



海商法博士精品文库 | 总主编 司玉琢

COMPARATIVE STUDY ON MARITIME LITIGATION JURISDICTION

Dr. BENCHAO FU (付本超) 著



法律出版社
LAW PRESS · CHINA



海商法博士精品文库

总主编 司玉琢

COMPARATIVE STUDY ON MARITIME LITIGATION JURISDICTION

Dr. BENCHAO FU (付本超) 著



法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

海事诉讼管辖权制度比较研究 = Comparative Study
on Maritime Litigation Jurisdiction: 英文/付本

超著. —北京:法律出版社, 2011. 11

(海商法博士精品文库)

ISBN 978 - 7 - 5118 - 2765 - 4

I. ①海… II. ①付… III. ①海事诉讼特别程序法—
管辖权—研究—英文 IV. ①D997.4

中国版本图书馆 CIP 数据核字(2011)第 229805 号

© 法律出版社·中国

责任编辑/吴 昉

装帧设计/乔智炜

出版/法律出版社
总发行/中国法律图书有限公司
印刷/北京中科印刷有限公司

编辑统筹/法律教育出版分社
经销/新华书店
责任印制/张宇东

开本/A5
版本/2011年11月第1版

印张/7.25 字数/220千
印次/2011年11月第1次印刷

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908
上海公司/021-62071010/1636 北京分公司/010-62534456 深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 2765 - 4

定价:26.00元

(如有缺页或倒装,中国法律图书有限公司负责退换)

总 序

仲春四月,正值莺飞草长、万物复苏之季。本人总主编的《海商法博士精品文库》与读者见面,图为繁荣法学园圃,能增添一枝新葩。

海商法作为法学的一个分支,屈指算来,在欧洲近则有几个世纪的发展历史,远则可追溯到查士丁尼的《法律汇编》。经过长期的积淀,形成了特色鲜明、风格独特的调整海上运输关系和船舶关系的法律制度。我国航海事业的萌芽发展也甚为悠久,据史料记载,早在殷商末年,我国就有人横渡太平洋到达美洲。后来,秦朝徐福远渡日本,唐朝设立众多市舶司,明朝郑和七下西洋——这些辉煌的航海历史,说明我们曾经在航海事业上处于世界领先水平。然而自明清以来,政府厉行海禁,闭关锁国,谓之寸板不得下海,航海事业一落千丈。在这样的社会政治经济背景下,加之我国历代民商法制落后,海商法的立法和研究也就暂付阙如。

改革开放后,我国国民经济持续快速发展,依法治国方略逐渐得以实施,对外经贸来往活动日益繁多。在现实经济生活的推动下,我国海商法理论和实践也取得了突飞猛进的发展,与航运发达国家的差距正在不断缩小。其主要标志有三:一是1993年新中国第一部《海商法》颁布并实施,标志着我国海事立法进入一个新的历史阶段;二是自1985年以来,十个专门海事法院相继诞生,每年受案量逾万件,海事司法实践锤炼了大批海事专业法官和律师;三是人才培养,每年数以百计的海

商法本科和硕士研究生,源源不断地输入人才市场。更为可喜的是,自20世纪末,中国开始自己培养海商法的博士生。

大连海事大学基于自身位居沿海港口城市的地缘优势,一直着重海商法学科建设。在领导的关心、学校的扶持、教师的群策群力下,海商法学在大连海事大学得以稳步发展,学生培养层次也逐渐提高。1998年,经国家学位委员会正式批准,大连海事大学设置了我国第一个以海商法为主要研究方向的国际法学博士点,迄今共有博士生导师7人。

本人所指导的年轻学子,理论功底深厚,专业知识广博,思想敏锐,有强烈的创新意识及开拓精神。他们的博士论文拓宽了海商法学的视野,丰富了海商法学的内容,具有较高的学术价值及实践意义。为了展示年轻一代海商法学者的风貌及研究成果,增加不同部门法之间的了解融通,今将陆续出版其中佳作,命名为《海商法博士精品文库》。希望该系列专著能够由涓流而积瀚海,推动我国海商法的研究,使之走向更高远的境界。同时也恭迎兄弟院校的海商法博士论文,列于此系列专著。如果这种愿望可以达致,实为海商法研究之福祉。

寥此数言,是为序!

