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Latest Development of Shipping Case Laws in Hong Kong – A Comparative Approach

Lianjun Li[1] and Cheryl Yu[2]

ABSTRACT

Since the implementation of the "One Country, Two Systems" policy in 1997, cooperation between Hong Kong and Mainland China, at both the governmental or commercial levels, has drastically increased over the years. It goes without saying that such a phenomenon is also applicable to the maritime industry. While enhanced cooperation would most definitely drive the maritime industry to newer heights, it also poses challenges for maritime lawyers given the very different legal systems and developments. This essay aims to explore the recent developments in Hong Kong maritime law by examining three recent decision from the Hong Kong Courts, followed by a critical comparison of the approaches taken by Hong Kong and the PRC Courts. It is hoped that this essay sheds light on the similarities and differences in the development of shipping law in the two jurisdictions, contributing to the legal scholarship in the Greater Bay Area.

1. INTRODUCTION

[1] Mr. Lianjun Li (M.Sc., LLM, FCIArb, FHKIArb) qualified as a solicitor in Hong Kong, England and Wales and is a senior partner of Reed Smith Richards Butler. He is a fellow of the Chartered Institute of Arbitrators, a panel arbitrator in many leading arbitration institutions including the HKIAC, HKMAG, CIETAC, CMAC, SCMA, SIAC, SAIC, Law Society of Hong Kong, Arbitration Centre Across the Straits, a Supporting Member of London Maritime Arbitrators Association ("**LMAA**") and LMAA Supporting Members Liaison Committee (Asia Pacific), and a member of the SCMA Procedure Committee, Hong Kong Maritime and Port Board, and The Law Society of Hong Kong - Transportation and Logistics Committee. He is also a Council Member of China Maritime Law Association and a visiting professor to the Dalian Maritime University, Korea University and Shanghai Maritime University. He has extensive experience in dealing with legal issues and disputes relating to international trade, commercial transactions, transportation, shipping, ship finance and sale and purchase, cross-border investments and international commercial and shipping litigation and arbitration. Email: lianjun.li@reedsmith.com; Telephone: (852) 2507 9857; Mobile: (852) 9835 5039 / (86) 139 2382 9039. He would like to thank Thomas Leung and Leah Lei for their assistance in the relevant researches for this article.

[2] Ms. Cheryl Yu (LLB, LLM, ACIArb) is a Counsel (Registered Foreign Lawyer (PRC)) of the Litigation Department, Reed Smith Richards Butler. She is a supporting member of LMAA, Associate Member of the Chartered Institute of Arbitrators, Member of Shanghai Bar Association, China Maritime Law Association, Hong Kong Institute of Arbitrators and Hong Kong Maritime Arbitration Group. She is specialized in transnational litigation and international arbitration covering all areas of commercial and maritime disputes and regularly represents clients in London, Hong Kong and Singapore arbitrations administered by ad hoc or institutional rules (such as LMAA/ HKIAC/CITEC HK/SIAC/FOSFA/ICA rules). Email: cheryl.yu@reedsmith.com; Telephone: (852) 2507 9819; Mobile: (852) 5320 0801/ (86) 130 5215 0144.

Hong Kong has always been an international shipping centre. According to the Baltic International Shipping Centre Development Index in 2020, Hong Kong is one of the top four international shipping centres, ranked only after Singapore, London and Shanghai.[3] The Hong Kong Shipping Register has ranked 4th in the world, providing quality services to over 2,500 vessels with a gross tonnage over 110 million.[4] Indeed, BIMCO has included Hong Kong law and arbitration as one of the four standard arbitration options in its standard law and arbitration clause.[5] As more and more shipping contracts and disputes are governed by Hong Kong law, the development of maritime law in Hong Kong has become increasingly important.

Being the southern gateway to China, Hong Kong has always shared close socio-economic ties with Mainland China. In 2019, the State Council published the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (the "**GBA**"), seeking to "*consolidate and enhance Hong Kong's status as an international maritime centre*" by enhancing collaboration between Hong Kong and other shipping ports in the GBA.[6] With the favourable policies by the central government, it is foreseeable that there will be more opportunities for cooperation within the GBA, both at the governmental and commercial levels, in the shipping industry. This brings new opportunities, as well as new challenges to maritime law practitioners. Under the constitutional framework of "One Country, Two Systems" in the Basic Law, Hong Kong is a common law jurisdiction, while civil law is used in Mainland China. It is clear that a GBA shipping lawyer has to familiarise himself with both areas of law.

