

To: Transport Industry Operators

**Maritime Code of PRC 1/7/1993 Seminar
28 October 2008 – Q & A**

The annual seminar was the Seventh of Sun Mobility (SMIC), and the Third jointly held with the Hong Kong Shippers' Council. Continuing various legal updates SMIC constantly made, we chose this time the Maritime Code of PRC 1/7/1993 for its increasing importance evidenced by the lopsided expansion of China exports on one hand, and the tightening of NVOCC licencing control in China by the Ministry of Communication (MOC) on the other. We trust many sea forwarders are aware of the looming imperative liability insurance requirement before any NVOCC licence could be granted. Registration of the NVOCC house bill of lading may render the application of the Code unavoidable.

The joint seminar was therefore a timely introduction of the Maritime Code of PRC 1/7/1993 vis-à-vis other international conventions of transport by sea. The 150-minute session allowed a quick run through of the 278 clauses of the Code plus 17 questions from the floor of which 6 were answered on the spot. The remaining 11 questions were responded in detail by email directly to the participants after the seminar. They are compiled in this issue of the Chans Advice for the handy reference of discerning forwarders.

1Q. What typed of code, regulation can be used for determining liability if delivering goods from HK to Zhuhai port by barges?

- A. It should be the Bill of Lading terms, the Hague Visby Rules or the PRC Maritime Code to determine the carrier's cargo delivery liability for the carriage of goods from Hong Kong to Zhuhai by barges provided that a Bill of Lading has been issued. If the carrier is sued in Hong Kong, it is likely that the B/L terms or the Carriage of Goods by Sea Ordinance (Chapter 462) adopting the Hague Visby Rules will apply. However, if the carrier is sued in the Guangzhou Maritime Court, it is extremely likely that the PRC Maritime Code will apply.

2Q. Goods delivered from HK to Suzhou via sea port to Shanghai + truck to Suzhou consignee. If goods is total lost during trucking to Suzhou, what is the liability of forwarder? Limit of liability applied? Or full value? What is the current situation (or China court)?

- A. On the assumption that the forwarder has issued its B/L covering the entire carriage from HK to Shanghai by sea and from Shanghai to Suzhou by road, the PRC Maritime Code theoretically would allow the B/L terms to apply to the cargo losses that happened during the road haulage from Shanghai to Suzhou. However, from our experience, the Shanghai Maritime Court would still likely apply the PRC Maritime Code instead of the B/L terms to the case that happened during the land leg from Shanghai to Suzhou. In fact, it is common that the PRC Maritime Courts would not consider B/L terms but would only apply the PRC Maritime Code no matter the cargo losses or damage happens during the sea or land leg as long as a B/L is issued. However, if the forwarder is sued in the Hong Kong Court, the Court will not apply the Hague Visby Rules but the B/L terms to this land leg case because the Hague Visby Rules only apply to the sea leg.

Unless the forwarder can submit sufficient evidence proving the cargo loss accident during the trucking is completely out of its control and not its fault, the forwarder should be liable for full value of the cargoes lost subject to the liability limitation as provided in the PRC Maritime Code (i.e. 666.67SDR / package or 2SDR / kg whichever is the higher) or the B/L term (e.g. US\$500 / package or US\$2 / kg) as appropriate. If the trucking company is the forwarder's subcontractor, the forwarder should have a good indemnity claim against the trucking company based on the trucking contract.

3Q. When a claim case happens, and there is a need to send a surveyor to investigate, what survey company is authoritative to do the survey? Can the report of the surveyors appointed by the customer, forwarder, and carrier be regarded as acceptable to process the claim later on?

A. The first thing is: the surveyor must have the expertise to carry out the survey as requested. The other thing is to consider whether it is likely the case will be litigated in a particular court. If yes, you have to find out if that court will only recognize survey reports of some designated surveyors. If yes, you have to instruct those particular surveyors. From our experience, most courts in the world do not have a system of only recognising certain surveyors' reports. Theoretically, the report of any surveyors who are good at the things in question should be reliable no matter the surveyor is instructed by the cargo owner, forwarder or carrier because the surveyor is supposed to be an impartial third party expert. However, from our experience, it is common that a surveyor would look at the issues from the perspectives of the party instructing that surveyor. Moreover, if you instruct a surveyor, you naturally can ask him a lot of questions relating to the case. This may help your case. Therefore, it is advisable that each party e.g. cargo owner, forwarder and carrier should appoint its own surveyor to do the inspection and investigation in order to protect its own interests for processing the claim case later on.

4Q. - shipment (FCL)from Shanghai to Italy.
- cargo loss upon arrival destination but without supporting reasons / document that the forwarder rejected the claim from shipper.
- shipper claimed from the maritime insurance and was compensated.
- months later, a staff of a trucking company admitted the stolen of cargoes from that particular FCL during the transportation from the factory to the terminal.
- since insurance company compensated the shipper and asked for compensation from the forwarder who appointed the trucking company to pick up the cargoes from shipper.