司玉琢

二零零七年春于大连

Abstract

Maritime litigation is a special kind of rules of litigation, especially the litigation jurisdiction of which is a rich and complicated subject. In the field of international maritime litigation jurisdiction, the coordination and settlements of the conflicts of jurisdiction is vital to the uniform of the international maritime law. This article, starting from the historical source of maritime litigation jurisdiction, amply introduces the conception, category and legal characteristics of maritime litigation jurisdiction, points out the conflicts and settlements of international maritime litigation jurisdiction, demonstrates the maritime litigation jurisdiction in International Conventions, European Union, China and Korea, and emphatically analyzes rules of jurisdiction clauses of bill of lading and maritime litigation jurisdiction on the ship-owner's limitation cases which are the specific solutions on maritime litigation jurisdiction in Chinese laws; then, aiming at defects existing in maritime litigation jurisdiction of China, puts forward corresponding suggestions to improve the rules of maritime litigation jurisdiction for China.

Chapter 1 Introduction. This chapter involves the objective, scope and method of the research. The objective is as follows: the rules of maritime litigation are special and important legal rules. But they are rarely referred to in international conventions and are undound in many countries including China. The author, as a judge

engaging in maritime trial, decides to research maritime litigation jurisdiction rules due to his confusion of it in judicial practice. This article involves the history, conception, category and legal characteristics of maritime litigation jurisdiction, relative rules concerning jurisdiction of maritime litigation in international conventions and laws all over the world, conflicts and settlements of international maritime litigation jurisdiction and measures for improvement of jurisdiction rules of China. This article, firstly lengthways compares the internal development of rules of maritime litigation jurisdiction system and secondly breadthwise compares the maritime litigation jurisdiction rules of China with relative rules in international conventions and other countries. In addition, as a judge engaging in jurisdictional practice, the author also adopts the way of combination of theory and practice.

Chapter 2 General Theory of Maritime Litigation Jurisdiction. This chapter firstly demonstrates the overview of maritime litigation jurisdiction. It introduces the definition, origin and historical development, jurisdictional scope of maritime litigation jurisdiction. Then it sets forth the category and legal characteristics of maritime litigation jurisdiction. This chapter secondly discusses maritime litigation jurisdiction involving foreign elements. It analyzes the fact basis and legislative authority of performance of maritime litigation jurisdiction involving foreign elements, the reasons for conflict of maritime litigation jurisdiction involving foreign elements and from aspects of legislation and judicature, points out the principles and ways of solving the conflict of maritime litigation jurisdiction involving foreign elements.

Chapter 3 Comparative Analysis of Maritime Litigation Jurisdiction. This chapter demonstrates maritime litigation jurisdiction

in International Conventions, European Union (hereinafter referred to as “EU”), China and Korea in detail and compares with each other by combination of their own characteristics. In the rules maritime litigation jurisdiction in International Conventions, it introduces the importance of maritime litigation jurisdiction in procedural justice, International Conventions concerning legal rules of maritime litigation jurisdiction and the application of International Conventions concerning maritime litigation jurisdiction in China. In maritime jurisdiction rules of EU, it demonstrates the concept and characteristics, the legal basis and the legal meaning of research of maritime litigation jurisdiction of EU. As for the introduction of maritime litigation jurisdiction in Korea and China, it analyzes the connective elements for confirmation of domestic maritime jurisdiction by Korea and foundational principles and litigant logos of maritime jurisdiction exercised by Korea, which are all from aspect of the domestic maritime jurisdiction and maritime jurisdiction involving foreign elements, introduces the domestic structure of maritime jurisdiction in China including legal jurisdiction, jurisdiction by order, exclusive jurisdiction and agreed jurisdiction, legal basis and legal system of the maritime jurisdiction involving foreign elements. At last, it conducts a summary of comparative analysis on maritime litigation jurisdiction between International Conventions and China, between European Union and China and between Korea and China.

