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Cover Story

Would the Court impose conditions for granting relief against non-compliance in admiralty actions?

Introduction

In admiralty actions where there are cross claims, the procedure is governed by Order 75 Rule 41 of The Rules of High Court (Cap.4A) ("**RHC**"). The rule does not provide for an automatic deadline for a defence to a cross-claim to be filed, instead the Registrar of the High Court may give directions for such filing under Order 41 Rule 41(2) of RHC as he thinks fit.

The recent judgment of the admiralty action in *Noor Maritime Ltd v Calandra Shipping Co Ltd* [2018] HKCFI 609 illustrates the Court's approach in granting relief against a non-compliance of an unless order and the factors to be considered by the Court in determining whether the Court should grant such relief and whether conditions such as payment into court should be imposed.

The Appeal

Background

In *Noor Maritime Ltd*, the Plaintiff's vessel "The Rainbow" sank with cargo fuel and effects on board after colliding with the Defendant's vessel "The Calandra", resulting in various actions *in rem* and *personam* pursued by the parties. The present judgment concerns a claim and a cross claim both *in personam*.

The Plaintiff filed its writ concerning its claim *in personam* against the Defendant in mid-2017. A settlement agreement was then signed between the parties to apportion liability at 1/3 for "The Calandra" and 2/3 for "The Rainbow". The settlement agreement also provided for claims

for damages to be referred to the Registrar of the High Court.

Subsequently the Defendant filed its cross claim and the parties went before the Master for directions. The Master made an unless order against the Plaintiff to file a defence to the Defendant's cross claim within 14 days, failing which the Plaintiff shall be barred from filing any such defence, while the Master also made a separate order directing that the Defendant's defence to the Plaintiff's claim shall be filed within 42 days without an unless order.

The Plaintiff failed to comply with the unless order. The Plaintiff therefore sought for an extension of time to file the defence. The Master gave relief against the sanction and gave leave to the Plaintiff to file and serve a defence within 28 days on the condition that the Plaintiff paid US$700,000 into the Court, failing the compliance of the condition the Plaintiff shall be debarred from filing and serving the defence to the Defendant's cross claim.

Court's ruling

On appeal against the imposition of the condition, the Judge in chambers applied the following guidelines for imposing a condition for payment into court as set out in *Schenker International (HK) Ltd v Natural Dairy (NZ) Holdings Limited* [2014] 1 HKLRD 274:

1. The court must first consider the nature and effect of the order that gave rise to the application for relief;
2. The condition of payment-in is a type of condition associated with summary judgment application and normally imposed where e.g. there is good ground in the evidence for believing that the defence is a sham defence;
3. Payment-in may not further the primary objective to secure a just resolution of the dispute in accordance with the substantive rights of the parties;
4. A payment into court might be appropriate where there was a history of repeated breaches of timetables, court orders or something in the conduct of the party that gave rise to the suspicion that it was not bona fide;
5. A short breach that does not prejudice the other side or the trial would not merit a payment-in order;
6. Proportionality of the sanction is a relevant and weighty factor.

The Defendant argued that imposition of the condition was consistent with the admiralty jurisdiction of requiring security. The Defendant's counsel sought to justify the condition by praying in aid authorities for claims *in rem* in the admiralty jurisdiction. Further, the Defendant's counsel sought to apply and illustrate by analogy Section 20(6)(b) of the Arbitration Ordinance (Cap. 609), which provides that in the case of admiralty

proceedings, if the court makes order to stay the proceedings under Section 20(5), the court may order that the property arrested or the bail or security given be retained as security for the satisfaction of any arbitral award. However, the Judge stated that the present claim was not *in rem* and "The Rainbow" had never been arrested, nor was there any summons for security.

Despite the Defendant's arguments above, it was held in the appeal that, applying those guidelines in *Schenker International*, the imposition of the condition in the present case was disproportionate to a single breach, and had the effect of preventing a just resolution of the dispute in accordance with the substantive rights of the parties. The Judge noted that the unless order was made at the very first hearing for directions without prior non-compliance of the Plaintiff, while no unless order was made against the Defendant. There was also no suggestion that the defence of the Plaintiff lacked merits or that the delay would cause any prejudice to the Defendant.