A. On assumption that the forwarder issued its B/L for the shipment from Shanghai to Italy, the forwarder as the NVOG under its B/L should be liable for the cargo theft done by the forwarder's appointed trucking company's employee. The forwarder should base on its B/L terms (e.g. US\$2 / kg or US\$500 / package) to settle the cargo insurer's recovery claim. However, in case the cargo insurer having subrogated the shipper's rights sues the forwarder in the Shanghai Maritime Court, it is likely the Court would apply the PRC Maritime Code (i.e. 666.67SDR / package or 2SDR / kg whichever the higher) to determine the forwarder's liability.

Of course, the trucking company should in turn indemnify the forwarder's losses based on the trucking contract terms, and the trucking company's employee should be reported to the Shanghai police for arrest and sending to court for prosecution and sentencing as appropriate. It is not likely that the stolen cargoes could be recovered or the trucking company's employee would have any money to pay any compensation.

5Q. ex Xiamen FCL consignments under routing / nomination from forwarder in Denmark under freight collect and shipping line nominated from Denmark under their service contract arrived destination and officially received advise after 3 months goods non-delivery with accumulated demurrage / storage and unpaid freight collect. Consignee now bankrupt and Denmark agent claim shipper should be responsible for outstanding payment. MBL consigned to Denmark against and HBL consigned to actual consignee. Is forwarder issued FIATA B/L need to take up responsibility to chase payment from shipper in Xiamen or is forwarder in Denmark giving routing / nomination of consignment responsible to hold consignee in Denmark for outstanding payment.

A. On the assumption the Xiamen forwarder as the NVOG issued its FIATA B/L to the shipper, it should be the shipper under the HB/L to pay all the outstanding charges including freight plus the extra costs e.g. demurrage & storage charges resulting from the uncollected cargoes. The consignee has bankrupted and not taken cargo delivery. The shipper under the B/L contract should assume liability for all the consequences arising from the cargoes being uncollected by the consignee as agreed per B/L terms. The Xiamen NVOG should press the shipper for immediate cargo delivery instruction and settlement of all outstanding charges. In case the shipper also disappears, the Xiamen NVOG as the carrier under its B/L will be the one to bear the losses resulting from this uncollected cargo case. The Xiamen NVOG should settle the demurrage and storage charges with the shipping company based on the OB/L terms, and should sell or dispose of the uncollected cargoes according to its HB/L terms.

The fact that this was a nomination cargo or routing order from the Denmark forwarder does not change the fact that the final conclusion of the contract was evidenced by the issue of the Xiamen NVOC's B/L. The Xiamen forwarder is the NVOC whereas the Denmark forwarder is the NVOC's agent. The fact that the shipping line was nominated by the Denmark forwarder under its service contract should also not change the position as such could be viewed as some kinds of introduction and arrangement that the Xiamen principal asked its Denmark agent to perform. The Denmark forwarder being the agent for the Xiamen NVOC has not done anything in this uncollected cargo matter and therefore should have no liability. The Xiamen NVOC should also have no right against the consignee because there is no contractual relationship between the Xiamen NVOC and the consignee as it is assumed the bankrupted consignee has never presented the HB/L for cargo delivery.

- 6Q. The laden container had been received by the forwarder and Customs cleared at Shanghai. However, the information had not been timely relayed to the shipping company, and this caused the laden container to be delayed on board the vessel for one week. The buyer has cancelled the sale contract because of the shipment delay. Can we claim against the forwarder for compensation? If yes, should the compensation base on CIF value or one time of the freight charges?
- A. It depends on the contract terms between you and the forwarder. It is a universal customary practice in the shipping industry that forwarders and shipping companies do not agree in their contract terms to assume liability for delay. It is therefore unlikely the forwarder would have liability for the delay of one week. Even in the remote case that the forwarder does agree in the contract to assume liability for delay, you still have to prove your actual losses (not necessarily the CIF value) resulting from the one week delay e.g. you find another new buyer who only takes your delayed goods at 60% of the original price and hence your actual losses of 40% of the original price. Furthermore, it is also a very common practice in the shipping industry worldwide that forwarders and shipping companies in their contracts limit their liability for delay to one or at most two times of the freight charges. If that applies to your contract in question, the forwarder will only be liable to compensate you no more than one or two times of the freight charges even if you can prove your actual losses arising from the delay. Moreover, according to the PRC Maritime Code, the forwarder as carrier under its HB/L is entitled to limit its liability to one time of the freight charges for your economic losses of 40% in the example.
- 7Q. If the laden container has been lost due to the shipping company's mistake, how should we process the claim? What is the difference in claim handling if we have bought or not bought the cargo insurance policy?
- A. If you have bought cargo insurance, the cargo insurer should compensate you 100% or 110% (depending on the insured value as agreed between you and the insurer in the policy) of the cargo value. Thereafter, the cargo insurer will subrogate your rights and sue the shipping company for recovery. However, if you do not have any cargo insurance, you have to instruct your lawyer to sue the shipping company for the cargo losses. If you take action in the Shanghai Maritime Court, the PRC Maritime Code will apply to your claim. The Court will order the shipping company to compensate the cargo value to you subject to the carrier's liability limitation (666.67SDR / package or 2SDR / kg whichever is the higher) if it is proved the cargo losses was caused by the shipping company's negligence. In general, legal proceedings against shipping companies are very time consuming and costly, it is most advisable that cargo owners should buy cargo insurance to protect their interests for fuller and quicker compensation in case of cargo losses or damage.
- 8Q. Can a carrier delivery a shipment to the named consignee without B/L (under a straight B/L)?
- A. In the USA, it should be still legally acceptable for the carrier to deliver the cargoes to the named consignee without production of the straight B/L, and the carrier should not assume any liability for such cargo delivery. In the English legal system places including Hong Kong, the courts would not allow the carrier to deliver the cargoes to the named consignee without production of the straight B/L unless there are very clear B/L contract terms to the contrary as agreed by the parties in the B/L. In most of other countries including China, the carrier should not deliver the cargoes to the named consignee without production of the straight B/L. Otherwise, the carrier would have the legal liability to compensate the cargo value to the shipper who is still holding the full set of the straight B/L.
- 9Q. In July 2008, we on behalf of our customer arranged a shipping company to ship 1x40' laden container to Jakarta. However, because of the weather problem, the ship arrived the port one week late. Our customer needed the cargoes urgently. We shipped the replacement cargoes by air to Jakarta for our customer. In the

