DALIAN MARITIME COURT OF THE PEOPLE'S REPUBLIC OF CHINA (CIVIL JUDGMENT)

29 December 2021

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YINGKOU GONGXIAO AGRICULTURAL PRODUCTS CO LTD
v
WAN HAI LINES LTD

[2021] L 72 MC No 1184

Before Presiding Judge: Li Shuang,
Judge: Wang Zhengyu,
Judge: Wang Min,
Assistant Judge: Yan Jingru and
Clerk: Liang Huiyuan

Carriage of good by sea — Sale contract — Damage to cargo — Liability — Proportion of cargo salvageable.

On 12 May 2020 the plaintiff Yingkou Gongxiao, as shipper, entered into a sale contract to sell fresh plums to DM Co for a total contract price of US$108,756.

On 13 May 2020 the plaintiff picked up the container, packed it and delivered it to the carrier at the loading port on 14 May 2020. A phytosanitary certificate was issued, and the goods were declared to customs which issued a corresponding declaration form.

On 15 May 2020 Shanghai Clipper, acting as the defendant's agent issued an onboard bill of lading to the plaintiff.

On 30 May 2020 DM Co took delivery of the goods at the port of discharge. The goods were found damaged when the container was opened at DM Co's warehouse. A survey concluded that changes in and/or instability of the temperature during the voyage had caused the goods to rot, rendering them unfit for consumption. A second survey concluded that the residual value of the goods should be between 10 per cent to 20 per cent of the goods' value, and that the damage to the goods could not have been caused by the container.

DM Co assigned to the plaintiff the right to claim and other rights under the bill of lading.

The claimant submitted that the defendant should be held liable for the damage, and that it should pay compensation in the amount of US$108,756 (equivalent to RMB775,604.29).

The defendant argued that:

(1) The plaintiff has no right of claim or title to sue in respect of the alleged damage to the goods.

(2) The plaintiff failed to prove that the damage occurred during the period of carrier's responsibility.

(3) The defendant should not be held liable as it had exercised due diligence and reasonable care of the goods during carriage.

(4) The plaintiff failed to prove the extent and amount of damage to the goods.

———*Held*, by Dalian Maritime Court of the People's Republic of China (Presiding Judge Li Shuang) that Yingkou Gongxiao's application would succeed, and the defendant should pay compensation for the loss of the goods in the sum of US$29,364.12, which was 30 per cent of the sum claimed.

(1) The plaintiff had the right of claim for the damage to the goods. There was a legal contract for the carriage of goods between the plaintiff and the defendant, and the assignment agreement made clear that the consignee assigned the right of claim to the plaintiff.

(2) The defendant should bear 30 per cent of the responsibility of the damage to the goods.

(a) The carrier's period of responsibility was from 04.37 GMT on 14 May 2020 to 15.12 GMT on 30 May 2020. The damage to the cargo was calculated as having occurred between 04.37 GMT on 14 May 2020 and 04.00 GMT on 31 May 2021, therefore mainly during the carrier's period of responsibility.

(b) The temperature records for the container showed that the main power was on during this period (except for the cargo discharging operation period). However, the recorder was not a precise instrument and only measured and recorded the temperature of individual spots in the container. The survey stating that the change and/or instability of the temperature during the voyage caused the damage to the goods was considered correct.

(3) A reasonable cost of damage to the goods was calculated as US$97,880.40, being 90 per cent of the total claimed. The court considered that there had not been a total loss of the goods, and so followed the survey by deciding that 10 per cent of the goods would be salvageable.

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The plaintiff, Yingkou Gongxiao Agricultural Products Co Ltd, was located in Yingkou,

Liaoning Province. The defendant, Wan Hai Lines Ltd, was located in Taipei, Taiwan Area.

This was a dispute over a contract for the carriage of good by sea. This case was filed by the plaintiff against the defendant on 18 December 2020. After accepting the case, the court publicly tried this case by applying the ordinary procedure. The trial of this case has now been finalised.

