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12 December 2018
Ref : Chans advice/215

To: Transport Industry Operators

Sanchi c/w CF Crystal

The High Court of Hong Kong issued a Decision on 15 November 2018 concerning the tragic collision between the cargo vessel CF Crystal and the tanker Sanchi, which happened on 6 January 2018 and led to the death of all the officers and crew of the Sanchi. [HCAJ3/2018] [2018HKCFI2474]

Background

The action concerned a collision at sea between Changhong Group's cargo vessel, the CF Crystal, and a tanker owned by Bright Shipping, the Sanchi. The collision took place at around 19:50 hours on 6 January 2018 at a location about 125 nautical miles from Changjiang Kou Light Ship in the East China Sea.

The CF Crystal flied the Hong Kong flag and her port of registry was Hong Kong. She was laden with nearly 64 m.t. of sorghum cargo and was on a voyage from Port Kalama in the USA to Port Machong, Guangdong, PRC. Her crew were all Chinese nationals. She was managed by Changfeng Shipping, a company incorporated in Hong Kong. Changhong Group was a Hong Kong incorporated company with a registered office in Hong Kong.

The Sanchi flied the Panamanian flag. Her crew were Iranian and Bangladeshi. She was loaded with 115,000 tonnes of natural gas condensate and was on her way from Iran to South Korea. She was managed by an Iranian company, National Iranian Tanker, which had a representative office in Shanghai. Bright Shipping was incorporated in Belize. The evidence before the court did not show that Bright Shipping had any business operation other than owning the Sanchi.

The Sanchi exploded immediately upon collision and both vessels caught fire. The CF Crystal managed to reverse her engine and escape the fire. Her crew abandoned the vessel but returned to successfully extinguish the fire on board. Afterwards, she safely proceeded to and berthed at Zhousan, Zhejiang, PRC.

The Sanchi kept burning and drifting after the collision. Eventually, she sunk at a location around 151 nautical miles southeast of the point of collision on 14 January 2018. Tragically, none of her officers or crew survived the accident. Pollution resulted from the collision in the form of spilt bunkers and natural gas condensate. Some of the pollutant made landfall in the PRC as well as Japan.

The Mainland authorities had been heavily involved in all aspects of the aftermath of the collision, including investigation and pollution issues. A multi-national task force, led by the Shanghai Maritime Safety Administration (MSA) (with participants from Hong Kong, Iran and Panama), carried out an investigation. On 11 May 2018, a 191 page report of the joint investigation dated 10 May 2018 (Report) was submitted to the International Maritime Organisation. The Report is publicly available via the website of the Organisation.

The collision was followed by a number of legal actions, including Changhong Group's proceedings against Bright Shipping and National Iranian Tanker in the Shanghai Maritime Court, and the Hong Kong legal action in question. These inter-ship actions were commenced simultaneously on 9 January 2018.

On 9 January 2018, Changhong Group also applied to establish in the Shanghai Maritime Court two limitation funds, one for personal injury and one for property.

In addition, the insurers of the CF Crystal's cargo brought an action in the Shanghai Maritime Court against, Changhong Group, Bright Shipping and National Iranian Tanker in respect of the loss of cargo on the CF Crystal. Further, there were emergency response and pollution related claims, two of such actions involved Bright Shipping.

Bright Shipping did not submit to the jurisdiction of the Mainland court in any of these proceedings.

The Hong Kong legal action in question was an *in personam* collision action brought by Bright Shipping against Changhong Group. There was no dispute that the jurisdiction of Hong Kong court was invoked by Bright Shipping as of right, having served the legal proceedings on Changhong Group at its registered address in Hong Kong. However, Changhong Group made an application for stay of the Hong Kong legal proceedings on the ground of *forum non conveniens*.

Issues

What underpinned the jurisdictional dispute before the Hong Kong court was the very different tonnage limitation in the Mainland and in Hong Kong. The relevant monetary limit applied in Hong Kong is roughly 3.6 times of those in the Mainland.

Changhong Group contended that: (a) the overwhelming "centre of gravity" of the case in question was in Shanghai, the Shanghai Maritime Court was an available and experienced specialist court which was dealing with pollution and civil claims arising from the collision and would apply various legislation based on international conventions, and it would not be reasonably open to the Hong Kong court to hold that substantial justice could not be obtained in the Shanghai Maritime Court; and (b) the questions of inter-ship liability and assessment of Changhong Group's loss were going to be tried in its proceedings against Bright Shipping in the Shanghai Maritime Court in any event (*lis alibi pendens*).

