring "one core, one belt, one zone", i.e. the Pearl River Delta as the core, the coastal economic belt, and the ecological development zone in the north of the province. In the year, Guangzhou Maritime Court retained its place among the top three maritime courts of China on the openness of judicial process. The court was also awarded for its efforts in the international communication of the rule of law, which was listed in China's ten typical cases of international communication of the rule of law. It also succeeded, inter alia, in completing the first judicial confirmation case by opening an online court session that connected the parties involved in Guangdong and Hong Kong simultaneously.

In 2020, through case study on issues such as maritime administrative litigation, freight forwarding, time charter, personal injuries, rights and interests of crew, and limitation fund for maritime claims, we would like to pinpoint the risks and present some solutions and suggestions to shipping market participants and relevant authorities for reference, to help boost healthy development of the ocean economy.

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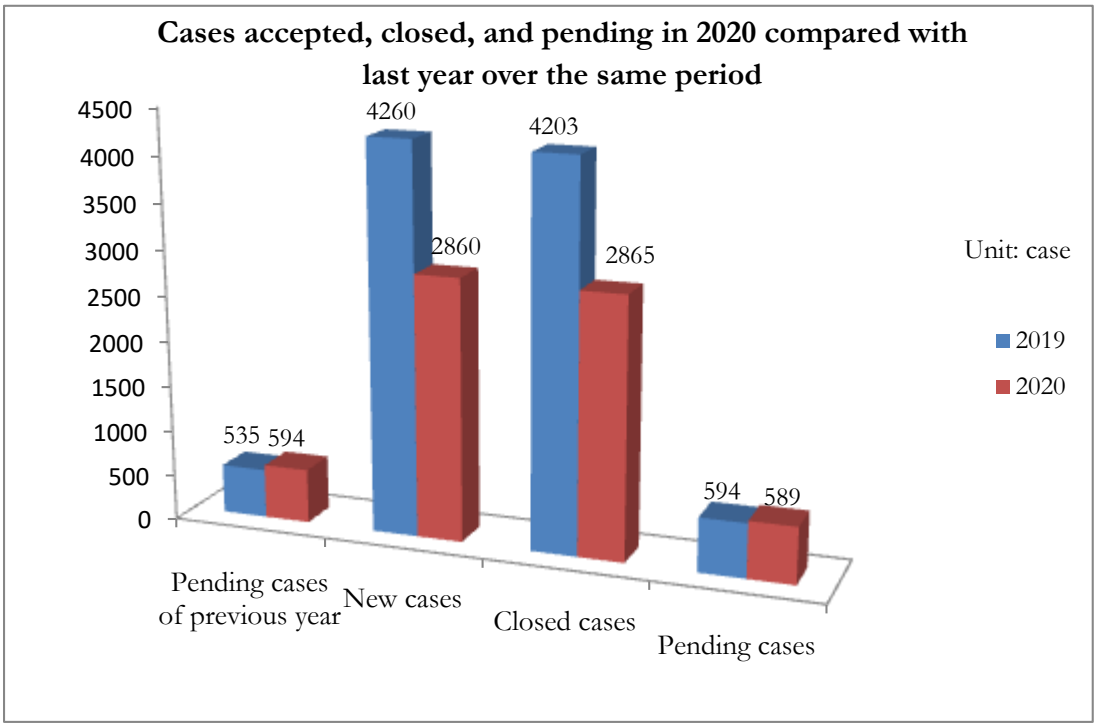
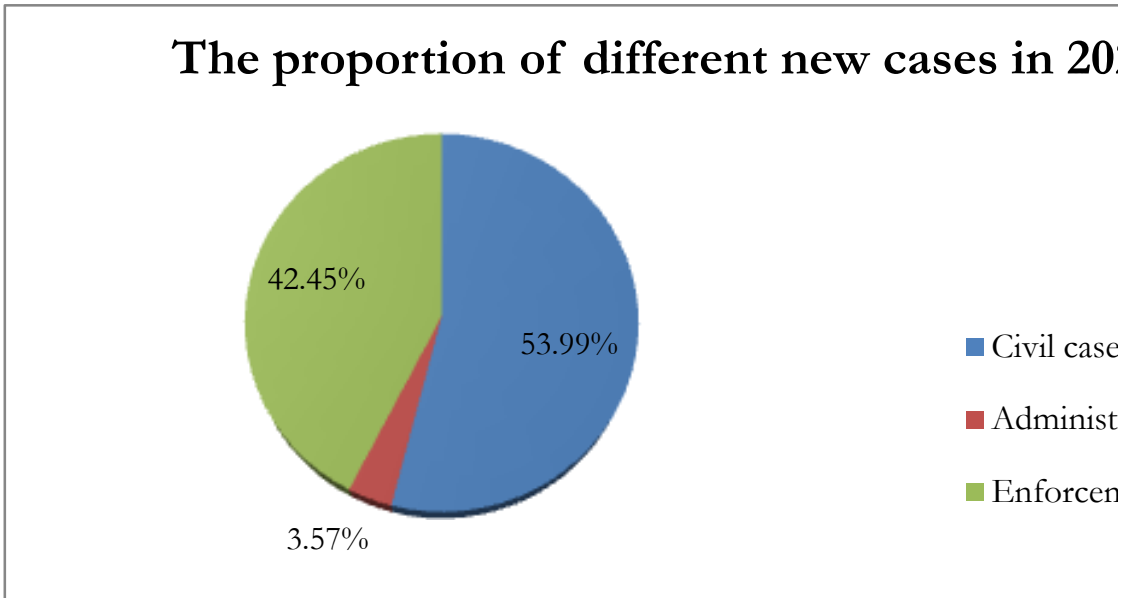
General Information of Maritime Trials

(I) Overall performance

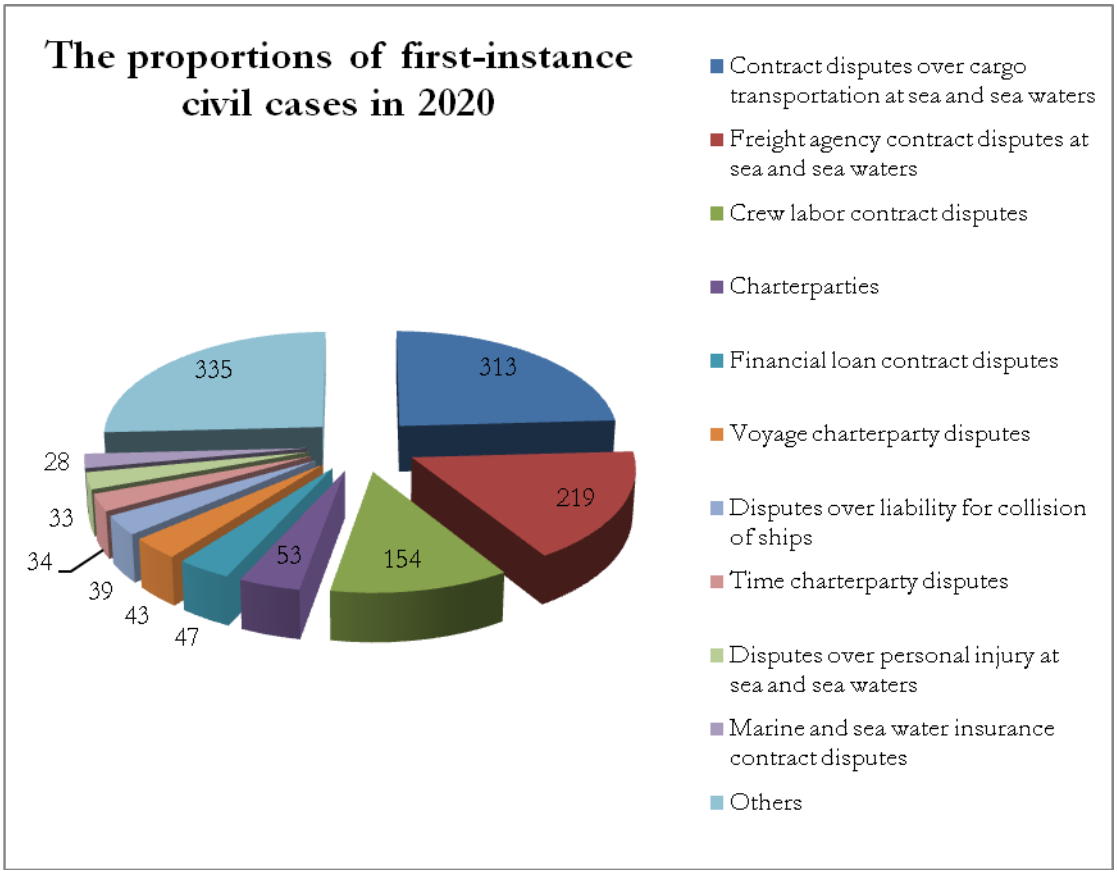
In 2020, Guangzhou Maritime Court accepted 3454 cases, including 2860 new cases and 594 pending cases of the previous year. 2865 cases were closed, indicating a closing rate of 82.95%. New cases involved a total value of 9.554 billion yuan, falling 1.76% from the previous year, and the value involved in the closed cases totaled 5.987 billion yuan, falling 46.17% from the year earlier. Throughout the year, the ratio of closed cases to accepted cases was 100.17%, up 1.51 percentage points.



Among the new cases accepted by the court, there were 1544 civil cases (non-litigation cases included), accounting for 53.99% of the new accepted cases, 102 administrative cases (non-litigation review cases included), accounting for 3.57%, and 1214 enforcement cases, accounting for 42.45%.



Of the 1298 new civil cases accepted in first instance, 93 causes of action were involved. The top three causes were disputes over contract of carriage of goods by sea or waters connected to sea, disputes over freight agency contract for carriage of goods by sea and sea-connected waters, and crew labor disputes.