end, our customer refused to pay the sea and air freight charges on the ground that we should be responsible for the delay. However, we had to pay freight charges to the shipping company, and hence we became the ultimate loser. We would like to ask if the shipping company really does not have any liability at all. Can we claim against the shipping company? If we cannot get any compensation from the shipping company, what are your views? What can we do?

A. As the delay was caused by the weather condition, such should be out of the shipping company's control and hence the shipping company should have no liability for your claims of sea and air freight charges. You in turn should have no liability to your customer, who should pay the sea and air freight charges to you as agreed according to the contracts (your HB/L? and your HAWB?). Failure to pay freight charges is a breach of contract by your customer. You may take legal action against your customer to recover your losses.

10Q. One laden container was sent to the destination. After the consignee had received the cargoes, the consignee discovered the cargoes were wet damaged. Does the consignee have the right to sue the forwarder?

A. It all depends on the evidence. For example, if the consignee having discovered the damage immediately appointed a surveyor to conduct inspection and investigation, and the surveyor subsequently issued a report opining e.g. it was seawater damage to the cargoes, the forwarder being the NVOCC under its HB/L should have the liability to compensate the consignee in accordance with the HB/L terms. Accordingly, the consignee should have a valid claim to sue the forwarder, which in turn should sue the shipping company under the OB/L for indemnity.

11Q. Can a "yacht" be regarded as one unit based on the limitation clause? But even settle by weight, if this is a total loss, the yacht owner still can only get back a small amount!

A. On the assumption that the yacht has no packing, the yacht should be regarded as one shipping unit according to the PRC Maritime Code's liability limitation of SDR666.67 (per package or other shipping unit) or SDR2 (per kg) whichever is the higher. For example, if the weight of the yacht is 3,000kg, the carrier's liability limitation will be 3,000kg x 2SDR = 6,000SDR, which is about US\$9,000. This should only represent a tiny part of the yacht's full value. It is therefore very important the cargo owner should buy cargo insurance to protect its interests, and to get fuller and quicker compensation from the cargo insurer in the unfortunate event of cargo losses or damage during the carriage.

Like all other previous SMIC seminars, we attempted to give the trade a précis of the otherwise complicated content of the prevailing transport laws. **The real time application of them of course would need professional understanding and experience to enable full use of them to any NVOCC's better protection.** Please feel free to talk to us by contact anyone of us at www.sun-mobility.com.

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Forwarders, airlines, shipping liners and alike have difficulties concluding space booking agreements for 2009. The consensus in the trade invariably become 'to proceed with caution' as most expected the freight demand would falter by as much as 50% next year. The economic outlook for 2009 of the logistics industry seems to be dismal in the wake of the financial tsunami.

That said, while focus is absolute on the cost side of the business equation, prioritizing agenda that could leverage chance to stay afloat and weather through the bad times becomes more essential. - **it is proven that bad times DO attract more claims.**

What is it like piggybacking and skating on thin ice at the same time? It is analogous to having a bad claim when margin is thin. If skating on thin ice is inevitable, is it not safer to unload the piggyback first?

SMIC works around the clock to fortify YOU by letting you know more transport laws (Seminars), perfecting your transport documents (1000 documents we edited), handling your claims professionally (6000 claims concurrently), and predicting problem areas in logistics (Daily routine). All these means additional costs to SMIC but at NO additional cost to you apart from insurance premium; they are done for the sole purpose of unloading your piggyback and allow you to withstand trouble times.