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CHINA MARITIME ARBITRATION COMMISSION

28 October 2011

CHINA MARITIME ARBITRATION COMMISSION (CMAC) AWARD

MA200919

Presiding Arbitrator Mr Si Yuzhuo,
Arbitrator of applicant Mr Li Jing, and
Arbitrator of respondent Mr Song Chunfeng

CMAC Award — Breach of contract — Damages for late payment — Currency — Calculation of prospective profit.

On 10 December 2008 the applicant and the respondent signed a Transport Agreement concerning the maritime transport of goods for an Angolan social housing project run by Company A, which required the respondent to negotiate with Company A and the applicant to arrange the transport. After receiving the freight from Company A, the respondent was to forward the same to the applicant, and the parties agreed a distribution of the net profit at 50:50.

After four shipments of goods the respondent suspended the Transport Agreement ex parte. In a new agreement the respondent agreed to forward the freight and profit within two working days after receiving payment from company A. It was agreed that liquidated damages for late payment was to be calculated at 4.8 per cent per day. The respondent also confirmed that the outstanding payment owed to the applicant was US$182,793.81 for costs and US$2,598,101.94 for profit.

The respondent subsequently paid RMB17,216,374.21 to the applicant for profit and, without agreement from the applicant, the respondent arranged another two shipments with Company A unilaterally.

The applicant made the following claims:

(1) A claim for unpaid costs plus liquidated damages for late payment for the first four shipments.

(2) A claim for insufficient payment for profit caused by the currency exchange rate plus liquidated damages for late payment of profit for first four shipments.

(3) A claim for profit for two shipments arranged by the respondent.

(4) A claim for prospective profit loss should the Transport Agreement have been performed in full.

———*Held*, by the China Maritime Arbitration Commission (Presiding Arbitrator Mr Si Yuzhuo; Arbitrator appointed by the applicant Mr Li Jing; and Arbitrator appointed by the respondent Mr Song Chunfeng), as follows.

The tribunal is of the opinion that the respondent's ex parte conduct seriously breached the Transport Agreement and that, therefore, the respondent is liable for the consequences caused by such a breach.

The tribunal also finds that under the new agreement the payment shall be made in US dollars, which means that the amount paid by respondent in renminbi must satisfy the condition that at the time when the payment is made, the applicant could use the said money to buy the total outstanding profits in US dollars from the bank.

Therefore, tribunal awarded both the cost and the profit in the first two claims.

However, the tribunal finds that in the new agreement the annual interest rate is 172.8 per cent, which is excessively high. Pursuant to article 114 of the Contract Law and article 29 of the Interpretation of Contract Law (II) of the Supreme People's Court, the tribunal fixes the interest rate at 9.477 per cent, which is 30 per cent higher than the short-term loan rate of the People's Bank of China.

As to the third claim, the tribunal held that the applicant is entitled to the profit because, in the absence of breach by the respondent, the profit should have been shared in accordance with the Transport Agreement.

The arbitration tribunal finds that the loss of prospective profit shall be determined in the light of the profit that has been obtained by the non-breaching party from performance of the contract. The profit rate could be calculated from the first four shipments and the gross volume is also known from the Transport Agreement. Hence, the prospective profit shall be calculated by the profit rate multiplied by the gross volume, minus the profit actually awarded for the six performed shipments. Considering uncertain factors, the majority of arbitrators are of the opinion that the above amount shall be reduced to 50 per cent.

In accordance with the Angola Project Transport Agreement (hereinafter referred to as the "Transport Agreement") concluded between the applicant XXX Co Ltd (hereinafter referred to as the "applicant") and the respondent XXX Co Ltd (hereinafter referred to as the "respondent") on 10 December 2008, the arbitration clauses in the agreement concluded between the applicant and the respondent on 24 August 2009, and the application

for arbitration submitted by the applicant on 9 November 2009, the China Maritime Arbitration Commission (hereinafter referred to as "CMAC") accepted this case. The case number is MA200919.

