

A Study on the Strategy of Establishing China Maritime Performing Party System

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Abstract : Based upon the analysis of the former paper, this paper suggest that present problems existing in China's relevant laws and regulations, the difficulties in constructing China's maritime performing party system, the strategy in constructing maritime performing party in China. The writer focused on the strategies of establishing maritime performing party in China, and analyzed the problems which needed to pay attention. Finally, in the writer's view, China does not need to take part in the Convention, and can establish the maritime performing system by amending China Maritime Code.

Key words : Maritime performing party, China Maritime Code, The transportation convention, Himalaya Clause, The liability of carrier

1. Introduction

There are 'Hague Rules', 'The Hague-Visby Rules', 'Hamburg Rules' etc. in international convention which limit the liability of carrier(Kim, 2003).

In the former paper of the author¹⁾, it was concluded that the main differences between the maritime performing party and the actual carrier is that: firstly, in maritime performing party system, the "Himalaya clause" is not only applied to the carrier and the agent or servent of the carrier, but also applied to other separate contractors(the intermediate maritime performing party). Secondly, in maritime performing party system, the independent contractors, such as the port maritime performing party, can enjoy carrier's exception clause and limitation of liability.

In order to update "China Maritime Code" to modern standards, China should establish maritime performing party system. However, there are still some problems and difficulties in establishing it.

This paper will suggest that present problems existing in China's relevant laws and regulations, the difficulties in constructing China's maritime performing party system, the strategy in constructing maritime performing party in China.

2. Present problems existing in China's relevant laws and regulations

2.1. The disputes of 'Himalaya Clause' provisions in the judicial practice

Article 58, paragraph 2 of 'China Maritime Code' provides that the servants or agents of the carrier are entitled to the carrier's defenses and limitations of liability rights, but there is dispute in the judicial practice with respect to the application of the provision. The main dispute is that if the port operator is the carrier's servant or agent thus has the right to limitation of liability. From the current judicial practice in China, the judgments of different maritime courts and higher people's courts are different.

For example, in Fujian Dingyi Food Co v. Guangzhou Container Terminal Co. case in 2004²⁾, the Guangzhou Maritime Court held that as a port operator Guangzhou Container Terminal Co. Ltd. was entitled to have the limitation of liability according to the provisions of 'China Maritime Law' Article 58, paragraph 2 and Article 59, paragraph 2. However, when the case was appealed to Guangdong Higher People's Court, the Court considered that as a port operator Guangzhou Container Terminal Co. Ltd. did not have the right to have the limitation of liability, and should compensate the actual damage according to 'Civil Law' and 'Contract Law'. The main divergence of this case was if the port operator was the servant or agent of the carrier.

The author believe that under the current legal system and port operator operating system in China, it is difficult to determine the port operator as the carrier's servants or agents. At present there are no special provisions on the employment relationship in China Law system, however,

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1) Liu Xiaoxian, Noh, C. K.(2012), "A basic study on the maritime performing party system and the difference between the maritime system" and the master paper of Liu. Xiaoxian

2) [http://www.ccmr.org.cn\(china foreign commercial and maritime trial\)\(2010.10\)](http://www.ccmr.org.cn(china%20foreign%20commercial%20and%20maritime%20trial)(2010.10))

according to general understanding, the servant generally refers to the nature person who is assigned by the hirer and provides services in the name of the hirer under the employment contract relationship.

According to the China 'Civil Law' Article 63 an agent shall perform civil juristic acts in the principal's name within the scope of the power of agency. At present the port operator in China performs the port operation in their own name, therefore the port operator is not the carrier's agent. In China, as the employees of port operators, the port workers will neither sign the contract with the carrier in their own name nor be employed by the carrier. As well as the port operator signing the contract with the hirer, he is not the natural person, so there is not the employment contract relationship between them. As a result, the port operator is not the carrier's employee.