[Editor's note: this judgment is translated and provided by Mr Zhu Moquan and Ms Shen Xiaoping, lawyers of Heng Xin Law Office, with due editorial work by the Editors. Mr Zhu Moquan and Ms Shen Xiaoping represented the defendant in this case. On 8 February 2023 the Supreme People's Court convened the "Sixth Working Conference on Foreign-related Commercial Maritime Trials of National Courts", during which the "2022 Selection of Outstanding Judgement Documents on Foreign-related Commercial Maritime Trials of National Courts" was published. This judgment was granted a Grade II Award.]

Wednesday, 29 December 2021

JUDGMENT

DALIAN MARITIME COURT OF THE PEOPLE'S REPUBLIC OF CHINA:

I. Claim by the plaintiff

1. The plaintiff claims that the defendant should compensate for the loss of the goods the subject of this case, in the total amount of US$108,756 (equivalent to RMB775,604.29 at the exchange rate on the date of discovery of the damage) and corresponding interest from the date of filing claim to the date of actual payment according to LPR (Loan Prime Rate) published by NIFC (National Interbank Funding Center).

2. The plaintiff's submitted the following facts.

(1) In May 2020 the plaintiff entered into a sale contract to sell 28,620 kg of fresh plums to DM Fruit Co Ltd (hereinafter referred to as "DM Co") with the unit price of US$3.80/kg and total FOB contract price of US$108,756. After signing the contract, the plaintiff arranged a booking with the defendant. On 11 May 2020 the plaintiff sent the application for a container inspection to the defendant's empty container storage yard, Yunli Yard. On 13 May 2020 Yunli Yard completed the inspection.

(2) On 14 May 2020 the involved goods were declared for export at Dalian Dayaowan Customs Administration. The Customs Declaration Form with reference No 090820200080173108 recorded that the shipper was the plaintiff, the consignee was DM Co, the mode of transport was by waterway, the mode of transaction was FOB, the name of conveyance and the voyage number was WANHAI 612/S048, the bill of lading number was 032A502512, the quantity of the goods was 28,620 kg, and the total price of the goods was US$108,756.

(3) On 15 May 2020 the goods were loaded on board the vessel. Shanghai Clipper International Shipping Agency Ltd the agent acting on behalf of the defendant, issued an onboard bill of lading No 032A502512 to the plaintiff in the name of defendant in Dalian, China. The bill of lading recorded that the shipper was the plaintiff, the consignee and notify party was DM Co, the loading port was Dalian, the discharging port was Laem Chabang Port, Thailand, the vessel name was *Wan Hai 612*, the voyage number was S048, the container number was SZLU9909580, the container type was a 40' refrigerated container, the cargo description was 3,180 cartons of fresh plums, the weight was 28,620 kg, and the temperature should be set at 1°C during the voyage.

(4) On 29 May 2020 the vessel arrived and the goods were discharged at Laem Chabang, Thailand. DM Co picked up the goods from the port in the evening of 30 May 2020. After arriving at DM Co's warehouse on 31 May 2020, they opened the container and found the goods damaged. DM Co immediately notified the defendant's agent about the damage on the same day.

(5) On 1 and 2 June 2020 a joint survey was performed and attended by DM Co, the agent of the defendant and a third-party inspection company. The inspection company issued survey report No COND-19-0497/2020 on 5 June 2020, which recorded that the temperature was set at 1°C and the actual temperature was 0.8°C. The report held that the change and/or instability of the temperature during the voyage had caused all the goods to rot.

(6) In July 2020 the plaintiff and DM Co reached an agreement on this matter, in which DM Co assigned the right of claim under the bill of lading to the plaintiff who would act as the sole claimant of the bill of lading.

II. Defence of the defendant

3. The defendant argues as follows.

(1) The plaintiff has no right of claim or title to sue in respect of the alleged damage to the goods.

(2) The plaintiff failed to prove that the damage occurred during the period of carrier's responsibility.

(3) The defendant had exercised due diligence and reasonable care of the goods during carriage and should not be held liable.

(4) The plaintiff failed to prove the actual extent and amount of damage to the goods.

III. Evidence submitted by the parties

4. The parties submitted evidence regarding the plaintiff's requests and the defendant's defence submissions. The court organised the parties so as exchange and cross-examine evidence, and confirmed such evidence including the export declaration form, the inspection and quarantine certificate, a container inspection sheet, the bill of lading No 032A502512, the letter of claim, the Thai customs declaration documents of the goods involved, the flow record of container No SZLU9909580 and pre-shipment container inspection report, of which the two parties had no objection as to their authenticity, legality and relevancy. With respect to the disputed evidence and facts, the court holds as follows.