Chapter 4 Specific Solutions on Maritime Litigation Jurisdiction in Chinese Laws——Rules of Jurisdictional Clauses of Bill of Lading and Maritime Litigation Jurisdiction on the Ship-owner’s Global Limitation Cases. This chapter, with reference to maritime litigation jurisdictional clauses of bill of lading, analyzes the characteristics of it in nomology, sets forth its effectiveness from the aspects of legal rules

and formal condition and shows the comprehension and cognizance of America, Japan, Korea and China to it. In demonstration of maritime litigation jurisdiction on the ship-owner's global limitation cases, it firstly demonstrates the legal meaning of maritime litigation jurisdiction on the ship-owner's global limitation, maritime litigation jurisdiction on the ship-owner's global limitation in pollution by ship and collision cases and the relationship of maritime litigation jurisdiction on the ship-owner's global limitation and Forum Non Conveniens. Then, it analyzes the concept, origin and development, application, comment, and the judicial practice of Forum Non Conveniens in China.

Chapter 5 Conclusions and Suggestions. In demonstration of conclusions, this chapter, with combination of the internal characteristics and developmental situation of maritime litigation jurisdiction, points out that the maritime litigation jurisdiction rules of China need further improvement to meet the new demands to maritime litigation jurisdiction. In demonstration of suggestions, this article advises that China should try their best to establish the rules of maritime litigation consistent with international conventions and customs and realize the uniform of maritime litigation jurisdiction through special and centralized jurisdiction to maritime litigation, respect of the agreed jurisdiction of the parties and establishment of the relative rules.

Table of Contents

Chapter 1	Introduction	1
1.1	Purpose of the Study	1
1.2	Scope of the Study	4
1.3	Methods of the Study	7
Chapter 2	General Theory of Maritime Litigation Jurisdiction	10
2.1	The Overview of Maritime Litigation Jurisdiction	10
2.2	Maritime Litigation Jurisdiction Involving Foreign Elements	36
Chapter 3	Comparative Analysis of Maritime Litigation Jurisdiction	51
3.1	Maritime Litigation Jurisdiction in International Conventions	51
3.2	Maritime Litigation Jurisdiction in European Union	66
3.3	Maritime Litigation Jurisdiction in Korea	73
3.4	Maritime Litigation Jurisdiction in China	85
3.5	Summary of Comparative Analysis on Maritime Litigation Jurisdiction	104

Chapter 4	Specific Solutions on Maritime Litigation Jurisdiction in Chinese Laws	112
4.1	Rules of Jurisdiction Clauses of Bill of Lading	112
4.2	Maritime Litigation Jurisdiction on the Ship-owner's Global Limitation Cases	141
Chapter 5	Conclusions and Suggestions	203
5.1	Conclusions	203
5.2	Suggestions	206
References		215

Chapter 1 Introduction

1.1 Purpose of the Study

Basing on the achievements obtained over the past centuries and with the economic internationalization and fast increasing international trade and rapidly developing science & technology, ocean transportation and other ocean-related activities are increasing day by day. China is an important ocean state. She has about 18,000 km coastal line and exercises jurisdiction of different degrees over a large ocean area. China-related international investment and trade are developing at an astonishing speed, and ocean transportation is becoming more and more important in China. The Republic of Korea (hereinafter referred to as “Korea”) is a friendly neighbor of China. Since the establishment of formal diplomatic relationship between the two countries, the bilateral trade and investment has increased at an astonishing speed, and therefore there are more and more cases concerning the two countries. It is very necessary to conduct a comparative study on the legal regimes of these two countries.

