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To: Transport Industry Operators

HK or Yangon?

The Hong Kong High Court issued a Judgment on 25/8/2017 to determine whether the Hong Kong Court or the Yangon Court was the natural and appropriate forum in an in rem legal proceedings in relation to a cargo damage claim of USD143,852.02. [HCAJ 101/2015]

Introduction

This was the Defendant's application by summons dated 26 September 2016 (**"Summons"**) for an Order under RHC O 12 r 8(2)(a) and (b), r 8(2A)(a) and inherent jurisdiction that the court should not exercise any jurisdiction it had in this Action; alternatively, that all further proceedings in this Action be stayed. In the Summons, it was stated that the grounds for the application were that in all the circumstances of the case considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in the District Court of Yangon, Myanmar (**"Yangon Court"**).

Background Facts

The claim of the Plaintiffs (the cargo owners) was a cargo claim, the cargo being RBD Palm Olein (**"Palm Olein"**), an edible oil. The Defendant, Yangtze Navigation, a Singapore company, was the demise charterer of the vessel "Kappa Sea" (**"Vessel"**). Golden Agri International (**"1st Plaintiff"**), a Singapore company, was the seller and shipper of 3,200 MT of Palm Olein (**"Cargo"**).

By a Bill of Lading dated 17 August 2014 issued in Singapore, the demise charterer acknowledged receipt of the Cargo in good order and condition and agreed to carry the same from Tarjun, Indonesia to Yangon, Myanmar on board the Vessel. The Hague-Visby Rules were incorporated into the Bill of Lading by virtue of clause 1(b) the General Paramount Clause and owing to the fact that the Bill of Lading was signed in Singapore. Alternatively, the Hague Rules were incorporated into the Bill of Lading by virtue of clause 1(a) of the General Paramount Clause by contractual incorporation.

Yangon Technical and Trading (**"2nd Plaintiff"**), a Myanmar company, was the buyer of the Cargo and the notify party under the Bill of Lading. It was also said to be the endorsee and/or the lawful holder of the Bill of Lading.

The Vessel together with the Cargo laden thereon departed from Tarjun, Indonesia on or around 17 August 2014. The Vessel arrived at Yangon, Myanmar on or around 29 August 2014 and began discharging on the same day. While the Vessel was discharging to the shore tank "J", contaminants were discovered in the Cargo. The contaminated Cargo was then moved to a site approximately 20 km from the port for storage.

Both the cargo owners and the demise charterer had appointed their own local surveyors to assess *inter alia* the particulars of the contaminants and cause of contamination. The conclusion of the

surveyors was that the contamination was from the Vessel's internal discharge line which contained remains of stearin, being the previous cargo carried by the Vessel.

Both surveyors found that 383.86 MT of the Cargo was contaminated. Out of the 383.86 MT, 345.988 MT were successfully separated from the contaminant (**"de-contaminated Cargo"**). A sample of the de-contaminated Cargo was later certified by the Food and Drugs Administration of Myanmar (**"FDA"**) as fit for human consumption. Notwithstanding the certification, it was the cargo owners' case that the de-contaminated Cargo could not be sold at full market rate because potential buyers knew that they had been contaminated. The 2nd Plaintiff eventually sold them at less than their commercial value. Some of the remaining contaminated Cargo was sold for industrial use (**"Industrial Use Cargo"**) at a much lower price while the remainder was simply disposed of as being unusable. Apart from loss in the value of the Cargo, the cargo owners also claimed various "salvage costs" eg storage fees, reprocessing charges etc.

The cargo owners claimed the demise charterer was negligent, in breach of contract, in breach of duty, in breach of the Hague-Visby Rules alternatively Hague Rules for *inter alia* failing to properly handle the Cargo or deliver the Cargo at Yangon, Myanmar in the same good order and condition as when shipped. The amount of damages claimed was US$143,852.02.

Service of Process

While this was an *in rem* action, the court's jurisdiction was not founded on the arrest of the Vessel or the service of the Writ on the Vessel in Hong Kong. Further, since this was an *in rem* action, there could be no service of the *in rem* Writ on the demise charterer, a Singaporean Company, outside jurisdiction.

