Owner and/or Demise Charterer of the Vessel "A Symphony" v Owner and/or Demise Charterer of the Vessel "Sea Justice" [2024] SGHC 37

Forum non conveniens stays and in rem security

This judgment from the Singapore High Court sought to answer this issue: is a claimant entitled to retain security obtained in a second jurisdiction, while having participated in limitation proceedings in the first jurisdiction? This quintessential case of forum shopping spans three jurisdictions, involves arguments on forum non conveniens and raises issues of the aptness of retaining security for foreign court proceedings. It is a must-read for those involved in cross-border disputes featuring limitation proceedings.

The Sea Justice: the facts

The proceedings in China and the Marshall Islands

Following a collision off the Port of Qingdao between the defendant's cargo vessel Sea Justice and the plaintiff's oil tanker A Symphony, both owners commenced proceedings in the Qingdao Maritime Court. The defendant set up a limitation fund in the Qingdao Maritime Court for all maritime claims that may be brought against them due to the collision (the "SJ Limitation Fund"). The plaintiff commenced proceedings at the Qingdao Maritime Court to limit liability pursuant to the International Convention on Civil Liability for Oil Pollution Damage 1992. The defendant's application for an anti-suit injunction before the Chinese courts seeking to prohibit the plaintiff from initiating proceedings elsewhere was dismissed. Nevertheless, the plaintiff's in personam claim against the defendant in the Marshall Islands (the defendant's jurisdiction of incorporation) was dismissed on (amongst others) the grounds of forum non conveniens.

The Singapore proceedings

The plaintiff arrested Sea Justice in Singapore and was provided with a letter of undertaking (LOU) as security for its claim. The value of the LOU was pegged to the maximum that the plaintiff would be allowed to claim under Singapore's limitation framework. Upon provision of the LOU the vessel was released from arrest and the defendant applied for: (a) the Singapore action to be stayed in favour of proceedings in China, on the grounds of forum non conveniens; and (b) the LOU to be returned to the defendant.

The Registrar held that the Singapore action should indeed be stayed unconditionally on the ground of forum non conveniens for two reasons: (i) that the Qingdao Maritime Court was the more appropriate forum for the plaintiff's claim to be tried; and (ii) that he was not persuaded that the plaintiff losing its juridical advantage of the LOU security if the Singapore action was stayed was in itself grounds for a stay. Consequently, the LOU was returned to the defendant. The plaintiff appealed against the Registrar's decision that the LOU should be returned to the defendant. However, it did not appeal against the granting of the unconditional stay on the ground of forum non conveniens. The plaintiff argued for a limited stay on (amongst others) the following conditions: (a) that the stay of the Singapore action be lifted once liability and quantum had been determined in the Chinese proceedings; and (b) that the plaintiff be entitled to enforce against the LOU any sum not satisfied by the defendant in the Chinese proceedings.

The High Court's decision

The judge dismissed the appeal on the following four grounds.

First, the plaintiff was in effect seeking to retain the LOU as security for foreign proceedings. This is not permitted under Singaporean law. The High Court of Singapore held that it was impermissible to retain in rem security obtained in Singapore courts for foreign proceedings. This was regardless of whether oil pollution indemnity claims would be adequately compensated from the SJ Limitation Fund. This was because in rem security obtained in the Singapore courts could only be retained for the satisfaction of judgments given by foreign courts if there was a statutory provision empowering the Singapore courts to do so; but there was no such statutory provision under Singaporean law.1

The court contrasted this position with section7(1) of the Singapore International Arbitration Act (Cap143A, 2002 Rev Ed), which empowers courts to order a stay of proceedings in favour of an international arbitration and to order that the property arrested be retained as security for satisfaction of the arbitration award.

It also drew an analogy with the statutory provision in the UK- section26(1) of the UK's Civil Jurisdiction and Judgments Act 1982- which empowered the UK courts to retain security obtained in UK court proceedings in favour of foreign court proceedings.

Secondly, the plaintiff was effectively seeking to treat the Singaporean limitation regime as superior to the Chinese limitation regime. This is contrary to the Singapore courts' approach based on international comity. In support of its application for a conditional stay, the plaintiff relied on the judgment of the Federal Court of Australia in The Chou Shan.2 In The Chou Shan plaintiffs in a ship collision off the coast of China initiated Australian proceedings hoping to benefit from the limitation amounts in the Convention on Limitation of Liability of Maritime Claims 1976 (read with the Protocol of 1996) applicable in Australia. These were higher than those under the limitation fund set up in the Ningbo Maritime Court.

The primary judge stayed the Australian proceedings in favour of Chinese proceedings and the appeal against that decision to the Federal Court was dismissed. Nonetheless, the Full Court said - obiter - that the plaintiffs could have argued before the primary judge for the Australian claim to proceed "and to be finalised, by access to the Australian security or limitation fund" after the Ningbo Maritime Court had made its findings. It was this dictum that was relied on by the plaintiff in support of argument for a conditional stay. The court however held that the plaintiff's reliance on The Chou Shan was misplaced for at least two reasons: (i) the formulation of the forum non conveniens test under the Australian law was different from that under the Singaporean (or English) law; and (ii) following from the different formulation, greater weight was given to the plaintiff's juridical advantage under Australian law (relative to the test under the Singaporean or English law).

