

TO STAY OR NOT TO STAY?

FEDERAL COURT OF AUSTRALIA REVISITS 'FORUM NON CONVENIENS' PRINCIPLES IN COLLISION CASES



In the recent decision of the Federal Court of Australia in *CMA CGM SA v The Ship CHOU SHAN*¹, a shipowner whose ship had been arrested in Australia in respect of claims arising out of a collision that occurred about 100 nautical miles off the coastline of the People's Republic of China (China) was successful in obtaining a stay of the substantive proceeding on *inappropriate forum* grounds. The decision of McKerracher J provides a comprehensive analysis of the legal principles that are to be applied in considering the question of 'competing' forums in transnational cases in an admiralty context.

Facts

On 19 March 2013, the *CHOU SHAN* (CS), a bulk carrier in ballast on a voyage to Australia, was involved in a collision with the containership *CMA CGM FLORIDA* (CCF) in the East China Sea about 100 nautical miles from the Chinese

coastline and in China's exclusive economic zone (EEZ). As a result of the collision, oil and fuel leaked from the CCF into the sea and cargoes on board the CCF were damaged.

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) commenced an *in rem* proceeding in the Federal Court of Australia against the CS, claiming damages from the CS interests arising from the collision in the sum of approximately US\$60 million. Almost one month later, on 6 May 2013, Rockwell Shipping Ltd

¹ *CMA CGM SA & Anor v The Ship 'CHOU SHAN'* [2014] FCA 74.



(Rockwell), the owners of the CS, applied to the Ningbo Maritime Court in China to establish a limitation fund under Chinese law². Claims against the fund were registered by the CCF interests, the MSA and other parties with an interest in cargoes lost and/or damaged aboard the CCF.

On 17 May 2013, the CS interests arrested the CCF in China, demanding security for its claim for damages arising out of the collision. Security was posted one month later and the CCF was released from arrest.

Almost a week later, on 22 May 2013, the CCF interests arrested the CS at Port Hedland, Western Australia. The vessel was released upon the provision of security without prejudice to the CS interests' right to apply for a stay on the ground of *forum non conveniens*.

On 18 June 2013, the CS interests applied for a stay of the CCF proceedings on *forum non conveniens* grounds, namely that:

- The Australian Court was a 'clearly inappropriate forum' for the determination of the dispute; and/or
- The proceeding was vexatious and oppressive as it concerned

substantially the same subject matter as the pending proceeding commenced by the CS interests in the Ningbo Maritime Court.

It is to be noted that there wasn't any dispute as to whether the CCF interests had validly invoked the Court's *in rem* jurisdiction under the *Admiralty Act (1988)* (Cth) in arresting the CS³. Therefore, the application for the stay did not involve any challenge to the Court's jurisdiction.

The decision

Having undertaken a detailed analysis of the facts and applicable legal principles, McKerracher J found that Australia was a *clearly inappropriate forum* for the determination of the proceedings and ordered the proceedings be stayed. In his reasons, McKerracher J considered the Federal Court's decision in *The Ship XIN TAI HAN (No 2)*⁴ in which an application for a stay in similar circumstances was dismissed and provides a helpful explanation of the salient distinguishing facts between the two cases.

The 'forum non conveniens' test in Australia

The test in Australia for obtaining a stay on the grounds of *forum non*

conveniens differs from the test applied in England as established by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*⁵. In general terms, the *Spiliada* test requires local proceedings to be stayed where there exists a more appropriate forum (i.e. a forum with which the action has the most substantial connection) to hear the dispute. In Australia, however, the question for the Court is whether the local court is a *clearly inappropriate forum* to determine the matter. Therefore, a party applying for a stay in Australia generally faces a more onerous threshold to satisfy.

The Australian court will be a *clearly inappropriate forum* if continuation of the proceedings in Australia would be 'oppressive' or 'vexatious' to the defendant⁶. 'Oppressive', in this context, has been held to mean "seriously and unfairly burdensome, prejudicial or damaging"⁷ and 'vexatious' is understood to mean "productive of serious and unjustified harassment"⁸. The focus is on the inappropriateness of the Australian Court and not the appropriateness or comparative appropriateness of the other forum⁹. It follows that an Australian court is not an inappropriate forum simply because another forum is more appropriate¹⁰.

Despite the High Court's departure from the English test, the analysis in *Spiliada* regarding 'connecting factors' (i.e. the degree of connection between the forum, the action and the parties) and 'legitimate juridical advantage' (a more favourable limitation regime, higher damages and better trial procedures), was regarded by the

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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.

3 The arrest process in Australia is relatively straightforward. In broad terms, the requirements are that there must be a 'maritime claim' within the meaning of the Admiralty Act 1988 (Cth) and commonality in the identity of the debtor and the owner of the target vessel.

4 (2012) 301 ALR 357

5 [1987] 1 AC 460.

6 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197.

7 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (*Voth*) at 555.

8 *Voth* at 555.

9 *Atlantavios Navegacao Ltd v The Ship XIN TAI HAI (No 2)* [2012] FCA 1497 at [109].

10 *Regie Nationale des Usines Renault SA v ZHANG* (2002) 210 CLR 503 (ZHANG)



Australian High Court as providing “valuable assistance”¹¹ when applying the ‘*clearly inappropriate forum*’ test.