The arbitration proceedings of this case shall apply the Arbitration Rules of China Maritime Arbitration Commission (hereinafter referred to as "Arbitration Rules") which took effect as of 1 October 2004.

The applicant appointed Mr Li Jing as an arbitrator, while the respondent appointed Mr Song Chunfeng as an arbitrator. Since both parties concerned did not jointly appoint or jointly entrust the chairman of CMAC to appoint the chief arbitrator within the time limit as specified in the Arbitration Rules, the chairman of CMAC appointed Mr Si Yuzhuo to be the chief arbitrator of this case in accordance with the provisions of Arbitration Rules. After the above three arbitrators signed the statement, they formed an arbitration tribunal on 29 December 2009 to hear this case. On the same day, the secretariat sent the notice of formation of an arbitration tribunal to the parties concerned.

On 10 May 2010 the arbitration tribunal held a hearing on this case in Beijing. The agents ad litem of the parties had attended the hearing. During the hearing, both parties made statements regarding the facts of this case and cross-examined the evidence. The parties also debated legal issues and answered the questions of the arbitration tribunal.

As this was a complicated case, the arbitration tribunal could not make an arbitral award within the time limit as prescribed in the Arbitration Rules. After an application by the arbitration tribunal, the secretary general of CMAC agreed to extend the time limit for the award to 30 October 2011.

The hearing of this case has now been finished. Pursuant to the materials provided by the parties concerned and the facts identified in the hearing, the arbitration tribunal hereby delivers this arbitral award. The findings of facts and opinions of the arbitration tribunal and the arbitral award are stated as follows. [Editors' note: this case is provided by China Maritime Arbitration Commission, with due editorial work by the Editors.]

Friday, 28 October 2011

JUDGMENT

CHINA MARITIME ARBITRATION COMMISSION:

I. Applicant's statement of the claims

The claims of the applicant

1. On 10 December 2008 the applicant and the respondent signed a Transport Agreement, reaching consensus on the maritime transport of goods under an Angolan social housing project run by Company A. According to the Transport Agreement, the respondent was responsible for signing an agreement with Company A, and settling and collecting the sea freight; while the applicant was responsible for carrying out the maritime transport of goods for the Angolan project. After receiving the freight from Company A, the respondent was to forward the same to the applicant. The parties agreed on a net profit distribution of 50:50.

2. After signing the Transport Agreement, the applicant completed the maritime transport of goods for the first four shipments, and prepaid the sea freight for the shipment Nos 1, 2 and 4 as well as the transportation costs of the first four shipments. In the meantime, after negotiation by the parties, the respondent agreed to prepay the sea freight for shipment No 3. The applicant provided the settlement list of freight for all the shipments to the respondent.

3. Before 2 June 2009 Company A paid the sea freight of shipment No 1 to the respondent. After negotiation and on the basis of amicable cooperation, the applicant agreed to set off the sea freight of shipment No 3, prepaid by the respondent, from the abovementioned sea freight.

4. After receiving the sea freight of shipment No 2 from Company A, the respondent refused to perform the payment obligation under Transport Agreement, and unilaterally suspended the Transport Agreement.

5. After repeated pleas by the applicant, both parties reached an agreement regarding payment of the freight for the first four shipments and profit distribution, etc on 24 August 2009. As per the agreement, the respondent was to pay the above outstanding freight to the applicant. In the meantime, pursuant to the income and expenditure, prepaid amounts and profit calculation confirmed by both parties, the respondent should, within two working days after receiving any payment related to Angolan project from Company A, pay the applicant the profits of transport for the first four shipments. If the respondent failed to make the said payment to the applicant within the time limit, the respondent should pay liquidated damages calculated at 4.8 per cent per day to the applicant. It was stated in clause 8 of the Agreement that:

> "This agreement is an effective supplement and appendix to the Transport Agreement dated 10 December 2008, which shall be governed by Chinese law. In case of any dispute arising from or related to this agreement, both parties shall settle the dispute through amicable negotiation; if negotiation fails, the dispute shall be submitted

before CMAC for arbitration as per the arbitration rules of the said commission that are effective at the time of application for arbitration. The arbitral award shall be final and binding on both parties concerned."

