SUPREME PEOPLE'S COURT OF CHINA (CIVIL RULING)

29 December 2015

DALIAN OCEAN AND FISHERY BUREAU
v
ONDIMAR TRANSPORTES MARITIMOS LTDA AND ANOTHER

[2015] MSZ No.1637

Before Presiding Judge Hu Fang,
Judge Guo Zhonghong,
Judge Yu Xiaohan and
Court Clerk Li Na

Marine pollution damage — International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC Convention) — Reasonable measures of reinstatement — Environment capacity loss — Recoverability of marine environment/ecosystem loss — Court's determination regarding quantity of spilled oil — P&I Club's joint and several liability for oil pollution damage — Time limit for court's handling of the case.

Being unsatisfied with civil judgment [2013] LMSZZ No.00146 issued by Liaoning High People's Court (the judgment) regarding claim for compensation for oil pollution, the retrial applicant Dalian Ocean and Fishery Bureau ("DOFB") filed an application for retrial against the first respondent, Ondimar Transportes Maritimos Ltda ("Ondimar"), and the second respondent, Britannia Steam Ship Insurance Association Ltd (the "Club").

The issues in the retrial include: (a) whether the marine ecological loss shall be compensated; (b) the quantity of the spilled oil; (c) the joint liability of the Club; (d) the nature of the payment of US$1 million to Liaoning Maritime Safety Administration (the MSA); and (e) the time limit for adjudication.

———*Held*, by the Supreme People's Court of China (Presiding Judge Hu Fang, Judge Guo Zhonghong and Judge Yu Xiaohan) as follows.

(1) The spillage accident of M/T *Arteaga* and the resulting oil pollution occurred within the territorial seas of China. Pursuant to article 146 of the General Principles of the Civil Law of the PRC, Chinese law shall be the applicable law to the dispute. Since China is a contracting state to the CLC 1992 and the oil spilled in this accident fell into the category of persistent oil as provided for in the CLC 1992, the CLC 1992 shall apply to this case.

(2) Regarding the issues in the retrial:

(a) Whether DOFB's claim for marine ecological loss should be compensated depends on whether such a loss belongs to the definition of pollution damage under article 1 of the CLC 1992; there is no evidence of the costs of reasonable measures of reinstatement actually undertaken by DOFB; and the evidence as to water quality proved that there was no requirement for any reasonable measures.

(b) As the claimed marine ecological loss does not classify as pollution damage, ascertainment of the quantity of spilled oil was irrelevant.

(c) Pursuant to article 7(8) of the CLC 1992, any claim for compensation for pollution damage may be brought directly against the insurer. However, the CLC 1992 does not provide that the insurer shall be jointly liable for compensation.

(d) The respondent's payment of US$1 million to the MSA is part of a salvage operation payment which has no relation to the claimed marine ecological loss.

(e) The time limit for adjudication is not a condition upon which a case shall be retried.

(3) The application for retrial was dismissed.

Being unsatisfied with civil judgment [2013] LMSZZ No.00146 issued by Liaoning High People's Court regarding a claim for compensation for marine pollution damages, the retrial applicant DOFB filed an application for retrial to our Court against the retrial respondents, Ondimar and the Club. After accepting this case, our Court formed a collegial trial panel in accordance with the law. The trial of this case has now been finalised.

[Editors' note: this case is provided by Mr Zhu Moquan, senior partner of Heng Xin Law Office, Dalian, PRC, with due editorial work by the Editors.]

Tuesday, 29 December 2015

JUDGMENT

SUPREME PEOPLE'S COURT OF CHINA:

I. Application for retrial of the applicant, Dalian Ocean and Fishery Bureau (DOFB)

DOFB stated its application for retrial as follows.

1. The original judgment has not clearly ascertained the facts of this case. During the first instance trial of this case, the first instance court

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(Dalian Maritime Court) entrusted Shandong Maritime Center of Judicial Authentication for judicial authentication, and the first instance court provided the figure of 241 mt to the Dalian Maritime Court as the quantity of spilled oil. The original judgment does not make a clear determination regarding the exact quantity of oil spillage, and this is an error in facts (in that it is an unclear finding of facts).

2. The conclusion of the "Appraisal Report on Loss of Value for Marine Environment Damage arising from the Spillage of M/T *Arteaga*" (hereinafter referred to as the "Appraisal Report"), made by the Forensic Sciences Institute of the National Marine Environmental Monitoring Center, should be understood to conclude that the pollutants had diffused to tiny particulates, although this does not mean that the pollution does not exist at all.

3. The original judgment refused to accept this conclusion of the Appraisal Report, but made a biased determination that the spilled area of the sea had actually been reinstated to its normal condition without any reinstatement measures being taken on the basis of the "Calculation Report on Spillage" issued by the Dalian University of Technology, which should be an erroneous determination of facts. The payment of US$1 million to Liaoning Maritime Safety Administration (the MSA) by Ondimar was allocated to salvage charges, rather than the compensation for pollution damage to the marine environment.

