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JAPAN P&I NEWS

外航組合員各位

中国－中国人船員の傷害、疾病、死亡に関するリスクへの注意喚起

中国の弁護士事務所 Wang Jing & Co.から中国人船員クレームにおける注意情報を入手しましたのでお知らせします。
注意事項の要旨は以下のとおりです。詳細については、添付をご参照ください。

対象：中国人船員を擁する中国国内および海外船主

1. 雇用契約書の改訂：治療補償期間を明示しないことに起因するトラブルの可能性
2. 二重請求のリスク
3. 社会保険の不十分な手配によって追加の補償責任を負うこと

ご不明な点については適宜、中国の法律事務所などに確認することをお勧めします。

以上

添付資料：Wang Jing & Co Newsletter: Alert to Risks in the Claims for Injury, Illness or Death of Chinese Seafarers Expatriate.
Wang Jing & Co Newsletter:中国外派海员伤病亡索赔的法律风险提示和防范建议（原文）

Alert to Risks in the Claims for Injury, Illness or Death of Chinese Seafarers Expatriate

These years, WJNCO has handled a number of cases arising from claims for injury, disease or death of Chinese seafarers sent overseas, mostly based on the law of the PRC, but unfortunately a sound system has not yet been established in China to fairly protect the seafarers and ship interests. Loopholes in the law are therefore found, exploited and enlarged, making shipowners exposed to more and more risks, liabilities and burdens.

1. Potential troubles due to unspecified period of medical attention

When suffering from dread diseases such as cancer, a seafarer will seek medical attention, possibly for an unexpectedly long period, which can put onerous burdens on the shoulder of shipowners, including reimbursement for medical expenses and sick pay (this is frequently seen in the seafarer cancer cases we've handled). Although the Chinese labor law has quite clear provisions on the period of medical attention (dependent on the working years: for example, an employee with over-10-year seniority is entitled to a period of medical attention of 3 months if he has been working in the current company for less than 5 years), those provisions apply only when a labor contract defined under the PRC law exists, and do not cover service/employment contracts or tortious disputes, in which case the SEA and the relevant CBA should become the key to decide the period of medical attention. However, specified periods of medical attention are often absent in lots of SEAs and CBAs, and this obviously will

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pose great risks to shipowners in respect of their liabilities for the medical attention of sick seafarers (including reimbursement for medical expenses and sick pay).

In particular, we would like to call your special attention to the loophole in the Chinese CBA[1]. The Chinese CBA (2022-2023 version) defines the "period of medical attention" in its Clause 44 as "until the seafarer has recovered; until the sickness or incapacity is declared permanent; until the agreed period of medical attention expires (the agreed period of medical attention shall not be shorter than 16 weeks)". Namely, this Clause provides for three options to decide the period of medical attention. If it is not expressly agreed which option applies when the Chinese CBA is incorporated, it leaves large room for controversies—seafarers surely will argue for the most favorable option, like "until the seafarer has recovered" or "until the sickness or incapacity is declared permanent", in which case risks will grow uncontrollably.

WJNCO's Advice: Check whether the SEA and the CBA used have given clear provisions on the period of medical attention; if the Chinese CBA is used, it is recommended to clearly select one of the three options and agree upon a specific period.

2. Expanded risks of double claims

As foreign shipowners cannot sign labor contracts or labor dispatching contracts with Chinese seafarers, nor are they able to place Chinese social insurance for Chinese seafarers, in some cases, Chinese seafarers dispatched overseas to work for foreign shipowners will sign labor contracts with Chinese manning agents, and the latter will place social insurance for them. This leads to the result that when the seafarers suffer from work-related injuries, the manning agents will be held liable for work-related injury compensation under the labor contracts, but meanwhile, the seafarers may also seek for another compensation in tort from the foreign shipowners. This practice is not prohibited by Chinese courts, but even upheld. In other words, a seafarer is allowed to raise respective claims against both the foreign shipowners and the Chinese manning agents.

It is worthy of note that this risk of double claims is now confronted by not only Chinese manning agents, but also ship managers in China. Some foreign shipowners place social insurance for Chinese seafarers through their ship management companies in China,

[1] We've also checked the HK CBA and Taiwan CBA, and found both have restrictions on the maximum days of medical attention, respectively being 112 days from the day of the injury and 130 days after repatriation.

and the ship managers' act of paying social insurance premiums may therefore be construed by Chinese courts as they having established labor contracts with the seafarers. That enables seafarers to claim not only work-related injury compensation from the ship managers under the construed labor contracts, but also damages in tort against the foreign shipowners. Even though the premiums are actually contributed by the foreign shipowners who are also in the group of ship interests as the ship managers are, the foreign shipowners cannot be exempted or relieved from the liability in tort. The spirit of integrity of ship interests in the shipping practice that shipowners, managers and operators belong to the same group of interest and any of them shall not be deemed as a "third party" to the other two is not recognized by the Chinese judicial practice.

