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Hong Kong update

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Agenda

- 1) Is it possible to stop a judicial sale?
- 2) Actions *in personam* vs actions *in rem*
- 3) Various other recent developments



Stopping a judicial sale

The BRIGHTOIL GLORY

The BRIGHTOIL GLORY

21 January 2019	BRIGHTOIL GLORY arrested in Hong Kong by mortgagee bank
4 February 2019	Admiralty Court orders appraisalment and sale of the vessel <i>pendente lite</i>
13 March 2019	Invitation to tender published
28 March 2019	Deadline for submission of bids
4 April 2019	Completion of sale due to take place

So far, so ordinary...

The BRIGHTOIL GLORY

21 January 2019	BRIGHTOIL GLORY arrested in Hong Kong by mortgagee bank
4 February 2019	Admiralty Court orders appraisalment and sale of the vessel <i>pendente lite</i>
13 March 2019	Invitation to tender published
26 March 2019	Owners apply for 3 month stay of sale order
27 March 2019	Admiralty Court grants stay to 24 April, and Judge refuses to hear bank's application for leave to appeal
28 March 2019	Court of Appeal hear and dismiss bank's appeal
28 March 2019	Deadline for submission of bids
4 April 2019	Completion of sale due to take place

The BRIGHTOIL GLORY – round 2

Revised timetable ordered by Court of Appeal:

25 April 2019	Bailiff to place advertisements
2/3 May 2019	Invitation to tender to be published
20 May 2019	Deadline for submission of bids
27 May 2019	Completion of sale due to take place

The BRIGHTOIL GLORY – round 2

24 April 2019	Owners apply for further stay of sale order Duty Judge rejects application and refuses Owners' application for leave to appeal
25 April 2019	Bailiff places advertisements
2/3 May 2019	Invitation to tender published
17 May 2019	Court of Appeal hear Owners' appeal Court of Appeal dismiss Owners' appeal
20 May 2019	Deadline for submission of bids
27 May 2019	Completion of sale takes place

The BRIGHTOIL GLORY – why?

- Principles
 - Court has power to sell vessel pending determination of claims
 - Order for sale usually made because vessel is wasting asset incurring costs for maintenance and preservation

- Why did Owners succeed in round 1?
 - Substantial equity in vessel (value US\$ 60m vs mortgage US\$ 34m)
 - Brightoil group at 'advanced stage' of negotiations for refinancing entire fleet, including BRIGHTOIL GLORY
 - Judge only granted extension for 1 month (not 3 months sought)
 - Owners undertook to pay maintenance and preservation costs

The BRIGHTOIL GLORY – why?

- Why did Owners fail in round 2?
 - Some safety concerns due to approaching typhoon season (mostly addressed by agreement that Master could sail if in danger)
 - Not enough progress made in refinancing – nothing binding on the parties
 - Alternative proposal to carve-out BRIGHTOIL GLORY for quick private sale was not sufficient because too many uncertainties
 - If further extension granted and refinancing / sale failed, vessel would be advertised for a third time – might put off potential buyers

“Ultimately, the court is faced with a choice between a certain, orderly court-ordered sale process and a private sale riddled with uncertainties and potential mishaps.

“We are not persuaded that the judge’s rejection of a further stay to give yet another opportunity to the [Owners] to pursue a private sale is plainly in error.”



The benefits of proceeding *in personam*

The CF CRYSTAL and The SANCHI

The CF CRYSTAL – parties

The parties involved in the Hong Kong proceedings

- Changhong Group (HK) Ltd (Hong Kong) – owner of CF CRYSTAL (Hong Kong flag)
- Bright Shipping Ltd (Belize) / NITC (Iran) – owner / manager of SANCHI (Panama flag)
- Hanwha Total Petrochemical Co Ltd (Korea) – owner of SANCHI cargo
- Hanwha General Insurance Co Ltd (Korea) – insurer of SANCHI cargo

The CF CRYSTAL – timeline

6 January 2018	Collision between CF CRYSTAL and SANCHI CF CRYSTAL reached Zhoushan SANCHI eventually sank
9 January 2018	Changhong commence action against Bright Shipping / NITC in Shanghai Maritime Court (SMC) Changhong apply to SMC to establish 2 limitation funds (personal injury and property) Bright Shipping commence action against Changhong in Hong Kong Admiralty Court (HKAC)
19 January 2018	Hanwha Total / Hanwha Insurance commence action against Changhong in HKAC
30 January 2018	Changhong commence action against NITC (as shipper) and Hanwha Total (as receiver) in SMC

