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Ref : Chans advice/198

To: Transport Industry Operators

Tonnage limitation vis-a-vis collision

The Hong Kong High Court issued a Decision on 9/5/2017 allowing a time extension for some cargo interests to claim against the Tonnage Limitation Fund constituted by the owner of one of the two vessels involved in a collision that happened on 7/11/2013. [HCAJ 189/2013]

The background

On 7 November 2013, a collision at sea occurred between two vessels, *The Eleni* owned by Eleni Maritime Limited ("Eleni Maritime") and *The Heung-A Dragon* owned by Heung-A Shipping Co Ltd ("Heung-A Shipping") off Phu My in Vietnam. As a result, *The Heung-A Dragon* with all its cargo on board sank.

In respect of the sinking of *The Heung-A Dragon*, Eleni Maritime admitted liability. Attribution of blame for the collision was agreed at 70:30. Then, Eleni Maritime initiated limitation action in the action in question against Heung-A Shipping and three other potential claimants (ie the 1st to 4th Defendants) under Order 75 of the Rules of the High Court, seeking to limit its liability in the collision. On 14 May 2014, Ng J granted a limitation decree (the "Decree") including, *inter alia*, the following terms:

1. that the *Convention on Limitation of Liability for Maritime Claims 1976* (the "*Limitation Convention*") has the force of law in Hong Kong;
2. that the tonnage of *The Eleni* for the purpose of this action was 23,494 tons;
3. that the liability of Eleni Maritime was limited to 4,006,998 Special Drawing Rights;
4. that claims against Eleni Maritime in respect of the collision should be filed within a period of 6 months and 14 days from the date of the Decree; and
5. that Eleni Maritime to advertise a notice specifying the particulars of the Decree once in each of Lloyd's List, South China Morning Post and the Hong Kong Standard.

On 21 May 2014, Eleni Maritime constituted the limitation fund (the "Fund") by making payment into court.

The date for filing of claims under the Decree was initially 28 November 2014, but was extended on two occasions to 28 January 2015. This final deadline was nearly a year before the expiry of the two-year limitation period under section 7(1) of *Merchant Shipping (Collision Damage Liability and Salvage) Ordinance, Cap 508* ("the Ordinance") for claiming damages arising out of collision at sea.

In mid 2015, well after the expiry of the final deadline but about six months before the expiry of the two-year limitation period, solicitors for the 2nd to 4th Defendants (E-One Garment, Peninsula Merchandising, Faratronic), Smyth & Co, received initial instructions from some 22 additional claimants in respect of a further round of claims against Eleni Maritime. Since July 2015, Smyth & Co was communicating with solicitors for Eleni Maritime and Heung-A Shipping about late filing of claims by the additional claimants against the Fund. Eleni Maritime maintained a neutral stance, but Heung-A Shipping objected. Instead of seeking an extension of time for filing of claims under the Decree or to have the Decree set aside, Smyth & Co filed a writ of action in

HCA 135/2015 on 6 November 2015, against Eleni Shipping on behalf of the 2nd to 4th Defendants and the additional claimants just before the expiry of the limitation period. Eleni Shipping acknowledged service of the writ and submitted to jurisdiction.

The progress in respect of claims under the Fund was slow due to various complications, including the fact that there remained an issue to be resolved as to wreck removal and that other actions were commenced against *The Eleni* by other claimants in India and the Marshall Islands. No distribution from the Fund was made and there was no immediate prospect of distribution.

The application

On 14 October 2016, Smyth & Co issued the summons in question seeking an extension of the deadline under the Decree for the 2nd to 4th Defendants and the additional claimants to file claims against the Fund. Eleni Maritime took a neutral stance but Heung-A Shipping objected.

The basis of the additional claimants' application was that they had commenced writ actions within the limitation period which were perfectly valid and might be pursued against Eleni Maritime who had submitted to jurisdiction. There was no provision in the Decree prohibiting or staying other actions against Eleni Maritime. The additional claimants and their insurers had no knowledge of the Decree and constitution of the Fund until long after the deadline fixed under the Decree had expired. They had already issued a protective writ within the limitation period. In any event, the deadline fixed by court was an administrative deadline, which the court has discretion to extend. The court had no power to reduce the two-year statutory limitation period. The Fund was still in its early stages of administration and no distribution was made. Granting the extension would not create any prejudice to anybody. Hence, in all circumstances the extension ought to be granted.