2.2. Dispute of the actual carrier system

According to the 'China Maritime Code' provisions, 'actual carrier' means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract. This concept is the same with the concept of actual carrier in 'Hamburg Rules'. China did not take part in the 'Hamburg Rules', but introduced the actual carrier concept into 'China Maritime Code', and the concept caused a lot of debate. The main debate was about the scope of the actual carrier, that was who could be recognized as the actual carrier and could have the right to enjoy the carrier's power and limitation of liability defense under the 'China Maritime Code'.

1) The dispute about "entrust"

'Hamburg Rules' Article 1: "actual carrier" means any person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted. In accordance with the interpretation in 'ANGLO-AMERICAN LAW Dictionary', 'entrust' refers to commission, trust, company management (property, etc.). In the actual carrier concept of China, it uses the word '委托' (trust), but the understanding of 'trust' is different from the 'entrust' of Hamburg Rules. Some scholars define 'trust' in its narrowest sense that the actual carrier only includes the person who has signed the contract with the carrier. However, some scholars believe that 'entrust' is not limited to the case of a commission contract, it can mean affairs

commission.

In the drafting process of the Hamburg Rules, the expert of the Working Group considered that the main purpose of introducing the actual carrier system is to solve the liability problems of the carrier when the carrier translates part of or whole of the transportation to the other person. Then a consensus was reached, the so-call entrust refers to the situation that the first shipping company delivers the goods to the second then the goods was transported by the second company. That is, it not only includes the situation that two carriers do the connecting transport, but also includes the situation that, under the time charter contract, the ship-owner transports the goods which are contracted by the charterer in the name of the 'carrier' by his rental ship. Therefore, according to the Hamburg Rules' legislation purpose, the carrier delivers the goods to the ship owner based on the charter-party, which means that the carrier entrusts the ship owner to transport the goods, even if there is no mandate contract between them, the person who accepts the goods and transports is also the actual carrier.

2) Disputation about 'carriage of goods'

The first disputation: "Carriage" includes the 'land carriage' or not.

Regarding the problem of whether 'carriage' in this definition includes the 'land carriage', one view is that, the 'carriage' refers to all carriage activities during the period of responsibility of carrier. No matter what kind of carriage, as long as it is in the carrier's responsibility period, should belong to the 'carriage' defined in 'China Maritime Code'. The person who undertakes performance of carriage of goods may be the actual carrier. The definition does not make any restrictions on the 'carriage', so all the 'carriage' entrusted by the carrier should belong to it. Professor Si Yuzhuo, a scholar in China Maritime Law, considers that the 'carriage' is not only limited to the maritime carriage, but also includes load, handle, stow, carry, keep, care for and discharge the goods carried and even load and unload in the port of land. Another point of view is that, the 'carriage' in the definition only refers to maritime carriage and does not include the land carriage.

In the first theory, through re-positioning the port operator in the international carriage, the port operator can enjoy the carrier's limitation of liability. This theory developed a new method of its own, but it should be based on the premise that cargo handling and other obligations in the port operation contract are part of the carrier's transport obligation during the period of responsibility. If lose the

premise (For example, the carrier is not responsible for the loading and unloading, and the port operations contract is signed by the port operator and the cargo owner.), port operator can neither be identified as the actual carrier, nor have the limitation of liability. This formulation is an extensive interpretation of the concept of the actual carrier, so it is hard to be accepted.

The second disputation is If the carriage of goods must be personal.

During drawing the 'Hamburg Rules', there was a heated dispute about whether the actual carrier should include the intermediate actual carrier or not. The result of the vote was that there were 30 affirmative votes, 22 negative votes and 7 abstention votes. Therefore, the 'Hamburg Rules' only emphasize 'entrusted by the carrier', do not emphasize 'the actual transport'. In sub-entrustment, the entrusting party and the trustee party are all considered to be the actual carrier, so the intermediate actual carrier should be included. It is not clear in China 'Maritime Law', the intermediate actual carrier is included in the actual carrier or not.