Bright Shipping's case was that the collision took place on the high seas and there was no natural forum to determine such a collision. Changhong Group's case did not get pass the stage 1 requirement to establish that the Shanghai Maritime Court was "clearly and distinctly" more appropriate than the Hong Kong court to determine the inter-ship disputes: see *The "Spiliada"* [1987]. Further, even if Changhong Group succeeded in discharging its burden for the stage 1 analysis, the significant difference in tonnage limitation applied in Hong Kong and the Mainland was a decisive personal juridical advantage in favour of refusing a stay.

Law

The Spiliada is the seminal authority on *forum non conveniens* (FNC). There are many authorities which contain a distillation of the principles expounded in that case. The Judge referred to the summary adopted by the Court of Final Appeal in *SPH v SA* (2014) 17 HKCFAR 364 :

> "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."

Location of the collision

The collision took place outside the PRC's territorial waters. Although the location lied within international waters, it was within the PRC's exclusive economic zone (EEZ) pursuant to the United Nation Convention on the Law of the Sea (UNCLOS) to which the PRC acceded in 1997. Article 3 of UNCLOS provides that the breadth of the territorial sea does not exceed 12 nautical miles. The collision position was thus far beyond the territorial seas of the PRC. Article 55 of UNCLOS defines the EEZ as an area beyond and adjacent to the territorial sea. Article 57 provides that the breadth of the EEZ shall not extend beyond 200 nautical miles. The point of collision also lied within the EEZ of Korea and Japan. It was within 155 miles of Jeju, South Korea and 190 miles of Me Shima, Japan.

Appropriate forum

Bright Shipping submitted that there was no natural forum for a collision in international waters. Hong Kong is not the natural forum for the inter-ship litigation. However, Bright Shipping was entitled to bring the action in question as of right given that Changhong Group was a Hong Kong company.

Bright Shipping relied on the *dicta* of Lord Goff in *The Spiliada* :

> " [T]here are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions … or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right."

The Judge was also referred to Meeson and Kimbell, *Admiralty Jurisdiction and Practice*, 5th edn, and the observations made by Sheen J in *The "Coral Isis"* [1986] 1 Lloyd's Rep 413 :

> " The same cannot be said of an action arising out of a collision in international waters between two ships of different nationality. It must frequently happen that when such a collision has occurred no Court can properly be described as "the natural forum" or even "a natural forum". The reasons are self-evident. The two ships may be registered in different countries; their owners or managers may be companies incorporated in yet other countries; the master and crew may be nationals of still different countries; after the collision the ships may go into repair yards in other countries …"

The Judge did not take the view that the occurrence of the collision in international waters necessarily precluded the Hong Kong court from concluding that Shanghai was clearly and distinctly more appropriate than Hong Kong as the forum for the inter-ship action. On the other hand, it was clearly an important factor to evaluate whether Shanghai had the most real and substantial connection with the inter-ship action.

The Judge referred to the *dicta* of Recorder Ma SC (as he then was) in *Rambas Marketing Co LLC v Chow Kam Fai David* [2001] 3 HKC 250 :

> " The burden is on the defendant to show that the courts of Nevada are *clearly* or *distinctly* more appropriate than the Hong Kong courts for the *trial* of the action. Mere convenience is not enough nor is it enough simply to point to factors which connect a case or the parties to any particular jurisdiction. The approach in *forum non conveniens* applications is not just an exercise in loading up with factors which point to any particular jurisdiction. The court is required to focus on the appropriateness of a forum from the point of view of the trial of the action. This would in part explain the need to identify the particular court in favour of which the action is to be stayed, for it is to the appropriateness of that court for the trial that the court's attention is directed."

The evaluation required the court to focus on the inter-ship action. The primary issues for trial in such action were (a) the inter-ship apportionment of liability for the collision and (b) assessment of the parties' respective quantum of loss.

On the liability issue, it could not be seriously doubted that with the availability of the Voyage Data Recorder (VDR) data from the Sanchi (those of the CF Crystal was lost) and the Report, which contains a detailed summary of the evidence collected from the investigation, the most important evidence was readily available in documentary form.