6. On 4 September 2009 both parties signed a Confirmation Letter, which jointly confirmed the income and expenditure, prepaid amounts and profit calculation of the first four shipments as follows:

(1) the applicant had prepaid US$5,926,388.22;

(2) the total profit was US$5,196,203.88, and

(3) the applicant shall be entitled to the profit of US$2,598,101.94.

7. On the same day, both parties signed a Confirmation on Outstanding Payment, where the respondent promised to pay the outstanding operation costs of US$182,793.81 for the first four shipments.

8. Before 30 September 2009 the respondent received the balance payment of sea freight for the first four shipments from Company A, but the respondent refused to pay profit and operation costs to the applicant. After repeated contact from the applicant, on about 28 October 2009 the respondent paid the profit of transport of the first four shipments of RMB17,216,374.21 to the applicant.

9. Until now, the respondent did not pay the operation costs for the transport of the first four shipments under the Confirmation on Outstanding Payment.

10. At the same time, the applicant heard from Company A that the respondent unilaterally arranged for the transport of shipment Nos 5 and 6 under the Angolan project without consent from the applicant.

11. On 28 and 29 October 2009 the applicant wrote to the respondent to require the respondent to pay the outstanding freight of the first four shipments, the liquidated damages and exchange loss before 29 October 2009, and required the respondent to settle and pay the profits of transport of shipment Nos 5 and 6. In the meantime, the applicant required the respondent to continue the Transport Agreement, and to make a written reply to the applicant regarding this issue before 29 October 2009. Failing this, it should be deemed that the respondent "flagrantly violates and breaches the existing contract and agreement between both parties".

12. However, until now, the respondent did not make any outstanding payment to the applicant, and did not settle the profit of transport of shipment Nos 5 and 6 with the applicant, not to mention delivering a reply on the continual performance of Transport Agreement.

13. The applicant requested the respondent make the outstanding payments and perform the obligations under the Transport Agreement via numerous phone calls, emails and written letters, but with no success.

14. The breach of contract by the respondent has caused huge losses to the applicant. The applicant is a company mainly engaged in maritime transport, which has operated for 15 years since establishment, and has maintained a good reputation in the industry. In order to perform the transport obligations under the Transport Agreement, the applicant called on good cooperation from established relationships including chartering, transport, forwarding, inspection and insurance, etc. However, due to the respondent breaching the contract and not paying the operation costs, the applicant has risked a bad influence on its reputation and might even be faced with a claim from a third party.

15. Therefore, the applicant applied for the following arbitration claims:

(1) the respondent shall pay the applicant the liquidated damages for late payment of sea freight for the first four shipments of US$349,184.90 and the exchange loss of US$6,664.59;

(2) the respondent shall pay the applicant the outstanding operation costs for the first four shipments of US$182,793.81;

(3) the respondent shall pay the applicant the profits of transport of shipment Nos 5 and 6 of US$1,299,050.97;

(4) the respondent shall pay the applicant the anticipated profits of transport from shipment Nos 7 onwards to completion of performance of the contract at US$8 million;

(5) the respondent shall pay the applicant other losses and expenses caused from the respondent's breach of contract;

(6) the respondent shall pay the applicant the legal expenses arising from this dispute of US$150,000; and

(7) the respondent shall assume the arbitration fee of this case and the arbitrators' rewards as well as other expenses resulting from this arbitration case.

16. Thereafter, the applicant changed the arbitration claims as follows:

(1) the respondent shall pay the applicant the outstanding profits and liquidated damages for late payment of sea freight for the first four shipments of US$524,854.31;

(2) the respondent shall pay the applicant the outstanding operation costs for the first four shipments of US$182,793.8l;

(3) the respondent shall pay the applicant the profits of transport of shipment Nos 5 and 6 of US$1,299,050.97;

(4) The respondent shall pay the applicant the anticipated profits of transport from shipment No.7 to the completion of performance of contract at US$10,606,552.81;

(5) the respondent shall pay the applicant other losses and expenses caused by the respondent's breach of contract;

(6) the respondent shall pay the applicant the legal expenses for the dispute of this case of US$165,707.45, and shall assume further legal expenses incurred by the applicant; and

(7) the respondent shall assume the arbitration fee of this case and the arbitrator rewards as well as other expenses resulting from this arbitration case.