> Under RHC O 75 r 8,
> "(1) Subject to paragraph (2), a writ by which an action in rem is begun must be served on the property against which the action is brought…
> (2) A writ need not be served or filed as mentioned in paragraph (1) if the writ is deemed to have been duly served on the defendant by virtue of Order 10, rule 1(4) or (5)."
>
> RHC O 10 r (1)(4) provides:
> "(4) Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made."

What happened was that the P & I Club of the demise charterer, in order to avoid the arrest of the Vessel, acceded to the cargo owners' request and signed a Letter of Undertaking dated 23 May 2016 which provided *inter alia* that:

> "(2) We undertake that we will, within 14 days of the receipt from you of a request so to do:
> (a) instruct solicitors to accept on behalf of the Demise Charterers service at your option of *in rem* and/or in *personam* proceedings brought by Cargo Owners and to file an acknowledgment of service thereof…"

Thereafter, the amended Writ was served on the demise charterer's Hong Kong solicitors who, at the time of accepting service in June 2016, expressly reserved the demise charterer's right to contest the jurisdiction of the Hong Kong Courts and made clear that service would be accepted on that basis only, and also made an endorsement on the amended Writ to that effect.

This prompted the parties to raise an interesting preliminary argument as to whether or not the court should treat this as a so-called "as of right" case.

The cargo owners argued that the P & I Club had contractually agreed to instruct solicitors to accept service of *in rem* and/or *in personam* proceedings, in consideration of the cargo owners refraining from arresting the Vessel. The acceptance of service of the Writ within the jurisdiction under the terms of the Letter of Undertaking was akin to jurisdiction being established by the arrest of the

Vessel: *PT Krakatau Steel (Persero) v Mount Kerinci LLC* [2009] 1 HKLRD 264. Hence, this was in effect an "as of right" case and the Hong Kong Court's jurisdiction should not lightly be disturbed: *The Kapitan Shvetsov* [1997] HKLRD 374; *Hong Kong Civil Procedure 2017* Vol 1 para 11/1/10A. The cargo owners further submitted that the onus was on the demise charterer to show that (i) Hong Kong was not the *forum conveniens*; and (ii) the Myanmar Court was an available forum and was clearly or distinctly more appropriate than Hong Kong.

The demise charterer submitted that service was not "as of right" in the sense that neither the demise charterer nor the Vessel was served in Hong Kong to give the court statutory jurisdiction. Rather, acceptance of the service of the Writ was pursuant to the Letter of Undertaking and, importantly, with an express reservation of the right to challenge jurisdiction. Thus, this case was unusual in that it was neither a RHC O 11 service outside jurisdiction case where the onus would be on the cargo owners to show *inter alia* that Hong Kong was the natural forum, nor an "as of right" case where the onus would be on the demise charterer to show the Yangon Court was the natural forum. The demise charterer submitted that the case in question was closer to the factual situation in *New Link Consultants Ltd v Air China* [2005] 2 HKC 260. At [38]–[39], Deputy Judge Poon (as he then was) observed:

> "38. Under the Rules of the High Court, service of a writ on a defendant within jurisdiction may be by way of personal service (Order 10, rule 1(1)), registered post at the defendant's usual and last known address (Order 10, rule 1(2)(a)), insertion through letter box (Order 10, rule 1(2)(b)), indorsement by the defendant's solicitors on the writ to accept service (Order 10, rule (4)) or in suitable cases, substituted service (Order 65, rule 4). Where the defendant is outside jurisdiction, the writ may be served outside jurisdiction under Order 11.
>
> 39. The rules do not prevent the parties from agreeing on how the service of a writ is to be effected. Thus, in cases where a foreign defendant is involved, in order to "short-circuit" the cumbersome procedure under Order 11 and hence saving costs, solicitors have developed a practice, which is laudable, of agreeing to accept service on behalf of that defendant but reserving at the same time its right to dispute jurisdiction later. (This reservation is important because if the indorsement on the writ by the solicitors is not so qualified, the defendant will be precluded from disputing jurisdiction later: see *Hong Kong Civil Procedure, Vol 1*, paragraphs 10/1/9 and 11/1/13A at pp 88 and 103). The writ so served on the defendant's solicitors would then be regarded as if it had been served on the defendant outside jurisdiction under Order 11. The defendant will then be free to dispute jurisdiction in the normal way under Order 12, rule 8. See generally *Sphere Drake Insurance Plc & others v. Gunes Sigorta Anonim Sirketi* [1988] 1 Lloyd's LR 139." (emphasis added)