Unlike Chinese shipowners who may rely on the labor dispatch mechanism provided for in the Chinese labor law to defend that they are in the same group of interest with the ship managers (ship owners are the employer dispatching the labor, while ship managers are the employer receiving the labor), foreign shipowners are not in a position to raise the defense since the foreign shipowners are not governed by the Chinese labor law, and will therefore be considered as a "third party" under the tort law.[2]

WJNCO's Advice: To avoid double claims against ship interests, the key lies in avoiding establishment of labor relationship between any Chinese company in the ship interests (such as ship managers) and Chinese seafarers. Accordingly, we suggest any Chinese affiliate of foreign shipowners (such as ship managers) should not have any connection with Chinese seafarers in the terms of employment in any form, including showing its name in the SEA and signing the SEA in its name (but in the name of an offshore company instead). Additionally, it is worthy of consideration to add a special provision in the SEA that provides for "one compensation only for one single incident". Although the legal effectiveness of such a provision may be challenged, we consider it at least offers a chance of defense to shipowners.

[2] For example, in the case *(2020) Hu Min Zhong No.40* of the High People's Court of Shanghai Municipality where the Chinese shipowners recruited the seafarer through its affiliated crew management company in China, the court held that the Chinese shipowners, the crew management company and the seafarer concluded a labor dispatch contract, that the shipowners therefore were not a "third party", and hence that the seafarer was unentitled to raise another claim for tortious damages against the Chinese shipowners in addition to the work-related insurance compensation; in contrast, in the case *(2014) Min Shen Zi No.763* of the Supreme People's Court where it is foreign shipowners involved and the ship managers are a Chinese company, the court held that the Chinese ship managers had concluded a labor contract with the seafarer, and though the foreign shipowners argued it was a labor dispatch contract concluded by them with the ship managers and the seafarer, the court held the provisions of the Chinese labor law regarding labor dispatch contracts are not applicable to foreign companies, and therefore held the foreign shipowners shall bear a separate liability (the family of the seafarer also raised a claim against the Chinese ship managers for work-related injury compensation, and was supported by the High People's Court of Hubei Province in the judgment *(2016) E Min Zhong No.36)*.

3. Additional liability arising from insufficient social insurance (for the attention of Chinese shipowners, ship managers and manning agents)

Under the Chinese labor law, an employer shall pay social insurance[3] premiums in full for its employees, and in case of insufficient payment which results in any employee obtaining less social insurance benefits, shall make up the difference. However, in practice, most seafarers are reluctant towards payment of social insurance premiums at their full wage level (as it will not only result in less wages actually received, but also will cause higher personal income tax to be paid); on the other hand, employers also tend to pay the social insurance at a lower wage level in order to lower its contribution. As a result, the social insurance premiums for many expatriate seafarers, though paid, are in fact paid insufficiently, with a lower figure. When a work-related injury accident occurs to a seafarer, as some claim items under the work-related injury insurance, such as next-of-kin compensation, depend on the social insurance contribution base, the employer would be faced with the liability to compensate for the difference. In a case handled by us, the manning agent was sued for compensation for such a difference in the amount of nearly RMB 2 million.

Meanwhile, as the social insurance contribution base is related to the wage level at the locality where the social insurance premiums are paid, not lower than 60% of the average wage of employees at the locality and not higher than 300% of the same, some employers choose to entrust a company in a place with lower economic level to arrange social insurance for their employees (seafarers). This can indeed reduce costs and transfer risks. However, the compulsory obligation to pay social insurance premiums rests on the employer, deliberately entrusting a company having no labor relationship with the seafarer to pay social insurance premiums for the employee might be regarded as an insurance fraud by fabricating a contractual labor relationship. In practice, we also encountered cases where the crew rejected to recognize such arrangement after a work-related injury accident occurred, making the intended function of the arrangement unachievable.

WJNCO's Advice: Insufficient payment of social insurance premiums undoubtedly will expose employers to supplementary liability of compensation for the insufficiency and such liability would be hard to be avoided as the arrangement itself violates the

[3] The Chinese social security scheme consists of pension insurance, medical insurance, work-related injury insurance, unemployment insurance and maternity insurance. In our experience, most of the cases involving work-related injury compensation concern the work-related injury insurance ("WRII") only, so the social insurance in this part refers to WRII.

national compulsory requirement. Nonetheless, in our experience, there are two ways to lessen such exposure to a certain extent: (1) when a company at a place with lower economic level is entrusted to arrange social insurance, enhancing the relevancy between the company and the employer, e.g., the shipowners or the manning agent may sign a cooperation agreement with the company and ask the relevant seafarer to issue a statement to confirm his agreement to such arrangement; (2) in addition to a SEA or a labor dispatch agreement, requesting the seafarer to issue a statement confirming that he requests the company to pay his social insurance premiums based on the base amount proposed by the company, that he is aware of and willing to assume the relevant liabilities and risks, and that he waives his right to claim for compensation for insufficient social insurance. Though the validity of such a statement is controversial, it is always beneficial for shipowners to establish a firewall.