Conclusion

The present case is an illustration of the Court's approach in granting relief for sanction in the context of a cross claim in admiralty proceedings. In considering whether or not to grant relief against a non-compliance of an unless order, the Court will conduct a multi-facet balancing exercise of factors for granting the relief from sanction and consider the guidelines as set out in *Schenker International* in determining whether the Court should grant such relief and whether conditions such as payment into court should be imposed.

Cosco still pending US watchdog's approval for OOIL purchase

Cosco Shipping Holdings, a Shanghai and Hong Kong listed company and the port arm of China Cosco Shipping Group, is still waiting for the greenlight from the Committee on Foreign Investment in the United States of America for its acquisition of one of its Hong Kong listed competitors Orient Overseas (International) Ltd.

The spokesperson of Cosco revealed that there are some "issues" that the US watchdog would like to clarify with Cosco and thus the company is still in the course of providing the relevant supplemental documents for the institution's review and consideration. Having said that, the spokesperson reiterated that the plan remains on schedule and confirmed that the deal could be completed smoothly.

CIMC Enric's comments on the Lloyd's Register link

Lloyd's Register, the British maritime classification society, has been alleged by the subsidiary of state-owned conglomerate China International Marine Containers, CIMC Enric, that the former has offered certifications to latter's rivalry products.

CIMC Enric is a listed company on the Main Board of the Hong Kong Stock Exchange. Its business includes the design, development, manufacturing, engineering and sales of, and the provision of technical maintenance services for, a wide spectrum of transportation, storage and processing equipment that is widely used in the energy, chemical and liquid food industries, and thus possesses certain patents. While the company has indicated that it is not satisfied with Lloyd's Register's "wrongful backing" of its competitors, which have infringed CIMC Enric's intellectual property rights, an official for CIMC Enric revealed that the company remains flexible to have dialogue to maintain a long-standing partnership.

HPH Trust expects less than 2% fall in volumes from US tariffs

Hutchison Port Holdings Trust has said it expects a negligible effect on its volumes if the US goes ahead with imposing tariffs on Chinese goods, while at the same time it also announced a 3% rise in revenue and a 12% rise in net profit for the first quarter.

Chief executive Gerry Yim said the estimated effect on the Singapore-listed and Hong Kong-based port operator's volume is less than 2%. He explained that HPH Trust is largely unaffected by the tariffs on steel and aluminium because these industries are located in north China and would affect ports such as Tianjin and Dalian. The likely hit is from the subsequent proposed $50bn of tariffs on high-end products because Shenzhen and South China also make south electrical goods, along with garments and furniture.

Volume boost drives profits at Cosco Shipping Holdings

Cosco Shipping Holdings has reported a net profit attributable to equity holders of Yuan180m ($28.4m) in the first quarter, after volumes rose 11.8% to 5.2m teu during the period. Excluding non-recurring gains and losses, net profit attributable to equity holders of the company was Yuan150m, up 65%. The company reported revenues of Yuan21.9bn, up 9.1% on the corresponding quarter of 2017.

CSH said it had benefited from the container shipping market expanding steadily as the Chinese economy maintained its growth momentum and the global economy continued to recover. "For the container shipping business, Cosco Shipping Holdings strengthened its global network [and] upgraded its products from 'shipping routes' into 'shipping routes, digitalised services and end-to-end solutions'," the company said. It added that it had continued to put economies of scale into effect, enlarged its shipping capacity and increased market development efforts along the Belt and Road regions.

Transport Desgagnes Inc. v Wartsila Canada Inc.

[2017] QCCA 1471

* *

Transport Desgagnes Inc, the respondent, purchased certain ship equipment, namely a bedplate and crankshaft, from the appellant, Wartsila Canada Inc., for the purposes of installing the same in the main engine of one its cargo ships, the "Camilla". The appellant assembled and installed the said bedplate and crankshaft in or about February 2007. It was undisputed that after 2 and a half years when the ship had run approximately 13,600 running hours, the crankshaft was no longer working.

In the circumstances, the respondent commenced legal proceedings against the appellant claiming for damages. The parties did not seek to contend the factual cause of the failure which was due to insufficient tightening of a connecting rod. Nevertheless, the respondent alleged that the crankshaft was inherently defective when delivered. On the other hand, the appellant disputed that the respondent should be the one responsible for the improper tightening during routine maintenance, and the appellant relied on the sale contract between the parties which only provided for the repair or replacement of any defect discovered within 6 months and excluded all other warranties. Further, the appellant contended that the maximum liability pursuant to the said contract should be €50,000.

