SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

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Ref : Chans advice/234

To: Transport Industry Operators

Sanchi c/w CF Crystal (VI)

In Chans advice/215, we reported the High Court of Hong Kong refused Changhong Group's application to stay the Hong Kong action. The Court of Appeal also subsequently dismissed Changhong Group's appeal. On 13 July 2020, the Court of Final Appeal finally dismissed Changhong Group's application for leave to appeal. [FAMV No. 34 of 2020] [2020 HKCFA 24]

Introduction and background

On 6 January 2018, a maritime collision occurred between a Hong Kong flag cargo vessel (*CF Crystal*) owned by Changhong Group and a Panamanian flag tanker (*Sanchi*) owned by Bright Shipping in international waters in the East China Sea. The *Sanchi* exploded and caught fire and eventually sank. The collision resulted in pollution in the form of spilled bunkers and natural gas condensate.

The *in personam* collision action was commenced in Hong Kong by Bright Shipping against Changhong Group as of right by service of the writ on Changhong Group, a company incorporated in Hong Kong. The main issue to be determined in the action is the extent to which each vessel was to blame for the collision and also the quantum of any damages to be awarded.

Other actions have also been commenced arising out of the collision.

(1) In Hong Kong, another action commenced by parties interested in cargo on the *Sanchi* will be proceeding to trial, an application by Changhong Group to stay the action on the ground of *forum non conveniens* having been dismissed.
(2) In the Shanghai Maritime Court:
    (a) Changhong Group has applied to establish limitation funds in respect of personal injury and property claims respectively;
    (b) Changhong Group has also commenced an action in that court against the company which managed the *Sanchi* in respect of the collision; and
    (c) the insurers of the cargo on board the *CF Crystal* have brought an action against Changhong Group, Bright Shipping and the manager of the *Sanchi* in respect of the loss of that cargo; and
    (d) there are also cargo claims against Changhong Group as well as emergency response and pollution related claims, two of which involve Bright Shipping.
(3) Bright Shipping had not submitted to the jurisdiction of the Shanghai Maritime Court in any of the above proceedings.

The application for a stay of the action in question

Changhong Group applied for a stay of the Hong Kong action on the ground of *forum non conveniens*. That application was refused by the High Court and the subsequent appeal was dismissed by the Court of Appeal.

In approaching Changhong Group's application for a stay of the action in favour of the Shanghai Maritime Court, the High Court applied the well-known test applicable to applications to stay

proceedings on the ground of *forum non conveniens* laid down in the House of Lords' seminal decision in *The Spiliada* [1987] 1 AC 460. The test, approved and adopted by the Court of Final Appeal in *SPH v SA* (2014) 17 HKCFAR 364 at [51], is as follows:

> "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 i.e. in which the action may be tried more suitably for the interests of all the parties and the ends of justice?
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> 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.
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> 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.
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> 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."

The High Court, after weighing up the various factors for and against the competing jurisdictions in terms of the trial of the action between the parties, concluded that Changhong Group failed to establish that the Shanghai Maritime Court is clearly and distinctly more appropriate than the Hong Kong court to determine the issues in the action. The Court of Appeal agreed with this conclusion. Thus, the application failed below at the first stage of the *forum non conveniens* test (Stage 1) without reference to whether Bright Shipping could show the absence of a legitimate personal or juridical advantage if the action were tried in a forum other than Hong Kong (Stage 2). However, the High Court was of the view that the lower tonnage limitation in the Shanghai Maritime Court as compared with Hong Kong was an important juridical disadvantage for Bright Shipping, as was the fact the time limit for bringing a claim in the PRC had already expired, so that an inter-ship action by Bright Shipping brought in Shanghai would not provide an effective remedy. The High Court concluded that substantial justice would not be done in Shanghai, a conclusion with which the Court of Appeal agreed.

The application for leave to appeal

Changhong Group's application for leave to appeal to the Court of Final Appeal having been refused by the Court of Appeal, Changhong Group renewed its application for such leave to the Court of Final Appeal. Changhong Group sought leave to appeal on the ground that the case raised three questions of great general or public importance and on the "or otherwise" basis.

The first question concerned the relevance of pending proceedings in another jurisdiction (*lis alibi pendens*) in the context of an application to stay proceedings on the ground of *forum non conveniens*. The question proceeded on the premise that the test in such cases boiled down to a choice between what Changhong Group described as "the *Nan Tung* test", on the one hand, and "the *Abidin Daver* test", on the other. It was suggested by Changhong Group that there was a divergence between the two tests and that final appellate guidance was necessary to clarify the applicable test.

The Court of Final Appeal was satisfied that Changhong Group's first question proceeded on the false premise that either "the *Nan Tung* test" or "the *Abidin Daver* test" was the applicable test for a stay application in the case of *lis alibi pendens*. Neither of those tests, as defined by Changhong Group, is applicable to that situation. The relevance of *lis alibi pendens* is clearly established, and

consistently applied in a number of court decisions, to be *one* of the relevant factors that a court will take into account when addressing the Stage 1 question of whether an applicant for a stay has demonstrated that another jurisdiction is clearly or distinctly more appropriate than Hong Kong. That was the approach of the High Court in the case in question, endorsed by the Court of Appeal.