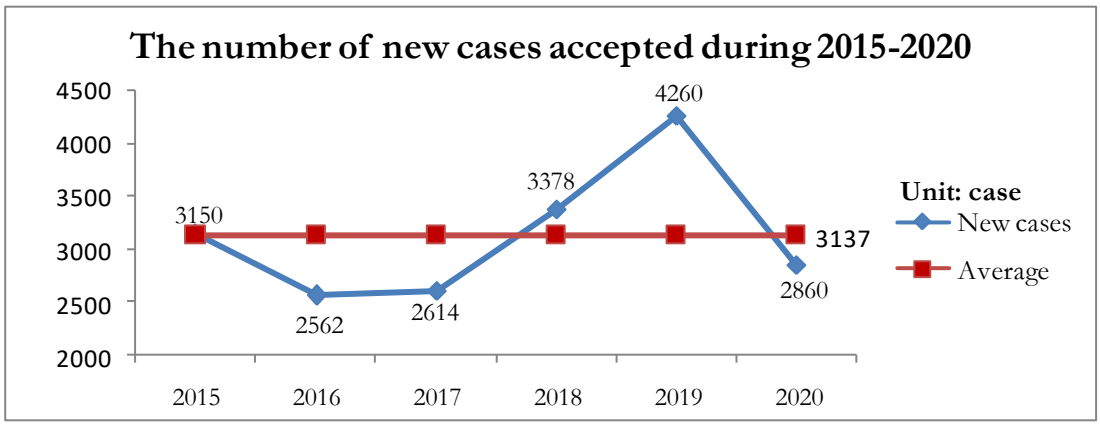
Among the cases closed by the court, there were 1366 litigation cases (inclusive of 1343 first-instance civil cases and 23 first-instance administrative cases), accounting for 47.68% of the total cases closed, 244 non-litigation cases, with a percentage of 8.52%, and 1255 enforcement cases, accounting for 43.80% of the total closed cases.

Among the litigation cases closed in first instance, there were 537 cases concluded by judgment, accounting for 39.31%, 381 concluded by mediation, accounting for 27.89%, 358 allowed to be withdrawn by a ruling or ruled to be withdrawn, taking up 26.20%, and 90 closed by other means, accounting for 6.59%.

In 2020, the court accepted 1214 new enforcement cases, while there were 144 pending cases of previous year. With 1255 cases effectively enforced, 92.42% of the enforcement cases were concluded by the court, up 2.54 percentage points compared with last year. Among the closed cases, 95.83% with available property for enforcement were enforced within the statutory period, 100% were successfully enforced or discontinued according to law, 100% of the cases with letters and visits involving enforcement were resolved or concluded, and online auction had covered all cases, with total enforced value amounting to 812.881 million yuan.

(II) Characteristics of the trial and enforcement work in 2020

1. Significant fall of new cases compared with last year. Since the implementation of the case filing registration system by the people's courts in 2015, the new cases accepted by this court in each year (except 2019) varied between 2500 and 3500. The number of new cases accepted in 2020 was also among the normal range at 2860, although falling significantly by 32.86% compared with a record high of 4260 cases accepted in 2019.



2. Large portion of cases involving foreign affairs and Hong Kong, Macao, Taiwan. In 2020, the court accepted 322 first-instance civil cases involving foreign affairs and Hong

Kong, Macao, Taiwan, which accounted for 24.81% of the new first-instance civil cases. Among them, there were 269 new first-instance civil cases involving foreign affairs, 64 involving Hong Kong, 2 involving Macao, and 13 involving Taiwan. There were 385 of first-instance civil cases involving foreign affairs and Hong Kong, Macao, Taiwan closed, accounting for 29.32% of all the civil cases concluded in first instance. By trying such cases according to law, Guangzhou Maritime Court was performing its responsibility and judicial capability to safeguard the advancement of the Belt and Road Initiative and the construction of the Greater Bay Area.

3. A record high of administrative litigation cases accepted in first instance. In 2020, the court accepted 89 administrative litigation cases in first instance, an all-time high surging 122.5% from the previous year, while it only accepted 12, 63, 10, 29 and 40 cases respectively during 2015-2019. The majority of these cases were caused by administrative acts, such as fishery administration and environmental protection administration. Facing the challenges in the trial of maritime administrative disputes brought by the increasing number of administrative cases in first instance, the court, by visiting and doing research in maritime administrative organs and allowing judges to observe and learn skills from adjudication of administrative cases, ensured that such cases were handled with fairness and justice.

4. A small number of cases involving the new coronavirus epidemic. Throughout the year, the court accepted only 17 litigation cases in relation to the impact of COVID-19 (inclusive of the liability or litigation acts related to the epidemic and the prevention and control of the epidemic), accounting for only 1.23% of the new cases accepted in first instance. The handling of these cases were progressing at a steady pace, with 8 cases having been concluded, accounting for 47.06% of all the epidemic-related cases in first instance. In the light of the strong recovery of the shipping industry in the second half of 2020, it is expected that the impact of COVID-19 on the shipping industry is limited and the number of maritime cases following such impact is also limited.

5. Initial results achieved in diversified dispute resolution. In 2020, the court accepted 20 new mediation cases applying for judicial confirmation, surging 566.67% compared with last year, an evidence of the efforts of Guangzhou Maritime Court in the launch and implementation of related measures under the campaign of building the two "one-stop services" litigation service system. By collaborating with maritime administrative organs, industry associations, bar associations, arbitration bodies, crew's trade unions, conducting court hearings and publicity of law in communities, and establishing diversified dispute resolution channels online and offline, the court aimed at providing more comprehensive

and high-quality judicial services to the people.

6. The support of smart court in trial. Throughout the year, the court conducted 211 hearings on the internet. Nearly all the cases handled by the head office and the detached tribunals of the court could be handled by internet court. The court also witnessed two authorization cases involving parties form Hong Kong and Macao respectively by means of the cross-border authorization platform, and it also succeeded in the delivery of an auctioned vessel outside the province through the enforcement command center.

7. Satisfactory results achieved by the multiple measures in advancing the campaign of solving the difficulties in enforcement. In the year, the court initiated and developed new enforcement methods, such as launching the special enforcement campaigns of "Nanyue Enforcement Operation 2020" and "Exercising enforcement function to ensure stability on six key fronts and maintain security in six key areas". In March, the court held China's first live streaming promotion of judicial auctions, which was reprinted by the official Tik Tok and WeChat accounts of the High People's Court of Guangdong Province and the Supreme People's Court. In July, the court sent the first warning notice for enforcement punishment in the province. In November on the occasion of the double 11 shopping spree, the court introduced its online judicial auctions to netizens through live streaming, transferred a case that was contemplated to be discontinued for bankruptcy examination, and confiscated the deposits of two buyers who repudiated bids and ordered them to pay balance of the transaction prices of the judicial auctions. Throughout the year, the court successfully enforced 117 cases involved the people's livelihood, such as crew service contract disputes, and completed the enforcement of the existing and new wage arrears cases, with 7.745 million yuan enforced.

8. Successful practice to deliver quality cases. The case *Shenzhen Hengtonghai Shipping Co., Ltd. v. Ji'an Hengkang Shipping Co., Ltd. on dispute over voyage charterparty* was listed by the Supreme People's Court in the Typical Maritime Cases of China 2019; *Xiamen Mingsui Grains & Oils Co., Ltd v. Atlantic Mexico Pte. Ltd. on dispute over contract of carriage of goods by sea*" and "*Taiwan Fire & Marine Insurance Co., Ltd v. All Oceans Transportation Inc. on dispute over liability for collision of ships* were awarded second prize and recognition prize for the 2020 excellent cases of the people's courts in China. The case *Application of Farenco Shipping Pte. Ltd. for enforcement of arbitration award made in Hong Kong* was listed as case 4 of the *Supplementary Arrangement for the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* released by the Supreme People's Court on 26 November 2020.

I. Participating in Maritime Litigation According to Law

—Analysis and suggestions concerning procedural issues in maritime litigation

(I) Appropriateness of insurer as a subject in administrative litigation

In August 2019, A Vessel sank in the waters 3.4 nautical miles to the south of Dawoshan of Hengqin Island. The department of the maritime safety administration in charge made the Investigation Conclusions on the maritime accident (hereinafter the "Investigation Conclusions"), which determined that the gale (Beaufort scale 8) was the major cause of the tragedy and the loose hatch cover and change of the ship's hull strength might also contribute to the accident. The insurer A, however, disagreed with the conclusion of the gale of Beaufort scale 8. In its opinion, there is no available wind data to prove the wind blowing on the accident site as strong as a gale of Beaufort scale 8.On the contrary, they believed that the change of hull strength(fracture) caused by allowing in a flood of water from the loose hatch cover, was the primary cause of the accident. Insurer A thus applied with the court to annul the Investigation Conclusions and draw a new conclusion. The first-instance court rejected the case on the ground that insurer A was not an appropriate subject to initiate an administrative lawsuit in respect of the Investigation Conclusions. The insurer filed an appeal, which was dismissed by the second-instance court who maintained the decision of first instance.

According to the effective decision of the court, pursuant to paragraph 1 of Article 25 of the *Administrative Procedure Law of the People's Republic of China*, "The persons subject to an administrative act and other citizens, legal persons or other organizations having interests in the administrative act are entitled to bring a lawsuit". Insurer A was not the administrative conterpart to the Investigation Conclusions involved. There was no interests between the insurer and the Investigation Conclusions in administrative law, because the latter didn't set any rights and obligations for the former directly. Although the Investigation Conclusions might be used as an evidence in the litigation of the maritime accident dispute that followed and might have some impact on the insured and thus on the insurer, it did not directly impair the insurer's legitimate rights and interests. So, the insurer could not act in the capacity of claimant in this case based on the insurance contract relationship with the insured. The insurer could seek civil remedies to protect its interests under the insurance contract.

In the *Reply to the Consultation Letter of the Maritime Safety Administration of the Ministry of Transport on the Actionability of Maritime Investigation Conclusions* on 20 May 2019, the Fourth Civil Division of the Supreme People's Court made it clear: "Currently, traffic accident

liability decisions in China not only find the facts, but also determine the liabilities of the parties. They therefore actually affect the rights and obligations of the private parties and are used as the evidence in civil cases involving traffic accidents. Such decisions could not be an excuse to invalidate the right of the private parties to bring an administrative lawsuit to the court.…There is no legal basis to exclude such decisions on the liability of maritime accidents from the scope of actionable administrative cases." Later on, several other administrative lawsuits were brought to our court in respect of decisions on the liability of maritime accidents.

We suggest that the parties involved in this new type of administrative lawsuits should properly and timely exercise the right to sue pursuant to the relevant provisions of the administrative procedure law, to protect their legitimate rights and interests, and that maritime administrative organs should perform governance strictly following the law to ensure that the administrative procedures are lawful and the related persons are treated with fairness. In the event of an administrative action, the maritime administrative organs should prepare evidential materials carefully and respond to the action actively, to ensure the smooth advancement of the law enforcement.

(II) Jurisdiction of crew labor (service) contract disputes

Feng belonged to the crew of a liquefied petroleum gas carrier. In May 2019, he was hit by cable by accident aboard the ship berthed at terminal. After discharged from hospital, Feng applied to the social security administration of Shenzhen for confirmation of employment injury, and the administration issued a decision to confirm the employment injury and also made a disability grading identification certificate. In October 2020, Feng brought a lawsuit against the ship management company headquartered in Tianjin and its branch in Shenzhen on dispute over employment injury compensation, whereby he requested the court to dissolve the labor contract relationship and demand the defendants to pay the disability subsidy, salary during injury, loss of working time, and the retrospective pay of social security contributions.