II. Statement of defence of the respondent

17. The respondent stated its defence as follows. First, the amount of liquidated damages claimed by the applicant against the respondent was improper, and it lacked factual basis for the applicant to claim for exchange loss.

(1) The amount of liquidated damages was excessively high, which violated provisions of law

(2) On 24 August 2009 the respondent and the applicant reached an agreement regarding profit distribution on the first four shipments: it was agreed that the respondent shall, within two working days after receiving any payment related to the Angolan project from Company A, pay the applicant 50 per cent of the profits of the first four shipments. If the respondent failed to make the said payment to the applicant within the time limit, the respondent shall pay liquidated damages calculated at 4.8 per cent per day to the applicant. In this regard, the respondent did not deny the fact that the respondent failed to pay the said profits to the applicant within the time limit, but the respondent argued that the 4.8 per cent per day of liquidated damages agreed by both parties was excessively high, which violated provisions of law. The arbitration tribunal should therefore not uphold this.

(3) In accordance with the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (II), where the amount of the liquidated damages exceeds 30 per cent of the losses incurred, it shall be deemed as excessively high, and the arbitration tribunal may properly reduce the amount of liquidated damages as per the application of the party concerned. In this case, both parties agreed the liquidated damages shall be calculated at 4.8 per cent per day (or an annual interest rate of 172.8 per cent), which far exceeded the actual loss incurred to the applicant. In respect of this case, the actual loss of late payment shall be calculated with reference to the bank deposit interest rate, and the current bank deposit annual interest rate was 0.36 per cent. Thus, the claim of the applicant regarding liquidated damages was improper, and the respondent applied to the arbitration tribunal to reduce the amount of liquidated damages.

(4) It lacked contractual basis to claim for exchange loss. When the respondent paid the applicant the profits of the first four shipments of US$2,528,101.94, it was indeed converted to renminbi at the exchange rate of US$1 to RMB6.81 on the day of payment. However, the applicant and the respondent did not agree the currency and conversion ratio in the contract. Thus, it lacked contractual basis for the applicant to claim for exchange loss, which should not be upheld.

18. Secondly, it was groundless for the applicant to require the respondent to pay outstanding operation costs for the first four shipments.

(1) On 4 September, 2009 the respondent signed the Confirmation Letter with the applicant. In the meantime, both parties signed the Confirmation on Outstanding Payment, in which both parties confirmed that in the operation of the first four shipments there was some outstanding payment, which should be borne by the respondent; and if the respondent failed to make the payment as promised, the respondent should assume legal liabilities accordingly. The respondent argued that the object that the respondent was obliged to pay was a third party instead of the applicant. As per the privity of contract, the respondent was not obliged to assume liabilities to the applicant.

(2) In fact, after signing the Confirmation on Outstanding Payment with the applicant, the respondent had already made a part of the said payment to the third party. Regarding the remainder of the outstanding payment, the respondent had negotiated with the third party. Because the payment details in the Confirmation on Outstanding Payment was provided by the applicant and some of the expenses was false or exaggerated, the respondent still needed to verify with the third party. After the third party formally confirmed the amount of the expense or issued the formal invoice, the respondent would settle the remainder of the outstanding payment.

(3) In conclusion, it was groundless for the applicant to require the respondent to pay the outstanding operation costs of the first four shipments.

19. Thirdly, the applicant shall not be entitled to the profits of shipment Nos 5 and 6 as well as the anticipated profit from shipment No 7 to completion of the performance of contract.

(1) During the performance of the related agreements in this case, the applicant was in material breach of contract, which resulted into both parties unable to continue cooperation. Hence, the respondent shall be entitled to terminate the contract and the applicant shall not be entitled to any anticipated profits.