中国外派海员伤病亡索赔的法律风险提示和防范建议

近年来我们处理了不少中国外派海员伤病亡索赔的案例，中国海员往往选择中国法律作为索赔依据，鉴于中国法律法规暂时尚未形成一个健全的海员劳动保障体系，存在一些法律漏洞，这些法律漏洞逐渐被发掘和放大，随之而来船东所承担的风险、责任和压力越来越重。

● 风险一：医疗期未予明确带来的风险

在面临海员疾病尤其是癌症等重大疾病时，海员的医疗期可能遥遥无期，船东对海员医疗责任（包括医疗费用和病休工资）变得非常繁重（目前我们处理的几个船员癌症案件都面临这个问题），中国劳动法虽然对医疗期有较为明确的规定（按照工作年限给予员工一定的医疗期期限，比如实际工作年限十年以下且本单位工作年限五年以下的享有三个月的医疗期），但只能适用于劳动合同关系存在的情形，对于劳务合同或侵权纠纷则没有与医疗期有关的规定。海员就业协议及其适用的集体协议成为了判断医疗期的关键，但我们注意到有不少的海员就业协议或其所适用的集体协议并没有明确医疗期，对此船东对海员医疗责任（包括医疗费用和病休工资）存在非常大的风险。

需要特别提醒的是中国 CBA 关于医疗期所存在的问题和漏洞[1]。以 2022 年

[1] 我们也翻阅香港 CBA 和台湾 CBA，发现其均有对疾病医疗期期限有最长期限的限制，分别为患病之日起 112 天和遣返后 130 天。

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~2023 年版本的中国 CBA 为例，其第四十四条规定船东应当提供的治疗期为“直至痊愈；确诊为永久性疾病或者永久性残疾；约定的医疗期届满（双方约定的治疗期不应少于 16 周）”，具体条款截图如下：

第四十四条　船员在船期间发生或者源于这期间工作而发生疾病或者受伤的，船东应当及时为船员安排治疗。治疗期为：直至痊愈；确诊为永久性疾病或者永久性残疾；约定的治疗期届满（双方约定的治疗期不应少于16周）。

生病或受伤船员在船期间，船东应向其支付全部医疗费和全额在船工资。

船员离船治疗的，受伤船员在治疗期内船东应当负责支付船员的全部医疗费和全额在船工资；在船生病的船员在治疗期内，船东应按照法律法规的规定支付全部医疗费和不低于公休工资或待派工资的工资，两者以较高者为标准。

根据我们的理解，该规定提供了三个医疗期届满的情形供选择，如果会员在并入该 CBA 的时候没有明确选择，则医疗期将存在较大的争议，船员完全可以主张对其有利的情形如直至痊愈或需到确诊为永久性疾病或者永久性残疾时，这是非常不可控的风险。

风险防范建议：审查海员就业协议与所使用的集体协议关于疾病医疗期的约定是否明确，尤其如果使用中国 CBA，建议对医疗期进行明确选择和约定。

● 风险二：“一次工伤、两份赔偿”的双重赔偿风险依然存在并有所扩展

由于中国劳动法律不适用于外籍船东，中国社保体系也未向外籍船东开放，外籍船东与中国外派海员无法建立劳动合同法律关系或劳务派遣法律关系，无强制义务也无法为海员缴纳中国社保。对于海员工伤索赔，外籍船东需按照合同约定或侵权责任承担一份赔偿责任。实践中，如果船员外派公司与海员存在劳动合同关系（为其安排社会保险），该公司就需向海员承担工伤赔偿责任，同时，海员仍可能基于侵权关系向外籍船东另行索赔一份侵权责任赔偿。

目前中国司法实践认可受害人同时分别向用人单位主张工伤责任和向“第三人”主张侵权责任，支持海员向外国船东和境内船员外派公司分别索赔的主张。

但是，我们也注意到，这种双重赔偿模式也逐渐蔓延到船舶管理公司身上。有些外籍船东通过其国内船舶管理公司为船员安排缴纳社保，但该缴纳社保的行为很可能被法院作为依据认定该船舶管理公司与海员存在劳动合同法律关系，进而海员一方面向船舶管理公司索赔工伤责任，一方面向外籍船东索赔侵权责任。