The trial Judge held that the defect in the crankshaft was presumed to have existed and should have been known to the vendor at the time of its sale and that any exclusion or limitation clause excluding such liability was invalid. Accordingly, the judgment was granted in favour of the respondent who purchased such a defective crankshaft. On appeal, the Court of Appeal identified that there were certain legal issues, in particular whether the appellants were liable to the defect and if so, whether the contractual term would operate to exclude or limit that liability.

In respect of the first question, the Court of Appeal held that it was an issue of implied warranty of fitness, under which the onus would be on the purchaser to establish that a latent defect was known to the vendor or that the vendor had demonstrated reckless disregard for what it should have known. On the basis of the findings of fact by the trial Judge, the Court of Appeal considered that the appellant, being the vendor, must have known the defect.

In respect of the second question issue, the Court of Appeal was of the view that a limitation of liability clause was valid. The Court did not consider the exculpatory clauses in the subject agreement were inherently unreasonable. In particular, no unconscionable behaviour was found when the agreement was made and the appellant could not establish that there was paramount consideration of public policy that would affect the enforcement of the terms of the agreement. On the premises of the findings, the Court of Appeal concluded the appellant should be entitled to limit its liability under the agreement to a sum of €50,000 only.

AP Moller-Maersk A/S trading as Maersk Line v Kyokuyo Limited

[2018] EWCA Civ 778

This appeal concerns the scope of the Hague and Hague-Visby Rules and their application to the carriage of goods by sea in containers.

The respondent claims as the receiver of three container loads of frozen tuna shipped at Cartagena in Spain for carriage by the appellant to Japan. The frozen tuna loins were stuffed into the containers as individual items of cargo, without any wrapping, packaging or consolidation. No bill of lading was ever in fact issued in respect of any of the three containers. The appellant issued three sea waybills. The respondent contends that the tuna as delivered to it was damaged through raised temperatures during carriage and/or rough handling.

It is common ground that any liability of the appellant is governed by the Maersk Terms and by either the Hague-Visby Rules or Articles I to VIII of the Hague Rules, Article IV rule 5 of each of which sets out monetary limits of liability. Those limits are £100 "per package or unit" in the Hague Rules and, in the Hague-Visby Rules, the greater of 666.67 units of account "per package or unit" or 2 units of account "per kilogramme of gross weight of the goods lost or damaged".

The Commercial Court held in favor of the respondent (please see our newsletter "*How to Determine "Per Package or Unit" Limitation under the Hague-Visby Rules?*" for details) and the appellant appealed. The appeal was dismissed by the Court of Appeal. The Court of Appeal decided on three issues:

1. Is liability limited by reference to Article IV rule 5 of the Hague Rules or Article IV rule 5(c) of the Hague-Visby Rules?

   The Court of Appeal held that the contract of carriage at its inception provides for the issue of a bill of lading on demand, the contract of carriage is "covered by a bill of lading" within the meaning of Article I(b) of the Hague-Visby Rules. Furthermore, since the contract provided by implication for the issue of such a bill of lading on demand, the requirements of section 1(4) of the Carriage of Goods by Sea Act 1971 ("**the 1971 Act**") are clearly satisfied.

   The Hague-Visby Rules had the force of law in the present case under section 1(2) of the 1971 Act. It does not follow that liability is limited by Article IV rule 5 of the Hague-Visby Rules, because the appellant may have assumed greater liability or because damage occurred after the

sea transit, so that the appellant can limit by reference to the Maersk Terms.

The Court of Appeal held that the Hague-Visby Rules apply compulsorily and have the force of law in the present case. The provisions of Article X and Article IV rule 5(c) must be interpreted in a manner which gives effect to that compulsory application and does not frustrate it.

2. Are the individual frozen tuna loins or the containers the relevant packages or units for the purposes of limitation under Article IV rule 5(c) of the Hague-Visby Rules?

   The Court of Appeal held that the words: "the number of packages or units enumerated" mean no more than the specifying of the number of packages or units in words or numbers. "Enumeration" does not as a matter of language entail some further description in the bill of lading as to how the packages or units are actually packed in the container. Also, the words "as packed" are simply descriptive, in the sense that they are stating no more than that the enumerated number of items have been packed in the container. The words "enumeration…as packed" do not justify the additional requirement for which the appellant contends, that the bill of lading has to go on to specify how the packages and units have been packed in the container. There was sufficient enumeration of the frozen tuna loins in the waybills that each loin was a separate "unit" for the purposes of limitation under Article IV rule 5(c).