After examining the complaint materials, this court found that there was an agreement under the Crew Embarkation Agreement signed by Feng and the defendants, which read "Any dispute arising from this Agreement, if not settled by negotiation, shall be referred to Qingdao Maritime Court for judgment". Upon the court's explanation on the jurisdiction clause, the claimant lodged a lawsuit before Qingdao Maritime Court.

By hearing the case, Qingdao Maritime Court concluded that as the Crew Embarkation

Agreement established an employment agency relationship between the two parties, the jurisdiction clause point to Qingdao Maritime Court only applied when a dispute was arising from the agency contract. However, in this case, Feng brought a suit for employment injury compensation, which was based on a labor contract relationship. The case was indeed a labor dispute. Pursuant to Article 8 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law for the Handling of Labor Dispute Cases*, "Labor dispute cases shall be governed by the primary people's court at the place where the employer is located or where the labor contract is performed. Where the place of performance of the labor contract is not clear, the dispute shall be governed by the primary people's court at the place where the employer is located." In the case, since the employer was a Shenzhen company located within the jurisdiction of Guangzhou Maritime Court and the case was a crew labor contract dispute as defined in Article 24 of the *Provisions of the Supreme People's Court on the Scope of Cases to be Accepted by Maritime Courts*, which shall be accepted by maritime courts, Qingdao Maritime Court thus ruled to transfer the case to Guangzhou Maritime Court.

We held that as crew related disputes often involved maritime liens, pursuant to Article 8 of the Interpretation of *the Supreme People's Court on Several Issues Concerning the Application of the Special Maritime Procedure Law of the People's Republic of China*,"A maritime court shall accept lawsuits directly brought to it which are arising from disputes over crew service contracts." In the *Provisions on the Scope of Cases to be Accepted by Maritime Courts* released by the Supreme People's Court in 2016, a distinction is made between "crew labor contract" and "labor service contract" under Article 24, which reads: "Cases of disputes over the payment of remunerations and the compensation for personal injuries and death that are related to the embarkation of crew, services provided on board, and disembarkation and repatriation of crew under crew labor contract or labor service contract (including crew labor service dispatch agreement)". As there are special laws and procedures in China to deal with labor dispute cases, if a seafarer is involved, the two different disputes shall be settled by different resolution schemes. In recent years, there were cases that crew were making litigation requests unrelated to on-board services or maritime liens. Pursuant to Article 1 of *the Provisions on Some Issues Concerning the Trial of Cases Involving Crew-related Disputes implemented by the Supreme People's Court* on 29 September 2020, if a crew labor contract dispute does not involve embarkation of crew, services provided on-board, or disembarkation and repatriation of crew, i.e. maritime lien is not involved, the dispute shall be deemed as a general labor dispute, and the party shall be instructed to follow the preceding procedure as provided in *the Labor Dispute Mediation and Arbitration Law of the People's Republic of China* and refer the case to arbitration as will be done by other general labor disputes, and bring a lawsuit if not satisfied with the

arbitration. The disputes related to crew service contract or those disputes related to embarkation of crew, services provided on-board, and disembarkation and repatriation of crew shall still be directly governed by a competent maritime court pursuant to Article 2 of the judicial interpretation. Thus, the subject dispute was a labor dispute arising from personal injury during his service on board, which was within the scope of cases to be directly accepted by maritime courts. It is worth noting that crew' s litigation requests may cover matters with or without relation to maritime liens. To facilitate crew' s participation in ligation, it is not encouraged that maritime courts should require crew to seek justice by means of arbitration and litigation separately. Maritime courts should address these requests at the same time.

(III) Chinese seller's right to sue under contract of carriage of goods by sea on FOB term

The claimant Company A, operating in Foshan, lodged a suit before this court on dispute over contract of carriage of goods by sea, requesting that Company B (an international freight forwarder) and its Shenzhen branch and Company C (an international carrier) and its Zhongshan branch to jointly compensate Company A for the cargo loss at an amount of USD47,665 and othe relevant costs. In March 2020, Company A signed a purchase contract with Company D (a Hong Kong enterprise) whereby Company D agreed to buy coffee makers from Company A on FOB term, and Company D was responsible for the transportation of goods and would make cargo payment upon the receipt of a copy of bill of lading presented by Company A. After signing the contract, Company D assigned Company B to act as freight forwarder and Company C as actual carrier. In September, Company A delivered the goods to Company C at Shenzhen Port as per instructions of Company D and thus obtained the manifest and original bill of lading (noting Company A as shipper) for the shipment of goods. When the goods arrived at the destination port at Jakarta, Indonesia, Company D told Company B to arrange telex release of the goods. However, after Company A presented the copy bill of lading to Company D, Company D did not make cargo payment as agreed. Company A hence lodged the suit complaining that it was the actual shipper on the bill of lading and lawful holder of the original bill of lading, and it had established a contractual relationship for the carriage of goods by sea with the defendants Company B, Company C and their branches, but the defendants' release of cargo without the presentation of original bill of lading had made it lose the control of the cargo, due to which it was unable to collect cargo payment. The claimant therefore demanded compensation from the four defendants.

In the understanding of the court, when cargo is transported by sea on FOB term, buyer is responsible for chartering or booking space and paying freight, and seller is responsible for delivering the cargo to the vessel designated by buyer at the time or within the period agreed in contract, and shall notify buyer and provide general documents to prove that the cargo has been delivered on board. Buyer will receive the cargo upon receipt of the delivery documents and make payment. And the risks associated with the cargo will be transferred from seller to buyer when the cargo pass ship's rail. FOB term is widely used by Chinese traders for many years due to the convenient delivery under the term. In this case, the claimant was seller to the sales contract of goods, but before it obtained the bill of lading and presented the same to buyer, the carrier had released the cargo to buyer. The carrier violated the general procedures that required delivery of cargo against the presentation of transportation documents, due to which the seller failed to receive cargo payment. Although the claimant did conclude a carriage contract with the carrier, it was the party noted on the bill of lading issued by the carrier as shipper and had actually sent the cargo to carrier for transportation, and the claimant also provided evidence to prove that it had established cargo carriage relationship with the defendants. The lawsuit met the requirements set forth under Article 119 of the *Civil Procedure Law of the People's Republic of China* and was accepted by the court.

We suggest that Chinese sellers should pay special attention to the legal risks for trading on the FOB term: while foreign buyer is bound by a contractual relationship for carriage of goods by sea with carrier when booking shipping space, Chinese seller is usually not a party to the carriage contract. That means, the Chinese seller, if it encounters difficulties in negotiating transportation documents or shipping frauds when settling accounts with buyer after it has delivered the goods to carrier for shipment, it is possible that seller may be unable to collect cargo payment and recover the goods. If Chinese seller loses money or goods, it may initiate a lawsuit in the capacity of actual shipper or consignor pursuant to paragraph 3 of Article 42 of the *Maritime Law of the People's Republic of China* to recover its loss to the extent possible.

II. Maintaining the Order of Rule of Law of Maritime Administration According to Law

— Issues and suggestions concerning maritime administrative litigation cases

(I)Review of legality in disputes related to administrative agreements

In December 2012, Government A signed a Project Agreement with Company C for the restoration of marine ecology, infrastructure, and real estate development that would last for eight years with a total investment of more than ten billion yuan. In October 2013, the Oceanic and Fishery Bureau A signed a Project Franchise Agreement with Company C. In March 2017, Government A and the Oceanic and Fishery Bureau A issued a notice to dissolve the Project Agreement and the Project Franchise Agreement, claiming that Company C did not make investment and advance the project as agreed, and had failed the purposes of the agreements and constituted material breach. Thus, they decided to reclaim the right of investment, development and operation of the project. Company C hence brought a lawsuit and requested the court to order Government A to continue to perform the Project Agreement on the ground that the Project Agreement was valid and effective and qualified for further performance, and that there was no factual basis for Government A to take such action.

According to the effective judgment of the court, Company C violated the contract since it did not perform obligations within the given time as agreed after it signed the Project Agreement. Pursuant to the Project Agreement and paragraph 2 of Article 93 of the *Contract Law of the People's Republic of China*, as Company C failed to perform the primary obligations under the contract, Government A was entitled to terminate contract without the consent of Company C. However, the Project Franchise Agreement concluded by Company C and the Oceanic and Fishery Bureau A involved franchised operations, and it was indeed inappropriate for Government A to dissolve the administrative agreement before consulting and making an agreement with Company C, which was in violation of Article 38 of the *Measures for the Administration of Franchise of Infrastructure and Public Utilities*. Further, although the parties had negotiated with each other for several times in respect of the termination of contract before the termination of the Project Agreement, and Government A had given Company C opportunities to make statements and defense, Government A did not notify Company C in writing of the right to make statement or defense and the way to seek remedies, nor did it notify Company C of specific judicial remedies in the termination notice. Government A's act violated the statutory procedures. Considering that the administrative agreement concerned public benefits in ecological conservation, environmental protection and infrastructure, if the administrative act of

Government A, though in violation of law, was rescinded, it would cause serious damage to the national interest and the public benefits. Therefore, in accordance with paragraph 1(1) of Article 74 of the *Administrative Procedure Law of the People's Republic of Chin*a, the court adjudged that Government A was in violation of law by issuing the notice of dissolving the Project Agreement, but the act shall not be withdrawn.

This is a typical case involving administrative agreement. Administrative agreement is in nature a contract based on administrative mandate. When handling disputes arising from the conclusion, performance, amendment and termination of administrative agreements brought against an administrative organ, the people's court should, on one hand, examine the validity of the administrative act in such aspects as whether the administrative organ is acting in statutory capacities, whether it is abusing authorities, whether it applies laws and regulations correctly, whether it follows the statutory procedures, whether it is acting appropriately, and whether it performs statutory duties; on the other hand, in addition to the application of administrative laws and regulations, the people's court may also apply relevant civil laws and regulations and the agreements of the parties involved, provided that such application does not violate the mandatory provisions of the administrative law and the administrative procedure law.

We suggest that when concluding, performing, amending, and terminating administrative agreements, administrative organs should ensure that they act in a way compliant with the administrative laws and regulations, and they should also observe the relevant civil laws and regulations. Especially when an act is to be taken during the conclusion, performance, amendment, and termination of administrative agreement that may impair the rights and interests of the persons subject to such administrative act, the administrative organs shall give full opportunity so that the private parties are able to make statement or defense, and guide them to seek remedy according to law. Further, administrative agreement is made for administration or public service purpose which will affect people's immediate interests and the performance of which usually necessitates a great deal of administrative approvals, reviews, and planning, and a large volume of capital flow and deployment of labor force and supplies. We suggest that after signing an administrative agreement, both parties shall actively and fully fulfill the agreed rights and obligations during performance of the agreement, so as to avoid the waste of public resources and damage to the public interests.