Where a Writ is served on a foreign defendant's solicitors in Hong Kong by agreement coupled with a reservation of right to dispute jurisdiction, it will be treated as having been served on the foreign defendant outside jurisdiction ie an RHC O 11 situation. The defendant is still free to dispute jurisdiction under RHC O 12 r 8 but in such an application, the onus is on the plaintiff to show, *inter alia*, that Hong Kong is the natural forum.

In the court's view, it was unhelpful and unnecessary to characterise the case in question as an "as of right" case or not an "as of right" case.

The cargo owners' argument overlooked the important distinction between the case in question and *PT Krakatau Steel (Persero) v Mount Kerinci LLC* ie there was an express reservation of the right to contest jurisdiction in the case in question which was absent in *PT Krakatau Steel (Persero)*. *PT Krakatau Steel (Persero)* was "an example of defendants which had *submitted to the jurisdiction* by instructing the solicitors to accept service in Hong Kong": see the judgment at [41] and that "Service on their solicitors was equivalent to serving the defendants themselves within the jurisdiction, and thus there was no right to challenge the jurisdiction of the court under O 12 r 8": see the judgment at [42].

On the other hand, the demise charterer's submission by analogy with *New Link Consultants Ltd v Air China* was also unsatisfactory. Given that an *in rem* Writ cannot be served outside jurisdiction as such, the decision of *New Link Consultants Ltd v Air China* that a Writ served on a foreign defendant's solicitors in Hong Kong by agreement (coupled with a reservation of right to dispute jurisdiction) would be treated as having been served on that defendant outside jurisdiction was clearly distinguishable from the case in question — it did not assist in resolving the dichotomy of "as of right" and "not as of right" or where the onus of proof lay.

In the court's view, the really important question was which party bore the onus of proof in the application in question. To that question, the answer was plain and obvious — the onus must be on the demise charterer.

Under RHC O 75 r 8 (2), a writ *in rem* need not be served on the ship if it is deemed to have been duly served on the defendant by virtue of RHC O 10 r 1(4). Under RHC O 10 r 1(4), a writ is deemed to have been duly served on a defendant by an endorsement on the Writ by its solicitors. That was what happened in the case in question, albeit with an express reservation of the demise charterer's right to contest jurisdiction. The significance of the express reservation was simply this: without it, the demise charterer would be precluded from disputing jurisdiction later: *New Link Consultants Ltd v Air China* at [39].

The onus could not fall on the cargo owners to show that Hong Kong was the natural forum. As the only ground set out in the Summons for disputing jurisdiction concerned forum, specifically under RHC O 12 r 8(2A)(a), it was difficult to escape the well-established principle that a defendant who disputes the Hong Kong Court's jurisdiction on the ground of *forum non conveniens* has the onus of proof: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 480H–482A.

Deliberation

Both parties accepted that the principles derived from *Spiliada Maritime Corp v Cansulex Ltd* and re-affirmed by the Court of Final Appeal in *SPH v SA* (2014) 17 HKCFAR 364, were applicable. In *SPH v SA* at [51], Lord Collins of Mapesbury NPJ stated:

> "51. We adopt the re-statement of the principles…in *DGC v SLC (née C)* [2005] 3 HKC 293, 297–298, applying *Spiliada Maritime Corporation v. Cansulex Limited* [1987] 1 AC 460, 477 and *Louvet v. Louvet* [1990] 1 HKLR 670, 674–675:
>
> > "1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action ie in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
> >
> > 2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.
> >
> > 3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceedings has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.
> >
> > 4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum."