3. If the Hague Rules apply, are the individual pieces of tuna or the containers the relevant "package or unit" under Article IV rule 5?

   This Issue would only arise if the Hague Rules rather than the Hague-Visby Rules applied. Therefore, this Issue is academic but the Court of Appeal still dealt with it.

   The Court of Appeal held that "unit" can be regarded as synonymous with a "piece", they are both descriptive of a physical item of cargo which is not a "package", because, for example, it is incapable of being packaged or is not in fact packaged. This definition is clearly wide enough to encompass the frozen tuna loins stuffed in the containers without further packaging.

Seatrade Group N.V. v Hakan Agro D.M.C.

[2018] EWHC 654 (Comm)

This is an appeal by the Owners of the "Aconcagua Bay" ("**the Vessel**") under section 69 of the Arbitration Act 1996. The question of law considered by the Court is whether the warranty in a voyage charterparty that a berth is "always accessible" means that the vessel is always able not only to enter but also to leave the berth. In an Award dated 23 February 2017, Mr Ian Kinnell QC as Umpire found that a warranty in those terms referred to entry and not to departure. The Court allowed the appeal and found those terms referred to both entry and departure.

The charter of the Vessel was for carriage from the US Gulf to the Republic of Congo and Angola. The charterparty, on an amended GENCON 1994 form, provided:

> *"10. Loading port or place (Cl.1)*
>
> *1 good safe berth always afloat always accessible 1-2 good safe ports in the USG in Charterers' option …"*

Whilst the Vessel was loading, a bridge and lock were damaged. As a result the Vessel was unable to use a channel so as to be able to leave the berth until 14 days after she had completed loading. The Owners claimed damages for detention from the Charterers for the period of delay.

In interpreting a contract the Court considered the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been available to the parties would have understood them to be using the language in the contract to mean; the Court focusses on the meaning of the words in their documentary, factual and commercial context.

In an arbitration award published at London Arbitration 11/97 (1997) LMLN 463 the term "always accessible" was found not to extend to leaving the berth The tribunal looked at the Voylayrules 93, finding an inference from the absence of reference to a ship leaving a berth or port. But Commencement of Laytime (2006) stated that the tribunal in 11/97 did not have the benefit of seeing the Baltic Code 2003 (and 2007, and see also 2014) which specified that "Where the charterer undertakes the berth will be 'always accessible', he additionally undertakes that the vessel will be able to depart safely from the berth without delay or at any time during or on completion of loading or discharge".

The Umpire in the present case also looked at English dictionary definitions. *Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd* [1987] 1 Lloyd's Rep 48 looked to the shorter Oxford English Dictionary for the meaning of "access" as "way or means of approach" and "accessibility" as "capable of being approached". Yet if regard is had to a wider selection of dictionaries, then capable of "use" or usability, which can include departure, will be found among the available meanings of accessibility.

The Court also considered that as full term used is "always afloat always accessible" (sometimes elsewhere "always afloat, always accessible" and sometimes "always accessible, always afloat"), it is easier to recognise the point about continuity. "Always afloat" refers (as the Charterers accepted) to the duration of the period alongside or in berth. "Always accessible" refers at least to entry into that berth.

The Court held that where commercial parties have addressed the question of the accessibility of a berth, there is no basis for a conclusion that they should be taken to have addressed entry alone. The Court stated that London Arbitration 11/97 has not always been free from question when commentaries refer to it and held that the Umpire was not correct in law.

The Court also commented that the term "reachable on arrival" is to be found in some charterparties. A number of textbooks treat "reachable on arrival" and "always accessible" as synonymous or as to much the same effect. The Court held that that the terms are to the same effect when arrival is considered. Both these provisions provided that the vessel in question would be able to proceed directly to the designated loading (or discharging) berth either on arrival or at the opening of the laycan spread.

What are the responsibilities of a port owner? (II)

As mentioned in our previous issue of *The Voyager*, due to the development of international trade, the ports sector becomes an essential part of the global economy. As such, the Ports Good Governance Guidance (the "**Guidance**") published in March 2018 aims to set out the good governance guidance for the Statutory Harbour Authorities which is also relevant to all organisations that own or manage harbour and port facilities.