In *The "Peng Yan"* [2008] 5 HKLRD 418, Reyes J summarised the approach of the court in assessing liability in a collision that was investigated by maritime authorities :

> " … I doubt that much (if any) evidence can usefully be obtained from the crew many months after the event. In contrast, the collision was thoroughly investigated by the MD[1] and MSA shortly after the accident occurred. I suspect that the evidence supporting their reports (including records of interviews with The Peng Yan third officer) will be more useful to any trial judge.
>
> That body of evidence from the MD and MSA will likely be largely agreed for the purposes of trial. That will mean that the task of the Court will essentially be hearing submissions on how such evidence is to be assessed from the standpoint of the law generally and the International Regulation for the Prevention of Collisions at Sea 1972 specifically.
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> That body of evidence would likely be available to both the Hong Kong and Ningbo Courts."
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> [1] Hong Kong Marine Department.

The decision of Reyes J was affirmed by the Court of Appeal: [2009] 1 HKLRD 144, per Ma CJHC :

> " [I]t 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."
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> " Here, the careful analysis undertaken by the Judge directed at what was likely to occur at trial (which analysis was not really challenged on appeal) 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."

As regards the assessment of damages, Bright Shipping's suggestion that all of the evidence on quantum was likely to be available to the Hong Kong court was not contradicted. The vast majority of contracts, invoices and receipts concerning the claim of the Sanchi for loss arising from the collision were in the English language. The evidence of the value of the Sanchi was likely to come from international experts adopting a market comparables approach and, in relation to the CF

Crystal, international surveyors (including surveyors based in Hong Kong) who had inspected the vessel at a shipyard on 1 February 2018.

Changhong Group's case that Shanghai Maritime Court was clearly and distinctly the more appropriate forum rested heavily on *lis alibi pendens*. In addition, a number of factors had been identified by Changhong Group, as pointing in favour of Shanghai Maritime Court as the appropriate forum. These factors included the lack of commercial operation in Hong Kong in respect of both Changhong Group and Changfeng Shipping; the CF Crystal was managed by the Shanghai operation of Changfeng Shipping; and the CF Crystal's crew, as well as 2 independent witnesses, were based in the Mainland.

The Judge did not believe that these factors assisted Changhong Group's case. It could readily be seen that it would be more convenient to Changhong Group that the inter-ship action be tried in the Mainland, but it did not follow that Shanghai was clearly and distinctly more appropriate than Hong Kong. It had to be said that the location of witnesses, in the absence of specificities about the relevance and importance of their evidence, was of little weight. Further, the location of witnesses is rarely a real obstacle. In the worst case, evidence might be given via video link. Furthermore, the Hong Kong court is well-placed and experienced in dealing with cases involving Mainland witnesses, documents in Chinese and Mainland law.

Lis alibi pendens

The evidence of Changhong Group was that Mainland court had, and had accepted, jurisdiction over the collision, being one which took place within the PRC's EEZ. A jurisdictional challenge was indeed made by National Iranian Tanker before the Shanghai Maritime Court, which was rejected. The decision of the Shanghai Maritime Court had been upheld on appeal.

However, Bright Shipping submitted that there was inconsistency between the relevant law of the Mainland and the provisions of UNCLOS (in particular, Articles 55, 56 and 58 which set out the specific legal regime over the rights of exploration, exploitation and conservation of natural resources of the EEZ by costal states and the rights of other states to lawful use of the sea, including the freedom of navigation), and that the Shanghai Maritime Court did not have jurisdiction over the inter-ship claim as a matter of international law.

In *The "Chou Shan"* [2014] FCAFC 90, §102, the Full Court of the Federal Court of Australia ("Full Court") held in respect of a collision that took place in the EEZ of the PRC that the *lex causae* was not the PRC law. Whilst noting that the law of the coastal state applied if the activity giving rise to damage was "closely connected with the exercise [of a state's rights over the EEZ under UNCLOS]" (§90), the Court held that the activity concerned was the "freedom of both parties to navigate under Arts 58 and 90" and it was not relevant that pollution was caused by the collision. It was held that the "closest and most direct analogue" to a collision in the EEZ was a collision "on the high seas", in respect of which the general maritime law as administered in the forum applies (§92).