(2) On 10 December 2008 the respondent and the applicant formed a Transport Agreement, which agreed that the applicant was responsible for organising the Angolan project group, as well as prepaying the loading and unloading port fees and charter costs for three to four shipments. At the same time, the applicant was to deliver the list of sea freight in full to the respondent as soon as possible after every shipment sailed.

(3) However, during the process of actual performance, after prepaying the charter costs for the first two shipments, the applicant contended that it did not have sufficient funds to make any further prepayments, and refused to perform the main obligations under the Transport Agreement. In order to prevent disruption to the said project, the respondent had to prepay the expenses of the second two shipments. Moreover, the applicant refused to provide any charter document and transport document, which meant that the respondent could not fully understand the actual conditions of the project and the expenditures in detail.

(4) On 14 July 2009, with respect to the applicant's breach of contract, the respondent sent the Notice of Suspending Performance of Angola Project Transport Cooperation Agreement. The respondent required, in the said Notice, that execution of the cooperation agreement should be suspended temporarily. The applicant had no objection in this regard.

(5) During performance of the first four shipments, the applicant acted in bad faith: it defrauded expenses, enlarged costs and reduced profits. Until now, it was proved that the applicant had defrauded the respondent of US$137,250. Additionally, the applicant made false representation of the Angolan project to the owner, Company A, through phone calls or written forms, which damaged the respondent's reputation and meant that Company A no longer wanted the respondent to provide transport services after shipment No 7.

(6) In conclusion, the applicant not only failed to perform the main contract obligations, but also violated the principle of good faith, which seriously damaged the lawful rights and interests of the respondent. Due to the actions of the applicant, the basis for cooperation between both parties was repudiated as well as the continual performance of related agreements. Thus, the applicant should assume responsibility for breach of contract, and should not be entitled to request the respondent to pay any anticipated profits.

20. Fourthly, the respondent should not assume any so-called other losses and expenses as well as the attorney fees and arbitration fees of the applicant.

(1) This case was completely caused by the applicant's breach of contract. Thus, the respondent should not assume any so-called other losses or expenses as well as the applicant's attorney fees or arbitration fees. On the contrary, the applicant should pay the attorney fees and arbitration fees of the respondent.

III. Counterclaims of the respondent

21. The respondent raised the following counterclaims:

(1) To confirm the Angola Project Transport Cooperation Agreement, Transport Agreement and Agreement concluded between the respondent and the applicant as terminated.

(2) To order the applicant to refund the respondent the exceeded payment of RMB607,870.

(3) To order the applicant to refund the respondent the exaggerated payment of US$137,250.

(4) The applicant should assume the respondent's attorney fees in this arbitration case.

(5) To order the applicant to assume all the arbitration fees of this case.

IV. The arbitral tribunal's summary of the main disputes between the parties in this case

(i) Whether the respondent's transferral of the Angolan Project at zero cost constituted breach of contract

22. The applicant contended that from the transport of shipment No 1, the respondent instructed Company A to pay the sea freight under the Angolan project to the respondent's affiliate in Hong Kong, XXX (International) Co Ltd, which was a sole corporation established by Mr A, the chief executive officer (CEO) of the respondent (who held 70 per cent of the shares of the respondent) in Hong Kong. In the meantime, Mr A negotiated with Company B, a listed company in Hong Kong and its subsidiary, Company C, and reached a preliminary agreement on Company C acquiring 100 per cent of the shares of XXX (International) Co Ltd at HK$1.144 billion. According to a purchase announcement publicised by Company B on 16 October 2009, the transport profits of the Angola project formed 92 per cent of the profits of XXX (International) Co Ltd; the said

project would last for four years, and each year the cargo quantity of transport would exceed 1 million tons. Obviously, the decisive factor for Company B and its subsidiary Company C to acquire XXX (International) Co Ltd at HK$1.144 billion was the anticipated logistics profits of the Angolan project. In contrast, the respondent never informed the applicant that it would transfer the profits under Transport Agreement to XXX (International) Co Ltd and to further resell the same. On the purchase announcement publicised by Company B, it was never disclosed that the said project a cooperation by the respondent and the applicant and that the two parties shared the profits jointly. In other words, if the said transaction was completed, the respondent actually took possession of 50 per cent of the anticipated profits under the Angolan project which should be endowed to the applicant.

