

Identification of Maritime Freight Forwarder within the Framework of “One Country, Two Systems”

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I. Introduction

Due to the differences in the fields of history, politics and legal culture, the international maritime freight forwarding scheme has shown regional characteristics in Mainland China, Hong Kong, Macao and Taiwan respectively. In the course of the development of economic integration among Mainland China, Hong Kong, Macao and Taiwan, international maritime freight forwarding industry, on the one hand, plays the role of “organizer and designer of the international transportation” which makes great contributions to the economy and trade development. On the other hand, the differences lie in the provisions regulating international maritime freight forwarding in Mainland China, Hong Kong, Macao and Taiwan give rise to many uncertainties in disputes settlement which holds back the development of such industry.

This article puts emphasis on the analysis and comparison to the similarities and differences among the international maritime freight forwarding schemes within the law districts of Mainland China, Hong Kong, Macao and Taiwan from the perspective of relationship between the Agency Scheme and Maritime Freight Forwarding Scheme. It may discuss on the feasible mode for resolving the legal conflicts pertain to the international maritime freight forwarding in aforesaid four law districts on the basis of the said analysis and comparison. Due to the limitation on space, this article may only discuss on the issues of “identification of freight forwarder” which has decisive effect on the rights and obligations of the freight forwarder.

II. International Maritime Freight Forwarding Scheme and Identification of Freight Forwarder in Mainland China

With regard to the rights and obligations between the freight forwarders, including the maritime transport freight forwarders, and their consignors, no specific laws could be found under the present Chinese legal system, but only the fundamental laws, such as the *Civil Law of the People's Republic of China* and the *Contract Law of the People's Republic of China* could be applied to the determination of such kind of relationship. In practice, maritime transport freight forwarders may play many roles. Sometimes they act as entrusted agents to handle the cargo transportation in the name of their principals, however sometimes they participate in maritime transport services as independent operators. Diverse roles of maritime transport freight forwarders are confirmed by *Detailed Rules for the Implementation of the Regulations of the People's Republic of China on the Administration of the International Freight Forwarding Industry*.¹ However identifying the legal role of a freight forwarder under Chinese law is difficult, especially when the freight forwarder sign the transport contract in his own name. On one hand *Civil Law of the People's Republic of China* follows the custom of continental law, it only admit direct agency², which means if the freight forwarder sign transportation contract in its own name, it will be deemed as independent operator, not agency. On the other hand unnamed agency and undisclosed agency in Anglo-American laws, entitle the principles rights of intervention and the third parties rights of election, are adopted in *Contract Law of the People's Republic of China*³,

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freight forwarders who sign the transportation contract in his own name would be deemed as agency under certain condition. In practice, whether the freight forwarder take responsibilities as independent operator, in most cases carrier, or as agency depends on which law applies. Lots of arguments arise but no specific provisions have been provided by the current Chinese laws.

On 27th February 2012, the Supreme People’s Court of the People’s Republic of China issued *Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Cases of Disputes over Marine Freight Forwarding*⁴, which presents the position of Chinese highest judicial organ and provides important guidance for the following trial. This judicial interpretation comes into force on 1st May 2012. In this judicial interpretation the Supreme People’s Court explains its understanding on how to identify the legal role of a marine freight forwarder. Article 3 of this judicial interpretation rules that people’s court shall decide whether a marine freight forwarding contractual relationship is established according to the nature of the rights and obligations stipulated in the written contract, the name and manner in which the freight forwarding enterprise receives payment, the type of invoice issued, the fees charged, the trade usage between the two parties and other information on the actual performance of the contract. Article 4 rules that when a freight forwarding enterprise issues bills of lading, seaway bills or other shipping documents in its own name in the course of handling marine freight forwarding affairs, if the consignor claims that the freight forwarding enterprise assume carrier’s liability on those grounds, a people’s court shall uphold such a claim. When a freight forwarding enterprise issues bills of lading, seaway bills or other shipping documents in the name of the carrier’s agent but fails to prove that it has obtained authorization from the carrier, if the consignor claims that the freight forwarding enterprise assume carrier’s liability on those grounds, a people’s court shall uphold such a claim. In light of this provision, the Supreme Court did not respond positively to the question whether *Civil Law of the People’s Republic of China* or *Contract Law of the People’s Republic of China* applies in identifying the legal roles of freight forwarder. However, combining the analysis on the provisions as stipulated by Article 3 and 4, the Supreme Court holds that in addition to take the written contract, usage and actual