In *The Peng Yan* [2009] 1 HKLRD 144, the Court of Appeal also re-affirmed that the court's basic approach in admiralty proceedings in determining applications for stay on the ground of *forum non conveniens* is the same as in any action ie the application of the *Spiliada* principles: the burden on the applicant for a stay based on *forum non conveniens* is still to demonstrate there is another jurisdiction

that is clearly or distinctly more appropriate than Hong Kong — the legal burden is not on the party suing in Hong Kong to demonstrate the appropriateness of continuing proceedings in Hong Kong.

According to the demise charterer, there were at least three likely issues in dispute at trial: (1) whether the cargo owners had title to sue the demise charterer — the issue being connecting the contaminated Cargo with the cargo owners ("**1st Issue**"); (2) whether the demise charterer had discharged their contractual duty under the Bill of Lading and/or any duty of care in tort in relation to the cleanliness of the internal discharge line ("**2nd Issue**"); (3) quantum of damages — whether the cargo owners could have sold the de-contaminated Cargo at market rate, bearing in mind that it was certified by the FDA in Myanmar as fit for human consumption ("**3rd Issue"**). This was said to be a key issue since the cargo owners' sale of the de-contaminated Cargo at below market rate in Myanmar accounted for a substantial part of their claim for damages.

While the cargo owners submitted that the demise charterer had no arguable defence on *liability* ie to the 1st and 2nd Issues, it was, in the Judge's view, inappropriate to make a determination of the two issues at this stage.

Firstly, for an application of this nature, the evidential materials were by affidavits and those on the merits were almost invariably incomplete. It was not the function of the court to try a case on affidavits and it was wholly unsafe to purport to dismiss the demise charterer's defences on liability merely on such incomplete evidence, unless of course the matter was open and shut eg the demise charterer's liability in this case was strict. As far as liability was concerned, the demise charterer was not under a strict liability.

Secondly, making a determination on the merits in the course of the application in question was conceptually unsound. The whole purpose of a *forum non conveniens* application is to determine whether there is another forum which is clearly or distinctly more appropriate than Hong Kong to try the action. By taking upon itself to adjudicate on the merits, the court would be presupposing that Hong Kong *was* the natural and appropriate forum and that *no* other forum was clearly or distinctly more appropriate than Hong Kong to try the action. In any event, the quantum was a live and substantial issue. That live issue had to be tried, along with other live issues, at an appropriate forum, the determination of which was the whole point of the application in question.

The demise charterer must first establish that Hong Kong was not the natural or appropriate forum — "appropriate" in the sense that the forum had the most real and substantial connection with the action. In this regard, the demise charterer submitted that neither the cargo owners, the demise charterer nor the material events had any connection with Hong Kong. On the facts, the only Hong Kong connections were that the Vessel was Hong Kong-registered and, for reasons unknown, the cargo owners engaged solicitors in Hong Kong to institute and serve proceedings in Hong Kong.

In the court's view, the fact that the Vessel was Hong Kong-registered was irrelevant. It had no relation to the claim, it was not a material fact and did not have any bearing on the question where this action could most appropriately be tried. Also irrelevant was the fact that the cargo owners elected to institute and serve proceedings in Hong Kong. To hold otherwise would be an official endorsement of the practice of forum-shopping since a plaintiff can without undue difficulty institute and serve proceedings in a forum of its choice and use that fact to boost the preferred forum's connection with the action. The whole point of the application in question was to determine whether the cargo owners' choice of forum ie Hong Kong was inappropriate and whether there existed another forum which was more suitable for the trial of the action in the interest of all parties and the ends of justice. For these reasons, the court agreed with the demise charterer that Hong Kong was evidently not the natural or appropriate forum for the trial of the action in question. The real question was whether the demise charterer could satisfy the court that

there was another available competent forum which was clearly or distinctly more appropriate than Hong Kong. The demise charterer said the Yangon Court was such a forum.

