SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Arrest & Jurisdiction

On 17/10/2008, the Hong Kong Court of Appeal held that the Hong Kong court had jurisdiction on a case of ship collision that happened in PRC territorial waters because one of the ship was arrested in Hong Kong.

Where an admiralty action in rem has been instituted, what is the proper approach to be adopted by the court in an application to stay that action on the basis of *forum non conveniens*? In the present appeals, the competing jurisdictions were Hong Kong and the Ningbo Maritime Court, in the PRC. On 17/3/2007, the bulk carrier "PENG YAN" (which was on a voyage from Huanghua, PRC to Xiji, PRC) collided with a general cargo ship "HUI RONG" (which was on a voyage from Xingang, PRC to Bangkok, Thailand) while in PRC territorial waters. The location of the collision was Zhou San Dao, off the coast of Ningbo and Shanghai. The port of registry of PENG YAN was Shenzhen. PENG YAN sustained damage to her bow. HUI RONG sank with the loss of nine crew members, with another eight missing. The cargoes carried on board HUI RONG were lost. Apart from this damage, there was also some oil spill and consequent pollution damage.

Inevitably, actions for the loss of the cargoes on board HUI RONG were commenced. On 5 Mary 2007, certain cargo interests (represented by Richards Butler) commenced in rem proceedings in Hong Kong (HCAJ 76 of 2007) against the owners and charterers of HUI RONG (the vessel carrying their cargo) and also against the owners of PENG YAN. A sister ship of PENG YAN ("PENG WEI") was arrested on 12/5/2007 in these proceedings. On 15/5/2007, the release of this vessel was procured upon the owners of PENG YAN providing a letter of undertaking in the sum of US$2.5 million to cover "such sums as may be finally adjudged by the competent Court or on an appeal therefrom or as may be agreed to be recoverable from the above-named colliding ship "PENG YAN" and/or the owners thereof in respect of the said claims, interest and costs". The letter of undertaking expressly reserved the right of the owners to dispute the jurisdiction of the Hong Kong courts (thus paving the way for the application for a stay on the basis of *forum non conveniens*) but did not expressly reserve the right of the owners to limit their liability, whether by reference to statutory or Convention tonnage limitation or otherwise. The letter of undertaking was supplemented by another letter of undertaking dated 3/4/2008, this time in the sum of US$100,000 to cover an additional cargo claim. This was in the same terms as the original one. On 28/12/2007, a third letter of undertaking was provided in respect of more cargo claims, this time to those claimants represented by Clyde & Co in the sum of US$5 million. This was effectively on the same terms as the others. It was provided to prevent an arrest of either PENG YAN or a sister ship. The Writ in respect of the relevant cargo claims was issued on 21/01/2008 (HCAJ 12/2008). This action and HCAJ 76/2007 constituted the present proceedings. The claims in these actions represented approximately 92% of the cargo claims arising from the losses on board HUI RONG. For convenience, 'Plaintiffs' was to mean the plaintiffs in both actions, 'Defendants' was to mean the defendant owners of PENG YAN and the 'Letters of Undertaking' was to refer to the three letters of undertaking.

In March 2008, other cargo claimants (not the Plaintiffs in the Hong Kong proceedings) commenced actions in the Ningbo Maritime Court. On 30/4/2008, the writs in the Hong Kong proceedings were served on the Defendants. The same day, the Defendants commenced a limitation action in the Ningbo Maritime Court to set up a limitation fund. The Ningbo Limitation Action was brought pursuant to the Maritime Code of the PRC. Under Articles 204, 207 and 210, shipowners are able to limit their liability (by reference to tonnage) in relation to any claims for loss or damage to cargoes on board ships. The limitations of liability set out in the Code (including any claims in respect of loss of life or personal injury) apply to the aggregate of all claims that may arise from a single casualty (Article 212). By reason of Article 213, a shipowner is able to set up a limitation fund to cover the various liabilities from an incident. The Ningbo Limitation Action was the exercise of rights by the Defendants pursuant to these Articles of the Maritime Code. The limits of liability as set out in the Maritime Code mirror the limitation scheme which would be available to the Defendants in Hong Kong had a