performance of the contract into consideration, the fact that freight forwarders sign shipping documents in their names shall be deemed as the essential condition for the principal to request the freight forwarders to assume the carrier’s liabilities. In the future judicial practice, it would be convinced that the Chinese courts will treat the fact that “freight forwarders sign the shipping documents in their own names” as an important basis for the determination of a carrier.

III. International Maritime Freight Forwarding Scheme in Hong Kong

The international maritime freight forwarding scheme in Hong Kong is rooted in the agency scheme under the Anglo-American law system. The agency scheme under which the identity of the principal is undisclosed as stipulated in the Agency in English Law is for the purpose of protecting the principal “who is left in the dark” or the third party. It vests the principal and the third party relevant rights and remedies after the agency relationship is disclosed so as to protect the equity and efficiency of the law. The agent is not entitled to take the initiative to deny its legal status as contracting party on the ground of the existence of agency relationship. This special agency scheme makes the legal status of the freight forwarder become elusive.

In the case *Italia Marittima SpA v Translink Shipping (Hong Kong) Ltd*⁵, action was brought by the plaintiff-carrier against the defendant-freight forwarder for contractual indemnity and/or common law indemnity for container demurrage and expenses incurred in respect of containers carried by the plaintiff-carrier. District Court of Hong Kong held that the defendant freight forwarder shall take contractual liability towards the plaintiff for not disclosing the dangerous nature of the cargo to the carrier. The judge views that being a freight forwarder did not mean that the party would only contract with the carrier as agent of its clients. In this case the freight forwarder booked space for carrying the cargo with the carrier in his own name, the carrier then issued booking confirmations to the freight forwarder. Although it is the principal of the freight forwarder who picked up containers, packed cargos and delivered to the carrier, he did all these things in the freight forwarder’s name. The principal has not been disclosed to the

carrier till the bill of lading was issued. The court held that the freight forwarder should take contractual liability in the antecedent contract contained in or evidenced by the booking confirmations up to the time the bills of lading was issued. From this case, it seems that Hong Kong courts focus on the element that whether the principal is disclosed to the third party at the time when the contract is concluded. Hong Kong courts are inclined to protect the third party who is left in the dark, as what is recorded in the judgment that it would be against commercial reality to infer that the carrier intended that the guarantee (of the cargo fitness) by the freight forwarder in the antecedent contract should be discharged and replaced only by an indemnity from a party with whom the carrier had no direct dealing. Under Hong Kong law, all of the elements, such as the manner for collecting freights, the action to issue bills of lading, the way that goods were handled are compositively considered for determining the legal status of the freight forwarder.⁶ Like what is stipulated in article 4.3 of HAFFA Standard Trading Conditions issued by Hong Kong Association of Freight Forwarding and Logistics Ltd (HAFFASTC) that it shall not be construed that any Services are provided by the Company other than as an agent of the Customer by reason only of any one or more of the following:

- a. the Company issuing its own transport document including its house air waybill or air consignment note or house bill of lading or freight forwarder cargo receipt;
- b. the Company charges an inclusive price;
- c. the Customer's goods are forwarded, carried, transported, stored or otherwise handled together or in consolidation with other goods.