Henceforth, this article explores the recent development of shipping case laws in Hong Kong, with reference to the relevant legal positions under PRC law. This article discusses legal development in three areas, namely **(1)** limitation of liability; **(2)** jurisdictional challenge; and **(3)** incorporation of arbitration agreements into the bill of lading, with corresponding references to the three recent important maritime cases decided in the Hong Kong Courts: *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd* ("***Perusahaan***");[7] *Bright Shipping Ltd v Changhong Group (HK) Ltd ("**Bright Shipping**")*;[8] and *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* ("***OCBC***").[9]

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[3] Michael Grinter, 'Hong Kong Shipping Centre drops two places to fourth on Xinhua- Baltic ISCD Index' (*The Hong Kong Maritime Hub*, 13 July 2020) <http://www.hongkongmaritimehub.com/hong-kong-shipping-centre-drops-two-places-to-fourth-on-xinhua-baltic-iscd-index/> accessed 21 July 2021.

[4] Hong Kong Maritime and Port Board, 'Reputable Shipping Register' <https://www.hkmpb.gov.hk/publications/04.pdf > accessed 21 July 2021.

[5] Grant Hunter, 'BIMCO adds Hong Kong to New Shortened Arbitration Clause' (*BIMCO*, 6 October 2020) < https://www.bimco.org/news/priority-news/20201006-bimco-adds-hong-kong-to-new-shortened-arbitration-clause > accessed 21 July 2021.

[6] English translation available at <https://www.bayarea.gov.hk/filemanager/en/share/pdf/Outline_Development_Plan.pdf>.

[7] *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd* [2021] HKCFI 396.

[8] *Bright Shipping Ltd v Changhong Group (HK) Ltd* [2019] HKCA 1062, [2019] 5 HKLRD 30.

[9] *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* [2020] HKCFI 375.

For each of the areas, the disputed area is first introduced, followed by a critical examination of the relevant case. The relevant position under the PRC law is then compared and contrasted.

2. LIMITATION OF LIABILITY

2.1. Overview

On 1 December 1986, the Convention on Limitation of Liability for Maritime Claims 1976 ("**LLMC 1976**") came into force, superseding its predecessor signed in 1957.[10] The LLMC 1976 was convened in light of the desirability of having a set of uniform and harmonious rules in terms of limitation of liability in maritime claims. In fact, in *The Cape Bari*,[11] the LLMC 1976 was seen as a radical change of position since it "*confers*" statutory entitlement on ship-owners to limit their liability in the listed categories under Article 2 of the LLMC 1976, regardless of what basis the claim may be on.[12] Indeed, the LLMC 1976 was the first of its kind in attempting to unify all the claims.

However, with that said, the LLMC 1976 appears to be conservative in terms of limitation of liability concerning the removal, destruction, or rendering harmless of a ship that may be sunk, wrecked, stranded, or abandoned.[13] Under Article 2(2), these claims are not subject to limitation save to the extent that they relate to remuneration under a contract with the person liable. In addition, under Article 18, any state may reserve the right to exclude the limitation for shipwreck removal.[14] In fact, according to the International Marine Organisation ("**IMO**"), 15 states have reserved their rights to exclude the provisions under Article 2(1)(d).

Article 2 of the LLMC 1976 provides that:

> "*1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability—*
>
> *(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom*
> *…*

[10] Admiralty and Maritime Law Guide, 'Convention on Limitation of Liability for Maritime Claims, 1976' < http://www.admiraltylawguide.com/conven/limitation1976.html> (accessed 26 July 2021).
[11] *The Cape Bari* [2017] 1 All ER (Comm) 189.
[12] Ibid, [13].
[13] The LLMC 1976 (n 9), Article 2(1)(d).
[14] A convenient label for describing the claims under Article 2(1)(d).

> *(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;*
>
> *...*
>
> *2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.*"

The Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) (the "**MSO**"), incorporated the LLMC 1976 into the laws of Hong Kong. The relevant section in the MSO is Section 12, which provides that:

> "*Subject to this Part [Part III], the provisions of [LLMC 1976] set out in Schedule 2 ... have the force of law in Hong Kong*."

From the clear wordings "*subject to this Part*", it is evident that the LLMC 1976 will have the force of law in Hong Kong to the extent that is permitted under Part III of the MSO. Under section 15(1)(a) in Part III of the MSO , the Chief Executive may set up and manage a fund to be used for shipwreck removal claims under Article 2(1)(d) of the LLMC 1976.[15] In addition, section 15(3) of the MSO provides that Article 2(1)(d) of the LLMC 1976 shall not apply unless an order has been made under section 15(1) of MSO.

Another provision that is of relevance is Article 18 of the LLMC 1976, although it has not been incorporated into Schedule 2 given Hong Kong is not a "*State*". Article 18 provides that any state can reserve the right to exclude the application of Article 2(1)(d).