limitation action been commenced here. Hong Kong is subject to the Convention on Limitation of Liability for Maritime Claims 1976 (see the provisions of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap. 434). PENG YAN, whose gross tonnage was 34,886 tons, was at the time of the casualty engaged in a voyage between ports in the PRC. The requisite security was paid (and therefore the limitation fund set up) on 29/8/2008. The state of the Ningbo Limitation Action appeared to be that there were a total of 29 claimants who had registered claims against the limitation fund. These claimants comprised cargo interests (including the Plaintiffs) as well as the owners of HUI RONG. Other claims had been brought against PENG YAN in the Ningbo courts, such as the pollution damage claim brought by the Zhejing Maritime Safety Administration, but these claims were not part of the Ningbo Limitation Action since there were no applicable limitations of liability in relation to such claims.

On 11/7/2008, the Defendants issued notices of motion to stay the proceedings in Hong Kong on the ground of *forum non conveniens*. The Defendants also sought orders that the Letters of Undertaking should be returned for cancellation. Reyes J, the Admiralty Judge, heard the motions on 25/8/2008 and delivered a reasoned judgment the same day dismissing the applications for a stay. Looking to see whether it could be shown by the Defendants that the Ningbo Maritime Court was "clearly or distinctly" more appropriate a forum than the Hong Kong courts, judge Reyes then considered a number of factors in this regard.

> First, he did not regard the fact that PENG YAN was registered in the PRC and that her owners were PRC based, carried much weight. In an Admiralty context, it is commonplace for claims (and in particular, cargo claims) to be litigated in jurisdictions other than the 'home' of either the ship in question or her owners. Where ships and sister ships ply their trade worldwide, this is inevitable and in his view, would generally carry little or no weight in the consideration of *forum non conveniens* issues.
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> Secondly, the learned judge then looked at the fact of the PRC nationality of the crew of both PENG YAN and HUI RONG. Again, this was not considered a matter of sufficient weight. He pointed out that by the very nature of their occupation, crew members were often away from home and that therefore having to attend trial at a foreign jurisdiction would not be unduly inconvenient. In any event, the crew came from different parts of the PRC and travelling to Ningbo was really no more convenient for a person from, say, Shandong (like the Third Officer of PENG YAN) than coming to Hong Kong.
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> Thirdly, it was far from clear in any event what relevant testimony would come from crew members. The main evidence going to the issue of the respective fault of both ships would come from the reports of the incident compiled by the Hong Kong Marine Department and the Shenzhen Maritime Safety Administration. There was no evidence why the authors of these reports would find any difficulty in attending a trial in Hong Kong.
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> Fourthly, the Defendants referred to the existence of proceedings which had actually been commenced and pursued in the Ningbo Maritime Court. This was the Ningbo Limitation. The Defendants emphasized the point that the issue of the respective fault of the two ships (this involving of course the crucial issue of PENG YAN's liability) would be decided in the Ningbo Limitation Action. The shares to which the various cargo interests might be entitled in the limitation fund set up in the Ningbo Limitation Action would also be apportioned in that action.

The learned judge was not persuaded that there would be any substantial saving of time or costs if the dispute in the present action were also litigated in the Ningbo Maritime Court. He observed that the possibility of avoiding multiple actions was a distant one, given it was unlikely that the Ningbo courts would consolidate all the claims that arose from the collision (he referred specifically to the pollution claims and the cargo claims). The Judge further observed there was nothing unusual about a limitation action taking place in a different forum to the one in which the question of liability was being determined. Although the Judge concluded it had not been shown by the Defendants that there was a forum clearly or distinctly more appropriate than Hong Kong, he nevertheless considered the submissions made by the Plaintiffs based on loss of personal or juridical advantages should the Hong Kong proceedings be stayed. Though unnecessary to decide, he nevertheless dealt with these points but was not persuaded that there would be any loss of such advantages.