IV. International Maritime Freight Forwarding Scheme in Taiwan

In Taiwan, the practitioner in freight forwarding industry is called “forwarding agent”. In accordance with Article 660 of the *Civil Code of Taiwan*, the “forwarding agent” is defined as “a person, who undertakes, as a business, to forward goods through carriers in his own name but on account of other persons, for remuneration.” The said article puts emphasis upon the identity of the freight forwarder, i.e. an “agent”. However, Article 663 and 664 of the *Civil Code*

of Taiwan prescribe the other identity of the “forwarding agent”, i.e. “carrier”. Article 663 provides that unless otherwise provided by contract, the forwarding agent may himself assume the transportation of the goods, in which case he has the same rights and obligations as a carrier. The aforesaid article regulates the right of transportation-intervention enjoyed by the forwarding agent. Article 664 provides that if a fixed price for the whole of the transportation has been agreed upon, or if the forwarding agent has himself delivered to the shipper a bill of lading, the forwarding agent is deemed to have himself assumed the transportation of the goods, in which case he is not entitled to remuneration. This is a legal fiction to the right of intervention enjoyed by the forwarding agent. In addition, the *Civil Code of Taiwan* also provides that “unless otherwise provided in this Section, the provisions concerning Commission Agents shall apply mutatis mutandis to Forwarding Agency”. In view of the above provisions as stipulated in the *Civil Code of Taiwan*, the “forwarding agent” plays dual roles, namely “Commission Agent” who is engaging in the business of freight forwarding and “Carrier” who actually participates in the transportation of goods. In practice, the forwarding agent may, after concluding forwarding contract, sign various contracts which are necessary for the completion of the transportation of goods with third parties in the name of the principal. In such case, the forwarding agent performs its duties in the principal's name and the principal shall assume the liability for the agent's acts of agency. Compared with that the forwarding agent may perform its obligations under the forwarding contract in his own name, the only difference lies in that the former falls into the category of direct agency and the latter belongs to special commission agency, while the content and purpose of the forwarding contract is the same.⁷ Therefore, they are jointly named as “generalized forwarding agent” by some scholars.⁸ In case the definition of generalized forwarding agent is accepted, the contract range of forwarding contract in Taiwan is almost the same with the freight forwarding contract in Mainland China.

With regard to the definition of “maritime forwarding agent” which is different from the general “forwarding agent”, specific provisions have been provided by the laws of Taiwan. Paragraph 4 in Article 2 of the *Navigation Business Act of Taiwan* defines “maritime forwarding agent” as “a

person, who undertakes, as a business, to forward goods through shipping operators in his own name but on account of other persons, for remunerations.” In comparison to the definition of “forwarding agent” provided by the *Civil Code of Taiwan*, the definition of “maritime forwarding agent” puts emphasis upon the manner to forward goods, i.e. “through shipping operators” but not general carriers, from which gives prominence to the characteristic of “maritime transportation”. However, no provisions, which are similar to the provisions relating to the role of “Carrier” of the forwarding agent as stipulated in Article 663 and 664 of the *Civil Code of Taiwan*, have been provided by the *Navigation Business Act of Taiwan*. To the contrary, Article 48 of the *Navigation Business Act of Taiwan* provides that “unless otherwise the maritime forwarding agent itself is engaging in the shipping business, it shall not charter vessels to forward the goods.” Therefore, the maritime forwarding agent in Taiwan shall simultaneously be qualified for engaging in shipping business, otherwise it would not be qualified as “Carrier”. Some scholars in Taiwan hold that “Maritime Forwarding Agent” in Taiwan is equivalent to the “Non-vessel operating Common Carrier” in America.⁹ At all events, the maritime forwarding agent in Taiwan has been clearly defined as special commission agent with independent legal position. Only under the circumstance where it is engaging in shipping business, the issue that whether it is a commission agent or a carrier would arise therefrom. In practice, the criterion to determine the identification of a carrier lies in the manner for collecting freights and the action to issue bills of lading.