The subparagraphs of Article 2 of the LLMC 1976 are drafted in broad terms. Difficulties arise if a claim has the potential to fall under both subparagraphs (or heads) of Article 2 but limitation of liability can only be made under one of the subparagraph. Recently, the opportunity to review this issue arose in the decision of the Hong Kong Court of First Instance ("**CFI**") in *Perusahaan*.

2.2. *Perusahaan*

2.2.1. Facts

On 13 January 2019, *MV Antea*, owned by the plaintiff, collided with *MV Star Centurion*, owned by Trevaskis Limited ("**T Ltd**"). As a result of the collision, *MV Star Centurion* sank. On 24

[15] Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434), section 15(1)(a).

January 2019, the Indonesian Ministry of transportation issued a Wreck Removal Order requiring T Ltd to raise, remove and render harmless the wreck. Salvors are engaged under various contracts to remove the pollutants and the shipwreck. The Plaintiff accepted that *MV Antea* was 100% to blame for the collision.

On 10 October 2019, the plaintiff commenced an action against T Ltd and all other persons claiming or being entitled to claim damages arising from the collision to limit their liability in respect of the collision. On 28 April 2020, the parties entered into a settlement agreement and a limitation decree was granted by consent on 6 May 2020. The plaintiff later constituted a limitation fund by paying HK$175,062,000 into the court.

On 22 June 2020, the defendants sought a declaration that the plaintiff's shipwreck removal claims are not subject to limitations under Article 2 of the LLMC 1976. The declaration was likely sought because the quantum claimed was fast approaching the size of the limitation fund constituted by the plaintiff.[16]

2.2.2. Issues

The defendants contended that section 15(3) of the MSO, read in conjunction with section 12 of the MSO, suspended the operation of Article 2(1)(d) of the LLMC 1976 from having the force of law in Hong Kong. The clear intention of the legislature was to prevent all shipwreck removal claims from being subjected to limitation.

Conversely, the plaintiff argued that the claim was not a shipwreck removal claim but was instead a claim for consequential loss as a result of the collision constituting of shipwreck removal costs. In turn, such a claim should fall within Article 2(1)(a) and not under Article 2(1)(d).

2.2.3. Decision

Anthony Chan J of the CFI agreed with the defendants' formulation and granted the declaration in favor of the defendants.

Chan J adopted the interpretation principles in *Chan Ka Lam v Country and Marine Parks Authority*[17] and in particular to the principles of interpretation regarding the LLMC 1976 in *The Ocean Victory*.[18] His Lordship, in quoting Lord Clarke in *Ocean Victory*,[19] held that the duty of the court was to ascertain the ordinary meaning of the words used, bearing in mind the context

[16] *Perusahaan* (n 6) [12]-[13].
[17] *Chan Ka Lam v Country and Marine Parks Authority* [2020] HKCFA 33.
[18] *The Ocean Victory* [2017] 1 WLR 1793.
[19] Ibid, [74].

and the purpose of the Convention[20]. Moreover, the court may have recourse to the travaux préparatoires and the circumstances of the conclusion of the Convention for the purpose of ascertaining the ordinary meaning of the words.[21]

Chan J found that Article 2 of the LLMC 1976 was formulated in very wide terms (e.g. "*whatever the basis of liability may be*" under paragraph 1), and was no doubt intended to be extensive in its application. Nonetheless, Article 2(1)(d) of the LLMC 1976 specifically provided for shipwreck removal claims. His Lordship opined that the general provisions under Article 2(1)(a) of the LLMC 1976 should make way for the more specific Article 2(1)(d) of the LLMC 1976 under the maxim of *generalia specialibus non derogant* (i.e. general things do not derogate from specific things).[22]

In addition, Chan J held that the fact that Article 18 of the LLMC 1976 allowed State Parties to reserve their right to exclude claims under Article 2(1)(d) and (e) but not claims under other sub-paragraphs only served to confirm that Article 2(1)(d) should be separately considered.[23] Chan J also held that Hong Kong had opted out of Article 2(1)(d) of the LLMC 1976 until an order of the Chief Executive has been made in accordance to section 15(1) of the MSO.[24]

Chan J thought that the plaintiff's argument that the LLMC 1976 did not limit shipwreck removal claims based on recourse was misguided. The wide language used by Article 2 clearly evidenced an intention to abandon the distinction between a shipwreck removal claim based on recourse and one based on a statutory right.[25]

Chan J also did not find the travaux préparatoires of much assistance in this particular instance. In fact, his Lordship found that the non-adoption of the suggestion to accord public authorities differential treatment in terms of shipwreck removal claim fortified the proposition that Article 2(1)(d) was designated to cover all shipwreck removal claims.[26]

2.2.4. Discussion

Perusahaan is a first instance decision and is subject to appeal to the Hong Kong Court of Appeal ("**CA**"). The court's decision rests on its construction of the scope of Article 2(1)(d) and the following can be noted in terms of the reasoning.