We have discussed the four major aspects that a port owner should take into account as recommended by the Guidance in our last issue, including leadership, board effectiveness, accountability and remuneration. In this article, we continue to explore the sections of "stakeholder engagement" and "provision of information" recommended by the Guidance.

What is effective stakeholder engagement?

Effective engagement with stakeholders is essential to maintain or improve the understanding of the harbour by its stakeholders. The Guidance emphasises that it is important to understand the stakeholder's views from their perspective and to engage effectively and openly with a wide range of stakeholders having interests in the harbour. It is also crucial to identify all the relevant stakeholders and take into account their different voice and views.

The Guidance reminds the port facilities owner that ports and harbours should have a significant effect on their locality. In particular, ports are places of employment or locations of other commercial and business activities, and thus play a significant role in the economy even at the national level.

The Guidance further refers to the relevant company law which imposes the obligations on all companies in respect of corporate governance (such as the Companies Ordinance (Cap. 622) in Hong Kong and the Companies Act 2006 in the UK). In general, the port facilities owner should promote the success of their respective company, and in doing so they should have regard to the interests of the stakeholders, including but not limited to the interests of their employees, suppliers, customers and others, etc., as well as the potential impacts of their business operations on the community and environment.

The Guidance considers that there are different types of stakeholders. Normally they would be local communities, harbour users (commercial and leisure) and their representative organisations, local economy (including but not limited to suppliers and government, etc.) and employees. It is important to note that different stakeholders possess different views and interests on a particular matter from their own perspectives, which would be obviously different. A port facilities owner may develop stakeholder engagement activities and functions as part of corporate social responsibility programmes.

A port facilities owner should also consider how to effectively communicate the relevant information

to its stakeholders. The Guidance identifies that there are certain approaches to provide information to and develop relationships with stakeholders such as using websites with regularly updated information. In particular, information as to how to communicate with the port facilities owner and lodge complaints should be clearly provided. A port facilities owner may also use social media and organise public forums and meetings to engage in direct communications with its stakeholders. Other means such as newsletters, consultation on projects and community engagement programmes and partnerships may also be considered.

How to provide information?

The provision of information about the performance and activities of a port to its shareholders, stakeholders and other interested parties is one of the essential elements of good governance. The Guidance provides that it is a good practice to make information available and operating in a transparent way.

What the Guidance refers to is the provision of annual accounts and reports in line with the requirements of the relevant companies law. In general, a port facilities owner should operate in an open, transparent and accountable way, allowing a range of information to the relevant stakeholders in respect of the port's organisation and activities. Having said that, the Guidance also acknowledges the importance of maintaining confidentiality and business secrets. As such, the purpose of providing the annual report is to present a fair, balanced and understandable assessment of the port's position and prospects.

In addition, port facilities owners should establish a formal procedure to handle complaints lodged by their respective stakeholders. In particular, it is important to set out the way as to how to lodge the complaints.

Further, the preparation of the accounting reports should be made in accordance with the acceptable international standards in all material respects so as to give a true and fair view in respect of the port's operation. An annual report should include a Directors' report, setting out whether the company considers the annual report and accounts are fair, balanced and understandable and provides the information necessary for stakeholders to assess the port's position and performance, business model and strategy. Furthermore, there should be an auditor's statement setting out its reporting responsibilities.

In terms of the transparency of the information provided to the stakeholders, all port owners are encouraged by the Guidance to consider meeting reasonable and practical requests for information from stakeholders, though port owners are not expected to provide commercially sensitive information or to engage in disproportionate production of information for the purpose of meeting the request. As mentioned previously, port owners should establish a formal system to consider any complaints about their activities by stakeholders, and such a system should be made transparent. In particular, port owners should set out clearly the information about how and where to lodge a complaint through such a system through its website or other publication. More importantly, in order to

enhance the effective communication with the stakeholders, the Guidance recommends that port owners should be able to respond fully and in writing to any complaints made in an appropriate timescale or otherwise any complaint system would simply be undesirable and serve no purpose.

Concluding Remarks

The above are only some aspects of the issues discussed in the Guidance to which the port facilities owner should pay attention. There are other issues in the Guidance which should be taken into account will be discussed in our next issue. In any event, readers should bear in mind that the Guidance itself does not constitute an exhaustive list of what should be done in order to establish an effective port business.

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