(II) Res judicata of effective judgment

In October 2017, the Oceanic and Fishery Bureau A made a decision of administrative

penalty, which ascertained that Company B had built an impermeable pioneer road and a permeable construction platform without authorization, reclaiming sea areas of 2237 m^2 and 1335 m^2 respectively. The penalty decision ordered Company B to return the illegally occupied sea areas and restore them to the original state, and to pay a penalty in the sum of 2,321,390 yuan. In June 2018, the Oceanic and Fishery Bureau A applied with the court for enforcement of the administrative penalty decision, requesting the court: 1. to order Company B to return the illegally occupied sea areas and restore them to the original state; 2. to order Company B to pay the penalty in the amount of 2,321,390 yuan; and 3. to order Company B to bear the enforcement costs.

The court found that, upon the notice of the Oceanic and Fishery Bureau A, Company B removed the impermeable pioneer road and the permeable construction platform, but it did not pay the penalty of 2,321,390 yuan. In its effective judgment, the court held that the Oceanic and Fishery Bureau had conducted investigation, notification, and approval following the statutory procedures and the Decision of Administrative Penalty was valid as it was made by an appropriate administrative subject which acted in a way compliant with administrative procedures and regulations and was served on Company B according to law and became effective. Company B did not apply for administrative reconsideration or lodge a lawsuit before the people's court within the time prescribed by law, nor did it fulfill its obligations, and therefore the court ruled to enforce the penalty 2,321,390 yuan under the administrative penalty decision.

Upon the receipt of the administrative ruling of the court, Company B lodged a lawsuit before the court, requesting to withdraw the Decision of Administrative Penalty made by the Oceanic and Fishery Bureau A. Company B alleged that it only became aware that an administrative penalty decision had been made by the Oceanic and Fishery Bureau after it received the administrative ruling of the court. Company B held that the administrative penalty decision was not served according to law, the penalty was made against statutory procedures, the facts ascertained therein were wrong, and that there was no legal basis for the penalty amount. Although the court ruled to enforce the administrative penalty, Company B did not receive the notice of enforcement application from the Oceanic and Fishery Bureau A, and the court did not listen to the statements or defense of Company B during examination of the case.

Upon examination, the court held that, in accordance with paragraph 1 of Article 69 of the *Interpretation of the Supreme People's Court on Application of the Administrative Procedure Law of the People's Republic of China*, "A complaint which has been docketed shall be dismissed by the people's court under any of the following circumstances… (9) The subject matter

of the complaint is bound by an effective judgment or consent judgment". In this case, the court's administrative ruling in favor of enforcement had examined the validity of the administrative penalty decision in question, and the ruling had taken effect. Company B lodged a lawsuit against the administrative penalty decision, but the decision had been bound by the effective administrative ruling. If Company B insisted that the decision was in violation of the law and be withdrawn, it shall refer the dispute to the trial supervision procedures. The court thus dismissed the compliant of Company B according to law.

We suggest that when private parties believe that their legitimate rights and interests are impaired by administrative organs, they shall timely and actively seek remedies within the statutory period, for example, applying for administrative reconsideration or lodging an administrative lawsuit before the court. Private parties shall bear the adverse consequence for delay in exercise of such remedies. If private parties exercise remedies in a manner beyond the statutory scope, the people's court will dismiss such request according to law.

(III) Basis for administrative acts

In 2015, A applied with the Oceanic and Fishery Bureau B for diesel oil subsidy of the previous year for the 10 fishing boating operating under his name, and the Oceanic and Fishery Bureau B completed the subsidy approval and public disclosure. In 2016, A was sentenced to imprisonment and fine by a court located at B for assisting other fishing boats to gain diesel oil subsidy by cheating. In 2017, the Oceanic and Fishery Bureau B issued a notice based on the criminal judgment and decided not to allow subsidy to the 10 fishing boats operating in the name of A. A hence applied for administrative reconsideration to Government B, but Government B maintained the notice. He was not satisfied with the reply and brought a lawsuit before the court, requesting the court to rescind the notice and the administrative reconsideration decision and to order the Oceanic and Fishery Bureau and the government to amend their administrative acts. In the effective judgment, the court held that the evidence provided by the Oceanic and Fishery Bureau B was not sufficient to prove that when it issued the notice, A was acting in a way as prescribed in the circumstances under Article 20 of the *Provisional Measures for Administration of Special Funds to the Fishery Industry for Finished Oils Price Subsidy*. The court thus ruled to withdraw the notice of the Oceanic and Fishery Bureau B and the administrative reconsideration decision of Government B, and ordered the Oceanic and Fishery Bureau to amend its administrative act.

Public authorities shall follow the principle that administrative bodies should not take any action that is not mandated by law. Administrative bodies should always act on legal basis.

Article 20 of the *Provisional Measures for Administration of Special Funds to the Fishery Industry for Finished Oils Price Subsidy* delimits the circumstances where fishery subsidy shall not be allowed: "the subsidy fund shall be managed by a special account and is used for special purpose only, and no unit or individual is allowed to gain access to the subsidy fund by cheating (such as applying for subsidy by presenting a license but without a fishing boat at all, or presenting several licenses for only one fishing boat, or applying for subsidy for an illegal boat, or counterfeiting licenses), or give subsidy in a wider range of benefits, or occupy, withhold or misappropriate the subsidy fund or operating funds. In the event of any of such circumstances, financial authorities will recover the illegally occupied subsidy according to law, and the person in charge and other liable personnel shall undertake the legal liabilities according to law. For those who present false documents to gain subsidy by cheating, once found, they will be disqualified for fishery subsidy forever and will be disclosed nationwide." Although the court ascertained that A assisted others to cheat the authority for subsidy, the evidence presented by the Oceanic and Fishery Bureau B was not sufficient to prove that when it issued the notice the 10 fishing boats operating in the name of A were applying for subsidy in such a manner as "presenting a license but without a fishing boat at all, or presenting several licenses for only one fishing boat, or applying for subsidy for an illegal boat, or counterfeiting licenses". It was against the provision given above and there was no other legal basis for the Oceanic and Fishery Bureau B to disqualify A for the subsidy by referring to the criminal judgment. Thus, the court ruled to withdraw the administrative decision of the Oceanic and Fishery Bureau B and ordered it to amend its administrative act.

We suggest that administrative organs should learn more about the laws and regulations in relation to their functions and duties and apply the laws and regulations properly and improve their administration according to law. When taking an administrative act, they shall act strictly as mandated by law, interpret and apply the laws and regulations correctly, follow the statutory procedures, and protect the legitimate rights of the person subject to the administrative act.

III. Maintaining Legal the Order of Freight Forwarding Market According to Law

— Issues and suggestions concerning marine freight forwarding disputes

(I) Disposal of goods rejected by customs

Company A entrusted Company B to carry a shipment of polarizer from Pusan, South Korea to Shenzhen, China. The parties signed an agreement, whereby it was agreed that: "Company A promises to receive the containers no matter the container is rejected by the customs or is allowed for customs clearance. If the customs allows the importation of the container but Company A refuses to accept the container, Company B shall have the right to unpack the container and dispose of the goods, including, but not limited to, to sell, depreciate, auction off, mortgage or pawn the goods. Company B will withhold the proceeds from such disposal, and Company A shall bear the costs on the disposal of the goods. If the customs rejects the container but Company A refuses to take delivery of the container after Company B has returned the same to Hong Kong, Company B shall have the right to dispose of the goods in an appropriate manner , including, but not limited to, to abandon or dispose of the goods as waste or scrap, or to return the same to South Korea. And Company A shall bear the disposal costs incurred thereby." When the goods arrived at Shenzhen, Shenzhen Dapeng Customs rejected the importation of the goods, as it found that the goods were actually some composite materials made up of waste and scraps. So Company B notified Company A by sending letters to the address given under the agreement for three times by EMS, requiring Company A to confirm the contact details for the return. But the mails were rejected and Company A also refused to give information for the return. Company B had no choice but returned the goods to South Korea, but later Company A sued against Company B for disposal of goods without consent and demanded compensation from Company B. In its effective judgment, the court held that Company A, although well aware that EMS postmen had delivered mails to its address specified in the agreement, did not inquire about where the mails came from, nor did it notify Company B of its new address. Company A shall therefore undertake the unfavorable consequences for the rejection of mails. Company B was disposing of the goods according to the term of the agreement and shall not be deemed in breach of contract. The claims of Company A were untenable.

In this case, Company B had properly served notice by EMS for three times to Company A at the address specified in the agreement. Company A, although aware of such mails, did not receive the mails, which shall be deemed a rejection of the goods. Company B shall not be held at fault by disposing of the goods in an appropriate way as agreed in the

contract, and Company A shall bear the adverse consequences thereof.

We suggest that when facing cargo transportation difficulties, consignor and forwarder shall maintain good communication and notify the other party of any changes in its service address or contact details in time. Escaping the problems is not a good way to improve the situation. The parties should work together to solve problems. If consignor is out of contact, forwarder shall dispose of cargo appropriately following the laws , regulations and the contracts between them, and it should preserve evidence to prove its innocence and notify consignor of the situation once it gets in touch with the consignor.

(II) Sub-entrustment of freight forwarding contract

Company A and Company B signed a freight forwarding contract for export of goods by sea, whereby Company B agreed to arrange export transportation of the goods by sea. It was agreed that "in case of any change in the transportation conditions due to objective reasons or third party, Company B shall notify Company A in writing promptly and only ship the goods upon confirmation of Company A." After signing the contract, the legal representative of Company B, although without confirmation of Company A, entrusted Company C to arrange shipment for the goods. After the carriage service was performed, Company A paid the freight and related costs to Company B, and Company C issued invoice to Company B. Yet Company B only made partial payment to Company C. Now Company C, based on the freight forwarding contract with Company A, lodged a suit to demand Company A to pay the outstanding freight and related costs. According to the effective judgment of the court, although Company A and Company B did not make any agreement in respect of the sub-entrustment, Company C did not produce evidence to prove that Company A explicitly agreed that Company B might sub-entrust Company C to perform the contract. Thus, Company A and Company C did not establish contractual relationship under the freight forwarding contract. The court thus dismissed the litigation request of Company C.

Article 5 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Marine Freight Forwarding* provides that "Where there is no agreement in respect of sub-entrustment, if the freight forwarder or a third party alleges that the consignor has agreed on sub-entrustment of the marine freight forwarding operation on the ground that the consignor knows and does not object that the freight forwarder has sub-entrusted all or part of the marine freight forwarding operation to the third party, the people's court shall not uphold such a claim, unless the consignor acts in a way to make it clear that it accepts the sub-entrustment arrangement." In this case, as Company A and

Company B did not agree on the sub-entrustment arrangement, namely, Company C was sub-entrusted by Company B without the consent of Company A, and there was no evidence proving that Company A had given explicit consent on the sub-entrustment, so Company B shall assume the liability thereof.

