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To: Transport Industry Operators

Wreck removal

The Hong Kong High Court issued a Decision on 22 Feb 2021 holding that the wreck removal claims of a ship sunk were not subject to the Convention on Limitation of Liability for Maritime Claims 1976. [HCAJ 98/2019] [2021 HKCFI 396]

Background
On 13 January 2019, "ANTEA" collided with "STAR CENTURION" whilst "STAR CENTURION" was lying at anchor in Indonesian waters. As a result of the Collision, "STAR CENTURION" sank.

On 14 January 2019, the owner of STAR CENTURION commenced in personam proceedings against the owner of ANTEA in the Hong Kong High Court.

Shortly after the Collison, salvors were engaged to remove pollutants from the wreck. On 24 January 2019, the Indonesian Ministry of Transportation issued a Wreck Removal Order requiring the owner of STAR CENTURION to raise, remove and render harmless the wreck. On 28 May 2019, another salvor was engaged to remove, render harmless and dispose of the vessel including anything that was on board the vessel in compliance with the Wreck Removal Order.

On 10 October 2019, the owner of ANTEA commenced the legal action in the Hong Kong High Court to limit their liability in respect of the Collision. On 28 April 2020, the owner of ANTEA and the owner of STAR CENTURION entered into a settlement agreement whereby it was agreed, *inter alia*, that ANTEA was 100% to blame for the Collision.

On 6 May 2020, a limitation decree was granted by the High Court by consent. On 26 May 2020, the owner of ANTEA constituted a Limitation Fund by paying into court the sum of HK$175,062,000.

The owner of STAR CENTURION filed a Summons on 22 June 2020 ("Summons") for the following relief :

> A Declaration that part of the claim by the owner of STAR CENTURION (including one to be entitled to be indemnified) against the owner of ANTEA in respect of the raising, removal, destruction or the rendering harmless of the ship "STAR CENTURION" which was sunk and wrecked including anything that was on board such ship, not be subject to limitation under the Article 2 of the Convention on Limitation of Liability for Maritime Claims 1976 and/or the Limitation Fund constituted by the owner of ANTEA pursuant to the order herein dated 6 May 2020.

As of 6 August 2020, the Wreck Removal Claims in question (including claims in relation to wreck buoyage) amounted to US$17,780,994.36 (or about HK$139 million). Since the wreck removal operations were still underway, the quantum of these claims would increase with time.

Given that the Wreck Removal Claims alone were approaching the size of the Limitation Fund, the recovery of the owner of STAR CENTURION in respect of the loss of STAR CENTURION would be significantly impaired if such Claims were to be subject to limitation.

Issue

The Summons raised a question of statutory construction. The court was concerned with the provisions of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434 ("Ordinance"). In particular, Schedule 2 and section 15 of the Ordinance. By Schedule 2, the Convention on Limitation of Liability for Maritime Claims 1976 ("1976 Convention") was enacted in Hong Kong. Under section 15, the application of para 1(d) of Article 2 of the 1976 Convention was put in suspension. Article 2, 1(d) was at the heart of the dispute in question. The determination of the Summons turned upon the proper scope of the claims falling within para 1(d). Those claims are excluded from the limitation regime under the Ordinance.

Applicable principles

The general principles of statutory construction are well established and were recently summarised by Ma CJ and Cheung PJ in *Chan Ka Lam v Country and Marine Parks Authority* [2020] HKCFA 33, §§26-27 :

(1) Words are construed in their context and purpose. They are given their natural and ordinary meaning with context and purpose to be considered alongside the express wording from the start, and not merely at some later stage when an ambiguity is thought to arise;

(2) It is important to emphasise that a purposive and contextual interpretation does not mean that one can disregard the actual words used in a statute. To the contrary, the court is to ascertain the intention of the legislature as expressed in the language of the statute. One cannot give a provision a meaning which the language of the statute, understood in the light of its context and purpose, cannot bear.

In the context of the 1976 Convention, the English Supreme Court held that, so far as the Convention is in its own words incorporated into domestic law, the task of the court is to construe the Convention as it stands "without any English law preconceptions". The interpretation of international conventions must not be controlled by domestic principles but by reference to "broad and general principles of construction", including those enshrined in the Vienna Convention on the Law of Treaties 1969 (art 31 and 32): *The "Ocean Victory"* [2017] 1 WLR 1793, §§72-73, per Lord Clarke. At §74, these principles were summarised: "The duty of a court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the Convention. The court may then, in order to confirm that ordinary meaning, have recourse to the travaux préparatoires and the circumstances of the conclusion of the Convention." In respect of the context, object and purpose of the 1976 Convention, the Court referred to: (1) the general purpose of owners, charterers, managers and operators being able to limit their liability was to encourage the provision of international trade by way of sea-carriage; and (2) the main object of the Convention was to provide for limits which were higher than those previously available in return for making it more difficult to "break" the limit (§76).