It is taken that in the definition of the actual carrier in 'China Maritime Code', it uses the word 'includes' (any other person to whom such performance has been entrusted under a sub-contract). Therefore, through a logical analysis, the actual carrier is not limited to the person who transports the goods by its own cargo ships and crew, all the persons who sign the transport contract in the name of the ship owner or the carrier belong to the cargo transporter. As a result, the owner of the ship without crew and the transfer mandator who only has crew without ship or has neither ship nor crew are all likely to be the actual carrier. Thus, there may be multiple 'intermediate' actual carriers in a cargo transport activity. It is taken that, engaging in the transport of goods should have two conditions: First, the ship is owned or bareboat chartered by him. Second, the crew is hired and managed by him. The two conditions above must be met in the same time. In other words, the actual carrier must be actually engaged in the carriage of goods.

China did not join the 'Hamburg Rules' but introduced the actual carrier system into 'China Maritime Code'. Should we explain the concept of the actual carrier according to the original meaning of 'Hamburg Rules' or explain it according to the demand of China's judicial practice? The author believe that, China does not need to fulfill the obligations of international conventions as China is not a member of 'Hamburg Rules'. Therefore, China can

modify some systems of the Hamburg Rule and then introduce them into 'China Maritime Code'. But if not amended, they should be explained according to the original intent of 'Hamburg Rules'. If the explanation does not meet the needs of China's judicial practice, the relevant provisions should be revised to meet the needs of it, rather than meeting China judicial needs but not meeting the original intent of 'Hamburg Rules'. Therefore, The author believe that, during drawing up of the legislation, the 'transplanted' systems from the international convention should be transformed into the 'localized' ones, to guard against the ambiguous meaning of the systems or conflicting with the original intention of the convention. As to the problem that has been generated, they can be made to be clear and perfect by the judicial interpretation or amending the law.

In short, although 'China Maritime Code' had introduced the actual carrier system, there are some problems with it, especially in the problem of whether the port operator and the intermediate actual carrier can be included into the actual carrier system.

3. The difficulties in constructing China's maritime performing party system

From the comparison between China's relevant legal provision and the maritime performing party system, it can be seen that, the key factor in constructing China's maritime performing party is how to deal with the disputes about the limitation of liability of the port operator and the intermediate maritime performing party. If the port operators could have the right of limitation of liability and the intermediate maritime performing party could be regulated by the carrier responsibility system of the convention, it should not be a problem to establish the maritime performing party system in China.

3.1. The limitation of liability of the port operator

Generally, there are three modes of limitation of liabilities of the port operator around the world: The first one is the 'Himalaya clause' Mode, that is, the port operator can enjoy the right of carrier's limitation of liability under the contract according to the 'Himalaya Clause' in the Bill of Lading. The second one is the port operations contract model, i.e., it provides the port operator's right of limitation of liability in the operating agreement which is signed between the port operator and the operating principal. The third one is the

special legislation model, i.e., it makes the port operators have the right of limitation of liability through special legislation. The port operators enjoy the limitation of liability based on a different foundation, the practice that the port operators can enjoy the limitation of liability exists in world wide, however, in China it is a new problem which arises after separating government functions from enterprise management. There were different precedents in the judicial practice, such as, in one case, the port operator was identified to be the carrier's servant and could enjoy the carrier's limitation of liability according to 'China Maritime Code'. However, in the other case, it was decided that the port operator only could be governed by the 'Civil Law' and could not enjoy the limitation of liability. The author think that, at present the port operator is very difficult to have the right of limitation of liability, and it is also difficult to be covered in the article 58, paragraph 2 of 'China Maritime Code'.

In the limit of liability of the port operator issues, China's approach is different from the Anglo- American countries who give the limit of liability to the port operator according to the 'Himalaya clause'. Furthermore, in *Norfolk Southern Railway Company v. James N. Kirby* case, U.S. Supreme Court adjudged that the Railway Company could enjoy the right to limit the responsibility of ocean carriers based upon the 'Himalaya clause' in the through bill of lading of the carrier. American scholar commented that this was a maritime case about a train wreck. The deeper significance of this case is that the maritime law attempts to uniform the non-maritime section under multimodal transport. However, China is still separately looking at the responsibility of the port operator, so China should reflect on it. The port operator is entitled to limitation of liability does not base on the traditional maritime risks, therefore, the statement can not be made that the port operator can not enjoy the limitation of liability as lacking of the carrier's risk.