Settlement methods of conflicts of the special law are usually paid more attention, and the legal conflicts of the maritime law in many countries are of the same. It seems that there’s never more attention paid to the uniform problems of a legal region than that of the internationalization of the maritime law. Development from the

Hague Rules in 1924 to Hague-Visby Rules in 1968 and Hamburg Rules in 1978 promotes the maritime law to incline to the limited uniformity. Besides, activities of government organizations (such as International Maritime Organization, IMO for short) and non-government organizations (such as Committee Maritime International, CMI for short) further promotes the uniform trend of maritime rules.^[1] While the endeavor and headway to uniformity is not obvious as to the procedural jurisdictional problems of maritime litigation. Jurisdictional problems of maritime litigation in many international conventions of the maritime private international law are rare, and even the Convention on the Foreign Judgment and Jurisdiction in Civil and Commercial Matters (Draft) also excludes the application to the maritime issues.^[2] It's a long way before maritime litigation jurisdiction establishes its status in the civil litigation jurisdiction and obtains its independence.

China maintains a large fleet of ships. She is also a state with a large quantity of cargoes, so she is concerned with the protection of interests of cargo-owners too.^[3] In order to balance the interests of

[1] Committee Maritime International, since established in 1897, has successively formulated some international conventions and customs of maritime including international conventions concerning some laws and rules for unification of the bill of lading, the York-Antwerp Rules, International Regulation for Preventing Collisions at Sea, International Convention on Salvage, International Convention on Civil Liability or Oil Pollution Damage and so on. The 37th Singapore session made the unification of the Transport Law as its major object, which prepared for the draft of uniform rules of the International Transport Law.

[2] This convention applies only to the civil and commercial affairs, the conception of which though is not confirmed, it excludes maritime affairs in consideration of the special affairs shall be governed by the special conventions.

[3] In China, about 90% of import and export cargoes are transported by sea. Refer to: Li Hai, A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p. 336.

ship-owners and cargo-owners and keep pace with related international conventions, China is perfecting step by step her rules in the field of maritime litigation jurisdiction. As for the legislation and judicature, it is comparatively comprehensive in China, where the Some Rules of the Supreme People's Court on the Scope for Maritime Courts to Accept Cases pinpoints the division of the work between the maritime court and local court and the realization of the exclusive jurisdiction of the maritime litigation in the form of the judicial interpretation. In 1999, China enacted Maritime Special Procedure Law, one important content of which is about maritime litigation jurisdiction. In the course of legislation perfection, Chinese maritime judicial practice is getting richer and richer. In China, ten maritime courts have been established in major port cities along the coast and along the Changjiang River.^[4] Many special maritime judges are dealing with maritime cases the number of which is increasing at an annual speed of about 30%. According to statistics, Chinese maritime courts have dealt with more than 60,000 maritime cases, one-third of which are foreign-related. The object of Chinese maritime court system is to form a maritime judicial center in Asia-Pacific region.^[5] In China, a legal regime concerning maritime litigation jurisdiction with Chinese characteristics has been established. Now the Chinese law and practice have developed a lot, but this doesn't mean that there are no problems or no room for perfection. On the contrary, seen

[4] These ten Chinese maritime courts are: Dalian Maritime Court, Tianjin Maritime Court, Qingdao Maritime Court, Shanghai Maritime Court, Wuhan Maritime Court, Ningbo Maritime Court, Xiamen Maritime Court, Guangzhou Maritime Court, Haikou Maritime Court, Beihai Maritime Court.

[5] See: Jin Zheng-jia, *Appraisal and Analysis of Typical Chinese Maritime Cases*, Beijing: Law Publishing House, 1998, preface.

from the perspective of comparative law and judged according to practice, both Chinese law and judicial practice should be revalued and perfected.

In view of above background, I think it is meaningful to study the legal issues of maritime litigation jurisdiction. The reason is that maritime litigation jurisdiction is a worldwide issue, an issue concerning balance of interests of different states and different civil principles. As a judge engaging in maritime and commercial trial involving foreign elements, I have gone through too many confusion and lessons in process of handling the maritime cases.^[6] I have been very interested in this study and I get much courage from my supervising professor Dae Chung. In this paper, I want to focus on the Chinese laws and practice in respect of maritime litigation jurisdiction and, through mainly comparing with relative rules in international conventions and other countries, try to conduct a thorough and deep comparative study on maritime litigation jurisdiction and to propose possible programs for perfecting legislation and judicial practice of China.

