



10 May 2022

Ref : Chans advice/250

To: Transport Industry Operators

Sanchi c/w CF Crystal (VII)

In Chans advice/215, we reported that the Hong Kong High Court refused Changhong Group's application to stay the Hong Kong proceedings; and in Chans advice/234, we reported that the Court of Final Appeal dismissed Changhong Group's application for leave to appeal. On 7 April 2022, the Hong Kong High Court issued a Decision dealing with Changhong Group's action to re-litigate its stay application. [HCAJ 3/2018] [2022 HKCFI 920]

Introduction

The Hong Kong proceedings was an *in personam* action commenced on 9 January 2018. It concerned a collision between Bright Shipping's tanker Sanchi and Changhong Group's cargo vessel, CF Crystal. The collision took place on 6 January 2018 in international waters viz the East China Sea.

There is no dispute that the jurisdiction of the Hong Kong Court was invoked by Bright Shipping as of right, having served these proceedings on Changhong Group at its registered address in Hong Kong.

Changhong Group filed a Summons with the High Court on 30 October 2020 ("**Summons**") for a permanent stay of the Hong Kong proceedings under RHC O 12 r 8 and the inherent jurisdiction in favour of the Shanghai Maritime Court ("**SMC**") on the grounds of *forum non conveniens* and *lis alibi pendens* viz SMC was the natural forum for the determination of Bright Shipping's claim and that there were proceedings pending between the parties in the SMC. The application was Changhong Group's 2nd attempt to stay the Hong Kong proceedings.

Previously in May 2018, Changhong Group had applied for a stay of the Hong Kong proceedings on the same grounds of *forum non conveniens* and *lis alibi pendens* in that the proceedings should be conducted in the SMC instead of Hong Kong ("**1st Application**"). The 1st Application was dismissed by the High Court on 15 November 2018 (reported in our Chans advice/215). The High Court's decision was upheld by the Court of Appeal. Changhong Group went all the way up to the Court of Final Appeal at the leave to appeal stage. Its application for leave was dismissed by the Court of Final Appeal on 13 July 2020 (reported in our Chans advice/234).

The basis of the application in question was that since the 1st Application was determined, there were significant new developments. Changhong Group submitted that contrary to Bright Shipping's previous stance of (i) avoiding the proceedings in the SMC and (ii) seeking an early trial of liability in the Hong Kong proceedings, Bright Shipping:

- (1) started to participate in the SMC proceedings, by firstly instructing lawyers to appear at a pre-trial hearing on 30 June 2020 for disclosure and exchange of evidence and subsequently to argue the merits of the inter-ship liability at the trial before the SMC, which was concluded on 14 July 2020; and
- (2) after the parties had incurred costs in preparing for the trial of liability in the Hong Kong proceedings scheduled on 14 October 2020, applied by summons dated 11 September 2020 to adjourn the trial *sine die* with liberty to apply, in order to wait for the ruling on liability pending

before the SMC - at the hearing on 16 September 2020, the High Court granted the adjournment. (“**New Developments**”)

On 8 November 2021, the SMC handed down its Ruling on liability in which Sanchi was 70% to blame for the collision and CF Crystal was 30% to blame. Both parties have appealed against the Ruling.

Background

Bright Shipping was incorporated in Belize. Changhong Group is a Hong Kong incorporated company with a registered office in Hong Kong.

Sanchi flew the Panamanian flag. Her crew were Iranian and Bangladeshi. At the time of the collision, 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 Co (“NITC”) which has a representative office in Shanghai. CF Crystal flew 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.

Sanchi exploded immediately upon collision and both vessels caught fire. 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. Sanchi kept burning and drifting after the collision. Eventually, she sank at a location around 151 nautical miles southeast of the point of collision on 14 January 2018. None of her officers or crew survived the accident. Pollution resulted from the collision was in the form of spilt bunkers and natural gas condensate.

The Mainland authorities had been heavily involved in all aspects of the aftermath of the collision, including investigation and pollution issues. Following the collision, 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 was submitted to the International Maritime Organisation (“IMO”).

The collision was followed by a number of legal actions.

The Hong Kong proceedings were commenced on 9 January 2018. Also on 9 January 2018, Changhong Group applied to establish in the SMC two limitation funds, one for personal injury claims and one for property loss/damage claims. On 11 January 2018, Changhong Group commenced the SMC proceedings against Bright Shipping and NITC. Bright Shipping did not file a claim against Changhong Group in the SMC. It was time-barred from doing so.

On 30 January 2018, Changhong Group brought an action in the SMC against NITC as cargo shipper and a Korean entity as cargo consignee in respect of the collision. In addition, the insurers of CF Crystal’s cargo brought an action in the SMC against, Changhong Group, Bright Shipping and NITC in respect of the loss of cargo on CF Crystal. There were also cargo claims against Changhong Group. Further, there were emergency response and pollution related claims, two of such actions involved Bright Shipping.

As of 22 October 2018 i.e. the hearing of the 1st Application before the High Court, Bright Shipping did not submit to the jurisdiction of the Mainland Court in any of those proceedings.