The test under Australian law is whether the Australian court is a clearly inappropriate forum. The Australian formulation is not focused on whether justice can be achieved in a foreign court. The Australian court is concerned only with the appropriateness of the local forum. This formulation is different from the traditional common law test as stated in The Spiliada3 (which is also the law in Singapore). The two-stage test is: (i) whether there is a foreign forum that is clearly or distinctly more appropriate to hear the dispute; and (ii) whether the plaintiff can show that it will not obtain substantial justice in the foreign forum.

The contrast between the two formulations is this. Under Australia's formulation of the test, the inquiry is focused on the advantages and disadvantages arising from a continuation of the proceedings in the Australian court (which may be termed an inward-looking inquiry), rather than on a comparison between the Australian court and a foreign court (which requires an outward-looking inquiry). Approving the remarks of the Hong Kong Court of Appeal,4 the court held that it was not for the Singapore courts to adjudicate on the relative merits of different limitation regimes, be they domestic systems or based on international conventions, in comparison to Singapore's limitation regime. The court held that to grant a stay of proceedings, whether on the ground of forum non conveniens or on a more limited basis, would be contrary to judicial comity.

Thirdly, what the plaintiff was seeking was incongruent with the forum non conveniens stay that had been granted and which had not been appealed against. The plaintiff also relied on the principle in The RenaK5 which may be stated as follows: the cause of action in rem does not merge in a judgment in personam but remains available to the creditor so long as the judgment remains unsatisfied. Therefore, if it can be shown that the defendants would be unable to satisfy an arbitration award, the court should exercise its discretion to retain the arrested vessel or release her subject to the provision of alternative security. However, the court held that The Rena K principle was inapplicable for four reasons:

(a) the plaintiff's argument that any Chinese judgment that it obtains will not be fully satisfied and that the forum non conveniens stay will need to be lifted is no different from the plaintiff's argument for a limited stay. Therefore, it runs up against the same arguments and will be contrary to comity;

(b) The Rena K principle was developed to meet the needs of cases concerning mandatory stays in favour of arbitration where no conditions could be attached. In contrast, a forum non conveniens stay is discretionary and the court may impose an in personam requirement for the defendant to provide alternative security for the foreign proceedings;

(c) the test under The Rena K principle is whether the defendant would be unable to satisfy an award made against it. This is a contrast to where a forum non conveniens stay is concerned, in that the stay will only be lifted in exceptional circumstances where the premise on which the stay was granted turns out to be mistaken; and

(d) further and in any event, the plaintiff had not established the factual premise for its application for The Rena K principle, viz that the defendant would be unlikely to satisfy the judgment obtained by the plaintiff in the Chinese proceedings.

Fourthly, what the plaintiff was seeking effectively undermined the defendant's right to claim limitation in a forum of its

choice, while doubly securing the plaintiff. Allowing the plaintiff to retain the LOU would effectively be compelling the defendant to constitute a limitation fund in Singapore despite having chosen to claim limitation in China. This would infringe the shipowners' rights in law to constitute a limitation fund where it sees fit.6 It would also be unjust for a party to have to provide double security for the same claim.7

Comments

The incentive to forum shop permeates maritime claims. It stems from efforts by plaintiffs to gain a tactical advantage, as it was here with the plaintiff keen to benefit from the enhanced limitation amounts under Singaporean law. The fact that there are widely disparate regimes in force internationally8 with regards to tonnage limitation increases the incentive. Courts have, due to judicial comity, refused to make value judgments on the disparate regimes. This judgment illustrates the ingenuity to which parties often resort in pursuit of the tactical advantage, whether in relying on fine distinctions of the formulation of the forum non conveniens test or otherwise in seeking to retain security provided for their claim. It is a salutary lesson for those involved in cross-border claims in that it illustrates the hurdles to be mounted and resources to be expended well before the merits of a claim will be heard.

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1 DSA Consultancy (FZC) v Owner and/or Demise Charterer of the Vessel "Eurohope" [2017] 2 Lloyd's Rep 415.

2 CMA CGM SA v The Ship Chou Shan [2014] FCAFC 90.

3 Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada) [1987] 1 Lloyd's Rep 1.

4 Pusan Newport Co Ltd v The Owners and/or Demise Charterers of the Ships or Vessels "Milano Bridge" and "CMA CGM Musca" and "CMA CGM Hydra" [2022] 1 Lloyd's Rep 441 at para 53.

5 The Rena K [1978] 1 Lloyd's Rep 545.

6 Saipem SpA v Dredging VO2 BV (The Volvox Hollandia) [1988] 2 Lloyd's Rep 361 at page 370; Evergreen International SA v Volkswagen Group Singapore Pte Ltd (The Ever Glory) [2004] 2 SLR(R) 457 at para 47.

7 The Blue Fruit [1979-1980] SLR(R) 238; The Putbus [1969] 1 Lloyd's Rep 253.

8 MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV (The MSC Flaminia) [2022] 2 Lloyd's Rep 341 at para 95.