尽管海员社保费用来源于外籍船东而且船舶管理公司本质上也是船舶的一个共同利益方，但外籍船东无法因此减免赔偿责任，船舶利益方一体性（即船舶管理公司与船舶所有人、船舶经营人都是同一利益共同体，其中一方不应该被人为认定为“第三方”）的航运实践并未被中国司法实践所认可。

因为登记船东国籍的不同（如一个为外籍船东，一个为中国船东），则所面临的索赔将不一样，中国船东可以利用中国劳动法下的劳务派遣机制来抗辩他们和船舶管理公司属于同一利益共同体（分别为用人单位和用工单位），但外国船东却无法利用该法律抗辩而落入“第三人”的“坑”；从而导致两种截然不同的判例结果[2]。

风险防范建议：避免船舶利益方的双重赔偿的关键在于避免使利益方中的中国公司（如管理公司）与外派海员之间构成劳动关系，我们建议尽量不要让外国船东在中国的关联公司（如船舶管理公司）与海员存在劳动方面的关联，包括在海员就业协议中不要体现中国公司，不要以中国公司名义签订海员就业协议等等（而是用海外公司）。同时，可以考虑在海员就业协议中增加一次事故、一份赔偿的特别约定，虽然这种特别约定的法律效力有待商榷，至少为船东增加一层防火墙和抗辩机会。

- **风险三：不足额缴纳社保的补充责任风险（针对中国的船东、管理公司或船员外派公司）**

在中国劳动法下，用人单位须足额缴纳员工社保（中国社会保险包括了养老、医疗、工伤、失业和生育，在我们很多案件中，涉及工伤赔偿的也就是工伤保险这个项目，后文中提及的社保，指的就是工伤保险这个项目），并对不足额缴纳所造成理赔待遇上的差额承担补充赔偿责任。实践中，海员本身按照其全额工资水平缴纳社保的意愿不高（不仅实际到手工资少，而且也会暴露其实际工资而导致需要缴纳更高的个人所得税）；另一方面，为避免更高的社保负担，实务中用人单位往往也是根据较低的工资金额来缴纳社保，导致很多外派海员即便有缴纳社保但实际上处于不足额缴纳状态，在发生工伤事故后，鉴于某些理赔项目如供养亲属抚恤金与社保缴纳基数挂钩，此时公司就要面临承担补充差额部分的赔偿责任（我们接触的一个案件中，海员外派机构就因为这个问题被诉要求赔偿将近

[2] 如在上海市高级人民法院审理的（2020）沪民终 40 号案中，案涉船舶所有人为中国籍船东，其通过关联的国内船员管理公司招聘海员，法院认可中国籍船东、船员管理公司和海员构成劳动法下的劳务派遣法律关系，中国籍船东不属于用人单位之外的“第三人”，故在海员已经获得工伤理赔的情况下，无权要求中国籍船东另行承担侵权责任。而在最高人民法院审理的（2014）民申字第 763 号案中，案涉船舶所有人为外籍船东，管理公司为中国籍公司，法院认定中国籍管理公司与海员成立劳动合同关系，外籍船东抗辩其与中国籍管理公司和海员形成劳动法下的劳务派遣法律关系，最高人民法院认为劳动法所调整的劳务派遣法律关系不适用外籍公司，外籍船东须另外单独承担责任（海员家属就涉案事故也起诉中国籍管理公司索赔工伤赔偿，在（2016）鄂民终 36 号中得到湖北省高级人民法院的支持）。

人民币 200 万元）。

另外，由于社保缴纳基数与所缴纳地区的工资水平有关，最低不低于所缴纳地区职工平均工资的 60%，最高不超过所缴纳地区职工平均工资的 300%。我们注意到有些公司将海员的社保交由某些在经济水平较低的区域的公司来统筹安排，该方式确实能够降低费用且将风险转嫁出去，但社保缴纳义务在于用人单位，人为安排由不存在实际劳动关系的公司代为缴纳社保，存在虚构劳动合同关系投保和骗保的风险，实践中我们也处理过有海员在事后拒绝承认这种社保安排，使之失去了原有的保障作用。

风险防范建议：不足额缴纳社保本身就带来补充赔偿责任的风险，该风险因为违反了国家强制性的规定而难以解决。不过，根据我们的经验，有如下两种方式一定程度上可以减少风险：一是如将社保交由某些在经济水平较低的区域的公司来统筹安排，建议补强公司之间的关联性，如船东或外派公司与实际缴纳公司之间额外签订一份合作协议，并让海员也出具声明书确认同意此种社保安排，以避免海员事后不认可，导致所安排社保失去保障作用。二是让海员在签署海员就业协议或派遣协议时候一并出具声明书，声明其要求公司按照公司拟缴纳的社保基数进行缴纳、清楚且自愿承担相关的责任和风险并放弃索赔不足额缴纳社保的权利。虽然这种声明的效力存在较大争议，但设立一层防火墙对船东而言总归是有益的。