V. International Maritime Freight Forwarding Scheme in Macao

Since the legal system in Macao and Taiwan are both classified as Continental Legal System, the international maritime freight forwarding scheme in Macao is similar to that in Taiwan. In Macao, the freight forwarding contract is called “forwarding contract”. Particular provisions on “forwarding contract” are provided by the *Commercial Code of Macao*. In accordance with Article 616 under Title V of the *Commercial Code of Macao*, a forwarding contract is a mandate by which a commercial entrepreneur undertakes the

obligation to conclude, in his own name and for the account of the principal, a contract for carriage of goods and respective accessory operations. Article 617 provides the revocation of forwarding contract and Article 618 and 619 prescribes the rights and obligations of forwarding agent. The assumption of liability for execution of carriage is provided in Article 620, “a forwarding agent who, with his own means or with means from a third party, undertakes liability, wholly or partly, for execution of carriage, is also subject to the rights and obligations of a carrier.” The maritime freight forwarding contract, which is different from the general freight forwarding contract, is called “commission contract for carriage of goods” in Macao, which shall be governed by the *Maritime Law of Macao*.¹⁰ Article 84 of the *Maritime Law of Macao* prescribes relevant provisions on the “Concept and System applicable to the Commission Contract for Carriage of Goods”. Paragraph 1 of the said article provides that “a commission contract for carriage of goods is a mandate by which one party undertakes the obligation to conclude, in his own name and for the account of the sender, contract with carriers so as to forward goods through such carriers.” Paragraph 2 of the said article provides that “the rules regulating the forwarding contract shall apply to the commission contract for carriage of goods”. Therefore in Macao SAR, the provisions on the “forwarding contract” as stipulated in the *Commercial Code of Macao* shall apply mutatis mutandis to the maritime freight forwarding contract and general freight forwarding contract.

In accordance with the *Maritime Law of Macao*, international maritime freight forwarding contract is called “commission contract for carriage of goods”, with the term of “commission” adopted. In addition, although the provisions on “forwarding contract” as stipulated in the *Commercial Code of Macao* shall apply mutatis mutandis to the “commission contract for carriage of goods”, Article 621 under Title V, namely “Forwarding Contract”, of the *Commercial Code of Macao* provides that “the rules of the commission contract shall apply, with the necessary adaptations, to all matters not especially regulated in this Title”. Although the scope of business to the commission agent is limited to “buy or sell goods” by the *Commercial Code of Macao*, the Title “Forwarding Contract” of *Commercial Code of Macao* brings the commission contract into the scope of application mutatis mutandis, which serves

as the supplementation to the forwarding contract. Therefore, the rules concerning commission contract shall apply mutatis mutandis to forwarding contract. For instances, Article 601 provides that “A commission agent is not responsible for the performance of obligations undertaken by persons with whom he contracts, except if at the moment of the conclusion of the contract he knew or should have known of their insolvency;” and article 614 provides that “The commission agent has a right of retention over a principal’s merchandise under his control, regarding credits resulting from the execution of the commission, namely if he is in possession of the documents that incorporate the right to dispose of them.”

VI. Conflicts and Coordination among the International Maritime Freight Forwarding Schemes of the Four Law Districts

In order to reconcile the interregional legal conflicts arising from the special “One Country, Two Systems, three law systems, four law districts” within China, the academic circles have witnessed extensive discussion¹¹ on such topic and summed up, on the basis of reviewing the useful experiences of foreign countries, some modes for coordinating the legal conflicts, such as the mode of conflict of laws and mode of substantive law. With regard to the conflicts of international maritime freight forwarding schemes within the four law districts in China, not all the modes are feasible under the current political and economic background. The author holds that in view of the political and economic factors in China, the method, which is the most effective one and of the most realistic significance, to deal with legal conflicts of the maritime freight forwarding schemes within the four law districts in China is to apply the flexible and open Model Rules. The characteristics of the maritime freight forwarding scheme determines on the practical possibility to formulate Model Rules for maritime freight forwarding.

6.1 To establish the formulating mechanism for model rules through fair cooperation among the four law districts

Since the four law districts have equal legislative power,

the model rules shall be formulated on the basis of equal consultations among Mainland China, Hong Kong, Macao and Taiwan. Therefore it is very important to establish the formulating mechanism for model rules. In light of the above, an independent official working committee with official support of each law district should be set up to take charge of the research work and drafting of model rules. In the course of formulating model rules, it should solicit opinions and suggestions from the freight forwarding associations and the associations of relevant walks of life, such as shipping and trading associations, in Mainland China, Hong Kong, Macao and Taiwan, so as to ensure the formulation process of the model rules is objective and fair and to lay a sound foundation for model rules to be recognized and eventually accepted by each law district.