The thrust of the argument of Heung-A Shipping, in opposition to the application was that regardless of the filing of the writs, the additional claimants' claim against the Fund was statute-barred as they had not filed their claims against the Fund in the limitation action within the time limit under section 7(1) of the Ordinance. Filing of a writ was not sufficient to have preserved time for the purposes of claims against the Fund. As a competing claimant against the Fund, Heung-A Shipping was entitled to rely on this time-bar defence available to Eleni Maritime to defeat the claims of the additional claimants against the Fund. Simply put, Heung-A Shipping's proposition was that the statutory time-bar applied to each and every action taken to enforce the same claim or cause of action. Heung-A Shipping's subsidiary arguments were that the writ actions commenced by the additional claimants constituted an abuse of process and could not be relied on by them for protecting time; and that no good reason had been advanced in support of an application for extension of time.

The statutory claim regime in Hong Kong

The issues raised in the application in question were the true construction of section 7 of the Ordinance and the inter-relationship between that statutory time limit and the time limit fixed by the court in the limitation decree. These issues could only be resolved against the backdrop of the statutory claim regime under Hong Kong law.

The *Limitation Convention*, which was given the force of law in Hong Kong by the *Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434*, provides for a simple and practical regime for disposing of claims arising from collision at sea, which is acceptable to the shipping industry and beneficial to the parties in a collision. Litigations arising from collision at sea take a long time to resolve. Under the regime, shipowners get the benefit of limitation of their liability and have their vessels released on payment of a security calculated according to their tonnage so that the vessels may be sailed out of port to continue with their ordinary commercial activities. On the other hand, claimants get the benefit of a security in court. Section 7 of the Ordinance

provides for a limitation period of two years for making claims arising out of collision at sea. Order 75 provides the relevant procedures.

The regime is available to the shipowner who does not dispute liability but wishes to take advantage of the limitation of liability under the regime. The regime consists of a two stage process: first, the limitation action in which the shipowner seeks to limit his liability; and second, the reference action in which claims against that shipowner are processed upon the approval of his limitation application and constitution of the limitation fund. Once the fund is constituted, the shipowner ceases to have any interest in disputing anybody's claim because he is liable only for the amount he has paid in, and that being so all competing claimants to the fund are entitled to dispute one another's claims against the fund. It is similar to the interpleader proceeding in which the interpleader brings the claimants to court and leaves it to them to resolve their rights over the subject matter of the interpleader. It is for the shipowner to commence the limitation action so that he may limit his liability and have his vessel released upon constituting the fund. If he does not invoke the regime, the claimants would have to proceed by way of the usual writ action.

Rules 37 to 40 are described in their headings as "limitation action". They provide for the making of a decree limiting the shipowner's liability or the refusal to make a decree. Rule 37 identifies the parties. The shipowner who is the person liable to claims for damages is identified as "the plaintiff" and claimants or potential claimants with claims against the shipowner are identified as "the defendants". Under this rule, the plaintiff shipowner issues a writ to the defendants to seek the relief of limiting his liability. Rule 38 sets out the procedure to be followed after issue and service of the writ. It requires the shipowner to take out a summons supported by affidavit proving his case and stating the names of all the persons who to his knowledge have claims against him arising out of the collision. It provides for the hearing before the registrar. If the defendants dispute the shipowner's right to limit his liability, the registrar will give further directions for the conduct of the hearing of the summons. If the right to limitation of liability is not disputed, the registrar will issue a decree limiting the shipowner's liability and fix the amount to which that liability is to be limited. Rule 39 provides for the fixing of a time within which claimants may file their claims and for advertisement of the decree if so ordered. This step concludes the limitation action, if no action is taken to have the decree set aside pursuant to rule 40. Rule 40 provides for setting aside of the decree by any person who has a claim against the shipowner but was not named by his name in the writ as a defendant or who was named but was not served with the writ or has not acknowledged the issue thereof.

Thus a limitation action is an application by the shipowner to limit his liability in an action or actions arising out of collision at sea. The only issue before the registrar in a limitation action is whether the shipowner has the right to limit his liability. According to article 4 of the *Limitation Convention*, that issue, if disputed, is whether it is proved that the loss resulted from the shipowner's personal act or omission, committed with the intent to cause loss, or recklessly and with knowledge that such loss would probably result. The claimants' entitlement to claim is not an issue. The limitation action may be commenced by the shipowner at any time, even after expiry of the limitation period under the Ordinance for commencing actions by claimants. It is not an action in which the claimants sue the shipowner for damages caused by the collision. There is no issue about time bar, let alone one applicable to the claimants. The limitation action begins with issue of a writ by the shipowner and concludes with the granting of or refusal to grant a limitation decree.