This is also the approach that applies in England and Wales, where the leading textbook *Dicey, Morris & Collins on The Conflict of Laws* summarises the position as follows:

> "Although it was once thought that there were special factors in cases of *lis alibi pendens*, presumably because *litispendence* has always been more widely accepted as a ground for jurisdictional relief, it is now clear that the existence of simultaneous proceedings is no more than a factor relevant to the determination of the appropriate forum."

In any event, the passage from *The Abidin Daver* which Changhong Group relied upon does not support what it defined as "the *Abidin Daver* test". The context of Lord Diplock's remarks at pp.411H to 412A of his speech is clearly a reference to proceedings taking place in a jurisdiction which is the natural and appropriate forum for the resolution of the dispute. In other words, his remarks are directed to a case where Stage 1 has already been decided in favour of the applicant for the stay and the court is looking to see whether, at Stage 2, the plaintiff who has brought the proceedings sought to be stayed will be deprived of a legitimate personal or juridical advantage if a stay is granted. At the Stage 1 inquiry, as explained in *de Dampierre v de Dampierre*, a decision on an application for a stay of proceedings decided after *The Spiliada* where there was a *lis alibi pendens* between the parties, the existence of other proceedings already pending in the alternative forum is simply a relevant factor which may or may not have particular weight depending on the facts.

The Stage 2 inquiry was never reached in the case in question because the judge concluded that, even taking into account the parallel proceedings in the Shanghai Maritime Court, which in any event were not strictly parallel proceedings to the collision action in Hong Kong, that court was not shown to be clearly and distinctly more appropriate than Hong Kong in relation to the inter-ship action arising out of the collision.

The second question of law for which Changhong Group sought leave to appeal concerned the relevance of the PRC's exclusive economic zone ("EEZ"). Two separate arguments were sought to be raised. First, it was suggested that the fact that the collision occurred in the PRC's EEZ distinguished the case in question from a collision occurring in international waters outside an EEZ, where it might properly be said there was no natural or appropriate forum. Secondly, it was sought to argue that the principle in *The Albaforth*, namely that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute, applied to make the PRC EEZ the (or a) natural or appropriate forum for determining disputes arising from the collision.

The first argument did not justify the grant of leave since it was an academic debate to consider the position as if the collision had occurred in international waters outside an EEZ, which it did not.

The second argument was a new point raised by Changhong Group. Even assuming the point was open to Changhong Group, the Court of Final Appeal was satisfied that it was not reasonably arguable and that its resolution would not lead to a different result. It is well established that the place of a collision at sea is a matter that may be quite fortuitous and in respect of which there may be no obvious or natural forum for the resolution of disputes. The commencement of pollution claims in the Shanghai Maritime Court in respect of a collision that occurred within the PRC's EEZ does not make that court the natural or appropriate forum for the determination of the inter-ship dispute in question which sought to apportion liability for the collision between the vessels involved. In any event, the collision occurred within the EEZ of not just the PRC but also of Korea and Japan and that claims have been asserted against Bright Shipping in respect of the clean-up

operations in Japan. In short, the weight to be attached to the fact of the collision having occurred within the PRC's EEZ and the pollution claims in the Shanghai Maritime Court was a matter for the judge, again to be tested against other factors going to the question whether the Shanghai Maritime Court was clearly or distinctly more appropriate than Hong Kong.

The third question of law for which leave to appeal was sought concerned the relevance of limitation. Changhong Group's argument was that, having constituted a limitation fund in the Shanghai Maritime Court, that should be the natural or appropriate forum for the action to be tried. However, the question proceeded on an overall assumption which was circular, namely that because limitation proceedings happened to commence there, the Shanghai Maritime Court was the natural or appropriate forum. While Changhong Group was free to commence a limitation action wherever it chose, this cannot be given undue weight by itself. It also proceeded on a factual assumption that "that jurisdiction is the only jurisdiction where the shipowner is likely to be or has been sued and may limit its liability" which was not warranted. The Court of Final Appeal was not satisfied that Changhong Group's proposition, namely that, where a limitation action had been commenced in a particular jurisdiction, it would require exceptional factors to displace that jurisdiction for the purposes of *forum non conveniens*, was reasonably arguable. The weight to be accorded to the limitation proceedings commenced by Changhong Group in the Shanghai Maritime Court was a matter for the High Court in the exercise of its discretion at Stage 1 of the *Spiliada* test. It was open to the High Court to conclude that, notwithstanding the existence of those proceedings, Changhong Group had not demonstrated that the Shanghai Maritime Court was clearly or distinctly more appropriate than Hong Kong for the trial of the action in question. Given that the issues in the limitation action are different to those in the collision action, there is nothing surprising in the High Court's conclusion.

Changhong Group also sought leave on the "or otherwise" basis, relying on the same matters in support of the application for leave to appeal on the basis that questions of law of the requisite public importance are involved. This is not an appropriate case for the grant of leave on the "or otherwise" basis. The action in question was commenced by Bright Shipping in Hong Kong against Changhong Group as of right in respect of a collision at sea. If either party is to be described as "forum shopping", Changhong Group's desire to litigate the dispute in the Shanghai Maritime Court, where the limitation amount is lower than that in Hong Kong, was more appropriately so characterised, rather than Bright Shipping by bringing this collision action in Hong Kong where the applicant is incorporated.

For the above reasons, the Court of Final Appeal dismissed the application for leave to appeal.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
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