6.2 Taking the FIATA Model Rules as a base, complying with the principle of “seeking common ground while accepting the existing differences” and taking the characteristics of the legal systems of the four law districts into consideration

The International Federation of Freight Forwarders Associations (FIATA) is an international non-profit and non-governmental organization, which represents more than 50,000 freight forwarding and logistics firms and more than 10 million practitioners in freight forwarding and logistics industry from more than 150 countries around the world. It is the largest industrial organization which has great international influence in the field of international cargo transportation. In 1985, Sinotrans Limited jointed the said association as a member of state level. China International Freight Forwarders Association was found in September 2000 and joined FIATA in the next year as a member of state level. Taiwan and Hong Kong have one regional member respectively and Taiwan registered with FIATA under the name of Taipei China. Currently, Mainland China has more than 20 individual members, while Hong Kong has 105 and Taiwan has 48. In order to minimize the differences of legal systems regulating the freight forwarding industry in the countries worldwide, FIATA formulated the “FIATA Model Rules for Freight Forwarding Service” (hereinafter referred to as “FIATA Model Rules”) in 1996. It is the most important attempt made so far for the unification of international freight forwarding scheme. During the drafting of FIATA Model

Rules, the differences and similarities of the freight forwarding schemes of the countries worldwide have been taken into full account. In the course of formulating the model rules for maritime freight forwarding applicable for the four law districts in China, taking FIATA Model Rules as a base would become more acceptable to the four law districts. In respect of drafting of specific articles, in addition to refer to FIATA Model Rules, the representatives from each law district shall formulate substantive model rules matching up to the characteristics of four law districts on the basis of thorough consultation and the spirit of “seeking common ground while accepting the existing differences”.

With regard to the determination of carrier’s identity, paragraph 7.1 of FIATA Model Rules provides two criterions for the freight forwarder to assume the carrier’s liability, among which one is that whether it performs the carriage by his own means of transport, the other one is that whether it issues transport documents in his name. With regard to the second criterion, FIATA Model Rules have proviso provisions, i.e. “the Freight Forwarder shall not be deemed liable as Carrier if the Customer has received a transport document issued by a person other than the Freight Forwarder and does not within a reasonable time maintain that the Freight Forwarder is nevertheless liable as Carrier”. It would be generally accepted by the four law districts to take, in combining the provision in each law district and the FIATA Model Rules, the manner of getting remuneration, the fact that whether the freight forwarder performs the carriage of goods by his own means of transport and whether it issues transport documents in its own name as main criterions for determining the identification of carrier. However, when taking the fact that whether the freight forwarder issues transport documents in his name as the criterion, it shall not be taken as the only criterion and the specific contractual agreements reached between the principal and the freight forwarder shall be taken into consideration as well.

6.3 To gradually promote the application of model rules through updating the standard conditions of the freight forwarders associations in various regions

As the standard form of contract in the freight forwarding industry, the standard trading conditions made by the freight forwarders associations are widely adopted. The

Standard Trading Conditions issued by China International Freight Forwarders Association in 2002 and the Standard Trading Conditions (HAFFASTC) issued by Hong Kong Association of Freight Forwarding & Logistics Ltd in 1997 expressly prescribes detailed provisions on the rights and obligations between freight forwarding enterprises and their clients and disputes solutions, which substantially save the commercial transaction costs and sever as important grounds for the court or arbitration institutions in handling disputes. Since the model rules do not have the legal effect of mandatory application in each law district, the unification of law within the said four law districts could only be reached through substantive laws of the same or similar nature formulated based on the model rules by the legislature in each law district. Due to the complexity of legislative procedures, it’s not possible for each law district to draft and enact identical substantive law in a short time. In order to further the unification of substantive law, the freight forwarders association in each region may firstly amend and improve the Standard Trading Conditions within the legal framework of each law district and pursuant to relevant provisions provided by the model rules, so as to promote the application of model rules in each law district. It could also lay sound foundation for the enactment of substantive law and to eventually realize the unification of substantive law.