We suggest that freight forwarder shall fulfill obligations to the benefit of consignor and arrange sub-entrustment according to agreement of the parties (if any), or (if no such agreement) do so after obtaining the consignor's explicit consent. If sub-entrustment is in urgent need to protect the interests of the consignor, the forwarder should preserve relevant evidence and notify the consignor of the situation in a timely manner.

(III) Representative of a branch company pending scheduled deregistration

A was the person in charge registered by the Guangzhou Branch of Company B at the industrial and commercial bureau. During the period when the Guangzhou Branch of Company B was waiting for deregistration as scheduled, A entrusted Company C to provide freight forwarding service in the name of the Branch. A showed his title when communicating with Company C. During the freight forwarding operation, A continued to assign Company B's agent in America as consignee and notify party on bill of lading, and the personnel of Company B was responsible for contacting the American agent for the release of cargo. Company B knew that A continued to trade in its name although A did not possess the company seal and license at all, but Company B did nothing to stop him. Now Company C brought a lawsuit against Company B and demanded the latter to pay the outstanding freight and costs payable by its Guangzhou Branch. According to the effective judgment of the court, industrial and commercial registration was a kind of public notice, and it was natural that Company C would act by relying on the capacity of A, assuming that A was acting on behalf of the Guangzhou Branch of Company B. As A was entrusting Company C for the carriage in the name of the Guangzhou Branch of Company B and did not tell Company C about the deregistration that was to be taken by the Branch, Company B could not deny the validity of A to act as representative of the Guangzhou Branch on the ground that it had suspended the capacity of A. The court therefore upheld the litigation requests of Company C.

According to Article 14 of the *Company Law of the People's Republic of China*, "A company may set up branches. To set up a branch, the company shall file a registration application with the company registration authority and shall obtain a business license. If a branch is not a legal person, its civil liabilities shall be borne by its parent company." In this case, although Company B had decided to cease the operation of its Guangzhou Branch, it did

not complete deregistration at the industrial and commercial bureau in a timely manner or give notice to announce deregistration of its Guangzhou branch and the suspension of the company seal of the branch company. Now A was entrusting Company C to carry the goods, and the agent of Company B in America released the cargo under the bill of lading. As the registration at the industrial and commercial bureau remained unchanged and Company C had exercised the duty of caution, the freight forwarding business operating between A in the name of the Guangzhou Branch of Company B and Company C, shall be deemed an operation under a freight forwarding contract between the Guangzhou Branch of Company B and Company C. The freight and costs owed by the Guangzhou Branch of Company B to Company C shall be borne by Company B as it is provided by law that if a branch is not a legal person, its civil liabilities shall be borne by its parent company.

We suggest that if parent company decides to cease the operation of a branch, it should timely retrieve the company seal and licenses, complete deregistration formalities at the industrial and commercial bureau, and make public announcement. When trading with a branch, a commercial entity should make a check carefully to see whether the person in charge of the branch has the power to conduct the business and whether the branch has ceased operation or is deregistered. It would be better to contact the parent company to check the information of the person in charge of the branch and the operation of the branch, to avoid invalid representation.

IV. Maintaining the Order of Rule of Law of Chartering Market According to Law

— Issues and suggestions concerning time charterparty disputes

(I) General rules on ascertaining the legal effect of ship's stamp in the conclusion of contract

In a time charterparty dispute, A and B (as Party A) signed a charterparty with Vessel E (as Party B), whereby Party B agreed to charter Vessel E to Party A. Party B affixed the stamp of Vessel E on the contract, and D signed the contract as the legal representative of Party B. Company C was the registered owner and operator of Vessel E, and D was the actual owner and operator of Vessel E. A and B paid hire to D, but Vessel E was resumed by Company C before maturity. A and B therefore requested the court to order Company C to compensate the hire loss. The court held that A and B had no reason to believe that D was acting on behalf of Company C to sign the charterparty, and that the ship stamp of Vessel E affixed upon the contract did not surely have the legal effect of representing the act of owner. Therefore, A and B did not establish a time charterparty relationship with Company C, and the litigation requests of A and B shall be dismissed.

Pursuant to paragraph 1 of Article 64 of the *Civil Procedure Law of the People's Republic of China* and Article 90 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, A and B shall bear the burden of proof to prove that they had established a time charterparty relationship with Company C. But A and B mainly relied on the fact that the charterparty bore the stamp of Vessel E. In fact, the ship's stamp was not the official seal of Company C. A ship's stamp is usually carried with the ship and used by the actual owner in daily operation and management of the ship. When it is used in the conclusion of contract with other parties, generally such contract is not surely binding on the company that operates the vessel. Namely, such contract has not legal effect on the registered owner or operator of the vessel. Therefore, it was groundless for A and B to hold Company C as opposite party to the charterparty.

We suggest that when establishing a time charterparty relationship, especially concluding a charterparty, the parties should notice the different functions of a ship's stamp and a stamp under the legal person matrix. A ship's stamp is no more than an in-house seal and is not used for external business. In general, a contract bearing a ship's stamp has no apparent agency effect on the owner and operator of the ship.

(II)Exception on ascertaining the legal effect of ship's stamp in the conclusion of

contract

In a time charterparty dispute, Vessel C (as owner) signed a charterparty with A and B (as charterer). The charterparty bore the stamp of Vessel C at the bottom and the signature of E as representative. Later, the parties signed a supplementary agreement bearing the stamp of Vessel C. The stamp of Vessel C placed on the charterparty and supplementary agreement indicated the name of Company D. However, Vessel C was arrested by the court W due to Company D's failure in performing the obligations determined by the effective legal instrument in a another case. A and B could not employ the vessel as a result. A and B applied with this court to order the termination of the charterparty with Company D and demanded compensation. The court held that, A and B said they were signing the charterparty and supplementary agreement with E (alleged owner of Vessel C) and F (alleged operator of the vessel), F placed ship's stamp, and that A and B obtained the documents of Vessel C when concluding the contracts and knew that Company D was the registered owner and operator of the vessel. Before paying deposit, A and B also contacted Company D for confirmation, and the staff of Company D did not deny or confirm the identity of E. After the subject dispute arose, Company D also did not give reasonable explanation as regards whether Vessel C was under the actual control of E during the dispute. Based on above descriptions, A and B had exercised the duty of care when concluding the charterparty and supplementary agreement, and they had reason to believe that E and F had the authorization to rent out Vessel C on behalf of Company D. Pursuant to Article 172 of the *General Provisions of the Civil Law of the People's Republic of China*, "Where an actor still performs an act of agency without a power of agency, beyond his or her power of attorney, or after his or her power of attorney terminates, the act shall be valid if the opposite party has reason to believe that the actor has the power of attorney." The charterparty and supplementary agreement concluded by E and F on behalf of Company D shall be binding on Company D. As Company D breached the contract, in accordance with paragraph 4 of Article 94 of the *Contract Law of the People's Republic of China*, the requests of A and B to dissolve the charterparty was in compliance with the law and shall be supported by the court.

We suggest that charterer should exercise the duty of care before signing a charterparty and examine all the relevant certificates and documents of the vessel it indents to charter. When the charterparty bears the vessel's stamp by the owner, charterer should carefully examine whether the actor or personnel onboard has the power of attorney at the time the contract is concluded, and should preserve evidence, to protect its interests to the extent possible, and to avoid the failure of recovery of loss for breach of contract on the part of the opponent party as the charterparty bearing ship's stamp may not be binding

on the shipowner or operator.

(III) Identification of unnamed agency under charterparty

In a time charterparty dispute, B was the registered owner of Vessel D. B issued a power of attorney to engage C and E to provide intermediary services in the introduction and negotiation of sand-mining service contract. B also concluded sand-mining contract with C and E in respect of dredging and mining operations at a terminal by Vessel D. C, as lessor, signed a ship employment contract with Company A, whereby C agreed to deliver the vessel at the designated location for operation. Later, C (as lessor) signed a guarantee contract with Company A in respect of the chartering, whereby C agreed to return the deposit and pay liquidated damages to Company A if it failed to dispatch Vessel D at the designated terminal within the given time. However, later B failed to send Vessel D to the designated working area within the given time, Company A brought a lawsuit before the court, requesting the court to order B to return the guaranty money to Company A and repay the deposit in double. The court held that, although it had presented a power of attorney to Company A, C was in fact concluding the ship employment contract in its own name, which did not constitute unnamed agency. Thus, Company A and B did not establish a relationship under the ship employment contract. The court thus dismissed the litigation requests of Company A.

Pursuant to Article 402 of the *Contract Law of the People's Republic of China*, "Where the agent, acting within the scope of authority granted by the principal, enters into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party." Unnamed agency is conditional on the fact that principal and agent have established an agency relationship. B only issued the power of attorney to engage C and E to provide intermediary service, rather than to entrust C to sign contract on its behalf. B had signed the sand-mining contract with C and E in respect of Vessel D the previous day before the ship employment contract was signed. B was relying on the sand-mining contract in respect of receiving the guaranty money from C, instructing C for site survey, or inquiring about the progress of sand-mining approvals, and these activities was not ratification or implied consent under the ship employment contract signed by C on behalf of B as alleged. Although B indeed entrusted C and E to negotiate and sign a sand-mining service contract, there was no evidence proving that B and C agreed that C might act independently or that C directly disclosed the conclusion of contract to B when signing the ship employment contract with Company A to obtain

B's consent in signing such contract. On the contrary, there was evidence that C and E had signed a separate sand-mining contract with B to pocket the difference. C was not acting for the purpose of fulfilling obligations under an agency contract, in which by receiving agency fees, it shall follow the principal's instructions, report to the principal, and to transfer the properties received by operation of the entrustment to the principal. Hence, B and C did not establish a relationship bound by agency contract. C's conclusion of the ship employment contract in its own name did not constitute unnamed agency.

Identifying the subject of contract correctly is important to the handling of ship leasing contract dispute properly. Unnamed agency is a common practice in the legal activities of the ship leasing market. It should be noticed that unnamed agency is different from both named agency and unauthorized agency. It has important conditions and characteristics: 1. Principal has granted authorization to agent, or agent is authorized by operation of law; 2. Agent is exercising civil juristic act on behalf of principal, and such act is authorized by principal or mandated by law; 3. Agent performs the civil juristic acts in its own name against the opposite party; 4. Results achieved by such act shall be transferred to principal according to law. It follows that unnamed agency differs from unauthorized agency in that agent has the authorization and performs the civil juristic acts within the limit of authority. To identify whether a subject act under unnamed agency to sign a ship leasing contract, first of all, the court should focus on the core issue, i.e. whether the agent has authorization. Further, the court should strictly follow the provisions of Article 402 and Article 403 of the *Contract Law of the People's Republic of China* to examine the legal effect according to the regulations on legal elements, to strike a balance of interests among principal, agent and the opposite party.