To begin with, given the Cargo was discharged in Yangon, Myanmar and the contaminated part of it, ie the de-contaminated Cargo and the Industrial Use Cargo, was subsequently sold in Myanmar, the Yangon Court had and would accept jurisdiction to hear the cargo owners' claim. This was supported by the legal opinion of the demise charterer's Myanmar lawyers and not seriously in dispute. What the cargo owners did dispute was that the Yangon Court was clearly or distinctly more appropriate than Hong Kong for the trial of the action.

On that question, the demise charterer submitted that there were numerous factors which demonstrate the Yangon Court was clearly and distinctly the more appropriate forum:

(1) Under the Bill of Lading, the Cargo was shipped to and discharged at Yangon, Myanmar.
(2) The buyer of the Cargo viz the 2nd Plaintiff was a Myanmar company.
(3) The process of "de-contaminating" the contaminated Cargo took place in a facility 20 km away from the discharge port in Yangon.
(4) Both the cargo owners' surveyor Myanmar Marine and the P & I Club's surveyor Pandi General Surveyors, who had examined the contaminated Cargo and prepared their respective survey reports, were based in Yangon.
(5) The Vessel's officers and crew were of either Chinese or Myanmar nationality.
(6) The FDA, which certified the de-contaminated Cargo as fit for human consumption, was a government department in Myanmar.
(7) The de-contaminated Cargo and the Industrial Use Cargo were subsequently sold in the local market in Myanmar.
(8) All incidental expenses, such as transport and storage charges, were incurred in Myanmar

It could be seen from the list above that the Yangon Court had much more real and substantial connection with the action and was in this sense a more appropriate forum. In particular, since the de-contaminated Cargo and the Industrial Use Cargo were sold in the local market and all incidental expenses were incurred in Myanmar, it was highly likely that the trial of the action would require the attendance of Myanmar-based witnesses. These would potentially be factual witnesses who conducted the sale and incurred the expenses, the surveyors who had examined the contaminated Cargo and gave the observations and opinions in their reports, as well as experts who were familiar with the local market condition for Palm Olein at the time of the discharge.

On the issue of the market condition for Palm Olein at the time of the discharge, the cargo owners said they had lined up experts from Hong Kong and Singapore while the demise charterer had identified SGS (Myanmar) and OMIC Myanmar Inspection & Surveying who were able to give expert evidence on the quality and value of the de-contaminated Cargo should the action be tried in the Yangon Court. Of course, it was up to the parties to appoint expert witnesses of their choice but the cargo owners could not "pull themselves up by their own bootlaces" by appointing a Hong Kong (or Singapore) expert who did not speak the local language of Myanmar in order to make the point that the Yangon Court was not a clearly or distinctly more appropriate forum. In any event, the cargo owners' experts could easily travel to Myanmar and, witnesses were allowed to testify in English in Myanmar Courts. Further, submission of documents in English was also allowed in Myanmar Courts. So the cargo owners could not complain of any serious disadvantage if the action be tried in the Yangon Court even if they adhered to their Hong Kong or Singapore expert.

It was the demise charterer's position that it had exercised due diligence to clean the internal discharge lines so that the Vessel was cargoworthy ie it was fit and safe to carry the Cargo. Hence, on this issue, it would also likely entail *inter alia* factual evidence from the Vessel's officers and crew, some of whom were of Myanmar nationality. It would obviously be more natural and convenient if they were able to testify in the Myanmar language in the Yangon Court.

All in all, the court had no doubt that the Yangon Court was clearly and distinctly the more appropriate forum for the trial of the action than Hong Kong.

The next issue was whether the cargo owners could show they would be deprived of a legitimate personal or juridical advantage if the action was tried in the Yangon Court rather than in Hong Kong. It was necessary to go back to basics and set out the true principle underlying the courts' treatment of "legitimate personal or juridical advantage" and its impact on the question of forum.

