MARITIME LAW CASE

Case Update 1
Tianjin Ruifu Energy Trading Co., Ltd. v Kawang Interntional Holdings Co., Ltd. and Others (The "Hong Yu")-Supreme People's Court of the PRC- 20 June 2012
Charterparty - Jurisdiction - Hong Kong arbitration agreement - Whether the Registered Owners/Operator not being the party to the C/P are entitled to rely upon the agreement - Whether the Court can hand down a jurisdiction ruling without the presence of all parties

On 9 March 2011, the Plaintiff entered into a voyage charter party on an amended Gencon form (the "Charter Party") with the first Defendant as the Disponent Owners for the carriage of a shipment of bulk coal. The law and arbitration clause in the Charter Party provided for Hong Kong arbitration according to English law.

On 28 March 2011, the Plaintiff terminated the Charter Party by reason of the alleged anticipatory repudiation of the first Defendant.

On 16 June 2011, the Plaintiff filed a lawsuit against the first Defendant together with the second Defendant as the Registered Owners and the third Defendant (the Ship"s Operator) before the Shanghai Maritime Court, requesting the three Defendants to compensate their losses for engaging a substitute vessel.

The Shanghai Maritime Court dismissed the case on the grounds that the arbitration clause was sufficient to exclude the jurisdiction of the Chinese courts and all disputes under the Charter Party should be referred to arbitration in Hong Kong.

On appeal to the Shanghai High Court, the Plaintiff submitted that: a) the second and third Defendants, not being party to the Charter Party, should not then be entitled to rely upon the arbitration clause therein; b) the first instance court should not rule on the validity of the arbitration clause in the absence of the first Defendant. The High Court reconfirmed the validity of the arbitration clause and the Plaintiff"s appeal was dismissed.

The Plaintiff applied for retrial before the Chinese Supreme Court, alleging that a) the first instance court violated Article 179 (11) of the Civil Procedure Law of the PRC by ruling by default while the first Defendant was not properly summoned; b) the arbitration clause had no binding effect upon the second and third Defendants, not being parties to the contract, c) the first and second instance courts had wrongfully refused to establish jurisdiction by relying upon the arbitration clause, which deprived the Plaintiff of their right to sue.
The Supreme Court held that the arbitration clause in question was valid and enforceable, and that the first instance court should not have accepted the case from the very beginning. The Supreme Court upheld our defence (although impliedly) to the effect that the second and third Defendants should not be sued against under the Charter Party. The Plaintiff"s application was rejected.

It is not uncommon for Chinese cargo interests to claim directly against the registered owners/operators. From this judgement, it can be seen that the courts are in support of Hong

Kong arbitration clauses used in the shipping practice, and will in some cases allow registered Owners/operators to file a jurisdiction dissension before the Chinese court (rather than defend the substantive issues) to save time/costs. More importantly, by doing so, it is unnecessary for the registered Owners/operators to seek assistance from the disponent owners in their defence.

Case Update 2
Apollo Navigation Corp. & Zodiac Maritime Agencies Ltd. Zhoushan IMC-Yongyue Shipyard & Engineering Co., Ltd. (The "Hyundai Independence") Higher People's Court of Zhejiang Province (on appeal) - 4 January 2012

Allision with dock — oil spill — Whether Shipowners are entitled to pursue recovery from the Shipyard for compensation made to the pollution claimants? — Whether Shipowners can lodge an action in tort against the Shipyard in the presence of a ship-repairing contract? — Whether the Shipyard responsible for the inaction of the dock master?

On 22 April 2006, the M/V Hyundai Independence, a British container vessel, contacted with entrance of the dry dock. As a consequence, the side shell plating of the upper side fuel oil tank of the vessel was cracked and around 500 MT of heavy fuel oil (IFO 500) spilled out of the damaged oil tank, triggering a substantial oil pollution damage claim in soaring amount of US$16 million. Owners eventually concluded an amicable settlement at US$8 million with the pollution claimants and subsequently pursued a recovery against the Shipyard. The dock master embarked the vessel at the anchorage to facilitate the docking, together with the assistance of 3 tugs.

It was asserted by the Owners that the dock master gave improper instructions, the tugs in assistance were insufficient, and further the fender was not sufficiently strong. In response, the Shipyard asserted that i) the term "without any further claim by both parties" on the final ship repair invoice prevented the Shipowners from making their claim; ii) the dock master should be deemed as a pilot for whose faults the Shipyard did not need to assume any liability,; iii) the dock master only gave suggestions during his attendance on board and the master remained in control; iv) the tugs were sufficient; v) the master had consented to the docking procedure; v) the settlement was unreasonable and in any case was not adjudged by the court.
This case involved many complex technical and legal issues. Following the first instance trial appeal, the appeal court held the following:

i. The immunity clause in the ship-repairing contract shall only be relevant to any loss incurred by the ship repairs but not applicable to the pollution damage recovery claim.
ii. The dock master designated by the Shipyard was not a „pilot" in the legal sense and thus the Shipyard shall be liable for his incompetence and faults committed while piloting the vessel;
iii. The orders given by the dock master are in suggestive in nature. The Master is the primary person in charge of the navigation and management of the vessel and remains the final decision maker.
iv. The Shipyard should not be solely blamed for providing insufficient tugs. If at the material times the master considered the three tugs provided or dock facilities to be insufficient, he should have requested for further assistance.

v. Although the settlement between Shipowners and the pollution claimants was not adjudged by the court, it had been justified by the use of various expert reports and thus shall be deemed as reasonable and admissible.

The Court of Appeal held Shipowners and the Shipyard to be equally liable for the accident. This is a successful and valuable case demonstrating that it is possible for foreign shipowners to pursue a contribution to oil pollution damages from Chinese shipyards by litigating before the Chinese courts.

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