The maxim of construction *generalia specialibus non derogant* was of particular relevance in the case in question. According to which, where there is a conflict between general and specific provisions, the specific provisions prevail. The maxim has been adopted in the construction of international conventions: see *The "Giannis NK"* [1998] AC 605, 614A-B per Lord Lloyd, 622C per Lord Steyn and 627D-H per Lord Cooke. Lord Steyn and Lord Cooke regarded the maxim not as a technical rule peculiar to English statutory construction, but a matter of common sense and ordinary usage.

Relevant provisions of the Ordinance and 1976 Convention

The 1976 Convention became part of Hong Kong law in October 1993 upon the enactment of the Ordinance. Part III, s 12 of the Ordinance provides :

> " Subject to this Part, the provisions of the [1976 Convention] set out in Schedule 2 … have the force of law in Hong Kong."

In light of the introductory words "Subject to this Part", the 1976 Convention is only to have the force of law insofar as it is unaffected by anything in Part III of the Ordinance.

Section 15 ("Claims subject to limitation"), which is part of Part III, is important :

"(1) The Chief Executive may by order provide for –

(a) the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of paragraph 1(d) of Article 2 of the Convention, of amounts recoverable by them in claims of the kind there mentioned; and

(b) the maintaining of such a fund by contributions from such authorities raised and collected by them in respect of vessels in the same manner as other sums so raised by them.

…

(3) Paragraph 1(d) of Article 2 of the Convention shall not apply unless an order has been made under subsection (1)."

Article 2 of the scheduled 1976 Convention provides as follows :

"1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability –

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

…

(c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

…

2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable."

Article 3 provides that the "rules of this Convention shall not apply to" 5 types of claims including claims for salvage or contribution in general average.

Under Article 6, where it applies, limits of liability shall be calculated by reference to the tonnage of the vessel concerned.

The rival contentions

The owner of STAR CENTURION submitted that considering the relevant provisions as a whole, the ordinary meaning of the words used in the statute was abundantly clear :

(1) For a claim to be subject to limitation of liability, it must fall within the scope of Article 2 of the 1976 Convention;

(2) Section 15(3), when read together with section 12, specifically suspended the operation

of Article 2, para 1(d) from having the force of law in Hong Kong, until such time as the Chief Executive made an order under s 15(1) of the Ordinance;
(3) The Chief Executive had not made any such order;
(4) Thus, the clear intention of the legislature was that any claim within the scope of Article 2, para 1(d) was specifically excluded as a limitable claim under the Ordinance.

The owner of ANTEA argued that the case was a straight forward one :
(1) The owner of STAR CENTURION had a claim for consequential loss as a result of the Collision. Such loss was made up of various constituents, one of which was the cost of wreck removal;
(2) The claim for consequential loss (including wreck removal) clearly fell within Article 2, para 1(a) and it might also fall within para 1(c);
(3) It had long been the law that a recourse claim for wreck removal was subject to limitation;
(4) There was nothing in the language of Ordinance to disentitle the owner of ANTEA from relying on limitation for a claim within Article 2, para 1(a).

Ordinary meaning
Para 1(d) of Article 2 was formulated in very wide terms and no doubt intended to be extensive in its application. Such intention was confirmed by the terms of para 1 ("whatever the basis of liability may be") and para 2 ("even if brought by way of recourse or for indemnity … or otherwise").

On the face of the provisions, it can be seen that the various sub-paragraphs under para 1 may overlap in their scope.

When the claims for wreck removal were specifically provided for under a separate sub-paragraph, the maxim of *generalia specialibus non derogant* naturally applies. The more general terms of para 1(a) (or 1(c)) should give way to the specific terms of 1(d) when the claim is one for wreck removal.

Another way to approach the matter is to consider paras 1(a) and 1(d) in juxtaposition. Bearing in mind the wide terms of paras 1 and 2 of Article 2, it is fairly plain that the appropriate gateway for a wreck removal claim is 1(d).

The matter should also be considered in light of the provisions of Article 8 of the 1976 Convention. Article 8 allows the State Parties to opt out of limiting the claims under paras 1(d) and 1(e) of Article 2 but not the claims under the other sub-paragraphs. Hong Kong has indeed opted out of para 1(d) until an order of the Chief Executive is made pursuant to s 15(1) of the Ordinance.

Two important points arise from Article 8. Firstly, there is a good reason for the claims under 1(d) to be separately categorised as they may be excluded by individual State Parties. Secondly, to construe a wreck removal claim as falling within both 1(a) and 1(d) would render it meaningless to opt out of 1(d).

It followed that the construction advocated by the owner of ANTEA would not be consistent with the 1976 Convention as a whole, nor with the exclusion of Article 2, 1(d) under s 15 of the Ordinance. It might also be seen that the above analysis fortified the application of the maxim *generalia specialibus non derogant*.

In the premises, the Judge was of the view that according to the ordinary meaning of the relevant provisions, construed in their context and purpose, the wreck removal claim of the owner of

STAR CENTURION fell within Article 2, 1(d) exclusively, and was not subject to limitation under Article 2.

The above construction is consistent with the majority view of the Full Court of the Supreme Court of Queensland in *The "Tiruna"* [1987] 2 Lloyd's Rep 666.

Disposition
The Judge believed that the Summons was well-founded and the Judge granted the declaration sought.

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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