(1) The first group of evidence comprised the original documents of sale contract, packing list and invoice, submitted by the plaintiff. This group of evidence is to prove the value of the goods involved. The defendant argued that the sale contract did not conform to the usual practices of trading in fresh fruit. Since the plaintiff has submitted the originals of this group of evidence and the defendant failed to disprove this, the court accepts this group of evidence.

(2) The second group of evidence comprised survey report No COND-19-0497/2020 and its translation, submitted by the plaintiff. This evidence is to prove that the change and/or instability of temperature during the voyage led to the deterioration of all the goods and made them unfit for human consumption. The defendant argued that this evidence could not prove that the damage occurred during the period of the carrier's responsibility. The court confirmed the authenticity of this evidence which was formed overseas, as it had been notarised and authenticated. As to the matter of proof, the court will comprehensively consider this later in this judgment.

(3) The third item of evidence was the agreement between the plaintiff and DM Co, submitted by the plaintiff. This evidence was to prove DM Co and the plaintiff reached an agreement that the claim over the goods should be raised by the plaintiff. The defendant confirmed the authenticity of the evidence, but argued that whether the right of action could be transferred still needed to be reviewed, and the evidence showed that the goods were not completely damaged. The court confirms the authenticity of this evidence since the defendant raised no objection. As to the matter of proof, the court will consider this later in this judgment.

(4) The fourth item of evidence was the equipment interchange receipt (EIR) for container SZLU9909580 at the loading port, submitted by the defendant. This evidence is to prove that the container was in apparent good order and condition when it was delivered for use. The plaintiff argued that the key details in the EIR were handwritten, and the inspector and the company recorded in the EIR were not qualified. As such this document could not prove that the reefer equipment was running well. As the content of this evidence is consistent with the container inspection sheet submitted by the plaintiff about which both parties have no objection, the court accepts this evidence.

(5) The fifth item of evidence was a printout of an email reply from Dalian Container Terminal and Dalian Zhonglian Tally Co Ltd, submitted by the defendant. This evidence is to prove that there was no abnormality in the reefer containers when they were at the loading port and during tallying. The plaintiff argued that the evidence did not meet the requirements of the form of evidence, so they could not approve its authenticity. This evidence was electronic data and the original form of this evidence should be provided. Since the defendant did not demonstrate the content (of the electronic record) in court, the court rules that this evidence is inadmissible.

(6) The sixth group of evidence was survey report No MMSC 2020-0052 survey report and its translation, submitted by the defendant. This evidence is to prove that the container was running well during the period of the defendant's responsibility and the goods were not all damaged. The plaintiff argued that Merchant Marine Service Center Co Ltd (hereinafter referred to as MMSC), which issued the survey report, was not qualified to conduct assessments and appraisals. Since both MMSC and Technical Independent Survey Co Ltd (hereinafter referred to as TI Co, which issued survey report No COND-19-0497/2020), conducted an on-site survey and together witnessed the opening of the container, the court confirms the authenticity of this evidence. As to the matter of proof, the court will comprehensively consider this later in this judgment.

(7) The seventh group of evidence was the container temperature records and notarised and authenticated materials, submitted by the

defendant. This group of evidence is to prove that the container was running well during the period of the defendant's responsibility, that the air supply temperature was always maintained at 1°C, and there was no power failure or abnormal alarm. The plaintiff confirmed the authenticity of the evidence, but argued that the defendant could not prove that the temperature recorder was a product with a factory certification and was regularly checked, nor did the defendant prove where the recorder was placed and how it worked in the container. The court confirms the authenticity of this evidence. As to the matter of proof, the court will consider this later in this judgment.

IV. Finding of facts by the court

The court confirms the facts as follows.

