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To: Transport Industry Operators

Sanchi c/w CF Crystal (IV)

The Hong Kong High Court issued a Decision on 29 January 2019 dismissing Changhong Group's application for stay of the legal proceedings against it brought by the consignee and the insurer of the cargo on board the Sanchi. [HCAJ6/2018, 2019HKCFI263]

This case 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 on 6 January 2018 at a location about 125 nautical miles from Changjiang Kou Light Ship in the East China Sea. We already reported this collision case in our Chans advice/219, Chans advice/218, and Chans advice/215.

In the legal action in question, the 1st Plaintiff was the consignee of the cargo carried on board the Sanchi, which was totally lost as a result of the collision, and the 2nd Plaintiff was the insurer of that cargo. The Plaintiffs' claim was for the loss of the cargo on the ground that the collision was caused or contributed by the negligence or breach of duty of Changhong Group as owner of the CF Crystal.

The High Court had recently dealt with a related action which arose out of the same accident. It was an inter-ship action between Changhong Group and the owner of the Sanchi over the liability for the accident. By its Decision dated 15 November 2018, [2018] HKCFI 2474 ("Decision"), the High Court dismissed Changhong Group's application for stay of proceedings on the ground of *forum non conveniens*. (reported in our Chans advice/215)

The similar application in question by Changhong Group for stay of these proceedings was also on the ground of *forum non conveniens*. Save for the Plaintiffs' position that their opposition to a stay application was stronger than that of the owner of the Sanchi, there was no material difference on the consideration required by the court, and the reasoning set out in the Decision applied to the application. The Judge was unable to see any reason why a different outcome was justified in the application in question.

As regards the submission of the Plaintiffs, that there was no relevant on-going proceedings in the Shanghai Maritime Court ("SMC") between the parties in question, and therefore the principle of *lis alibi pendens* could not be invoked by Changhong Group, the Judge agreed with it.

There was only 1 action before the SMC between Changhong Group and the 1st Plaintiff. It was referred to as a "mis-declaration" claim by Changhong Group against, *inter alia*, the 1st Plaintiff. It was yet to be served on the 1st Plaintiff. It appeared to be a claim based on the allegation that the cargo in question, gas condensate, was highly volatile and dangerous because it was not fit for long distance sea carriage in substantial quantity.

However, the Judge was inclined to agree with the Plaintiffs that there was a fundamental question over the relevance of the mis-declaration claim. It was very difficult to see how such a claim, which did not depend on the existence of a duty of care owed by the Sanchi cargo interest to the owner of

the CF Crystal, could be brought in Hong Kong by way of a set off or counterclaim by Changhong Group in the action in question. The claim would not be able to meet the double actionability rule applicable to foreign torts: see *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 at 198C-D and 199F.

In the case of the 2nd Plaintiff, the registration of its claim (applied on 5 June 2018) against the tonnage limitation fund established by Changhong Group was approved by the SMC on 7 August 2018. However, the matter was not pursued further and the time for making a claim against the fund by the 2nd Plaintiff had expired. The registration should be viewed in light of the fact that the action in question was commenced by the Plaintiffs on 19 January 2018. There was no reason to doubt that the registration of claim by the 2nd Plaintiff was a protective step. The Judge agreed with the Plaintiffs that the position of the 2nd Plaintiff was stronger than the plaintiffs in the case of *The Peng Yan* [2009] 1 HKLRD 144, §33, where the Court of Appeal rejected the argument that the Hong Kong action should be stayed by reason of the fact that the plaintiffs had joined in the limitation action before the Ningbo Maritime Court. The Court of Appeal accepted that the step taken by the plaintiffs was a protective measure and that they would most likely withdraw from the limitation action if the Hong Kong proceedings were not stayed.

Finally, the Judge would deal with two points advanced by Changhong Group. Firstly, the Judge did not believe that the Plaintiffs could be criticized as having engaged in forum shopping. All the parties before the High Court were commercial entities. Undoubtedly, they acted in accordance with their commercial interest. The Plaintiffs could not be criticized for choosing to litigate in Hong Kong where there is a higher tonnage limitation when they did so as of right because Changhong Group was a Hong Kong company. The Judge had little doubt that Changhong Group had taken into account the lower limitation in Shanghai when it set up the limitation funds there.

Secondly, Changhong Group submitted that the limitation proceedings before the SMC constituted *lis alibi pendens* between Changhong Group and the Plaintiffs. The Judge was unable to accept such a sweeping proposition. It would amount to a considerable advantage if not a licence to Changhong Group to impose on all who might have a claim against it to litigate in Shanghai. Such a proposition was not supported by the authorities.

In the premises, the Judge agreed that the Plaintiffs were in a stronger position that the owner of the Sanchi in resisting a stay of proceedings application by Changhong Group. Accordingly, the application in question by Changhong Group 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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