The CF CRYSTAL – challenge to HKAC jurisdiction

- HKAC actions *in personam* were served on Changhong's registered office address in Hong Kong "as of right"
- No need to wait for CF CRYSTAL to come to Hong Kong and serve action *in rem*
- HKAC therefore seized with jurisdiction over the claims against Changhong
- Burden on Changhong to persuade HKAC that the claims should be determined elsewhere – i.e. why Hong Kong is *forum non conveniens*
- Why was jurisdiction such a big issue?
 - Hong Kong applies maximum 1996 Protocol tonnage limitation
 - Limit in HKAC about 3.6 times limit in SMC

The CF CRYSTAL – arguments

- Changhong's arguments against Bright Shipping:
 - The "*overwhelming centre of gravity*" of the case was in Shanghai
 - SMC was an available and experienced specialist court which was already dealing with other claims arising out of the collision
 - HKAC could not reasonably consider that substantial justice would not be obtained in the SMC
 - Determination of liability and Changhong's loss would be determined in Changhong's action against Bright Shipping in SMC (*lis alibi pendens*)
- Bright Shipping argued:
 - Since the collision took place on the high seas, there was no natural forum
 - Changhong therefore could not establish that SMC was "*clearly or distinctly*" more appropriate than HKAC to determine the inter-ship dispute

The CF CRYSTAL – decision

- The Judge quoted from the summary of The "SPILIADA" given by the Hong Kong Court of Final Appeal in SPH v SA :

"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?"

"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 which 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."

The CF CRYSTAL – decision

- Considerations:
 - Location of collision (high seas) was an important factor
 - Primary issues would be (a) liability and (b) damages
 - Most important evidence of liability already available – SANCHI's VDR and joint investigation report of Shanghai MSA, Hong Kong, Iran and Panama
 - All quantum evidence would be available to HKAC
- Changhong therefore heavily reliant on *lis alibi pendens* – multiple actions already underway in SMC
- However, Judge refused to stay HKAC action:
 - SMC proceedings not yet served on Bright Shipping
 - Multiplicity of proceedings not uncommon in collision cases
 - Changhong were served as of right in Hong Kong
 - Significant difference in tonnage limitation

The CF CRYSTAL – cargo claim

- Same Judge; same decision – no stay of HKAC proceedings
- Changhong accused cargo interests of forum shopping
- Judge disagreed:

"All the parties before the court are commercial entities. Undoubtedly, they acted in accordance with their commercial interest. The Plaintiffs cannot be criticised for choosing to litigate in Hong Kong where there is a higher tonnage limitation when they did so as of right because the Defendant is a Hong Kong company. I have little doubt that the Defendant had taken into account the lower limitation in Shanghai when it set up the limitation funds there."

The CF CRYSTAL – cargo claim

- Judge also rejected Changhong's argument that SMC limitation funds constituted *lis alibi pendens*:

"It would amount to a considerable advantage if not a licence to the Defendant to impose on all who may have a claim against it to litigate in Shanghai."

- BUT... the Admiralty Judge gave leave to appeal:

"The existence of parallel proceedings in different jurisdictions can be an important consideration in an application for stay of proceedings on the ground of forum non conveniens, and there is some substance in the contention that the correct approach by the court in the application of the principles deserves another visit by the Court of Appeal."



Other recent developments in Hong Kong
Arbitration and litigation involving Mainland China

Background

- *“One country, two systems”*
 - Mainland China – civil law
 - Hong Kong – common law
- Different jurisdictions within one country
- Series of arrangements to facilitate mutual legal assistance

Other recent developments – enforcement of judgments

- *“Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region”*
 - Previous arrangement only applied to exclusive jurisdiction clauses
 - New arrangement will apply to all judgments in civil and commercial matters (both monetary and non-monetary) unless expressly excluded
 - Main exclusions: certain family, inheritance, intellectual property and maritime matters, as well as bankruptcy and insolvency cases
 - Maritime exclusions: marine pollution, limitation of liability, general average, emergency towage and salvage, maritime liens, carriage of passengers (as per draft Hague Choice of Court Convention)
 - But judgments in maritime contractual and tortious claims will be covered
 - Claims under charterparties and bills of lading
 - Collision claims

Other recent developments – support for arbitration

- *“Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region”*
 - Hong Kong already benefits from arrangement for mutual enforcement of arbitral awards – skip ‘recognition’ stage in Mainland
 - New arrangement will allow parties to Hong Kong arbitrations to seek interim measures of protection from Mainland courts
 - Requirements:
 - Institutional arbitration, e.g. HKIAC, ICC
 - Application to be made through institution
 - Application may be made directly if arbitration not yet commenced (but institution must certify acceptance of case within 30 days)
 - Evidence of urgency of application
 - Evidence of property or evidence to be preserved



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