Bright Shipping also submitted that any judgment obtained from the Shanghai Maritime Court would not be recognised in Hong Kong or common law jurisdictions applying similar conflict of laws rules. Apart from the lack of jurisdiction over the inter-ship claim, the Shanghai Maritime Court had not established *in personam* or *in rem* jurisdiction over Bright Shipping. Thus, the Shanghai Maritime Court's jurisdiction would not be recognised as a matter of Hong Kong conflicts rules, and its judgment would not be enforceable.

As a matter of general principle, multiplicity of proceedings is not of itself a material factor for consideration of FNC but there might be exceptional cases where such proceedings may cause unusual hardship to a defendant: see *Nan Tung Bank v Wangfoong* [1999] 2 HKC 606, CA. Further, it

is not unusual for there to be parallel proceedings in collision cases. In *The "Peng Yan"*, Ma CJHC observed that :

> " Further, as cases like *The Kapitan Shvetsov* (at p.217(2)) and *Caspian Basin Specialised Emergency Salvage Administration v Bouygues Offshore SA* (No 4) [1997] 2 Lloyd's Rep 507 (at p.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* …"

In the case in question, the inter-ship proceedings before the Shanghai Maritime Court had not been served on Bright Shipping. The proceedings were therefore at the initiating stage, and of little relevance. Whilst the Judge was concerned about the possibility of inconsistent findings if the inter-ship dispute was litigated in 2 jurisdictions, this did not of itself render Shanghai the appropriate forum, nor would it constitute unusual hardship to Changhong Group in the context of a collision in international waters.

Finally, Changhong Group relied heavily on *The "Chou Shan"*, which was also a case involving a collision in the EEZ of the PRC. The jurisdiction of the Australian court was invoked by arresting "Chou Shan" in Australia. However, the Judge did not believe that *The "Chou Shan"* was of much assistance to Changhong Group's case. Most importantly, the Australian court applied a rather different test from that of *The "Spiliada"* for the stay application, namely, whether Australia was a "clearly inappropriate forum". As the Full Court explained, under the Australian test "[t]he focus is upon the chosen local forum – its advantage and disadvantages, rather than on a true comparative analysis". It appeared that *lis alibi pendens* was a major factor in the Full Court's determination to stay the Australian proceedings in favour of the Ningbo Maritime Court in the Mainland.

There was considerable force in Changhong Group's submission that the undesirability of the same issues being tried in different courts at the same time was so obvious and should be avoided. On the other hand, the test applied by the Hong Kong Court is different. It appears that under Australian law, it is *prima facie* vexatious and oppressive for identical issue or the same controversy to be litigated in different countries, and that the courts "should strive" to avoid that situation.

In addition to the fact that the Shanghai Maritime Court inter-ship proceedings had not been served on Bright Shipping, it should not be overlooked that Changhong Group was sued in its place of incorporation. The Judge was unable to see any unusual hardship to Changhong Group in the circumstances of the case in question.

For these reasons, The Judge was driven to the conclusion that Changhong Group had failed to discharge its burden for the stage 1 analysis and its application had to fail.

The Judge also mentioned very briefly his view on 2 factors which would have led him to decline a stay in the case in question in the stage 2 analysis. Firstly, the significant disparity in the tonnage limitation. The Judge was inclined to agree with Bright Shipping that the Hong Kong High Court was bound by Court of Appeal authorities to the effect that a significant difference in tonnage limitation applied in Hong Kong and the competing jurisdiction was a very important, if not decisive, personal juridical advantage in favour of refusing a stay: see *The "Adhiguna Meranti"* [1987] HKLR 904, per Hunter JA and *The "Kapitan Shvetsov"* [1997] HKLRD 374, per Litton VP. Secondly, all the PRC claims subject to limitation had to be brought against the limitation funds within a time limit, which had expired on 9 June 2018. Hence, an inter-ship action by Bright Shipping brought in Shanghai would not result in an effective remedy. The Judge did not believe that Bright Shipping could be criticised for allowing the time limit to lapse or for forum shopping. Apart from the lack of natural forum for the collision, it was entitled to bring the legal proceedings against Changhong Group at its place of incorporation, and to take into account the disparity in the tonnage limitation.

In the premises, The Judge did not believe that substantial justice would be done in Shanghai.

Conclusions
For these reasons, the Changhong Group's application was dismissed.

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

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