4. The Club did not submit any objection against the assumption of the joint and several liability with Ondimar. It is therefore groundless for the original judgment to adjudicate that only Ondimar shall assume the responsibility, and exempt the liability of the Club.

5. The original judgment erroneously applied the law. The RMB55.2 million, as calculated pursuant to "Notification to Collect Charges for Disposal of Polluted Water and Discharge of Excess Pollutants" (hereinafter referred to as the "Notification") promulgated by the General Office of Dalian People's Government, for disposal costs regarding the polluted water shall be viewed as the costs of reasonable reinstatement measures to be undertaken, whilst the original judgment erroneously applied the law by not accepting the same.

6. The court of first instance severely violated the legal provisions regarding the time limit for a court trial, which caused difficulty in ascertaining the extent of the pollution damage.

II. Retrial defence of the respondents

Ondimar's defence submission

Ondimar stated its defence submission as follows.

7. The loss and damage claimed by DOFB, namely, the loss of marine environmental capacity[1] and the loss of the service function of the marine ecosystem,[2] did not fall within the scope of compensation for oil pollution damages as stipulated in the International Convention on Civil Liability For Oil Pollution Damage 1992 (hereinafter referred to as the "CLC 1992"), as well as the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-sourced Oil Pollution Damage.

8. DOFB misinterpreted the original judgment by alleging that the basic facts ascertained by the same were not evidenced, and no such circumstances exist in this case.

9. Other reasons alleged in DOFB's application for retrial were totally groundless. Accordingly, Ondimar applied to dismiss the application for retrial.

Britannia P&I Club's defence submission

The Club stated its defence submission as follows.

10. In accordance with para 8 of article 7 of the CLC 1992 and article 97 of the Special Maritime Procedure Law of the PRC, the victim of oil pollution damage was entitled to file a direct action against the liability insurer, but there was no legal provision stipulating that the liability insurer should be jointly and severally liable with the shipowner for pollution damage.

11. Pursuant to the statutory principle that joint and several liability should be expressly imposed by law, it is groundless for DOFB to request the Club

[1] Editors' note: environmental capacity is defined by GESAMP (1986) as: "a property of the environment and can be defined as its ability to accommodate a particular activity or rate of activity (eg volume of discharge per unit time, quantity of dredgings dumped per unit time, quantity of minerals extracted per unit time) without unacceptable impact. Definition of this capacity must take into account such physical processes as dilution, dispersion, sedimentation and evaporation, as well as all chemical, biochemical and biological processes which lead to degradation or removal from the impacted area by which a contaminant or an activity loses its potential for unacceptable impact. It should take into account processes which may lead to reaccumulation of the contaminant in question and the possibility that the substance may be transformed into a more toxic compound (eg mercury to methylmercury)" (IMO/FAO/Unesco/WMO/WHO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Pollution: "Environmental Capacity: An Approach to Marine Pollution Prevention", available at www.fao.org/docrep/meeting/003/s0645e/s0645e00.htm).

[2] Editors' note: loss of service function of marine ecosystem is a kind of pollution damage caused by marine oil pollution. In recent years, ecologists and economists have done a lot in the assessment of ecosystem services and natural capital. Gretchen Daily (1997) introduced the concept of ecosystem services, service valuation assessment and different ecosystem service functions. The marine ecosystem service functions were classified according to the existing theory of ecology, environmentology, economics, ship pollution prevention technology, and the marine ecosystem was divided into coastal area, neritic province, near-shore land and oceanic province. The value of every ecosystem service functions were obtained based on the average public value of different marine ecosystems (Jianli Yang, Wanqing Wu, Xiaona Jiang, Xing Feng, "Damage Assessment of Marine Ecosystem Service Function Loss Caused by Oil Spill", Advanced Materials Research volumes 573-574, www.scientific.net/AMR.573-574.319).

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to bear joint and several liability with Ondimar. Accordingly, the Club should not be jointly and severally liable for the pollution damage with Ondimar.

III. Reasoning of retrial court

Our Court held as follows.

12. *Arteaga* is a Portuguese-flagged vessel, and thus this case is a foreign-related dispute arising from compensation for marine pollution damages. The oil spillage accident of *Arteaga* and the resulting oil pollution occurred within the territorial seas of China. Pursuant to article 146 of the General Principles of Civil Law of the PRC, Chinese law shall be the applicable law to the dispute.

13. Since China is a contracting state to the CLC 1992 and the oil spilled in this accident fell into the category of persistent oil as provided for in the CLC 1992, in accordance with article 268 of the Chinese Maritime Code, the CLC 1992 shall be applied to this case. As such, the application of law in the original judgment is correct.

14. According to the retrial application of DOFB, the key issues of this case are as follows:

(1) whether the marine ecological loss claimed by DOFB should be recoverable;

(2) the ascertainment of the quantity of the oil spillage;

(3) whether the Club shall assume joint and several liability;

(4) the legal nature of US$1 million paid by Ondimar; and

(5) the time limit for court trials.