In *Spiliada Maritime Corp v Cansulex Ltd* at 482B–F, Lord Goff of Chieveley observed:

> "(8) *Treatment of "a legitimate personal or juridical advantage"*
> Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the *Société du Gaz* case, 1926 S.C. (H.L.) 13, 22: "I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."
> Indeed, as Oliver L.J. [1985] 2 Lloyd's Rep 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v Robinow*, 19 R 665, 668.
> The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum." (emphasis added)
> Then, at 483 B–C, Lord Goff continued:
> "Then take the scale on which damages are awarded. Suppose that two parties have been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country. I do not think that an English court would, in ordinary circumstances, hesitate to stay proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here."

The cargo owners submitted that if this action was tried in Hong Kong, the claim would be subject to the Hague-Visby Rules whereas if the dispute was adjudicated in the Yangon Court, it would be determined in accordance with the unamended Hague Rules. According to the cargo owners, the advantages to the cargo owners of the Hague-Visby Rules were two-fold.

a. First, under Article III, rule 4 of the Hague-Visby Rules, if a bill of lading had been issued specifying the good order and condition of the Cargo, it was *conclusive evidence* if the bill of lading had been passed to a third party acting in good faith, being the buyer or consignee viz 2nd Plaintiff. By contrast, under Article III, rule 4 of the unamended Hague Rules, it was not conclusive evidence. This was important to the cargo owners since the demise charterer said it did not admit any contamination of the Cargo from the residue of stearin in the Vessel's internal discharge line.
b. Second, there are different package/unit limits under the Hague-Visby Rules and the unamended Hague Rules for cargo claims. Under Article IV rule 5 of the Hague-Visby Rules, liability is limited to 666.67 SDRs per package or 2 SDRs per kilogram of the Cargo lost or damaged, whichever is the higher. Under Article IV rule 5 of the unamended Hague Rules, the carrier was entitled to limit his liability for

> loss or damage to £100 per package or unit. Given the value of the Cargo ie US$830 per MT and the amount of the claim, limit of liability was not a concern to the cargo owners under the Hague-Visby Rules whereas it was unclear whether the limit of liability of the unamended Hague Rules would be applicable. Accordingly, there was a risk that the cargo owners' claim would be subject to the package/unit limit if tried in the Yangon Court. The possibility of a higher award of damages in Hong Kong was a legitimate juridical advantage: *The Kapitan Shvetsov* [1997] HKLRD 374.

The court was not satisfied these were legitimate juridical advantages to the cargo owners. Nor was the court satisfied that substantial justice could not be obtained in the Yangon Court by reason of its adherence to the unamended Hague Rules as opposed to the Hague-Visby Rules. The reasons were these.

First, it was inherently dangerous to take one or two provisions in the unamended Hague Rules at their face value and jump to the conclusion that the application of the unamended Hague Rules, in comparison with the Hague-Visby Rules, was necessarily less advantageous or that it would lead to a denial of justice to the cargo owners.

As far as the "conclusive evidence" provision in the Hague-Visby Rules was concerned, it was unlikely to be significant in the case in question since the demise charterer had never suggested that the Cargo was already contaminated prior to loading — indeed, in the P & I Club's surveyor report, the surveyor found that the Cargo was contaminated by the residual of the previous cargo carried by the Vessel. Now that the contaminated Cargo had been sold or otherwise disposed of, it would be far too late for the demise charterer to make that suggestion at the trial.

Regarding the different package/unit limits under the Hague-Visby Rules and the unamended Hague Rules, the short answer was that the limit under the unamended Hague Rules has no application to bulk cargo such as grain or liquids in bulk since the word "unit" only referred to a physical unit for shipment: *The Aqasia* [2016] EWHC 2514 (Comm); [2016] Lloyd's Rep 510. Hence, the perceived risk that the cargo owners' claim would be subject to the package/unit limit under the unamended Hague Rules if tried in the Yangon Court was more apparent than real.