5. On 12 May 2020 the plaintiff, as shipper, entered into sale contract No PH2020-D to sell 28,620 kg of fresh plums to DM Co, with a FOB unit price of US$3.80/kg and a total contract price of US$108,756. At 16.55 Beijing time on 13 May 2020 (Beijing time = GMT + 8 hours, all below are in Beijing time unless otherwise stated), the plaintiff picked up container SZLU9909580 at the yard. At 12.37 on 14 May 2020, the shipper finished packing the container and delivered it to the carrier at the loading port. On the same day CIQ (China Inspection and Quarantine Administration) issued a phytosanitary certificate for the goods. The goods were declared at Dalian Dayaowan Customs Administration, where a declaration form was issued (No 090820200080173108), on which it was recorded that the shipper was the plaintiff, the consignee was DM Co, the mode of transport was by waterway, the mode of transaction was FOB, the name of conveyance and the voyage number was WAN HAI 612/S048, the bill of lading number was 032A502512, the quantity was 28,620 kg, and the total price was US$108,756.

6. On 15 May 2020 Shanghai Clipper International Shipping Agency Ltd, acting as the agent of the defendant, issued an onboard bill of lading, No 032A502512, to the plaintiff in the name of the defendant in Dalian, China. The bill of lading recorded that the shipper was the plaintiff, the consignee and notify party was DM Co, the loading port was Dalian, the discharge port was Laem Chabang Port, Thailand, the vessel name was *Wan Hai 612*, the voyage number was S048, the container number was SZLU9909580, the container type was a 40' refrigerated container, the cargo description was 3,180 cartons of fresh plums, the weight was 28,620 kg, the temperature was to be set at 1°C during the voyage, and it was stated "freight prepaid" signifying that the plaintiff had paid the freight.

7. At 22.12 on 30 May 2020 local time in Thailand (GMT +7 hours), DM Co took delivery of the goods from the port of discharge. The goods were found damaged when the container was opened at DM Co's warehouse. On 2 June 2020 a representative of DM Co, and surveyors of MMSC and TI Co conducted a joint survey. On 5 June 2020 TI Co issued survey report No COND-19-0497/2020, which concluded that changes in and/or instability of the temperature during the voyage had caused the goods to rot and deteriorate, rendering them unfit for human consumption. The report also stated that it would take about two to three days for plums to ripen fully at normal room temperature, depending on their nature.

8. On 23 June 2020 MMSC issued survey report No MMSC 2020-0052, which concluded that the residual value of the goods should be between 10 per cent to 20 per cent of the goods' value, and that the damage to the goods could not have been caused by the container.

9. In July 2020 the plaintiff and DM Co signed an agreement which stipulated that: (1) DM Co was not to pay sales money from the goods to the plaintiff; (2) the sales proceeds of 54,315.70 baht (approximately US$1,670) from the sale of salvaged plums belonged to DM Co; and (3) DM Co assigned to the plaintiff the right to claim and other rights under bill of lading No 032A502512.

10. On 11 September 2021 the defendant notarised the temperature records of container SZLU9909580 in the Taiwan Area. The records showed (one temperature record every hour):

(a) From 07.00 GMT on 12 May 2020 to 04.00 GMT on 14 May 2020, the main power supply of the container was off.

(b) From 05.00 GMT on 14 May 2020 to 08.00 GMT on 30 May 2020, the power was on, the temperature was set at 1°C, with supply temperature fluctuating from 0.2°C to 2.1°C and the return temperature fluctuating from 2.8°C to 6°C.

(c) From 09.00 GMT to 11.00 GMT on 30 May 2020, the main power supply was switched off.

(d) From 12.00 GMT to 13.00 GMT on 30 May 2020, the power was on, the temperature was set at 1°C, the supply temperature was 1°C, and the return temperature was between 3.8°C and 3.7°C.

(e) From 14.00 GMT on 30 May 2020 to 04.00 GMT on 31 May 2020, the main power supply was switched off.

(f) From 05.00 GMT on 31 May 2020 to 06.00 GMT on 2 June 2020, the power was on, the temperature was set at 1°C, supply temperature was fluctuating between 0.9°C and 17.7°C and

the return temperature was fluctuating from 4.1°C to 30.2°C.

11. The court holds that the case is a dispute concerning a contract for the carriage of goods by sea. The port of discharge was Laem Chabang Port, Thailand. Therefore, this is a case with foreign-related factors. According to article 41 of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations, the parties concerned may choose the laws applicable to contracts by agreement. Article 6 of the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (I) provides that "where the parties concerned agree to choose applicable laws or to change the choice of applicable laws prior to end of court debate of the first instance, the People's Court shall permit such choice or change". Before the conclusion of the court hearing in the first instance, the plaintiff and the defendant agreed to choose to apply the laws of the People's Republic of China. Therefore, the laws of the People's Republic of China shall apply in this case.

