Shipping

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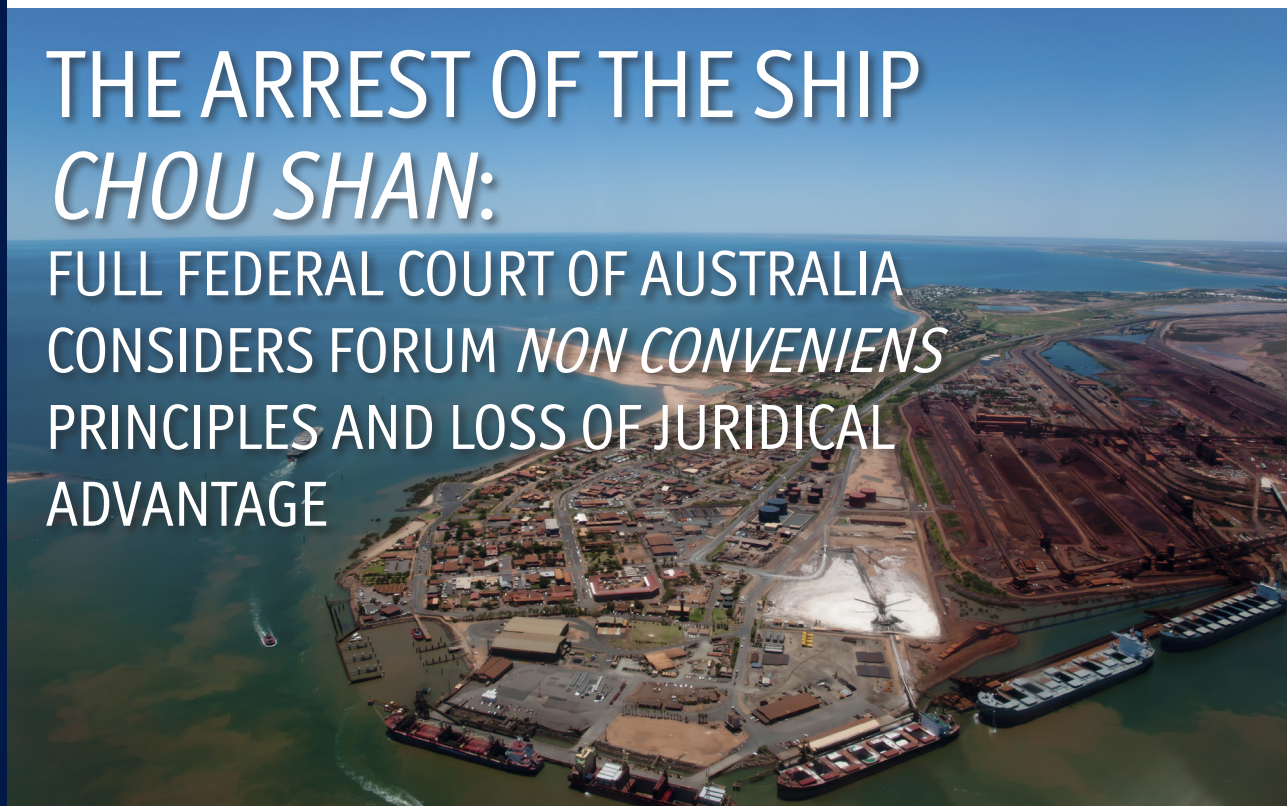
THE ARREST OF THE SHIP *CHOU SHAN*: FULL FEDERAL COURT OF AUSTRALIA CONSIDERS FORUM *NON CONVENIENS* PRINCIPLES AND LOSS OF JURIDICAL ADVANTAGE



In the recent appeal decision of *CMA CGM SA & Anor v the ship CHOU SHAN*[1] which concerned the arrest of the *MV CHOU SHAN* in relation to claims arising from a collision involving the ship, the Full Court of the Federal Court of Australia unanimously dismissed an appeal by the arresting party which sought to set aside orders staying its proceedings on forum *non conveniens* grounds. The collision had occurred in China's exclusive economic zone and Australian jurisdiction had been seized by the arresting party through the mechanism of arrest at a time when liability proceedings were pending in China, where the owners of the arrested vessel had applied to establish a limitation fund.

Background facts relating to the collision

On 19 March 2013, the *MV CHOU SHAN (CS)* and the *MV CMA CGM FLORIDA (CCF)* were involved in a collision in the East China Sea about 100 nautical miles from the Chinese coastline and in the exclusive economic zone (EEZ) of China. As a result of the collision, the *CCF* suffered damage which caused an oil and fuel leakage from the ship into the sea and damage to cargoes on board the *CCF*.