23. The respondent argued that whether the Angolan project was transferred was irrelevant to this case. First, the respondent had the right to decide whether to transfer the Angolan project or not. Pursuant to the General Agreement of Total Logistics Service concluded by the respondent and Company A, the respondent was the carrier under the general agreement while the applicant was not a party to the said general agreement. The applicant was only a cooperation party sought by the respondent for the purpose of completing the transport obligation under the general agreement. As such, it was not necessary for the respondent to obtain consent or approval from the applicant to transfer the Angolan project. Secondly, the applicant did not suffer loss from the transfer of the Angolan project. The respondent and XXX (International) Co Ltd were affiliates. Because of this affiliate relationship, transfer of the Angolan project at "zero cost" was actually a kind of financial arrangement between the respondent and XXX (International) Co Ltd. How the Angolan project was transferred, through an agreement arrangement, would not affect the cooperation with the applicant. After the "transfer at zero cost" on 15 April 2009, on 27 April 2009 the applicant and the respondent still continued to cooperate for shipment No 4, and the applicant obtained the profit of this shipment. Hence, the "transfer at zero cost" of the Angolan project had, in law or in fact, no influence on the cooperation between the applicant and the respondent.

(ii) Whether the suspended performance of contract by the respondent constituted breach of contract

24. The respondent contended that it sent the Notice of Suspending Performance of Angola Project Transport Cooperation Agreement to the applicant based on the following reasons: first, the applicant did not perform the prepayment obligations; and secondly, the applicant did not provide the transport documents.

25. The applicant argued that the above opinions were untenable. In respect of the issue of prepayment, both parties agreed in clause 6 of the Angola Transport Project Agreement dated 20 December 2008 that: "according to the payment process of owner, (the applicant) needs to prepay expenses of transport for about three to four shipments". Thus, the issue of prepayment was only an expectation of the parties at that time, and it was against the facts to define prepayment as the main obligation under the agreement. Moreover, even though the prepayment was defined as the main obligation under contract, as per Confirmation Letter dated 4 September 2009, both parties jointly confirmed that the applicant had prepaid US$5,926,388.22. Obviously, most of the expenses for the first four shipments were prepaid by the applicant. Therefore, it was groundless for the respondent to assert that the applicant refused to make a prepayment after prepaying expenses for the first two shipments.

26. It was groundless for the respondent to assert that the applicant refused to provide related charter documents and transport documents. As per clause 7 of Transport Agreement concluded by both parties on 10 December 2008, Party B (the applicant) should deliver the list of sea freight in full to Party A (the respondent) as soon as possible after every shipment sailed, and Party A would settle with the owner as soon as possible. The said clause only provided that the applicant was obliged to provide a list of sea freight, instead of related charter documents and transport documents. The applicant had provided the list of sea freight as agreed during the first four shipments, and that was to say, the applicant had performed its obligations. Thus, the respondent issued the invoice of freight to Company A according to the list of sea freight provided by the applicant. In case the above sea freight for the first four shipments were prepaid by the applicant, the only way for the applicant to reclaim the prepaid expenses was to timely provide the freight documents to the respondent so that the respondent could timely charge freight from owner. If the applicant deliberately refused to provide the documents, it would only cause damage to the applicant. Thus, it lacked fact and contractual basis for the respondent to make such an assertion.

(iii) Whether the applicant was in breach of contract

27. The respondent contended that the applicant violated the principle of good faith and committed the following breaches of contract:

1. The applicant obtained US$137,250 by fraudulently using a false ballast bonus claim and conversion cost of tweendeck

28. The US$137,250 has been recorded in the account reconciliation as a prepaid expense of the applicant, and the respondent had paid the said amount to the applicant: see the account reconciliation. Of this sum, US$65,000 was the so-called conversion cost of the tweendeck of shipment No 4, and US$32,500 and US$39,750 were the so-called ballast bonuses of shipment Nos 1 and 2.