Rockwell’s arguments

Rockwell argued that Australia was an inappropriate forum because:

- **China was the natural and obvious forum** as there were many factors connecting all the disputes arising out of the collision with China.
- **No connections with Australia:** other than the fact that the *in rem* proceeding was commenced in Australia, nothing and no one in the proceeding had any connection with Australia. It was argued that excessive weight should not be given to a party’s right to validly invoke the jurisdiction of the Australian court.
- **Chinese law applied:** the claim as to liability, damages and limitation was governed by foreign law, in this case, Chinese law¹². This would require an Australian court to apply Chinese law because under Australian choice of law rules the *lex causae*¹³ is the law of the place of the wrong. In the case of maritime torts (other than those occurring on the high seas), the *lex causae* is the law of the littoral state that asserts jurisdiction and rights over its territorial waters. The same jurisdictional significance should be attributed to the littoral state’s EEZ waters.

- **Parallel proceedings and inconsistent findings:** there were proceedings already on foot before a Chinese court which had jurisdiction over all persons and claims such that substantial justice would be done in China. The existence of Chinese proceedings meant there was a risk of inconsistent findings because regardless of what would happen in Australia, the Chinese proceedings would continue¹⁴.

- **Election:** by participating in the Chinese limitation proceedings, the CCF interests had made an election between two fundamentally inconsistent courses of action. The effect of the election was to submit to Chinese jurisdiction and waive any other rights to proceed elsewhere.

CCF interests’ arguments

The following arguments were advanced on behalf of the CCF interests in opposition to Rockwell’s application for a stay:

- **Jurisdiction validly invoked by arrest:** the CCF interests relied heavily on the fact that they had properly invoked the jurisdiction of the Australian court by arresting the CS. It was argued that CCF had a *prima facie* right to insist upon the court’s exercise of its jurisdiction validly invoked and that this right should not be lightly displaced.



In general terms, the Spiliada test requires local proceedings to be stayed where there exists a more appropriate forum (i.e. a forum with which the action has the most substantial connection) to hear the dispute. In Australia, however, the question for the Court is whether the local court is a *clearly inappropriate forum* to determine the matter.

JENNY BAZAKAS

11 *Voth* at 564-565

12 Whether the law of the forum will supply the substantive law is a factor to be considered by the Court but is not determinative in itself: see *ZHANG*.

13 The law of the cause, i.e. the law which governs the dispute/question.

14 Evidence was lead by Rockwell that there was no basis on which the CCF interests could apply for a stay of the Chinese proceedings.



- **Timing of proceedings:** the order in which the local and foreign proceedings had been commenced was a significant factor. The CCF interests had properly invoked the jurisdiction of the Australian court *before* Chinese jurisdiction had been invoked by any of the parties.
- **Loss of legitimate juridical advantage – higher limitation:** if a stay were granted the CCF interests would lose a legitimate juridical advantage (conferred on them by the *in rem* proceedings¹⁵), namely, access to a more generous limitation regime than that available in China and security for their claim which, it was submitted, should not be equated with the possibility of claiming against a limitation fund in China. Australia is a party to the 1996 Convention¹⁶ which has higher limits of liability than available under Chinese law. In the present case, the difference, in monetary terms, was approximately US\$19 million.
- If a stay were granted, CCF would withdraw its claim against the limitation fund in China and therefore there would be no pending parallel proceeding in China dealing with the same issues.

Reasons

In a judgment which provides a thorough and very informative analysis of the facts and applicable legal principles under Australian law, McKerracher J was clear in pointing out that there was no one factor which would have made the Australian court a *clearly inappropriate forum*. Rather, His Honour concluded

there were multiple factors when taken cumulatively that led to that determination. These factors were:

- The natural and obvious forum¹⁷ 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.
- 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. This was a compelling factor.
- 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 and increased costs for all concerned. Such implications and burdens on the parties arising from a multiplicity of proceedings were significant.
- The Judge noted the CCF interests' claims of loss of a legitimate juridical advantage (i.e. access to a higher limitation regime) in the event of a stay of the Australian proceeding, however, concluded that this factor was insufficient to undermine the conclusion that he had reached – that Australia was a *clearly inappropriate forum* for

the determination of the claims. The Judge also stated that he considered, in essence, that substantial justice would be done in China.

Comment

The *clearly inappropriate forum* test has often been criticised for being parochial because it arguably presents a more onerous burden for a defendant to have proceedings in Australia restrained, thereby encouraging forum shopping. This is particularly so in circumstances where the admiralty jurisdiction of the Australian courts may be engaged properly in respect of a maritime claim, as in this case, when a ship is in Australian waters. However, whilst the decision in the *CHOU SHAN*, is the first to the author's knowledge in Australia where the *clearly inappropriate forum* principle has been successfully engaged in an 'admiralty' context, it does demonstrate the willingness of the Federal Court to apply the principle in favour of a defendant and grant a stay when the facts support such a determination notwithstanding that the admiralty jurisdiction has been properly engaged.

The decision is the subject of an appeal by CCF interests to the Full Court of the Federal Court and a report on the result of the appeal will be published once it becomes available.

Rockwell/CS interests were represented by Holman Fenwick Willan.

¹⁵ China does not recognise the concept of *in rem* actions.

¹⁶ Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol.

¹⁷ This is perhaps the one factor distinguishing this case from an earlier decision of the Federal Court where a stay was refused: see *The XIN TAI HAI*. In the *XIN TAI HAI*, the *B OCEANIA* collided with the *XIN TAI HAI* in the Straits of Malacca. The owners of the *B OCEANIA* seized the jurisdiction of the Australian court by arresting the *XIN TAI HAI* in Western Australia (WA). At the time of the arrest, proceedings had been commenced in China by both owners, including an application by *XIN TAI HAI*'s owners to establish a limitation fund against which the owners of *B OCEANIA* had registered its interest only hours after filing in rem proceedings in Australia. The only factor that connected the dispute with Australia was the arrest in WA. Relevantly, and unlike the *CHOU SHAN* (and as noted by the Judge in the *CHOU SHAN*), there was no connection between China and the dispute.



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