Immediately after the collision both ships proceeded to ports in China. The Shanghai Maritime Safety Administration (MSA) performed a clean-up operation in the EEZ and China's territorial waters. The MSA also carried out an investigation of the collision, including as to liability, and the owners of both ships were required to provide securities to the Chinese authorities for claims for pollution clean-up costs and damage to fisheries.

On 9 April 2013, the owner and demise charterer of the *CCF* (*CCF* interests) filed a writ *in rem* in the Federal Court of Australia against the *CS* claiming US$60 million in damages arising out of the collision. One month later, on 6 May 2013, the owners of the *CS*, Rockwell Shipping Ltd (Rockwell) applied to the Ningbo Maritime Court in China to establish a limitation fund under Chinese law[2]. The application was formally approved by the Ningbo Maritime Court on 21 May 2013. The next day, the *CCF* interests arrested the *CS* at Port Hedland, Western Australia. The vessel was released upon the provision

1 [2014] FCAFC 90.

2 China is not a member state of any Limitation Convention, however, it has in place a regime which is comparable to the limitation regime in the Convention on Limitation of Liability for Maritime Claims, 1976.

of security by *CS*' P&I club without prejudice to Rockwell's rights to apply for a stay on the grounds of forum *non conveniens*.

Rockwell subsequently applied to stay the substantive proceedings and succeeded.

The decision at first instance

The primary Judge (McKerracher, J) found that Australia was a *clearly inappropriate forum* for the determination of the dispute and ordered the proceedings be stayed[3] for the following reasons:

a. The 'natural and obvious forum' for all disputes relating to the collision was China because of the many factors that connected the dispute to China, namely, (i) the collision occurred proximate to China; (ii) both ships steamed to China after the collision; (iii) there was an oil spill in China's EEZ; and (iv) the Chinese authorities (Shanghai MSA) were conducting an investigation into the collision.

b. A complete lack of any connecting factors to Australia; save for the commencement of *in rem* proceedings, there was nothing and no-one in the proceeding that had any connection with Australia.

c. The existence of parallel related proceedings in China in respect of the same subject matter made the Australian proceeding vexatious and oppressive because it created a risk of inconsistent findings. Such implications and burdens on the parties arising from a multiplicity of proceedings were significant. There were heavy considerations.

d. The Judge noted the *CCF* interests' claims of loss of a legitimate juridical advantage (greater security or higher limitation) in the event of a stay of the Australian proceeding, however, concluded that this factor was not sufficient to undermine the conclusion that he had reached – that Australia was a *clearly inappropriate forum* for the determination of the claims.

The grounds of appeal

The main grounds of appeal were:

a. The primary Judge applied the wrong test; by placing undue focus on the comparative suitability of China as a forum and identifying China as the 'natural forum', the primary Judge's analysis reflected an application of the English test (the more appropriate forum test) rather than the Australian test.

   In Australia, the test for forum *non conveniens* is whether the Australian court is a *clearly inappropriate forum*. The focus is on the local forum and its suitability to hear the action. This approach differs from that taken in the United Kingdom, as established by the House of Lords decision in *Spiliada*[4], which requires an English court to undertake a comparative analysis of the two forums to establish which is the more appropriate or natural one to determine the dispute.

b. The primary Judge did not adequately consider the *CCF* interests' significant juridical advantage in commencing *in rem* proceedings in Australia.

The decision on appeal

The Full Court rejected the submissions made on behalf of the *CCF* interests and found that the primary Judge had not erred in the exercise of his discretion to grant a stay. The Full Court's reasoning was as follows:

Wrong test?

a. The primary Judge's use of the expression *"natural and obvious forum"* or his examination of factors as to the suitability of China as a forum did not necessarily betray any misapplication of the Australian test – it did not mean he had applied the English test. The primary Judge's conclusion as to China being the natural and obvious forum were *"both defensible and relevant to the assessment of suitability of Australia"*[5] and the connections with China examined by the primary Judge reflected as much on Australia as they did on China.

Juridical advantage:

b. In finding that the loss of a juridical advantage was not sufficient to resist the conclusion that Australia was a *clearly inappropriate forum*, the primary Judge had not erred in his approach to the assessment and treatment of *CCF* interests' juridical advantage.