29. The above three expenses listed by the applicant could never have existed. From the charterparty RECA P provided by a third party to the respondent, it could be seen that there was no so-called ballast bonus stated in the charterparty for the shipment Nos 1 and 2, and there was no conversion cost of the tweendeck in the charterparty for shipment No 4. In fact, if there was any ballast bonus and conversion cost of the tweendeck, the payee could not be an individual but the actual payee for the said three expenses paid by the respondent was an individual. In the meantime, the tweendeck of a vessel was impossible to be converted at will. Thus, the said conversion cost of the tweendeck was forged, and the applicant should refund all the expenses obtained by fraud.

2. The applicant defrauded an insurance premium of US$27,317.42 with a false invoice

30. According to the evidence of the respondent, the applicant sent a letter of claim for an insurance premium and discharge and survey fees of US$27,317.42 to the respondent on 14 September 2009, and attached invoice No DN09A Company L09002. However, after verification by the respondent with the third party, Company A, the said invoice was not issued by the said third party, because there was no such invoice with this number in the third party's system.

3. The applicant overstated fuel charges

31. On 3 April 2009 the applicant instructed the respondent to pay the fuel charge of US$298,100 for shipment No 3 to the fuel party, but the actual fuel charge for shipment No 3 was only US$193,951.49. On 20 May 2009 the applicant instructed the respondent to pay the fuel charge of US$460,616 for shipment No 4 to the fuel party, but the actual fuel charge for shipment No 3 was only US$303,049.92.

4. The applicant exaggerated port charges

32. The applicant was well aware of the fact that port charges were calculated at US$15/ton, but the applicant reported the port charges to the respondent at a rate of US$16.50/ton.

5. The applicant misstated days for charter

33. In March 2009, Applicant reported to Respondent that the chartered vessel needed to stay at Singapore for fuel filling for 4 days, but in fact it would cost half day at most for the vessel to refuel.

34. With regard to the above statements, the applicant replied as follows:

1. In respect of the ballast bonus and conversion cost of the tweendeck of US$137,250

35. It was groundless for the respondent to assert that the applicant defrauded the ballast bonus and conversion cost of tweendeck of US$137,250. In fact, the said expense was cleared and calculated into the costs during the account conciliation by the financial staff of both parties, and was confirmed by signatures and stamps in the Confirmation on Outstanding Payment. Thus, there was no fraud. The applicant noticed that the respondent arbitrarily distributed the said expense as profit without consent by the applicant and deducted the same from the payables. Thus, it was the respondent instead of the applicant which breached the contract.

2. In respect of the insurance premium of US$27,317.42

36. The insurance broker Company A had confirmed in writing that the insurance premium and survey fees for the first four shipments was US$27,317.42, and confirmed the authenticity of invoice No DN09A Company L09002.

3. In respect of the two fuel charges dated 3 April 2009 and 20 May 2009

37. Company D, a Singaporean company that paid the above two fuel charges for the respondent, was one of the shareholders of the respondent's affiliates XXX (International) Co Ltd. Company D paid the fuel charges for the respondent for the purpose of recording the amount on the account. From the emails provided by the respondent, the fuel charges would be more than the actual amount, and the extra payment would be used to offset future fuel charges. Moreover, in the account reconciliation and confirmation of both parties, the fuel charges actually incurred had been entered into the operation costs.

4. In respect of port charges

38. The said charges were only estimated charges, which might show slight differences with the actual charges. There was no evidence to prove that the applicant deliberately defrauded the respondent over the said charges. Moreover, both parties had confirmed in the account reconciliation and confirmation that the said charges would be entered into the operation costs as per the amount actually incurred.

5. In respect of days for charter

39. The said charges were only estimated charges, which might show a slight difference with the actual charges. There was no evidence to prove

that the applicant deliberately defrauded the said charges. Moreover, both parties had confirmed in the account reconciliation and confirmation that the said charges would be listed into operation costs as per the amount actually incurred.

