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.