V. Protecting People's Rights and Interests in Sea-related Disputes According to Law

— Issues and suggestions concerning disputes over personal injury at sea

(I) Identification of the legal relationship under seafarers' service contracts

In a dispute arising out of a seafarer's contract for services, A was employed by G and worked on a ship but no written contract for services was concluded. Around 0705hrs on the morning of 7 May 2017, A had a headache and went into a coma. The ship clerk contacted the emergency services in Hong Kong and transported A to Tuen Mun Hospital. As shown on the hospital records dated 16 May, A had acute intracranial bleeding on 7 May, and brain CT scans showed excessive bleeding in left temporal lobe and extensive damage to both hemispheres of the brain; he was minimally conscious, had stable vital signs, and was unable to speak. On 1 November A's wife engaged an assessment agency to assess the extent of A's injury and disability, subsequent treatment cost and related matters. The assessment opinions described A as in a persistent vegetative state and rated his disability at Grade I. A requested the court to order Company F, registered owner of the ship, and G, the labour hire agency, for joint and several liability for medical cost, subsequent treatment cost, and disability compensation in the sum of about 1 million yuan. The first-instance court passed a judgment ordering Company F and G to compensate A in a sum of about 900,000 yuan for medical cost, subsequent treatment cost and disability compensation. During the second instance, A's wife B, daughter C, mother D, and father E made a statement to the court of second instance that A had passed away on 5 June 2018 and as his legal inheritors they duly applied to participate in the proceedings. The court of second instance affirmed the identification of the legal relationship and apportionment of liability but made amendments to the claimants and the contents of the damages. Its judgment ordered F and G to compensate B, C, D and E for medical cost, subsequent treatment cost, subsequent care cost, death compensation, and funeral expenses in a sum of about 900,000 yuan.

As stated in the court's effective judgment, although Company F and G argued that the dispute should be under a seafarer employment agreement and liability should be determined through a work-related injury evaluation, ascertained facts showed it was expressly agreed in the ship management agreement between Company F and G that the latter was in charge of actually operating the ship and recruiting the crew. The parties concerned did not deny that A was engaged by G to work on the ship. As G was not an employer as described in the *Labour Law of the People's Republic of China*, the relationship

between A and G should be a relationship under a seafarer's contract for services rather than that under an employment contract. Thus the Labour Law and related legal provisions did not apply to the case. Instead, the case should be tried by applying the *Tort Law of the People's Republic of China* and the *Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law in Trying Cases regarding Compensation for Personal Injuries*.

According to Article 1 of the *Notice of the Ministry of Labour and Social Security on Identification of Labour Relationship* (LSBF [2005] No.12), "Where no written employment agreement is concluded between an employer and a worker, an employment relationship exists when the following conditions are met. (I) The employer and worker both qualify as such under applicable laws and regulations…" In this case, G was not an employer and was not qualified as an employer, thus the Labour Law and related legal provisions did not apply to the dispute over compensation for personal injury arising out of the labour hire arrangements. It should be noted that the seafarer had not entered into a written contract for services with either of the other parties before he started to perform services. In some sense A's action had posed great risks to the exercise of his rights. This was due to his lack of legal literacy, but it also had a lot to do with the vulnerable position that seafarers found themselves in as labour providers. China is transitioning from a "large shipping nation" to a "shipping power". During this transition, seafarers as important participants should enjoy full protection of their lawful rights. In order to fully protect seafarers' rights, it is advisable to set up seafarers' unions, and maritime administration should tighten regulation on seafarer service agencies, shipping companies and ship owners.

(II) Ascertainment of liability between employers and ship operators

In the above case, as shown by the records of Tuen Mun Hospital, Hong Kong and the expert assessment opinions issued by the assessment agency, A was in a persistent vegetative state due to brain arteriovenous malformation and intracranial hematoma. However, there was no evidence that A's unique physiology was the only cause of his illness. The particularity of working on the ship, transition between day and night shifts, workplace noise in the engine rooms, and chronic fatigue from work could all have played a part in inducing the attack of illness suffered by A who had a unique physiology. Company F and G argued that the other 7 crew members had been working in the same environment and condition but had not fallen ill. However, they failed to produce sufficient evidence to rule out the work environment and condition on the ship as a cause of A's illness, and therefore should bear the adverse consequence of such failure.

Summing up all facts, the court of first instance held at its discretion that A should assume 50% liability due to his unique physiology while Company F and G should assume the other 50% liability for A's illness which put him in a persistent vegetative state.

Article 35 of the Tort Law provides that "in a client/contractor relationship, the client shall be liable for any damage to a third party caused by the contractor in performing the agreed services. If damage is sustained by the contractor himself in performing the services, liability shall be shared by the parties in proportion to their respective levels of fault." This is the first time China has referred to terms such as "contractor services (laowu)" and "client/contractor relationship (laowu guanxi)" in legislation. In Chinese legislation and judicial practice, they are associated with "employment" and "employment relationship". In the relationship under a seafarer's contract for services, the client is obliged to protect the seafarer's life, health and personal safety for the period in which he is performing services on the ship. In other words, if the contractor suffers personal injury in performing the agreed services, the client shall be liable for compensation. In this case, Company F was not only the registered owner of the ship but also the ship operator. It was responsible for ensuring the safe navigation of the ship and providing a good working environment for the crew. The existence of a ship management agreement did not relieve it of its obligation to manage the crew. Under the principle of fairness, both the client and the ship operator should be liable for personal injury suffered by a seafarer.

The shipping industry plays a key role in the growth of the national economy, whereas the occupation of seafarers involves great risks and a fair amount of hard work. Some seafarers start their career young and after years of unbalanced diet on ships, chronic homesickness, and fatigue from work combined with aging, they suffer high blood pressure, heart disease or other illnesses. If no compensation is made to a seafarer who falls ill on a ship and subsequently dies, it would be a total disregard for the seafarer's long-time devotion and would be against morals and humanity. It would also put the seafarer's family into financial difficulty. Moreover, insufficient protection of seafarers would drive young people away from the occupation, which would in turn have adverse effect on the growth of the shipping industry. For the sake of people's livelihood and humanity, we advise ship owners to compensate seafarers who fall ill on ships and pass away, and ship owners' liability insurers should settle the ship owners' claims. Insurers who thus incur increased insurance cost may charge higher premiums to protect their interests.

(III) Ascertainment of liability between concurrent tortfeasors without a common design

In a dispute over liability for personal injury at sea and in waters leading to the seas, the yacht "ZI YOU ZHI XING" navigated by A who was engaged by B collided with an unnamed fishing boat navigated by C at 2000hrs on 3 June 2017 in the northeast waters of Sanmen Island, Huizhou. The accident caused injuries to different extents to navigator C and 4 passengers, including D, on the fishing boat. D subsequently died despite medical efforts. The Maritime Safety Administration of Huizhou Port issued an accident liability report, apportioning the liability equally between the vessels on the grounds of their equal level of fault. D had been married to E and they had a son, F, who was born on 19 February 2015. And G was D's mother. E, F and G requested the court to order A, B and C to be jointly and severally liable for death compensation, medical cost, funeral expenses, living expenses of the dependent, and emotional distress damages in the sum of about 2 million yuan. The court of first instance passed a judgment ordering B and C to jointly and severally compensate E, F and G a sum of about 1.8 million yuan. The court of second instance affirmed the determination of amounts of expenses and damages, but made amendments to the modes of liability assumed by B and C to the damages. Instead, B and C were ordered to respectively pay about 900,000 yuan as compensation.

The effective judgment rendered by the court held that B and C were both at fault for the collision between the yacht and the boat but the two parties acted without a common design. Rather, they concurrently committed related wrongs. The joint and several liability prescribed in Article 8 of the Tort Law did not apply to the case. Moreover, existing evidence was insufficient to prove that either of the parties' respective wrongful acts would have sufficed to cause the whole injury. Therefore, Article 12 of the Tort Law should apply, which provides that "when two or more persons respectively commit tortious acts leading to the same injury, the tortfeasors shall be held proportionately liable if it is possible to determine their respective levels of fault, or equally liable if it is impossible to make such determination." Accordingly, B and C should be liable for the accident in proportion to their respective levels of fault. The accident liability report issued by the Maritime Safety Administration of Huizhou Port determined that both vessels had committed equal level of fault in the accident and should be held equally liable. B and C had no objection to the above decision. Accordingly, B and C should respectively assume 50% liability for the compensation.

When two or more persons respectively commit different acts without a common design

or negligence leading to the same injury, they are concurrent tortfeasors without a common design, and Article 12 of the Tort Law should apply to the determination of liability based on their respective levels of fault. Each tortfeasor commits an independent wrongful action and should only be liable for the injury caused by such action. Where each tortfeasor's wrongful action is sufficient to cause the whole injury, the tortfeasors shall assume joint and several liabilities; the tortfeasors shall be held proportionately liable if it is possible to determine their respective levels of fault, or equally liable if it is impossible to make such determination. To some extent, the Tort Law shows the legislation trend towards stricter criteria for and limitations on the application of joint and several liabilities. For instance, it holds concurrent tortfeasors without a common design proportionately liable for their concurrent wrongful actions. This restricts excessive application of joint and several liability and conflicts with the generally accepted practice in judicial trials that are familiar to most people. For victims and their relatives seeking dispute resolution through legal proceedings in similar circumstances, it is advisable to bring actions after distinguishing in good faith and based on facts the modes of liability attribution for different tortious acts. This will help to avoid inefficient trials and facilitate the fair and proper satisfaction of the victims' claims.

VI. Maintaining the Order of Rule of Law of Seafarer Labour Market According to Law

— Issues and suggestions concerning seafarer service contract disputes

(I) Ascertainment of seafarer's wages when no written labor contract is signed

On 5 November 2018, Seafarer C served as chief officer on Ship B operated by Company A. No written employment agreement had been signed between Company A and Seafarer C for the period in which Seafarer C is performing services on the ship B. Company A had paid Seafarer C 6 months' wages at a rate of 20,000 yuan per month. As Company A failed to pay the full remuneration on time, Seafarer C resigned and disembarked from the ship on 4 September 2019. The employment relationship between Seafarer C and Company A was affirmed in the court effective judgement considering that Seafarer C had been serving as chief officer on Ship B for nearly one year even though no written employment agreement had been entered into between Seafarer C and Company A. In accordance with applicable provisions of the Labour Contract Law, the court supported Seafarer C's claims for the unpaid wages of 80,000 yuan plus interest thereon, a double time pay of 180,000 yuan due to no written employment agreement being concluded, and the severance pay of 20,000 yuan.