12. The key issues of dispute in this case are: (1) the right of claim; (2) whether the damage to the goods occurred during the carrier's period of responsibility; and (3) the reasonable amount of damage to the goods. The court will comment as follows.

13. With regard to whether the plaintiff has the right of claim for the damage to the goods.

(1) According to article 71 of the Maritime Law of the People's Republic of China, the bill of lading is evidence of the contract of carriage by sea. The agent acting for the defendant issued bill of lading No 032502512 in Dalian, China, which recorded that the shipper was the plaintiff, "freight [was] prepaid" and the plaintiff had paid the freight under the bill of lading. The contractual relationship for the carriage of goods by sea between the shipper (the plaintiff), and the carrier (the defendant) was therefore legally established.

(2) DM Co, the consignee, stated in bill of lading No 032502512, had made it clear in the assignment agreement that DM Co had not paid the goods' sales money to the plaintiff, and had assigned the right of claim and other rights under bill of lading No 032502512 to the plaintiff.

(3) Thus, the lawsuit brought by the plaintiff has legal basis. The defendant's argument that the plaintiff has no right of claim is not supported by the court.

14. Whether the damage occurred during the carrier's period of responsibility.

(1) Paragraph 1, article 46 of the Maritime Law of the People's Republic of China provides that: "The period of responsibility of a carrier for containerized goods shall be the period during which the carrier has charge of those goods and shall refer to the period beginning from the receipt of goods at the port of shipment and ending when the goods are delivered at the port of discharge. The period of responsibility of a carrier for non-containerised goods shall be the period during which the carrier has charge of the goods and shall refer to the period beginning when the goods are loaded onto the vessel and ending when the goods are unloaded from the vessel".

(2) At 12.37 Beijing time on 14 May 2020 (04.37 GMT), the shipper (the plaintiff), finished packing cargo into the container and delivered it to the carrier (the defendant), at the loading port. At 22.12 local time in Thailand on 30 May 2020 (15.12 GMT), the consignee (DM Co) picked up the goods from the port of discharge. The carrier's period of responsibility was from 04.37 GMT on 14 May 2020 to 15.12 GMT on 30 May 2020, and the temperature records of the container showed that the container's main power was kept on during this period, except for the cargo discharging operation period from 09.00 to 11.00 GMT on 30 May 2020 when the power was switched off. As the temperature was recorded once every full hour, the time difference between receipt and delivery of the goods at the yard and full hour does not count. The temperature was set at 1°C, the supply temperature fluctuated from 0.2°C to 2.1°C and the return temperature fluctuated from 2.8°C to 6°C. After DM Co picked up the container, the main power supply was off from 15.12 GMT on 30 May 2020 to 04.00 GMT on 31 May 2021. According to common sense, this period should be the time during which the container was transported from the yard at the discharging port to DM Co's warehouse, during which the container had its power off on the truck.

(3) A clean bill of lading for the carriage of the goods had been issued by the agent of the carrier and the plaintiff had obtained a phytosanitary certificate for the goods. The defendant argued that the plaintiff failed to prove that the goods were intact before loading into the container, but has no evidence for this allegation. The goods were found damaged when opening the container at DM Co's warehouse. Therefore, the damage to the cargo should have occurred between 04.37 GMT on 14 May 2020 and 04.00 GMT on 31 May 2021.

(4) The defendant argued that the plaintiff did not prove that the cargo damage occurred

during the period of the carrier's responsibility and it had exercised due diligence and reasonable care of the goods during carriage, and should not be held liable. To support this argument, the defendant submitted the temperature recorder of the involved container.

(5) However, the recorder was not a precise instrument and only measured and recorded the temperature of individual spots in the container. Even though the temperature was set at 1°C during the power-on period, the supply temperature and the return temperature also fluctuated greatly. Moreover, a 13-hour absence of electricity, from pick up by DM Co to delivery at DM Co's warehouse, would not result in almost total loss of the goods (the report issued by TI Co stated that it would take about two to three days for plums to ripen fully at room temperature, depending on their nature). The conclusion of TI Co's report (the change and/or instability of the temperature during the voyage caused the damage to the goods) is somewhat reasonable.