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[20] *Perusahaan* (n 4), [16].
[21] Ibid, [16].
[22] Ibid, [34].
[23] Ibid, [36].
[24] Ibid, [37].
[25] Ibid, [44].
[26] Ibid, [48].

At the outset, it may be said that Chan J's use of the maxim *generalia specialibus non derogant* is misguided since it is arguable that Article 2(1)(a) and 2(1)(d) are not actually "in conflict" with each other. It may be said that the general wordings of head (a) does not detract from the specific provisions of head (d), where his Lordship erred in saying the head (d) "*specifically provides for*" the claims for wreck removal. In the absence of express provisions in the LLMC 1976 on the consequences for claims that may "overlap", it is arguable that the suspension under section 15 of the MSO was only meant for claims that fall exclusively within head (d).

Chan J may also have erred in holding cases before the LLMC 1976 as "*of little assistance*"[27]. Notwithstanding Lord Clarke's judgement,[28] it is arguable that there are no "radical changes" to the position in relation to the ship owner's limitation of liability for shipwreck removal claims. In reality, other than the increase in limits, all of the changes were in the ship owner's favour and that the changes were in no sense "radical". In fact, the elements of limitation in the LLMC 1976 are similar to its predecessor, namely **(1)** limitation of liability for claims in relation to shipwreck removal;[29] **(2)** the ability for State parties to reserve in relation to said limitation;[30] and **(3)** the potential overlapping nature of the heads of limitation. In such a contention, it follows that cases like *The Putbus*[31] should be considered. It can be seen that the position under the LLMC 1957 was to allow the limitation of liability for ship-owners for the shipwreck removal components of property loss and damage claims.

Limitation of said claims under LLMC 1957 was permitted on the basis that it falls within head (a) (similar to head (a) of the LLMC 1976) which is not mutually exclusive with head (d), contrary to Chan J's understanding that the right to limit was dependent upon the cause of action. Hence, it is arguable that the addition of the wordings "*whatever the basis of liability may be*" in the new LLMC 1976 should not bar limitations to non-statutory claims.

2.2.5 Impact of *Perusahaan*

Giving the foregoing, despite the decision in *Perusahaan,* the law regarding the limitation of liability for shipwreck removal claims may not be settled under Hong Kong law, as the decision is subject to appeal. The decision was based on the interpretation of the MSO and the ascertainment of its legislative intention, though it may be argued that the intention of the legislature is only to ensure claims from government entities for shipwreck removal would remain unlimited, instead of imposing a blanket ban on all non-governmental claims.

2.3. Approaches in Other Common Law Jurisdictions

[27] Ibid, [42].
[28] Ibid, [41].
[29] The LLMC 1957, Article 1(1)(c).
[30] The LLMC 1957, under "Protocol of Signature".
[31] *The Putbus* [1969] P 136.

It may also be useful here to compare the approach taken by other common law jurisdictions on this matter.

2.3.1. Australia

For Australia, it has ratified the LLMC 1976 via the Limitation of Liability for Maritime Claims Act 1989 ("**LLMCA**"). However, shipwreck removal claims have been specifically excluded under section 6 of the LLMCA. Shipwreck removal claims remains unlimited in Australia.

It is also unlikely that shipwreck removal claims that "overlap" in different sub-paragraphs under Article 2 of the LLMC 1976 would justify a claim under Article 2(1)(a) or indeed any other sub-paragraphs. In an earlier case *The Tiruna*,[32] the majority considered the effect of Article 1(1)(c) of the LLMC 1957 (a similarly formulated provision to Article 2(1)(d)) which was expressly excluded under section 333 of the Navigation Act 1912. McPherson J in his Lordship's orbiter opined that the only rational explanation for such an exclusion was to exclude all wreck removal claims that fall within the ambit of the provision to be subjected to limitation.[33]

Similarly, in a recent case, Rares J, in his Lordship's orbiter in *Atlasnavios Navegaco, Lda v The Ship "Xin Tai Hai" (No. 2)*,[34] commented on the matter of the "overlapping" claims under Article 2 of the LLMC 1976. His Lordship opined that if "overlapping" shipwreck removal claims are to fall within Article 2(1)(a) of the LLMC 1976, it would "*give Art[icle] 2(1)(d) very little work to do when it expressly relates to the claims in respect of wreck removal*". His Lordship also noted that there must be good policy reasons to allow state parties to exclude the claims under Article 2(1)(d) from being subject to limitation. Hence, there were good reasons for that exclusion to mean what is said.