Due to the particularity of seafarer jobs, a number of seafarers do not enter into a written employment agreement with their employers before starting their services. The determination of the existence of an employment relationship does not rely on an employment agreement. However, when a dispute arises over unpaid wages without written employment agreement, the seafarer has to prove the fact that he has been performing services on the ship and with whom he has established an employment relationship. In compliance with Article 38.1.2, Article 46.1, Article 47.1 and Article 82.1 of the *Labour Contract Law of the People's Republic of China*, and Article 6 of the *Regulation on the Implementation of the Labour Contract Law of the People's Republic of China,* the employer may be required to pay the arrears of wages, an amount to make up for the double time pay due to no written employment agreement, plus severance pay for the arrears of wages once such facts are proved. The double time pay shall be calculated from the first day of the second month following the commencement of services to the day preceding the date on which a written employment agreement is concluded, but no later than the day preceding the last day of the year following the commencement of services. The severance shall be paid based on the duration of the seafarer's service to the employer, at a rate of one month's wage for each year; any period not less than six months but shorter

than one year shall be counted as one year, and any period less than six months shall be counted as six months.

To protect seafarers' and employers' lawful rights and interests, it is advisable for employers to enter into written employment agreements with seafarers to set out rights and duties before they start performing services. If a seafarer has to board a ship in a city or port outside the domicile of the employer under emergency circumstances, the employer may enter into a written employment agreement with the seafarer through email, facsimile, instant messaging means or otherwise delegate to the officer who is in charge of shipping matters. If the employer is negligent in the above responsibilities, the seafarer may actively request the employer to fulfill his/her responsibilities.

(II) Identification of false records in seafarer's identity documents

In a dispute arising out of a seafarer's employment agreement, Seafarer C brought an action against Company A claiming payment of wage arrears based on the records in his seafarer's identity document. The records showed that Seafarer C had served as chief officer from 2 June to 30 September 2017 and as captain from 1 October 2017 to 20 September 2018 and from 1 October 2018 to 18 June 2020 on Ship B owned by Company A. Seafarer C thus claimed against Company A for unpaid wages earned after 1 October 2018. Company A argued that Seafarer C had not performed services on Ship B after 1 October 2018; the officer who held the position of business representative and was in charge of the safekeeping of Ship B's stamp and seafarer service stamp, had filled in and stamped Seafarer C's identity document without permission to help Seafarer C polish up his resume. When questioned by the court about the details of his service on the ship, Seafarer C voluntarily admitted that he had made a false statement and withdrew his claims in court. Seafarer C was thus admonished by the court and wrote a letter of apology.

A seafarer's identity document is a seafarer's professional identification, which is an important record of services performed by the seafarer to preliminarily proof that the seafarer has worked on a ship. Therefore, the entries in the document are significant for both the seafarer and the company. In this case, Seafarer C took advantage of the business representative's role in safekeeping the stamps and conspired with the representative to fabricate his service on the ship in an attempt to gain benefits. In doing this, Seafarer C not only violated regulations on crew management but also involved the company in litigation. Eventually, Seafarer C was admonished by the court.

It is important for ship companies to safe keep ship stamps, seafarer service stamps and other important items and documents. All important items and documents to be carried on board should be kept by persons selected with prudence in order to avoid unnecessary legal risks. Seafarers should be honest and trustworthy at work. In particular, captains who have the right to act at their discretion on behalf of the ship should observe strict self-discipline and abstain from momentary greed that will impair their career in the long run.

(III) Ascertainment of seafarers' wage periods

Starting from 21 November 2018, Seafarer C performed services on Ship B owned by Company A. No written employment agreement was concluded between the parties. On 14 June 2019, Company A delegated its business representative on board to give Seafarer C notice of termination of employment due to operational difficulty. However, Seafarer C continued his service on Ship B after receiving the notice given that Company A was in arrears with wages. He temporarily left the ship from 26 June to 1 July, from the afternoon of 28 August to the morning of 29 August, and from the afternoon of 1 September to the noon of 2 September. During these periods, Ship B remained in its anchorage. On 4 September, Seafarer C resigned, disembarked the ship, and completed the formalities for the separation with the maritime safety administration. As Company A failed to pay his wages on time, Seafarer C claimed to the court against Company A for unpaid wages earned up to 4 September, which amounted to 92,427 yuan, plus interest. Company A argued that it was not required to pay wages after 14 June as it had terminated its employment relationship with Seafarer C on that date when it gave the notice of termination, and Seafarer C had subsequently left work on multiple occasions. The court passed an effective judgment which held that after an employment relationship had been established between Seafarer C and Company A, it could not be terminated by Company A unilaterally by giving notice of termination; thus Seafarer C should be paid his wages until the date of termination, namely 4 September. Although Seafarer C had temporarily left the ship three times during the existence of the employment relationship, there was no evidence that such leave taken by Seafarer C while the ship was at berth had any substantial effect on the management or operation of the ship. Company A had not reached any agreement with or explained to Seafarer C about the wage deduction consequence of leaving the ship while she was at berth. For these reasons, Company A should pay Seafarer C wages for the periods in which he was temporarily off the ship..

The employment relationship between a ship company and a seafarer is under strict protection once established. Without an agreement, the ship company may only

terminate the employment agreement unilaterally under circumstances in which an employer is allowed to terminate an employment contract as provided for in Article 39, Article 40 and Article 41 of the *Labour Contract Law of the People's Republic of China*. Accordingly, a ship company may not stop paying a seafarer's wages simply based on a unilateral notice of termination. If a seafarer temporarily leaves the ship for personal reasons during the existence of the employment agreement, the payment or non-payment of wages during such leave should be determined taking into account relevant agreements between the parties, relevant policies published by the ship company, and the effect of such leave on the management and operation of the ship.

Seafarers' wages are paid by ship companies in consideration of the services performed by seafarers. We suggest that ship companies should pay seafarers' wages as agreed and in compliance with law, and not to make deductions for various reasons. Both ship companies and seafarers should be serious about their employment relationships. The parties should enter into a written employment agreement setting out rights and obligations. A ship company intending to prematurely terminate an employment agreement and stop paying wages for operational reasons should strictly comply with relevant agreement and applicable provisions. Where there is no agreement or provisions, the ship company should in good faith try to reach an agreement with the seafarer. The cooperation, mutual respect and common efforts between seafarers and ship companies are essential to the growth of the shipping market.

VII. Constituting Limitation of Liability Funds for Maritime Claims According to Law

— Issues and suggestions concerning application for constituting limitation of liability funds

(I) Whether voyage charterers may seek limitation of liability for maritime claims

Under a contract of carriage of goods by sea which gave rise to a dispute, Company A entrusted Company B with the carriage of a shipment from Tangshan, Hebei to Guangzhou, Guangdong. Company B as the charterer entered into a voyage charter with Company C, the lessor, for the carriage of the shipment by Ship No. 1. During the carriage, Ship No. 1 collided with Ship No. 2 and sank with the shipment on board. Company A's insurer settled its insurance claims and brought an action with us, requesting Company B for compensation. Company B argued that it was entitled to limitation of liability for the damage to the shipment in dispute. The court rendered an effective judgement which found Party B's defence of limitation of liability legally groundless and invalid because Company B was not among the persons entitled to limitation of liability for maritime claims.

The Maritime Law entitles ship owners, operators and charterers to limitation of liability for maritime claims. Such special protection is granted mainly based on the maritime risks involved in ship operations. A charterer under a voyage charter does not own the ship or control her operations or bear the risks involved in her operations. Such charterer is engaged in the carriage of goods rather than the operations of the ship. A voyage charterer in effect has the legal status of a shipper and holds the position of the cargo interests; they do not fall into the definition of "ship owners" in a broad sense and are not engaged in the specific operations of ships. Entitling voyage charterers to limitation of liability for maritime claims does not conform to the purpose or trend of the provisions on limiting liability for maritime claims. The charterers described in Article 204 of the Maritime Law include charterers under bareboat charters or time charters, but not charterers under voyage charters. Voyage charterers are not among the persons entitled to limitation of liability for maritime claims.

We advise litigants and their agents ad litem to comply with applicable Chinese laws on the entitlement to limitation of liability for maritime claims. Any defence of voyage charterers of entitlement to limit their liability for maritime claims will be dismissed by courts.

(II) Whether port operators may seek limitation of liability for maritime claims

In relation to a dispute over liability for damage to marine property, a loaded container in Yantian Port, Shenzhen was found damaged and the cargo inside suffered damage. Company A as the cargo insurer settled the insurance claims with the cargo owner and was duly subrogated to the claims. Company A made a cargo claim against the carrier on the grounds of improper safekeeping and care by the carrier, and requested to hold the port operator jointly and severally liable for the cargo damage on the grounds of its improper handling that led to the damage to the container which in turned caused the cargo damage. The port operator defended itself by arguing that it would be entitled to limitation of liability for maritime claims even if it was liable for compensation. The court rendered an effective judgment which found the port operator not entitled to limitation of liability for maritime claims and dismissed its argument for such entitlement.

Where a port operator causes cargo damage in the course of port operations and the shipper or consignee concerned brings an action in tort against the port operator, the port operator may not claim entitlement to limitation of liability for maritime claims under Article 58 of the Maritime Law, which provides for the limitation of liability enjoyed by carriers, whereas a port operator is neither a carrier nor an actual carrier. Moreover, the carriers' rights granted by the Maritime Law to exemption or limitation of liability are simply based on the particularity of maritime risks, which are not normally borne by port operators. For these reasons, port operators may not defend themselves by claiming carriers' entitlement to limitation of liability under Article 58 of the Maritime Law. Moreover, port operators are not ship charterers, operators or salvors as described in Article 204 of the Maritime Law, who are persons entitled to limit their liability for maritime claims. Port operators are therefore not entitled to limitation of liability for maritime claims.

If a port operator argues against liability for compensation in a dispute over damage to marine property, it is advisable for such port operator to prove that it is not an infringer and that the cargo damage is not due to its fault or caused by any of its actions. Any defence of port operators of entitlement to limit their liability for maritime claims will not be accepted by courts.