3.2. Problems about the intermediate maritime performing party

In accordance with the provisions of the Convention, the maritime performing party includes the intermediate maritime performing party and the actual maritime performing party. If the actual performing party causes damage or delay of the goods, not only the actual performing party but also the intermediate maritime performing party and the carrier should be responsible for it.

The cargo obligee can choose the carrier or the MPP to take the responsibility, or ask them to share the responsibility. There are at least the following benefits to take the intermediate MPP into the adjustment of the convention: First of all, it will intensify the protection for the cargo obligee, and thus reduce the negative impact on the cargo obligee because of giving the MPP limitation of liability. Secondly, it can make the people on the contract chain continuously, thus avoiding the buss-passing between the intermediate MPP and the actual MPP. So we do not need to identify the actual MPP, and at the same time avoid the conundrum that the cargo obligee could not lodge a proof about the identity of the actual MPP. It should be said that, taking the intermediate MPP into the adjustment of the convention will increase of the protection for the cargo obligee and enhance judicial efficiency. Finally, it will promote the intermediate MPP to choose a better actual MPP if the intermediate MPP needs to take responsibility for the actual MPP, thereby reducing the damage of goods and promoting the business. The intermediate MPPs participates in the transport and earns profits, so they should take responsibility, and can not be exempt from liability just because he is not actually in charge of the goods. Therefore, The author think there is nothing wrong in taking the intermediate MPP into the adjustment of the convention.

4. The strategy in constructing maritime performing party in China

From the above analysis, it can be seen that the author advocates accepting the MPP system and amending the relevant provisions in China Maritime Law. It is unknown whether the Convention will come into force in the future, and even if the Convention comes into force.

However, given the universality of the participating countries or the consideration of China's interests, China may not accede to the Convention. Therefore, I advocate not to join the Convention, but to introduce the MPP system into "China Maritime Code". We can borrow some ideas from Germany. In the Seven International Conference on Maritime Law held in Shanghai in 2009, Carsten Grau, the representative of Germany, gave a speech: Parallel to the development of the Rotterdam Rules, the German Ministry of Justice(GMJ) initiated a study how the German maritime code can be updated to modern standards. The results of the study have been published in the final report

of the panel of experts appointed by the Ministry. Although the GMJ has still not fixed its position towards 'Rotterdam Rules' and did not send an official delegation to the signing ceremony, several similarities can be found in this report compared to 'Rotterdam Rules'. (1) liability for delay; (2) the possibility of deviation from otherwise mandatory rules, if the parties are both merchants and thus not in need of special (consumer) protection, (3) increase of the amounts of limited liability to 875 SDR; (4) deletion of error in navigation as an exclusion for liability; (5) several changes referring to the Bill of Lading, incl. acknowledgment of the electronic form and a general approximation to German law on securities.

5. Conclusions

Through the above analysis, I am inclined to not to join the Convention but introduce the MPP system into 'China Maritime Code'. On one hand, it can safeguard China's interests and on the other, it would not depart from the Convention.

In view of the related systems in China Maritime Code are different with the MPP system of "Convention", I propose the following suggestions:

Firstly, it is about the provisions on liability. I propose to amend Article 60 of China Maritime Code to be: "The carrier should bear the burden of proof for the loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage".

The second one is about the joint and several liability provisions. Referring to the 'Hamburg Rules', China Maritime Code defines the joint and several liability about the carrier and actual carrier, which are provided in Article 63 and Article 64. The above two provisions are similar with the Convention, but there are a few differences. The existing provisions of the Convention are more precise than those in China Maritime Law. Therefore, if China introduced the concept of MPP, the terms on the actual carrier of Article 63 should also be accordingly adjusted to be maritime performing party system.

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