1.2 Scope of the Study

In order to accomplish the above-mentioned purpose, after deeply

[6] The author, in 1998, worked in Yantai Courtroom of Qingdao Maritime Court and processed a lot of maritime cases; in 2001, was redeployed to maritime courtroom of Qingdao Maritime Court and specially took charge of the trial of maritime cases; in 2002, joined in "the maritime judges following ships to practice" project organized by the Supreme Court of China and the Ministry of Communications and had been to dozens of countries; during 2003 to 2004, engaged in investigation and studying of the establishment of sending courts of PRC; in 2005, was reemployed to the Superior Court of Shandong Province and took charge of the trial of maritime cases and business cases involving foreign affairs.

thinking, I decide to include the following contents in this paper.

(1) General Theory of Maritime Litigation Jurisdiction.

In this part, I firstly demonstrate the overview of maritime litigation jurisdiction, introduce the definition, origin and historical development, jurisdictional scope and the category and legal characteristics of maritime litigation jurisdiction. Then, I analyze maritime litigation jurisdiction involving foreign elements, discuss the fact basis and legislative authority of performance of maritime litigation jurisdiction involving foreign elements, construe the reasons for conflict of maritime litigation jurisdiction involving foreign elements, point out the principles and ways of solving the conflict of maritime litigation jurisdiction involving foreign elements.

(2) Comparative Analysis of Maritime Litigation Jurisdiction.

I demonstrate maritime litigation jurisdiction in International Conventions, European Union (hereinafter referred to as “EU”), China and Korea in detail and compare with each other by combination of their own characteristic. In maritime litigation jurisdiction in International Conventions, I emphatically introduce maritime litigation jurisdiction over arrest of ships, maritime jurisdiction rules of ship pollution and collision. In maritime litigation jurisdiction in EU, I demonstrate the concept, characteristics and legal basis of maritime litigation jurisdiction of EU. As for the introduction of maritime litigation jurisdiction in Korea and China, I analyze the connective elements for confirmation of domestic maritime jurisdiction by Korea and foundational principles and litigant logos of maritime jurisdiction exercised by Korea, which are all from aspect of the domestic maritime jurisdiction and maritime jurisdiction involving foreign elements, introduce the domestic structure of maritime jurisdiction in China including legal jurisdiction, jurisdiction by order,

exclusive jurisdiction and agreed jurisdiction, legal basis and legal system of the maritime jurisdiction involving foreign elements. At last, I conduct a summary of comparative analysis on maritime litigation jurisdiction between International Conventions and China, between European Union and China and between Korea and China.

(3) Analyze Specific Solutions on Maritime Litigation Jurisdiction in Chinese Laws——Rules of Jurisdiction Clauses of Bill of Lading and Maritime Litigation Jurisdiction on Ship-owner's Global Limitation Cases.

With reference to maritime litigation jurisdictional clauses of bill of lading, I analyze the characteristics of it in nomology, set forth its effectiveness from the aspect of legal rules and formal conditions and show the comprehension and cognizance of China to it. In demonstration of maritime litigation jurisdiction on ship-owner's global limitation cases, I introduce maritime litigation jurisdiction on ship-owner's global limitation in pollution by ship and collision cases, demonstrate the concept, origin and development, application, comment and analysis, influence and the judicial practice of Forum Non Conveniens in China.

(4) Conclusions and Suggestions.

At the end of this paper, I summarize the contents discussed and give some suggestions for perfecting laws and practice of China. In demonstration of conclusions, with combination of the internal characteristic and developmental situation of maritime litigation jurisdiction, I point out that the maritime litigation jurisdiction rules of China need further improvement to meet the new demands to maritime litigation jurisdiction. In demonstration of suggestions, I advise that China should try its best to establish the rules of maritime litigation jurisdiction consistent with international conventions and