It can be seen that the Courts in Australia took a similar approach to that in Hong Kong in constructing the relevant provisions. The major difference is that Australia expressly excluded Article 2(1)(d) of the LLMC 1976 from having the force of law as against having provisions to provide for the setting up of a limitation fund.

2.3.2. The United Kingdom

As for the United Kingdom, the LLMC 1976 is given the force of law under section 185(1) of the Merchant Shipping Act 1995 ("**MSA**"). Article 2(1)(d) of the LLMC 1976 is excluded by the effect of section 185(2) of the MSA, where it states that the LLMC 1976 shall have effect subject to the provisions of Part II of Schedule 7 of MSA. Paragraph 3 of Part II of Schedule 7

[32] *The Tiruna* [1987] 2 Lloyd's Rep 666.
[33] Ibid, p 688.
[34] *Atlasnavios Navegaco, Lda v The Ship "Xin Tai Hai" (No. 2)* (2012) 301 ALR 357, [139].

of MSA ("**Paragraph 3**") provides that Article 2(1)(d) shall not apply unless the Secretary of State makes an order for the setting up and management of a limitation fund. In fact, this regime is similar to that of the operation of section 15(3) of MSO in Hong Kong, where the effect of Article 2(1)(d) is suspended until a Limitation Fund is set up.

Nonetheless, in the absence of cases like *Perusahaan* in the United Kingdom, it is uncertain as to whether Paragraph 3 would unify the distinction between wreck removal claims based on recourse (just like the case in *The Putbus*[35]) and claims based on statutory power in relation to limitation of liability. There have been debates in the academic realm with regards to the distinction and the balance seems to be tipping in favor of the unification of the two claims. In *Limitation of Liability for Maritime Claims*[36], the authors recognized that there are two-sided arguments to this particular point. Arguments that contend recourse claims should fall within the more general provisions under Article 2(1) are heavily based on the policy reasons behind Paragraph 3, which is to prevent harbor authorities from using its bill for shipwreck removals. They contend that such policy considerations ought not to have an application to shipwreck removal claims against third parties. On the other hand, arguments for unification are similar to that presented in *Perusahaan*[37], which is in essence the application of the maxim *generalia specialibus non derogant*. It is also argued that as a result of the introductory paragraph to Article 2 (which states that the listed claims are to be subjected to limitation "*whatever the basis of liability*" may be), the UK may by its reservation under Paragraph 3 "*inadvertently*" taken all of the claims related to shipwreck removal (regardless of its basis) out of the subject of limitation.

It should be noted that the distinction is still up in the air pending a determination from the English Courts. It remains to be seen as to what approach the English court will take.

2.3.3. Australia

For Singapore, the LLMC 1976 has been given the force of law in Singapore under section 136 of the Merchant Shipping Act with reservation as to Article 2(1)(d) and (e) of the LLMC 1976. Nonetheless, section 12 of the Merchant Shipping (Wreck Removal) Act 2017 has given both Articles the force of law. Section 12 provides that if a registered owner of a ship incurs liability for the cost incurred by the Director of Marine for the locating, marking, and removal of wrecks, he is entitled to limit his liability as if Article 2(1)(d) and (e) has the effect of law. In short, shipwreck removal claims are now subject to limitation under the laws of Singapore if the costs are incurred by the Director of Marine.

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[35] *The Putbus* (n 30).
[36] Partick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, 2005, Informa Law) Chapter 3.
[37] *Perusahaan* (n 4).

Nonetheless, the question of whether the shipwreck removal costs incurred by parties other than the Director of Marine can be limited is still unclear. Possible guidance may be found in the Singaporean Supreme Court case *The Seaway*[38]*,* where the Court followed the approach in *The Putbus* [39] and found that the provisions under Article 1 of the 1956 Convention (analogous to Article 2 of the LLMC 1976) are not mutually exclusive. However, it should be noted that *The Seaway*[40] was concerned with the 1956 Convention, which may, in light of the new Convention and the new domestic provisions, cease to be good law in Singapore. The position remains unclear as to whether shipwreck removal costs incurred by parties other than the Director of Marine would be limited and will only be clarified at a later date when the opportunity presents itself.

2.4. The PRC Approach

Although PRC has not ratified the LLMC 1976, there are nonetheless similar provisions in Chapter XI (Articles 204 to 215) of the Chinese Maritime Code 1993 ("**CMC**") and Chinese Special Maritime Procedure Law ("**MPL**"). In addition to the provisions under the CMC and MPL, the Supreme People's Court of the People's Republic of China also issued several judicial interpretations in this respect, including the Several Provisions on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims ("**Chinese Interpretation**"), which was entered into force on 15 September 2010.