Rules 41 to 46 set out the procedures for dealing with claims filed pursuant to the decree. This part of the proceeding is described in the rules as "references to the registrar". It is akin to a writ action. The rules provide for filing of claims and defence, hearing before a judge, drawing up and entry of judgment and orders and inspection of documents filed in the registry. In some authorities, this part of the proceeding is referred to as "limitation reference" or "reference". Heung-A Shipping made no distinction between the limitation action and the reference and

treated both proceedings as part of the limitation action. The Judge preferred to refer to the proceeding under rules 37 to 40 as the limitation action and that under rules 41 to 46 as the reference or reference to the registrar or reference action. The former commences with the issue of the writ and concludes with the making or refusal to make a decree. The latter commences with the making of reference to the registrar and concludes with adjudication.

The true construction of section 7(1) of the Ordinance

The core issue raised by the application in question was the true and proper construction of section 7(1) of the Ordinance. This sub-section requires that an action to enforce a claim or lien must be commenced within two years. Heung-A Shipping submitted that the word “action” did not necessarily mean that a claimant must issue a writ. Heung-A Shipping argued that the word was equally competent to include the filing of a claim in a limitation reference as contemplated by Order 75 rule 41.

Sub-section 7(1) provides as follows:

“Subject to subsection (3), no action shall be maintainable to enforce any claim or lien against a vessel or its owners in respect of any damage or loss to another vessel, its cargo or freight, or any property on board the vessel, or damages for loss of life or personal injuries suffered by any person on board the vessel, caused by the fault of the former vessel, whether such vessel is wholly or partly in fault, unless proceedings in the action are commenced within 2 years from the date when the damage, loss or injury was caused.”

It was Heung-A Shipping’s argument that the word “action” was equally competent to include the filing of a claim in a limitation reference as contemplated by Order 75, rule 41, which is the proceeding in which the claim arising from collision damage is to be enforced. However, the word “action” must be read subject to the qualification which followed. It must therefore be an action to enforce any claim or lien against a vessel or its owners. But upon constitution of the limitation fund, the maritime lien for collision damage ceases to run with the ship. The Judge agreed with that proposition which was based on article 13(1) of the *Limitation Convention*. That is how the regime operates. With constitution of the fund, the vessel arrested is released. The lien ceases to exist. The limitation reference, which the additional claimants sought to participate, was therefore not an action to enforce any claim or lien against a vessel or its owners. It was an action against the Fund, although that action arose out of the wrongful act of the vessel or its owners. In the Judge’s view, a fair reading of section 7(1) did not support Heung-A Shipping’s construction. The limitation period did not apply to an action commenced against the limitation fund. The time-bar applied to an action to enforce a claim or lien against a vessel or its owners. It did not apply to an action against the fund.

The limitation period fixed by section 7(1) is statutory and section 7(3) gives the court discretion to extend that period to such extent and on such conditions as it thinks fit. With these in mind, the Judge would approach the issue as follows. The deadline fixed in the decree for filing of claim was one fixed by the court in the exercise of its case management powers for the better and proper conduct of the claims and administration of the fund. It was a procedural time limit or “administrative deadline”. No court would, when imposing such an administrative deadline, contemplate that it should have the effect of overriding the limitation period fixed by law, thereby rendering the defence of time-bar unavailable to a defendant. It must necessarily follow from the above that the very fact that the administrative deadline expired before expiry of the statutory limitation period alone was a good reason for granting extension of time under the decree.

If a claimant had commenced action against the shipowner within the statutory time limit and filed his claim in the reference within the administrative deadline, there was no defence of limitation available to the shipowner which the other claimants could rely on. The claimant was entitled to have his claim processed as of right.

If a claimant had commenced action against the shipowner within time but filed his claim in the reference after the expiry of the administrative deadline, leave to extend the administrative deadline under the decree was required. As the other claimants could not avail themselves of the shipowner's defence of limitation and as the administrative deadline was procedural, subject to showing good reasons for the delay and lack of prejudice to other claimants, leave to extend the administrative deadline would invariably be granted.

If a claimant had not commenced action against the shipowner within the statutory limitation period or at all, but his claim in the reference had been filed within the administrative deadline, the other claimants can rely on the defence of limitation available to the shipowner to defeat that claimant's claim. That claimant's claim in the reference would be shut out by the registrar. He had to invoke the court's discretion under section 7(3) of the Ordinance to extend the time limit for commencing action against the shipowner on proof of good reason for his inaction and absence of prejudice to the other claimants. The threshold was higher than that facing the claimant in the scenario described in the preceding paragraph.