Whether DOFB's claim for marine ecological loss should be recoverable

15. According to para 6 of article 1 of the CLC 1992, the compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. Paragraph 4 of article 3 of the CLC 1992 further provides that no claim for compensation for pollution damage may be made against the shipowner unless otherwise provided for in the Convention. Therefore, the issue of whether DOFB's claim for marine ecological loss should be recoverable depends on whether such loss falls within the scope of compensation as stipulated in the CLC 1992.

16. In this case DOFB did not provide evidence to prove that any measures of reinstatement had been actually undertaken and costs thereof had been incurred.

17. DOFB argued that, as per the Appraisal Report and Notification, regarding the said RMB55.2 million for disposal of the water polluted by the vessel's oil, it should be identified as the measures of reinstatement to be undertaken.

18. However, as per the assessment conclusion drawn by the North China Sea Environmental Monitoring Center of the State Oceanic Administration and Forensic Sciences Institute of the National Marine Environmental Monitoring Center, the seawater quality of the polluted area was not worse than the second class of seawater quality[3] on 28 April 2005, ie 25 days after the spillage accident. Further, the state of the marine environment had been reinstated to normal in October 2005. Also, DOFB failed to provide any evidence to establish the necessity of disposing the polluted water in the disputed sea area. Therefore it is justified for the original judgment to adjudicate that the aforesaid cost did not fall under the costs of reasonable measures of reinstatement actually undertaken or to be undertaken as provided for in the CLC 1992.

Ascertainment of the quantity of oil spillage

19. In ordinary cases, the quantity of spillage should be the basis on which the amount of compensation for oil pollution damage is to be determined.

20. In this case, the original judgment confirmed the existence of oil pollution damage. However, DOFB's claim for marine ecological loss does not fall within the scope of compensation as provided for in the CLC 1992. Therefore, the original judgment made no determination on the quantity of the oil spillage and this would not affect the result of the judgment in this case. Hence, DOFB's claim that the original judgment denied the occurrence of an oil pollution accident by not determining the quantity of spillage lacks factual grounds, and is not tenable.

Whether the Club shall assume joint and several liability

21. In accordance with para 8 of article 7 of the CLC 1992, the victim could file a claim against the shipowner or the liability insurer or other person providing financial security for the owner's liability for compensation for oil pollution damages.

22. In this case, DOFB contended that the Club should be jointly and severally liable with Ondimar for oil pollution damages caused by *Arteaga*.

23. Since the CLC 1992 does not expressly provide that the shipowner and the liability insurer or other person providing financial security for the shipowner's liability for oil pollution damages

[3] Editors' note: seawater quality is regulated by the Chinese national standard Sea Water Quality Standard (National Standard GB 3097-1997) and in terms of second class of seawater, oil content should be ?0.05mg/L. The Sea Water Quality Standard (National Standard GB 3097-1997) is available at: http://kjs.mep.gov.cn/hjbhbz/bzwb/shjbh/shjzlbz/199807/W020061027511546974673.pdf.

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shall be jointly and severally liable for oil pollution damage, pursuant to the principle that joint and several liability should be expressly imposed by law, the original judgment held that DOFB's contention that the Club was jointly and severally liable for the pollution damages lacked the legal basis. Our Court holds that the original judgment is not apparently improper in this respect.

The legal nature of the fund (US$1 million) paid by Ondimar

24. In accordance with the facts ascertained by the original judgment, after the spillage accident involving *Arteaga*, the MSA immediately arranged for professional companies to carry out salvage, pollution prevention and oil clean-up operations, and entered into an agreement with Ondimar in which the salvage remuneration was agreed to be US$6 million (including US$1 million for the costs of pollution prevention and clean-up).

25. The aforesaid fund (US$1 million) was part of the contracted salvage remuneration paid by Ondimar to the MSA, which was irrelevant to DOFB's claim for marine ecological loss. Moreover, the payment of this US$1 million was not the ground of the original judgment to exempt Ondimar from the liability for marine pollution damages. Thus, DOFB's claim in this respect is untenable.

The time limit for court trial

26. This case is a foreign-related dispute case, which shall not be subject to the relevant legal provisions regarding the time limit for a court hearing. Moreover, as provided by article 200 of the Civil Procedure Law of the PRC, the issue of a time limit for a court hearing is not one which should be considered when deciding whether a retrial should be granted. Therefore, DOFB's application for a retrial by reason of exceeding the time limit for a court hearing lacks legal basis and shall not be supported.

IV. Decision of retrial court

27. To sum up, DOFB's application for retrial does not meet with the provision of article 200 of the Civil Procedure Law of the PRC. In accordance with para 1 of article 204 of the Civil Procedure Law of the PRC, this Court decides as follows.

28. The application for retrial filed by DOFB is dismissed.

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