Originally, there are no express provisions in the CMC that provide for the limitation of shipwreck removal claims. In turn, uncertainty and confusion were caused in relation to whether shipwreck removal claims would be subject to the limitation in PRC. The Supreme People's Court, in the Chinese Interpretation, clarified that shipwreck removal claims are not included in Article 207 of the CMC and hence not subject to limitation.[41] Nonetheless, if an action is brought against the other colliding ship in respect of the shipwreck removal, the ship-owner of the other colliding ship will be entitled to raise the defense of limitation of liability in accordance with Article 207 of the CMC.[42]

[*海商法第二百零七条规定的可以限制赔偿责任的海事赔偿请求不包括因沉没、遇难、搁浅或者被弃船舶的起浮、清除、拆毁或者使之无害提起的索赔，或者因船上货物的清除、拆毁或者使之无害提起的索赔。*

[38] *The Seaway* [2004] SGCA 57.
[39] *The Putbus* (n 4).
[40] *The Seaway* (n 37).
[41] Several Provisions on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims, Article 17.
[42] Ibid.

由于船舶碰撞致使责任人遭受前款规定的索赔，责任人就因此产生的损失向对方船舶追偿时，被请求人主张依据海商法第二百零七条的规定限制赔偿责任的，人民法院应予支持。]

The Chinese Interpretation and the CMC have recently be put in action in the case of *Shanghai Shengming Investment Group Co., Ltd v Provence Ship-owner 2008-1 Ltd for application of constitution of Limitation fund*[43]. The Supreme People's Court confirmed that the original legislative intent of Article 207 of the CMC was to exclude said shipwreck removal claims from being subject to limitation.

To conclude, the Chinese system excludes limitation of liability in relation to shipwreck removal claims altogether under the domestic legislation of the CMC. Nonetheless, if a recovery action is made against the other colliding vessel for these expenses, the other colliding vessel can limit liability under PRC Law, which is different from the position in Hong Kong.

2.5. Comments

It seems that the exclusion of limitation of liability in relation to shipwreck removal is based upon the policy reason for keeping the sea and ports safe, and to ensure that governmental expense spent on such is not limited. It is unclear whether the legislature of Hong Kong, in adopting the LLMC 1976, intends to apply the limitation to claims by other parties as well. There are a few key points and approaches which Hong Kong may consider for the future. It may well be that the wordings of section 15 had inadvertently barred all shipwreck removal claims from limitation, just as the case may be in the UK, and hence if this is not the desired effect, the legislature should rectify the situation through legislation. Hong Kong can also consider either rectifying Article 2(1)(d) just as Singapore has to help clear the uncertainty.

3. JURISDICTIONAL CHALLENGE

3.1. Overview

The test for *forum non conveniens*, whereby a court acknowledges that another forum or court is more appropriate and thereby sends the case to such a forum or court, is recently stated by the Hong Kong court by reference to *Spiliada Maritime Corp v Cansulex Ltd*.[44] The *Spiliada* principles are as follows:

1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in

[43] *Shanghai Shengming Investment Group Co., Ltd v Provence Ship-owner 2008-1 Ltd for application of constitution of Limitation fund* (2018) SPC Min Zai No. 370.
[44] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

which the action may be tried more suitably for the interests of all the parties and the ends of justice.

2. In order to answer this question, the applicant for the stay has to establish two elements. First, Hong Kong is not the natural or appropriate forum, which means the forum has the most real and substantial connection with the action, and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong ("**Stage 1 Analysis**").

3. After the applicant establishes both of these two elements, the plaintiff in the Hong Kong proceedings has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong ("**Stage 2 Analysis**").

4. If the plaintiff can establish the Stage 2 Analysis, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not necessarily be fatal to the applicant for the stay if he can establish to the court's satisfaction that substantial justice will be done in the available appropriate forum.

The CA also noted that it may only interfere with the exercise of the first instance judge's discretion in accordance with the principles in *Hadmor Productions Ltd v Hamilton*[45]. The CA can only interfere in three cases, namely:

1. where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised;

2. where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or

3. where his decision is plainly wrong.

Both of these principles are applied to the case of *Bright Shipping Ltd*, where the Hong Kong court has to decide a jurisdictional challenge for a ship collision case.

3.2. *Bright Shipping Ltd*

3.2.1 Facts

[45] *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 (HL).

Bright Shipping Ltd is an inter-ship action in Hong Kong arising from the collision of a vessel and a tanker. On 6 January 2018, a collision took place between the defendant's cargo vessel, *MV CF Crystal* ("**Crystal"**), and the plaintiff's tanker, *MT Sanchi* ("**Sanchi"**) in the East China Sea. Both vessels caught fire and Sanchi exploded immediately upon collision. Crystal managed to reverse her engine and escape the fire, while Sanchi eventually sunk on 14 January 2018. None of the officers or crew in Sanchi survived the accident. The accident caused pollution in the form of split bunkers and natural gas condensate. The pollutant made landfall in the PRC and Japan.