If a claimant had not commenced action against the shipowner within time or at all and his claim in the reference had been filed after expiry of the administrative deadline, the defence of limitation would be available to the other claimants. His position would be the similar to that of the claimant in the preceding paragraph, except that he had to obtain court's leave to, first, extend the time for filing claim under the administrative deadline and, second, to extend the time limit under section 7(3) of the Ordinance. The threshold was much higher than that facing the claimant in the preceding paragraph.

Abuse of process in filing the writs

Relying on article 13 of the *Limitation Convention*, Heung-A Shipping argued that if the additional claimants were granted extension of time to claim against the Fund, they would be barred from claiming against any other property of Eleni Maritime under the writ action already filed. Heung-A Shipping emphasised the fact that these additional claimants had not arrested any property of Eleni Maritime and argued that if they sought to arrest *The Eleni* within the jurisdiction of Hong Kong Court, the Hong Kong Court would be obliged to release the vessel pursuant to article 13(2) of the *Limitation Convention*. Heung-A Shipping therefore submitted that these considerations highlighted the fact that the *in rem* proceedings issued by the additional claimants one day before the statutory limitation period expired were not intended to be used for the purpose of enforcing their claims. The proceedings therefore constituted an abuse of process and could not be relied upon as protecting time.

However, this article did not protect *The Eleni* from arrest if judgment had been obtained and a warrant of arrest executed on her when she happened to be at a port of a contracting state to the *Limitation Convention* other than Hong Kong or any of the other three locations set out in article 13(2). The additional claimants made it abundantly clear that their intention was to forgo their remedy *in rem* by commencing the reference and to allow themselves to be caught by article 13(1), so that they might participate in the Fund. There were obvious benefits for them to opt to pursue against the Fund, such as time, costs and security. Though the likelihood of their obtaining the remedy *in rem* by the writ actions appeared remote, the inference that these additional claimants had no intention to pursue the remedy *in rem* if it became not open to them to pursue against the Fund was not a reasonable inference that could be drawn. The Judge was not satisfied that the writ actions commenced by the additional claimants constituted abuse of process of the court.

Good reasons for allowing extension of time

The additional claimants were cargo owners or subrogated insurers entitled to sue in respect of the cargos on board *The Heung-A Dragon*. They only came to know about the Fund long after the administrative deadline had expired. While Heung-A Shipping forcefully argued that as participants in the shipping industry, these subrogated insurers should have read the Lloyd's List

and become aware of the Fund, in the Judge's view, Heung-A Shipping and Eleni Maritime were more to blame for not doing what was reasonably expected of them. Despite Heung-A Shipping as cargo carrier carrying the additional claimants' cargo which it had failed to deliver, it took no steps to inform the additional claimants identified on their bills of lading and cargo manifest about the constitution of the Fund. Eleni Maritime as the plaintiff in a limitation action was duty-bound under Order 38 to bring the limitation action to the notice of the consignees of goods on board *The Heung-A Dragon* and therefore these additional claimants. It must also be obvious to both Heung-A Shipping and Eleni Maritime that many of the consignees of and persons interested in the cargo on board *The Heung-A Dragon* were located in the PRC and Vietnam. Yet, for reasons unknown, when seeking the Decree, no direction was sought to advertise the Decree in the PRC or Vietnam. The Decree was only advertised in two newspapers in Hong Kong and in the Lloyd's List.

While much had been said by Heung-A Shipping against the additional claimants for not making this application earlier, having regard to all the circumstances, it made no difference to Eleni Maritime, Heung-A Shipping or indeed anyone that the application was only made at this stage as the lateness did not even start to affect the administration of the Fund.

Though the additional claimants were late in filing their claims pursuant to the administrative deadline, the collision and their claims were not unknown to Heung-A Shipping and Eleni Maritime. In fact, Smyth & Co had informed them of the additional claimants' claims since July 2015. The parties had been communicating on this subject since. There could be no prejudice to Eleni Maritime as its liability was capped. No distribution was made by the Fund. Other than a possibility of dilution of the distribution from the Fund, Heung-A Shipping would suffer no loss as a result of the late filing of these additional claims. Such dilution cannot in law amount to prejudice. Eleni Maritime and Heung-A Shipping, in particular, should not be allowed to benefit from their omission, at the expense of the innocent additional claimants.

All these circumstances constituted good and sufficient reason for the court to exercise its discretion under Order 3 and its inherent jurisdiction to extend the administrative deadline in the Decree.

Conclusion

Accordingly, the Judge gave the additional claimants leave to file their claims in the reference to the registrar out of time and ordered that they should file and serve further particulars of their claims on Eleni Maritime and every other Defendants within 14 days of the date of the Decision.

Please feel free to contact us if you have any questions or you would like to have a copy of the Decision given by the Judge.

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