(6) Since neither the plaintiff nor the defendant has submitted sufficient evidence to prove the specific time when the cargo damage occurred, the court holds that the cargo damage was caused by a combination of unstable temperature inside the container during the carrier's responsibility period and the failure of electricity for cooling during the period from pick-up to DM Co's warehouse.

(7) Article 54 of the Maritime Law of the People's Republic of China stipulates: "If cargo is destroyed, or delivered late due to reasons caused by a carrier or his employees or agents for which there is no exemption from liability for compensation, the carrier shall bear liability for compensation only for that part which is non-exempt from liability for compensation; however, a carrier shall be responsible for providing proof of those other causes of cargo being destroyed, damaged or delivered late".

(8) Considering the actual circumstances of the case, the court decides, at its discretion, that the carrier, the defendant, should bear 30 per cent of the responsibility of the damage to the goods.

15. Regarding quantum of the cargo damage.

(1) The sales agreement signed by the plaintiff and DM Co stated that 54,315.70 baht (approximately US$1,670) was obtained from the salvage sale of plums. Survey report No COND-19-0497/2020 issued by TI Co concluded that all the goods were rotten and unfit for human consumption. Survey report No MMSC2020-0052 issued by MMSC concluded that the residue value should be between 10 per cent and 20 per cent of the goods' value.

(2) Based on the above, the court holds that the involved goods had not suffered a total loss. Therefore, the conclusion made by TI Co is not consistent with the reality and the conclusion made by MMSC is reasonable. Considering the actual circumstances of the case, the court decides, at its discretion, that the actual value should be 10 per cent of the cargo value before damage.

(3) According to article 55 of the Maritime Law of the People's Republic of China: "Compensation for destroyed cargo shall be calculated at the actual value of that cargo; compensation for damaged cargo shall be calculated according to the difference between the actual value of the cargo before and after being damaged or to expenses of repairing the damage". The plaintiff's claim that the actual value of the goods should be the FOB price in the amount of US$108,756, as stated in the sales contract signed by the plaintiff and DM Co (which is also the total price of the goods recorded on the customs declaration form) is reasonable. The court upholds it. The reasonable amount for damage to the goods should therefore be US$97,880.40 (US$108,756 × 90 per cent).

(4) The plaintiff also claims that the defendant should pay corresponding interest from the date of filing lawsuit to the date of actual payment according to LPR published by NIFC. The court upholds this claim.

V. Judgment of the court

16. In conclusion, the carrier, ie the defendant, shall compensate the shipper, ie Plaintiff, for the loss of the goods in the amount of US$29,364.12 (US$97,880.40 ×30 per cent) and corresponding interest (on the basis of US$29,364.12, from 18 December 2020 to the date of actual payment according to LPR published by NIFC).

17. In accordance with the provisions of articles 54, 55 and 71 of the Maritime Law of the People's Republic of China, the court decides as follows.

(1) The defendant shall compensate the plaintiff for the loss of the goods in amount of US$29,364.12 and corresponding interest (on the basis of US$29,364.12, from 18 December 2020 to the date of actual payment according to LPR published by NIFC) within 10 days from the effective date of this judgment.

(2) The other claims of the plaintiff should be dismissed.

18. If the defendant fails to perform its obligation of pecuniary payment during the period specified in this judgment it shall, as per

article 253 of the Civil Procedure Law of the People's Republic of China, pay double interest for the debt for the period of delayed performance.

19. The case acceptance fee is RMB11,556 (which has been prepaid by the plaintiff), RMB3,120 of which shall be borne by defendant and shall be paid to this court within seven days from the effective date of this judgment (enforcement measure would be taken if payment is not made within the due time); RMB8,436 shall be borne by the plaintiff, and the prepaid RMB3,120 shall be returned.

20. In the event that any party is dissatisfied with this judgment, the defendant can file an appeal with 30 days, while the plaintiff can file an appeal with 15 days to Liaoning Higher People's Court, from the day on which this judgment is served, by submitting the petition for appeal to this court together with copies of the appeal submission according to the number of the opposing parties.