   The Full Court noted that the primary Judge may have discounted, perhaps heavily, *CCF* interests' juridical advantage. However, given that the discretion presented to the primary Judge to refuse the stay involved consideration of competing actions and the risk of inconsistent

3 There was no contest as to whether the Court's jurisdiction had been properly invoked - it was accepted by the parties that the Court's *in rem* jurisdiction had been regularly invoked on a maritime lien (damage done to a ship) *Admiralty Act 1988* (Cth) s. 15(2)(b).

4 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460.

5 At [62].



findings, the Full Court was not prepared to conclude that the nature and character of the juridical advantage (of the higher security) called for a conclusion other than that reached by the primary Judge. The risk of inconsistent findings was a compelling consideration for the primary Judge and this was not only *"understandable but demanded"*[6] by Australian authorities[7]. The primary Judge, it was said, had taken the question of security into account in the proper framework of the clearly inappropriate test.

The Full Court explained that the Australian test mandated a different approach to juridical advantage than that provided for in English law. Under the Australian test, juridical advantage was a factor to be considered together with other factors in assessing whether Australia was a *clearly inappropriate forum*. However, under the English approach, there were two levels of inquiry and juridical advantage became relevant only in connection with the second level.

At the first level, it was necessary to ask whether there is another appropriate forum. If there was, the second inquiry was whether there was some special circumstance as a result of which justice required the proceeding to not be stayed in favour of the other forum. A claimant's juridical advantage was a 'special circumstance' if it could be shown that substantial justice could not be done in the other forum. Under English law[8], a juridical advantage which takes the form of a higher limitation amount does not necessarily mean that substantial justice could not be obtained in a forum which offers a lower limiation amount.

In a significant *obiter*[9], the Full Court stated that if the risk of inconsistent findings in parallel proceedings could be eliminated (or significantly reduced) it may be difficult for an Australian court to conclude in similar circumstances[10] that it is a *clearly inappropriate forum*. The Full Court also said that in this context a possible way forward by which a party may be able to secure its claimed juridical advantage (of greater security or a higher limitation amount) in Australia could be to manage the Australian proceedings as was done in *Caltex Singapore Pte Ltd v BP Shipping Ltd*[11]. In that case, the English High Court stayed its proceedings temporarily in order to enable the issues of quantum[12] to be determined in the other forum (Singapore) thereby eliminating the risk of the vexation of inconsistent findings and not denying the claimant its juridical advantage in the United Kingdom.

Comment

The Full Court's decision provides a clear explanation of the legal principles that are to be applied by an Australian court in its assessment and treatment of a claimant's 'juridical advantage' when determining whether to stay proceedings in an admiralty context where there are ongoing parallel proceedings, including limitation proceedings, in a non-Convention country. The point that is made clear is that a juridical advantage (such as a higher limitation amount) is a factor to be considered together with all other relevant factors in assessing whether or not the local forum (Australia) is inappropriate - it is not necessarily decisive nor should it be compared with the laws available in the other forum in terms of abstract justices. Arguably, this approach may give more weight to a claimant's juridical advantage than would be the case under English law but much will depend on all the other factors and whether they show Australia to be an inappropriate forum.

The Full Court's reference to the approach taken in *Caltex* presents an informative indicator as to how the Court might be prepared to preserve juridical advantage whilst staying proceedings in future in that it appears to signal a willingness to consider, under certain circumstances, alternative ways by which a claimant can be assisted to retain a juridical advantage offered under Australian law which has been obtained by the commencement of *in rem* proceedings. For claimants looking to secure the higher limitation amounts available under Australian law or greater security, the key may be to address how the Australian proceedings (which are to be stayed) could be managed so as to avoid potential inconsistent findings with the forum where the dispute is to be determined. Whether and how a *Caltex* approach would find itself worked into Australian law however remains to be seen.

An application for special leave to the High Court – Australia's final appellate court – was made by the *CCF* interests, but was recently discontinued.

Rockwell was represented by Holman Fenwick Willan.

6 At [61].
7 Namely, *Henry v Henry* (1996) 185 CLR 571.
8 *Herceg Novi (Owners) v Ming Galaxy (Owners)* [1998] 2 Lloyds Rep 454.
9 Obiter dictum is not binding on other courts but can be persuasive or provide guidance for the resolution of similar cases.
10 Where the Australian court's jurisdiction was regularly invoked by *in rem* proceedings to enforce a maritime lien claim.
11 [1996] 1 Lloyd's Rep 286.
12 Liability having already been admitted by the defendant (BP Shipping Ltd).

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