VII. Conclusion

Along with the development of economic and trade relation among Mainland China, Hong Kong, Macao and Taiwan, regional economic unification is the inevitable choice for the future development of Chinese economy. The coordination of legal system environment provides vital support in the course of regional economic unification. At the present time, the mainland market is fully opened to the freight forwarding service providers in Hong Kong and Macao. The “Three Linkages” across the Taiwan Straits provide channels for the freight forwarding service providers in Taiwan to access to the mainland market. On the one hand, full and precise understanding to the different freight forwarding schemes in Mainland China, Hong Kong, Macao and Taiwan is of the utmost importance for the freight forwarding service providers in the said regions. On the other

hand, to coordinate and unify the freight forwarding schemes in the said four regions is the only way to boost the development of freight forwarding industry and promote the competitiveness of such industry. The characteristics of the model rules, namely openness, flexibility and complementariness, match up to the characteristics of the freight forwarding scheme, namely high technicality and

internationalization, which makes it the best choice for the unification of the freight forwarding schemes in Mainland China, Hong Kong, Macao and Taiwan. However, the formulation and enactment of unified model rules is a long-term and gradual process which needs thorough consultation and discussion by the governments, industrial associations and legal experts from the said four regions.

Notes:

- ¹ Article 2 of *Detailed Rules for the Implementation of the Regulations of the People's Republic of China on the Administration of the International Freight Forwarding Industry* rules that an international freight forwarding enterprise may act as an agent of the consignee or the consignor of import and export cargo, or act as an independent operator engaging in international freight forwarding operations.
- ² Article 63 of *Civil Law of the People's Republic of China* rules that “An agent shall perform civil juristic acts in the principal's name within the scope of the power of agency. The principal shall bear civil liability for the agent's acts of agency.”
- ³ Article 402 of *Contract Law of the People's Republic of China* rules that “Where the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party.” Article 403 rules that “Where the agent enter into a contract in its own name with a third party who is not aware of the agency relationship between the agent and the principal, if the agent fails to perform its obligation toward the principal due to any reason attributable to such third party, the agent shall disclose the third party to the principal, allowing it to exercise the agent's rights against such third party, except where the third party will not enter into the contract with the agent if he knows the identity of the principal at the time of entering into the contract. Where the agent fails to perform its obligation toward the third party due to any reason attributable to the principal, the agent shall disclose the principal to the third party, allowing the third party to select in alternative either the principal or the agent as the other contract party against whom to make a claim, provided that the third party may not subsequently change its selection of the contract party. Where the principal exercises the rights of the agent against the third party, the third party may avail itself of any defense it has against the agent. Where the third party selects the principal as the other party to the contract, the principal may avail itself of any defense it has against the agent as well as any defense the agent has against the third party.”
- ⁴ No. 3 [2012] of the Supreme People's Court.
- ⁵ [2010] 1 HKLRD 98.
- ⁶ See *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49. See also *Hair and Skin Trading Co Ltd v Norman Air Freight Carriers* [1974] 1 Lloyd's Rep 443.
- ⁷ Huang Li (2003). *Special Provisions of the Part of Obligations of the Civil Code*. Beijing: China University of Political Science and Law Publishing Pres. 702.
- ⁸ Shi Shangkuan (2000). *Special Provisions of the Law of Obligation*. Beijing: China University of Political Science and Law Publishing Press. 659.
- ⁹ Lin Guang and Zhang Zhiqing (2001). *Operating and Management of Navigation Business*. Taipei: Dong Wei Co., Ltd. 360-361.
- ¹⁰ Maritime Law of Macau means the Decree of 109/99/M regulating issues in maritime circles promulgated by the legislature of Macao on 13th December 1999.
- ¹¹ Suo Guangju (2011). Unification of Private Inter-regional Laws in China and Establishment of Economic-Trade Areas of Greater China. *Journal of Guangzhou University (Social Science Edition)*. Vol. 10, No. 8.