Crystal flied the Hong Kong flag upon collision and her port of registry was Hong Kong. Her crew were all Chinese nationals. She was managed by Changfeng Shipping Holding Ltd, a company incorporated in Hong Kong. Sanchi flied the Panamanian flag. Her crew was Iranian and Bangladeshi. She was managed by an Iranian company, National Iranian Tanker Co ("**NITC**"), which has a representative office in Shanghai.

The accident took place at a location about 125 nautical miles from Changjiang Kou Light Ship in the East China Sea, which is outside the territorial waters of the People's Republic of PRC ("**PRC**"). Yet it was within PRC's exclusive economic zone ("**EEZ**") pursuant to the United Nations Convention on the Law of the Sea ("**UNCLOS**") to which the PRC acceded in 1997. Article 3 of UNCLOS provides that the breadth of the territorial sea does not exceed 12 nautical miles. Article 55 of UNCLOS defines the EEZ as an area beyond and adjacent to the territorial sea, while Article 57 provides that the breadth of the EEZ shall not extend beyond 200 nautical miles. It also appeared that the point of collision lied within the EEZ of Korea and Japan.

Different actions, including inter-ship action, cargo action, limitation of liability issue, and crew claims have been commenced by the parties involved in the accident. An *in personam* collection action was brought by Bright Shipping against Changhong in Hong Kong ("**Hong Kong inter-ship action**"). Changhong commenced legal proceedings against Bright Shipping and NITIC in the Shanghai Maritime Court ("**SMC**"). Changhong also applied to establish in the SMC two limitation funds, one for personal injury and one for property. Bright Shipping had not submitted to the jurisdiction of the Mainland court in any of the proceedings

3.2.2. Issues

In the Hong Kong inter-ship action, an application was brought by Changhong for a stay of proceedings on the ground of *forum non conveniens* in favour of proceedings in the SMC. The application has been unsuccessful in both the CFI (before Chan J) and the CA (before Susan Kwan VP and Aarif Barma JA). The Hong Kong Court of Final Appeal ("**CFA**") has refused leave to appeal.

In applying *The Spiliada* principles with regards to the Hong Kong inter-ship action, the CA accepted that the first element for the Stage 1 Analysis concerning the appropriate forum for the trial of this action is held in favour of Changhong because Hong Kong was not the natural forum for the inter-ship litigation. Yet Bright Shipping was still entitled to bring this action as of right, given that Changhong is a Hong Kong company. The dispute therefore concerns the second part of the Stage 1 Analysis, namely whether Changhong has established that the SMC is clearly and distinctly more appropriate than Hong Kong as the forum for the trial of the inter-ship action.

Two main arguments were submitted by Changdong to show that the SMC is clearly and distinctly a more appropriate forum than Hong Kong. Firstly, Changdong argued that Chan J's use of the term, "*international waters*", as the location of the collision was inapt and legally outdated in the context of an EEZ. He did not refer to the national laws relating to the exercise of the sovereignty of the PRC over the EEZ. Chan J had also failed to appreciate the link between the collision and the claims for incident response costs and environmental damage brought in the SMC, and that Changdong established two limitation funds. Secondly, Changdong argued that Chan J's analysis in respect of *lis alibi pendens* was wrong in law in that Chan J applied the test that proceedings abroad involving the same issue was not of itself a material factor for the consideration of *forum non conveniens* and where there were such proceedings the defendant must show unusual hardship.

3.2.3. Decision

The CA rejected all the arguments and dismissed the appeal.

The CA held that there was no need to debate whether it was correct for Chan J to say that the collision took place in "international waters", given that Chan J had already regarded the place of the collision as an important factor in the evaluation exercise. It was also immaterial that Chan J made no reference to PRC legislation giving effect to international conventions connected with the existence of its rights in the EEZ as the sovereignty rights under Article 56.1 of the UNCLOS did not apply to navigation activity.

As for the constitution of limitation funds in the SMC, the CA held that this is not a legal bar to bringing proceedings in Hong Kong. Hong Kong applies the LLMC 1976. As the PRC is not a state party to the LLMC 1976, there is no statutory bar on Bright Shipping bringing this action against Changhong in Hong Kong, notwithstanding the constitution of the limitation funds by Changhong in the SMC.

In addition, even though Chan J did not place undue emphasis on the place of the collision as within the EEZ of the PRC, Chan J was correct to put the focus on the appropriateness of the

forum "*from the point of view of the trial of the action*", i.e. the inter-ship apportionment of liability and the assessment of the respective quantum of loss.