V. Opinions of the arbitration tribunal

Issue one: regarding the nature of the disputes

40. The arbitration tribunal holds that this is a case about contractual disputes. As per the evidence provided by the applicant and the respondent, the parties concerned established a contractual relationship based on the Angola Project Transport Cooperation Agreement concluded on 17 April 2008, the Transport Agreement concluded on 10 December 2008, and the agreement concluded on 28 August 2009. These three documents confirm the cooperation relationship between both parties regarding the Angolan project, including the form of cooperation, the purpose of cooperation and the rights and obligations of both parties. There are some other documents that are related to this case, including the General Agreement of Total Logistics Service concluded by the respondent and Company A. Pursuant to the nature of contracts and the contents of contracts that have been performed, there is not a subcontracting relationship between both parties; instead, the parties concerned have formed a project cooperation association. Thus, the present case concerns the nature of contractual disputes over the transport cooperation relationship.

Issue two: regarding the breach of contract

(i) With regard to the transfer of the Angolan project at zero cost

41. On 15 April 2009 the respondent transferred the Angolan project (or the rights and interests of the project) at zero cost to Hong Kong XXX (International) Co Ltd, for the purpose reorganisation of assets for listing and then transferral of the said project (or rights and interests) to Hong Kong Company B.

42. Neither of the parties has provided evidence to prove that the respondent's transfer at zero cost referred to the transfer of the whole Angolan project (ie the rights and obligations) or to merely transfer the rights and interests of the said project. In the case it is the whole Angolan project which is transferred, legally speaking, it would be improper for the applicant to continue to perform the said transport project because it lacked the qualification to do so. On the other hand, if it is only the rights and obligations under the contracts which are transferred, and all the rights and interests instead of only 50 per cent thereof owned by the respondent [illegible] qualification of the applicant to perform the said transport project. Where the respondent continues to perform the profit distribution with the applicant at 50:50, the rights and interests of the applicant will not be damaged. The fact of this case is that the Angolan project was transferred at "zero cost" on 15 April 2009, and on 27 April 2009, the applicant and the respondent continued the cooperation and sent shipment No 4, and the applicant also obtained the profit of transport of shipment No 4. In other words, after the transfer, the contract continued to be performed, and the applicant did not suffer loss from the transfer of the said project. Therefore, the respondent's transfer at zero cost would not affect the arbitration result of this case.

(ii) With regard to suspension of contract performance

43. Pursuant to the contract, the applicant performed the obligation of the first four shipments. The respondent then sent the Notice of Suspending Performance of Angola Project Transport Cooperation Agreement (hereinafter referred to as the "Suspending Notice") to the applicant on 14 July 2009 for the reason that the applicant "violated the promise of prepaying sea freight and refused to provide charter documents and related transport documents". According to the Suspending Notice, the respondent required that: "since the date recorded in this Notice, the execution of the Angola project transport cooperation agreement between both parties shall be suspended temporarily . . . until our company confirms in writing to resume the execution of the project cooperation agreement".

44. Regarding the issue of prepayment, both parties agreed in clause 6 of the Angola Transport Project Agreement dated 20 December 2008 that "according to the payment process of the owner, (the applicant) needs to prepay expenses of transport for about three to four shipments". At the time when the respondent sent the Suspending Notice, the transport of the first four shipments had been completed. Moreover, before 2 June 2009, Company A had paid the sea freight for shipment No 1 of US$2 million. As per the Confirmation Letter concluded by both parties on 4 September 2009, both parties agreed that the applicant had prepaid the sea freight for shipment Nos 1, 2 and 4, as well as the transport costs for the four shipments; the total prepayment was more than US$5.92 million. In the meantime, after negotiation between both parties, the respondent agreed to prepay the sea freight for shipment No 3. Hence, the respondent suspending the applicant from continuing to perform the Transport Agreement for the reason that the applicant violated the promise of prepayment [illegible]

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