The Court of Appeal would reiterate that the basic approach of the court in determining applications for stay based on *forum non conveniens* in admiralty proceedings is the same as in any other action. The basic approach is well known : where jurisdiction in Hong Kong has been founded as of right, a stay will only be granted where it is shown that there is another forum which is clearly or distinctly more appropriate. Only if this has been shown will questions of the deprivation of personal or juridical advantages and any consequential balancing exercise, arise. In admiralty proceedings, the founding of jurisdiction as of right usually arises upon an arrest of the ship in question or a sister ship. The court has on numerous occasions emphasised this unique feature of the admiralty jurisdiction : see for example, *The Convenience Container* [2007] 2 HKLRD 575. In *The Kapitan Shvetsov* [1998] 1 Lloyd's Rep 199, the Court of Appeal alluded to the importance of the jurisdiction of the admiralty court having been founded as of right in this way. The foundation of the court's jurisdiction to arrest is of

course the provision of security for various types of maritime claims and it is this facet that gives the admiralty jurisdiction its uniqueness. Where jurisdiction is founded by an arrest, then, notwithstanding that there may be little or no connection with Hong Kong other than the fact of arrest, the burden on the party applying for a stay based on *forum non conveniens* is still to demonstrate that there is another jurisdiction that is clearly or distinctly more appropriate. The legal burden is not on the party suing in Hong Kong to demonstrate the appropriateness of continuing proceedings in Hong Kong. Further, as cases like *The Kapitan Shvetsov* (at 217(2)) and *The Caspian Basin* [1997] 2 Lloyd's Rep 507 (at 525(2)) show, the existence of parallel proceedings in admiralty matters is by no means unusual, nor should the mere existence of such by itself incline a court towards staying an action on the ground of *forum non conveniens* (as to this latter point, see *The Abidin Daver* [1984] AC 398, at 423F-H).

In *The Albaforth*, it was said at 96(2) in the judgment of Robert Goff LJ, that :

> "If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum".

No doubt this is correct as far as it goes. However, as confirmed in *Esquel Enterprises v Tal Apparel Ltd* [2006] 2 HKC 384, this is but a starting point. The underlying reason for *The Albaforth* principle is that, often in tortious claims, there are one or more elements that have a real connection with the place of the commission of the alleged tort. Thus, for example, where the extent of loss and damage (a requisite element to be proved in all tortious claims) in a particular location is an important issue, the place of the tort must be an important factor in determining the appropriateness of any given forum. Other examples where the location of the tort is important from the point of view of the trial of the action include misrepresentation claims where the alleged misrepresentation is acted upon in a particular country. It is therefore important when applying *The Albaforth* principle in the context of *forum non conveniens* applications, to examine just how close a connection there really exists with any given forum. In some cases, the place of the commission of the tort may be decisive; in others, perhaps not weighty at all. The place of the commission of the tort may in some cases be quite fortuitous and may provide no more than a convenient starting point or prima facie position. The court is required to look into more substantial factors in the application of the basic test. The present case involved a collision where, quite often, there is no obvious or natural forum. In the Court of Appeal's view, the approach of Judge Reyes could not really be faulted.

Multiplicity of proceedings became the main focus of the appeal. Put simply, the Defendants' submissions could be distilled into the following. The issues of the liability of PENG YAN, of the fault to be attributed to that ship and HUI RONG, and of the quantum of the Plaintiffs' claims (these being issues raised for determination in the Hong Kong proceedings) were all to be decided in the Ningbo Limitation Action. The amount of security available to the Plaintiffs in the Ningbo Limitation Action was no different from the security that was available in Hong Kong. The applicable limits of liability under the Maritime Code of the PRC were the same as those that would be applied in Hong Kong under the 1976 Convention. There was a certain attraction in the simplicity of the Defendants' submissions, but upon closer analysis, it amounted to saying no more than, at its highest, there existed parallel proceedings in Hong Kong and in the Ningbo Maritime Court. This is by no means unusual in admiralty matters and specifically within this rubric, limitation actions. It might have been of some relevance had it been shown that the Ningbo Limitation Action was near conclusion but this was not the case. Rather, the Ningbo Limitation Action was not at an advanced stage. The Court of Appeal had of course not lost sight of the argument that there might be a risk of inconsistent findings were the Hong Kong courts and the Ningbo Maritime Court to adjudicate on those issues common to both proceedings.

Nevertheless, it seemed clear that the reason for the Plaintiffs joining in the Ningbo Limitation Action was really only as a protective measure in case a stay was granted in Hong Kong. From the affirmation evidence filed on behalf of the Plaintiffs, their primary stance was not to litigate in the Ningbo Maritime Court. Without a stay, the Court of Appeal dared say the Plaintiffs would most likely withdraw or modify their participation in the action there.