Second, courts should in general be slow, if at all, to pass judgment on two international maritime conventions and decide which one is more conducive to the attainment of substantial justice or objectively more just than the other, unless there is consensus or substantial consensus in the international community on the matter. That is the point made by the English Court of Appeal in *Hercceg Novi v Ming Galaxy* [1998] 4 All ER 238 in relation to the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957 and the Convention on Limitation of Liability for Maritime Claims 1976. The former prevailed in Singapore at the time of the decision while the latter, which provided for a higher limit of liability, had the force of law in the United Kingdom. The Court of Appeal held that the 1976 Convention was not an internationally sanctioned and objective view of where substantial justice lay, but was simply the preference of those states who were signatories to it.

It seemed to the court that the same could be said of the unamended Hague Rules and the Hague-Visby Rules. The Hague Rules, adopted in Brussels in 1924, are a scheme for uniformity of bills of lading representing a compromise between the interest of carriers and that of owners of cargoes. The Hague-Visby Rules, adopted in Brussels in 1968, are "simply the Hague Rules with certain amendments which carriers and shipowners describe as clarifying and rectifying certain difficulties which had emerged over 40 years of the Rules. Cargo interests may, however, see them as being largely in the interests of carriers." Presently, there are still countries in the world who have declined to ratify the Hague-Visby Rules and stick with the unamended Hague Rules or some domestic legislative version of them, including the USA and countries in the South America eg Argentina. In these circumstances, it is extremely difficult to come to an objective conclusion on where, as between the unamended Hague Rules and the Hague-Visby Rules, substantial justice lies.

The cargo owners further submitted that their claim was now time-barred in Myanmar by reason of the expiry of the one-year time limit. On the other hand, the Writ in the action in question was issued in Hong Kong within time and no question of time-bar arose. Unless the cargo owners had acted unreasonably in failing to commence proceedings in Myanmar within the one-year limitation period, the Court should not deprive them of the advantage of having sued in Hong Kong within time.

On this issue of time-bar, one must again turn to the speech of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* at 483E-484A for guidance:

> "…Again, take the example of cases concerned with time bars. Let me consider how the principle of *forum non conveniens* should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the actions, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country." (emphasis added)

The question for the court was this: had the cargo owners acted reasonably in commencing proceedings in Hong Kong and had they acted unreasonably in failing to issue a protective writ in Myanmar within the limitation period applicable there?

The only explanation from the cargo owners which shed light on this question consisted of a few paragraphs in the affidavit of the cargo owners' lawyer. There was an assertion in paragraph 48 thereof that "The Plaintiffs took reasonable steps to protect this claim by issuing protective proceedings in 3 separate forums (ie Court proceedings in Hong Kong and Singapore as well as arbitral proceedings.) before the time bar. The Plaintiffs very sensibly did not commence proceedings in Myanmar…".

In the absence of a clear explanation as to why the cargo owners did not commence proceedings in Myanmar to protect the limitation period, the court was unable to be satisfied that they had acted reasonably in failing to do so. This was not a case where the factors connecting the action to Hong Kong were, rightly or wrongly, thought to be much stronger than Myanmar so that one might perhaps be excused from coming to the view that it was unnecessary to protect the limitation period in Myanmar. Nor was this a case where the factors connecting the action to Hong Kong and Myanmar were evenly balanced, and owing to the cargo owners' view on the comparative quality of justice in both jurisdictions, they had decided to sue in Hong Kong, instead of Myanmar. As the court pointed out earlier, the action had no or no relevant connections with Hong Kong at all. In these circumstances, the court must reject the time bar argument as something which weighed against a stay of the proceedings in question. Nor was the court minded to impose as a condition

for stay by requiring an undertaking from the demise charterer not to plead the time bar defence in the Yangon Court. This was a case where practical justice demanded that the cargo owners be deprived of the advantage of having commenced proceedings within time in Hong Kong, a jurisdiction to which the action had no real connection.

To conclude, for the reasons set out above, the court was satisfied that the Yangon Court was clearly and distinctly the more appropriate forum for the trial of the action in question and the proceedings in question should be stayed.

Disposition
All further proceedings in the Action were stayed to the Yangon Court.

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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