(III) When to invoke the right to limitation of liability for maritime claims

In a dispute over liability for damage caused by a ship collision, the fishing boat owned

by A collided with the fishing boat owned by B when they were engaged in shrimp trawling in the waters of Wanshan Port. The fishing boat owned by A sank as a result of the collision. A thus brought an action with us and claimed against B for compensation. The court of first instance made a judgment ordering B to compensate A for the economic loss caused by the accident. B lodged an appeal and claimed it had the right to limit its liability for maritime claims as provided in Article 207 of the Maritime Law. The court of second instance gave a judgment which, referring to Article 15 of *Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims*, did not support B's defence of limitation of liability for maritime claims during the second instance. The appeal was thus dismissed and the original judgment affirmed. B applied for a retrial, arguing that the court of first instance had not explained to it the limitation of liability for maritime claims, which was a procedural error, and that the second-instance judgment made a mistake by rejecting its argument on the grounds that it had failed to invoke the right to limitation of liability for maritime claims within the specified time limit. The retrial court held that the court of second instance made no mistake in rejecting B's defence of limitation of liability for maritime claims. Such defence of a litigant in maritime proceedings should be raised by the litigant himself. B was legally groundless in arguing that the court of first instance had made a procedural error by not explaining its right to limitation of liability for maritime claims, and its application for retrial was thus dismissed.

Article 15 of *Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims* provides that "where a liable person fails to raise the defence of limitation of liability for maritime claims before the first instance judgment is rendered, but raises such defence in the second instance or during retrial, the people's court shall not uphold such defence." Claims of a litigant should be made in the first instance. According to the principles of civil procedure, a court cannot arbitrarily make any decision as regards any independent claim added by the litigant in the second instance.

The right to limitation of liability for maritime claims is a defence that can be raised by a litigant, and a privilege vested in persons liable for marine accidents under the Maritime Law. A litigant's defence of limitation of liability is a defence of substantive rights and shall be raised by the litigant himself at his discretion. When a liable person is not raising the defence of limitation of liability, the competent court should not on its own initiative explain such right or render any judgment with reference to legal provisions on limitation of liability for maritime claims. We advise litigants to follow Article 15 of the above Provisions and raise a defence of limitation of liability for maritime claims before the

first-instance judgment is passed. Courts should not on their own initiative provide explanation or give judgments with reference to legal provisions on limitation of liability for maritime claims. Such defence should be raised by the litigants themselves.

VIII. Advancing Enforcement Processes According to Law

— Issues and suggestions concerning arrest and auction of ships during enforcement

(I) Ship's sailing away from the place of arrest without permission

In the enforcement with relation to a dispute under a financial loan contract, the court had acted on the informaiton received from Shareholder A of Company C, the debtor, and arrested Ship B, which was owned by the debtor and berthed at a shipyard in Nansha, Guangzhou. The court had also ordered the debtor to take responsibility for safekeeping the ship and not to allow her to depart from the place of arrest without the court's permission. Subsequently the ship was sold by the court through a judicial auction on Taobao.com. During the period from the arrest to transfer after auction, the court did not received an application for the ship to be moved.

In the investigation related to a separate case, the court found that the ship might have left her place of arrest without permission during the time she was under arrest. To verify the suspicion, the court applied to the maritime safety administration for access to the ship's historical movements recorded while she was under arrest, which showed that the ship had departed from her place of arrest in the evening of the same day she was arrested and had made a number of round trips between the waters of Xiaochan Island, Shenzhen and Xiaowanshan Island, Zhuhai. The court then summoned Shareholder A and the legal representative of the debtor to appear in court for investigation. Shareholder A spontaneously admitted their fault, actively cooperated with the court and informed other persons concerned of appearing in court for the investigation. Eventually the court found that the ship under arrest had departed from her place of arrest without permission for engagement in transportation under Shareholder A's instruction. In compliance with the *Civil Procedure Law of the People's Republic of China*, the court decided to impose a penalty of 80,000 yuan on Shareholder A. Shareholder A paid the fine as soon as he received the decision.

In accordance with Article 7.1 of the *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Arrest and Auction of Ships*, which provided that "during the period when a ship is under arrest, the ship shall be under the management of the shipowner or bareboat charterer", the ship owner or manager shall duly fulfil their obligations of managing the arrested ship and, without the court's permission, shall not allow the ship to depart from her place of arrest or engage the ship in any operations.

If any special circumstances arise during the period of arrest of a ship, such as typhoon,

which renders precautions or change of berth necessary, the interested parties of the ship are advised to promptly apply to the local maritime administration and report to the court for permission. If the ship departs or escapes without permission, a penalty and/or detention will be imposed accordingly, and criminal liabilities may arise in relation to serious offences.

(II) Assumption of liability when a successful buyer pulls out of an auction

In the enforcement with relation to a dispute under a ship sale and purchase contract, the court intended to auction off the ship owned by the debtor. An objective and comprehensive disclosure of the ship's condition was given in the published auction instructions. The appraised value of the ship was 326,900 yuan, the opening bid was 230,000 yuan, and the deposit was 20,000 yuan. At the first online judicial auction, Bidder A won the bid by offering 502,000 yuan. Under the influence of the COVID-19 pandemic, Bidder A was allegedly unable to pay the balance on time and take delivery of the ship on site. The collegial panel had a discussion and granted Bidder A's request to postpone the payment of the balance. However, after the granted extension Bidder A expressed its unwillingness to pay the balance. In accordance with Article 24 of the *Provisions of the Supreme People's Court on Several Issues Concerning Online Judicial Auctions Hosted by People's Courts* (Interpretation [2016] No. 18, hereafter referred to as Online Auctions Provisions), "where a successful buyer pulls out after an auction is closed, the deposit paid by such buyer shall be forfeit and applied, in turn, to cover the costs of the auction, make up for any deficiency if the re-opened auction is concluded at a price lower than the original purchase price, and offset the debts of the debtor(s) in the case and the debts of the debtor(s) in relation to the auction items. The original successful buyer may not bid in the auction re-opened after such pullout." According to these provisions and the published auction instructions, the court put the ship up for another auction. At the second auction, Bidder B won the bid at 538,000 yuan, with an excess of 36,000 yuan over the first hammer price. However, Bidder B decided to pull out of the sale alleging that it had offered too high a bid. Once again, the court had to re-initiate the auction process. Eventually at the third auction, Bidder C won the bid at 492,000 yuan and paid the balance.

Article 25.2 of the *Provisions of the Supreme People's Court about Auction and Sale of Property by the People's Courts in Civil Enforcement* (Interpretation [2004] No. 16, hereafter referred to as Provisions on Auction and Sale) provides that "the original successful buyer shall bear any deficiency if the re-opened auction is concluded at a price lower than the original purchase price as well as the costs and commission incurred in the original auction. A

people's court may deduct such amounts from the deposit paid by the buyer and shall return the balance thereof, if any, to the buyer; where the deposit is insufficient for such purpose, the buyer may be ordered to make up the sum required; such order may be enforced if rejected by the buyer." Accordingly, the deposit paid by Bidder B was withheld. As the online auction did not induce other costs, Bidder B who pulled out of the second auction sale was ordered to pay 26,000 yuan to make up for the deficiency. In compliance with Article 24.1 of the Online Auctions Provisions, it was decided that the deposit of 20,000 yuan paid by Bidder A would be forfeit. The sum of 66,000 yuan gained from the two failed auctions was thus kept as part of the auction proceeds of the ship.

Online judicial auction is no trifling matter. It reflects reverence for the law. When participating in a judicial auction, it is advisable to carefully read through the auction announcement and instructions, and not to casually pull out of the auction once it is concluded. Such prudence will contribute to the maintenance of a good auction order and the credibility of judicial auction.

(III) Application of the principle of restricting futile auctions in sales of ship

In a case regarding the dispute between A and B under a sale and purchase contract, A owed B a principal of 650,000 yuan and interest, and B applied to a court in Place D for enforcement. An investigation found no enforceable assets in A's name other than ships. Thus B applied for auctioning off Ship No. 1 and Ship No. 2 in A's name. The local court subsequently entrusted us with the auction of the ships. We found out that Bank C had already put a mortgage lien on the ships for a sum of 1.8 million yuan which was not at all paid. However, B as an ordinary creditor still insisted on auctioning off the ships, whereas Bank C as a known mortgagee had not applied for the arrest of the ships.

The ships were arrested, and a subsequent appraisal determined that Ship No. 1 had a value of 1,138,500 yuan and Ship No. 2 had a value of 993,600 yuan. Article 10 of the Online Auctions Provisions provides that "a reserve price shall be determined at an online judicial auction, and the reserve price shall be the opening bid. The opening bid shall be determined by a people's court with reference to the appraised value; where no appraisal is conducted, it shall be determined with reference to the market price, and the opinions of the parties concerned shall be consulted. The opening bid shall not be lower than 70% of the appraised value or the market price." Accordingly, the reserve prices of the ships would only need to be over 70% of their appraised values. However, as stated in Article 9 of the Provisions on Auction and Sale, "after the reserve price has been set,

if a calculation based on the reserve price of the current auction renders any surplus improbable after paying off priority claims and the enforcement fees out of the auction proceeds, the enforcement applicant shall be notified the relevant information prior to the auction. If, within 5 days after it has received the notice, the enforcement applicant requested to proceed, the people's court shall grant such request but shall determine a new reserve price, which shall exceed the sum of the priority claims and the enforcement fees. If the auction so conducted fails, the costs of the auction shall be borne by the enforcement applicant." As there were known priority claims on the ships, it was necessary to prevent a futile auction when setting the reserve prices, which means that the reserve prices should cover the priority claims and the enforcement fees. Faced with the thin demolition market and the ongoing expenses it incurred after the arrest if the ships were not disposed of promptly, Applicant B handed in 100,000 yuan as security that it would bear all the costs of a futile auction. The court thus initiated the online auction procedure. The ships were put up for public auction on Taobao.com and were eventually sold for a sum of 2,172,000 yuan.

During the announcement of the pending auction, Bank C and a non-party, D, came forward to register their creditor's rights and bring actions to ascertain related rights. Out of the auction proceeds of the ships, about 100,000 yuan was eventually paid to B who was an ordinary creditor.

Auction as a means of enforcement involves high costs. To decide whether to conduct an auction, we need to take into account its benefit to enforcement-related parties as well as its burdens on and benefit to the society. Enforcement that would not produce tangible benefits to any party concerned should be avoided to the greatest extent. However, a request for auction should not be dismissed casually in anticipation of a futile auction. The value of an asset cannot be determined until such asset comes onto the market. A futile auction in a real sense should feature an auction object with negative value, such auction not benefiting anyone in any way. For an ordinary creditor requesting for the auction of a ship owned by the debtor, it is advisable to find out in as much and accurate detail as possible whether any priority claim on the ship exists; where any existing secured creditor does not initiate an auction procedure, it is also advisable for the ordinary creditor to assess its capacity to bear all enforcement costs incurred in relation to the auction of the ship if such auction turns out futile.