The risk of inconsistent findings was, therefore, in the Court of Appeal's judgment, more apparent than real. One was accordingly left in the position in having to determine whether a trial in the Ningbo Maritime Court would, compared with a trial in Hong Kong, be clearly or distinctly more convenient. The careful analysis undertaken by Judge Reyes directed at what was likely to occur at trial clearly justified his conclusion it could not be shown that the Ningbo Maritime Court was clearly or distinctly the more appropriate forum for the trial of the disputes. In his judgment, Judge Reyes remarked that nothing prevented the owners from pleading limitation in the Hong Kong action and arguing that, in the determination of liability, the court should for some reason recognize any limitation decree by the Ningbo Maritime Court. Judge Reyes, however, also mentioned in his judgment the possible difficulties that might arise in the recognition by the Hong Kong courts of a PRC

limitation decree. There might or might not be such difficulties, but it could not be said that insuperable difficulties would be caused by the existence of contemporaneous proceedings in the Ningbo Maritime Court and in Hong Kong. Certainly, it could not be said that this aspect was sufficiently strong to justify a stay.

The Court of Appeal had so far proceeded on the assumption that the Hong Kong proceedings and the Ningbo Limitation Action were indeed parallel proceedings. Strictly speaking, however, they were not and there were important differences. First, the security for the Hong Kong proceedings came in the form of the Letters of Undertaking (this was of course not the position in the Ningbo Limitation Action where a limitation fund had been established). They did not contain any express reservation of the Defendants' right to limit liability by reference to the 1976 Convention (or indeed any other applicable limitation). The only reservation was to challenge the jurisdiction of the Hong Kong courts. It was the Plaintiffs' position that whatever limitation might be applicable in the Ningbo Limitation Action under the PRC Maritime Code, this would be inapplicable as far as the Hong Kong proceedings were concerned. They contended that on the true construction of the Letters of Undertaking, the Defendants had unconditionally undertaken to secure any damages ordered to be paid up to the limits set out in them. This was the price that was exacted to enable the arrested ship to be released or to prevent further arrest. The Defendants of course contended otherwise. The Defendants submitted forcefully that the Plaintiffs' position was untenable. The Defendents submitted it was unnecessary to set out in a letter of undertaking the full extent of any defence that would reduce or eliminate what otherwise might be the liability of the Defendants. The Plaintiffs pointed out, on the other hand, that the omission to refer to tonnage limitation in the Letters of Undertaking in the present case reflected the position in cases like *The ICL Vikraman* [2004] 1 Lloyd's Rep 21, at 25(2) (paragraph 8). It was at least arguable that tonnage limitation would not avail the Defendants in the Hong Kong actions. The Defendants might or might not be right, but this was an issue which the Court of Appeal was unable at this stage to determine. Ultimately, this aspect was one which, in the Court of Appeal's view, strongly militated against a stay being granted. Put simply, the Plaintiffs would be secured in the Ningbo Limitation Action only to the extent of the limitation fund established there. In Hong Kong, they could be secured in respect of a considerably larger amount. The existence of security for a claim is a relevant factor in the consideration of stay applications based on *forum non conveniens*: see *Spiliada* at 483D. As mentioned earlier, one of the orders sought by the Defendants in the application for stay was the cancellation of the Letters of Undertaking. The second difference is that in HCAJ 76/2007, the Plaintiffs claimed against, in addition to the Defendants, the owners and charterers of HUI RONG, with whom the Plaintiffs' cargo interests had contractual relations. Lastly, it was worth a reminder that the Ningbo Limitation Action was commenced the very day that the writs in the present proceedings were served. While it was to be acknowledged that the owners of PENG YAN were free to commence a limitation action wherever they chose (see *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361), this could not be given undue weight by itself. In the Court of Appeal's judgment, this ground of appeal similarly failed.

The appeals were dismissed. The Court of Appeal would also make an order nisi that the costs of the appeals be to the Plaintiffs to be paid by the Defendants, such costs to be taxed if not agreed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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It goes without saying the economy is heading further south as 2009 sets sail into the second quarter.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims.

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