Deliberation

Changhong Group's contention was as follows:

- (1) The High Court had jurisdiction to and should reconsider Changhong Group's stay application on the ground of *forum non conveniens* and *lis alibi pendens* or entertain it afresh.
- (2) Given the New Developments, there was a relevant change of circumstances. Had Bright Shipping participated in the SMC proceedings from the outset and/or had the High Court been aware of Bright Shipping's intended tactics at the time of its decision on 15 November 2018, the High Court would have reached a different conclusion and granted a stay.
- (3) Bright Shipping was guilty of abuse of process by way of "gaming the system" so as to achieve the best of both worlds, to Changhong Group's considerable and unfair disadvantage. Bright Shipping resisted a stay of the Hong Kong proceedings and obtained an early trial date of the Hong Kong proceedings on the basis that it had no intention to participate in the SMC proceedings. Having succeeded in defeating the 1st Application, Bright Shipping started participating in the SMC proceedings and sought an adjournment of the trial of the Hong Kong proceedings *sine die* with a view to reopening the Hong Kong proceedings in due course and taking what advantage it could of events in the SMC.
- (4) In light of these new circumstances, and given the existence of *lis alibi pendens* in the SMC, the High Court should grant a permanent stay of the Hong Kong proceedings on the grounds that (i) the SMC was the natural forum for the determination of Bright Shipping's claim and/or (ii) Bright Shipping was guilty of abuse of process.

The first question for the High Court was whether Changhong Group should be allowed to re-litigate its stay application.

Changhong Group was relying on the New Developments, in particular, Bright Shipping's application for an adjournment of the trial of the Hong Kong proceedings *sine die* which took place after the Court of Final Appeal had given its ruling, in seeking permission to re-litigate the stay application.

The High Court referred to the decision in *Re Prudential Enterprises Ltd (No 2)* [2004] 2 HKC 205 at [12] - [13] in which it was held that as a matter of general principle, when an interlocutory application was dismissed, whether on procedural ground or merits, it is not permissible to make a fresh application for the same relief and/or on the same ground. A possible exception to the general rule against re-litigating over interlocutory applications will be where there is a *significant* change of circumstances.

Bright Shipping submitted that its participation in the SMC proceedings was not a *significant* change of circumstances. The High Court agreed.

First, *lis alibi pendens* is only *one* of the relevant factors that a court will take into account when addressing the question of whether an applicant for a stay has demonstrated that another jurisdiction is *clearly or distinctly* more appropriate than Hong Kong.

As a general rule, the fact that to permit the Hong Kong action to be pursued would result in concurrent actions on the same subject matter proceeding in two different jurisdictions could not be sufficient to justify depriving the plaintiff of the advantage to which he was entitled to choose Hong Kong as a forum in which he preferred to litigate the matter. It is only in exceptional cases where the existence of parallel proceedings might cause unusual hardship to a defendant that an action might be stayed on that ground. There was no suggestion of unusual hardship in the case in question.

Second, the existence of parallel proceedings in admiralty matters is by no means unusual and the mere existence of such by itself should not incline a court towards staying an action on the ground

of *forum non conveniens*.

Third, the fact that Bright Shipping would fully participate in a full trial in the SMC was of limited utility. This was because whether or not Bright Shipping had submitted to the jurisdiction of the SMC, it did not abandon its claims in Hong Kong.

Fourth, the High Court Judge in his 1st Decision held that:

“ Whilst I am concerned about the possibility of inconsistent findings if the inter-ship dispute is litigated in 2 jurisdictions, this does not of itself render Shanghai the appropriate forum, nor would it constitute unusual hardship to Changhong in the context of a collision in international waters.”

The High Court’s decision on this point was upheld by the Court of Appeal, holding that in the absence of serious consequences with regard to expenses or other matters of the kind envisaged in *The Abidin Daver* and undue hardship, the SMC Action did not tip the balance in the analysis, despite the undesirability of the same issue being tried in different courts.

In the High Court’s view, there was no real basis for Changhong Group’s submission that “had matters been in 2018 as they are now, a different outcome would have almost certainly ensued. In short, there was a material change in circumstances” or that Bright Shipping’s success in opposing the 1st Application and in subsequent appeals depended *heavily* on its tactical non-participation in the SMC proceedings.

Bright Shipping further submitted that the adjournment of the trial of liability in Hong Kong pending the ruling in the SMC was also not a significant change of circumstances. The High Court agreed.

Bright Shipping accepted that in all likelihood the apportionment of liability as determined by the SMC would, subject to appeal, give rise to an issue estoppel in Hong Kong and would obviate the need for a liability trial in Hong Kong. The parties could then proceed to assessment of quantum in Hong Kong. Hence, the adjournment of the Hong Kong liability trial served to avoid a risk of the Hong Kong Court arriving at a contrary decision and prevented the wastage of the Court’s time in hearing unnecessary evidence and submissions.

In the High Court’s view, that was a sensible position for Bright Shipping to take and the High Court agreed by granting in effect a case management adjournment. The fact that Changhong Group did not oppose the application for the adjournment only served to reinforce the merits of Bright Shipping’s application. The High Court therefore could not see any basis for Changhong Group’s submission that Bright Shipping was guilty of abuse of process by “gaming the system” if the adjournment application was itself meritorious. Nor could the High Court see why the adjournment of the trial of liability in Hong Kong pending the ruling in the SMC was a significant or even relevant change of circumstances in order to justify re-litigating the stay application. Bright Shipping did not abandon the Hong Kong proceedings but simply obtained an adjournment *sine die* of the liability trial. It might still have to proceed to assessment of quantum in Hong Kong in the absence of agreement on quantum with Changhong Group. In civil litigation, all parties make what may be regarded as “tactical” decisions all the time. Even assuming Changhong Group’s submission was correct in that Bright Shipping’s overall pattern of conduct was aimed at obtaining the best of all possible worlds, in the absence of anything reprehensible or abusive of the system, that was not something which should be considered a significant or even relevant change of circumstances.

Conclusion

To conclude, the High Court did not see any compelling circumstances to entertain Changhong

Group's application under the inherent jurisdiction. Nor could the High Court see any significant change of circumstances to justify Changhong Group's re-litigating the stay application. For these reasons, the High Court was not minded to entertain Changhong Group's application.

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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