

Soundings

China's new Civil Code and its impact on shipping

The new China Civil Code (CCC), which will come into effect on 1st January, 2021 introduces significant changes to various sectors of Chinese law and will impact those doing business in China. In this article, we look at some of the potential impacts that on shipping.

The most extensive legislation in Chinese history, the CCC is an amalgamation and replacement of a number of key existing civil laws. In addition to matters of private property, contracts, privacy, marriage, family and inheritance, the CCC will also extend to maritime matters not expressly regulated by the 1993 China Maritime Code (CMC).

It is anticipated that the shipping industry is likely to be affected by the CCC in the following areas:

Transfer of ownership of mortgaged property

Mortgaged property (which includes ships) may now be transferred by the mortgagor, unless the parties agree otherwise (art. 406). This is a change from the current property law and the China Maritime Code, which prohibits such transfer during the mortgage period.

It is expected that banks and other financial institutions will now require an explicit prohibition against selling mortgaged property during the mortgage period. The CCC has no retrospective effect, so contracts that were concluded before its implementation will not be affected.

Contract for the benefit of a third party

A third party beneficiary under a contract is now entitled to claim directly against the contractual parties on the basis of legal provisions or clauses agreed in the contract (art. 522(2)). Privity of contract is no longer a requirement for enforcement in these particular circumstances.

This new provision may, for example, allow liner carriers to recover terminal handling charges arising under a FOB sales agreement, if the contract specifies that a party must pay such charges or other loading port costs directly to the carrier.

By way of another example, where a bareboat charterparty provides for hire payments to be made directly to the mortgagor bank, in the event that the mortgagee owner fails to pay its loan repayments, the bank may be entitled to claim directly against the bareboat charterer.

Performance by a third party on behalf of a contractual party in default

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rights assigned to it. This is subject to the nature of the obligation and absence of any statutory or contractual prohibitions (art. 524.)

The meaning of “legitimate interests” remains to be clarified by the courts, but, it is anticipated that the provisions might, for instance, be invoked by a Ship Pollution Response Organisation which engages in clean-up operations ordered by a local Maritime Safety Administration.

However, it seems unlikely that these provisions will assist, for example, an unpaid bunker supplier in claiming against an owner, where the bunker supply order is placed by a time charterer and is the charterer’s responsibility under the governing charterparty since Chinese law recognises the principle of privity of contract.

The independence of a guarantee

In a departure from the current law, the CCC makes a guarantee conditional upon the validity of the underlying contractual obligations which the guarantee assures (art. 682). This means that parties are not entitled to assert that a guarantee stands as an independent obligation.

If the underlying contract (such as a loan agreement, shipbuilding contract or charterparty) is deemed null and void, so too is any associated guarantee (for example an indemnity, letter of undertaking or deed of covenant).

However, in certain circumstances a refund guarantee under a shipbuilding contract may remain in place. For example, if the guarantee is issued pursuant to the “Provisions of the Supreme Peoples’ Court Concerning Trial of Independent Guarantee Dispute Cases” then it remains independent from the principal contract and would survive termination of the underlying contract.

The implied form of a guarantee

The current Chinese law on guarantees imposes, on a guarantor, joint and several liability with the guaranteed debtor unless expressly otherwise agreed.

The CCC changes this principle (art. 19) by restricting a guarantor’s liability to the guarantee terms without any

concomitant joint and several liability with the debtor unless the same is expressly agreed.

The implied guarantee period

In a further change to the law of guarantees, if the duration of a guarantee is unspecified or unclear the CCC implies a six month duration (art. 692). This is shorter than the two year period prescribed under the current law. The recipient of a guarantee will need to ensure the period of the contract is clearly defined and not compromised or in conflict with any other clauses in the agreement.

Time bar for claims in contract and tort

The limitation period for civil disputes is set at three years (art. 188), except as otherwise prescribed by any applicable law.

The prescriptive period runs from the day a party realises (or should have known) that a right has been breached and the identity of the infringer.

However, for shipping disputes the time bar stipulated in the CMC will prevail over the general time bar. Disputes or claims under a charterparty are governed by the CMC and the time limit of two years specified therein will therefore apply.

MOAs and shipbuilding contracts, on the other hand, do not fall within the ambit of the CMC and so the three year time limit prescribed in the CCC will apply to disputes under these types of contracts.

Since the application of the Code has not yet been tested in the courts, the interaction of the CCC and the CMC, as well as the impact on shipping, remains to be seen. One point that requires clarification is whether the CCC will supersede the CMC or vice versa, in the event of a conflict between the two. It is expected that the Supreme Peoples’ Court of China will issue official guidance on the interpretation and application of the CCC before it comes into force.

If Members have any questions regarding the CCC or other areas of Chinese law, they are invited to contact the Association in the usual way.

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