Moreover, the CA held that Chan J did not err by attaching little relevance to the limitation proceedings in the SMC. The equitable right of a shipowner to be given credit in the distribution of the fund for payment should be able to address the concern of Changhong that it might be subjected to two separate limits of liability in the PRC and Hong Kong. Also, the CA held that Chan J did not wrongly apply a test of undue hardship that must be shown to achieve a stay of proceedings. The mere multiplicity of suits may not be sufficient to stay an action.

Based on the above reasons, the CA upheld Chan J's conclusion on the Stage 1 Analysis. While it was not necessary to go the Stage 2 Analysis, the CA gave their views on the significant disparity in tonnage limitation on an *obiter* basis. The CA agreed that *The Adhiguna Meranti*[46] and *The Kapitan Shvetsov*[47] are binding decisions to uphold that a significantly higher limitation figure that applies in Hong Kong as compared to a lower figure in the alternative forum may be a decisive personal juridical advantage in favor of refusing a stay. Also, the CA expressed their views that it must be doubted if substantial justice can be achieved in the SMC by awarding a sum that has been significantly eroded by inflation. Bright Shipping had shown that it would be deprived of a legitimate juridical advantage if the action had been tried in the SMC.

3.2.4. Discussion

Further details in this case are worth considering. While Changhong applied for leave to appeal to the CFA, it was refused by the CA.[48] Changhong contended that an unusual hardship test should not be adopted for *lis alibi pendens*. Yet the CA rejected this argument by upholding that on a proper reading of the CFI and the CA judgment, "unusual hardship" was not applied as a strict test but rather that unusual hardship caused to a defendant by parallel proceedings may be relevant depending on an assessment of all the factors. Changhong also contended that proper wright was not given to the relevance of limitation and liability proceedings in the SMC. However, the CA rejected it and held that the courts have long recognized there is nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated. It is unnecessary for the CFA to give further guidance on this matter.

Changhong then renewed its application directly to the CFA to seek leave to appeal on the ground that the case raises three questions of great general or public importance and on the "or otherwise" basis. Yet the CFA dismissed the application for leave to appeal.[49]

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[46] *The Adhiguna Meranti* [1987] HKLR 904 (CA).
[47] *The Kapitan Shvetsov* [1997] HKLRD 374 (CA).
[48] *Bright Shipping Ltd v Changhong Group (HK) Ltd* [2020] HKCA 162.
[49] *Bright Shipping Ltd v Changhong Group (HK) Ltd* [2020] HKCFA 24.

The first question concerns the relevance of pending proceedings in another jurisdiction (*lis alibi pendens*) in the context of an application to stay proceedings on the ground of *forum non conveniens*. The CFA held that the relevance of *lis alibi pendens* is clearly established, and consistently applied in a number of court decisions, to be one of the relevant factors that a court will take into account when addressing the Stage 1 Analysis of whether an applicant for a stay has demonstrated that another jurisdiction is clearly or distinctly more appropriate than Hong Kong. The CFA also held that *The Abidin Daver*[50] that was relied upon by Changhong was not helpful because the case concerned a situation where the Stage 1 Analysis has already been decided in favour of the applicant for the stay. Yet the Stage 2 Analysis was never reached in the present case.

The second question concerns the relevance of the PRC's EEZ. The argument was that the collision that occurred in the PRC's EEZ distinguishes this case from a collision occurring in international waters outside an EEZ. However, the CFA held that this did not justify the grant of leave since it is an academic debate to consider the position as if the collision had occurred in international waters outside an EEZ. It is also well established that the place of a collision at sea is a matter that may be quite fortuitous and in respect of which there may be no obvious or natural forum for the resolution of disputes. Besides, the CFA held that the commencement of pollution claims in the SMC in respect of a collision that occurred within the PRC's EEZ did not make that court the natural or appropriate forum for the determination of this inter-ship dispute. The CFA affirmed that the weight to be attached to the fact of the collision having occurred within the PRC's EEZ and the pollution claims in the SMC was a matter for the judge, to be tested against other factors going to the question of whether the SMC was clearly or distinctly more appropriate than Hong Kong.

The third question concerns the relevance of limitations. However, the question proceeds on an overall assumption that because limitation proceedings happened to commence there, the SMC is the natural or appropriate forum. The CFA was not satisfied that the applicant's proposition, namely that, where a limitation action has been commenced in a particular jurisdiction, it will require exceptional factors to displace that jurisdiction for the purposes of *forum non conveniens*, is reasonably arguable.

Therefore, the CFA rejected the application of leave to appeal.

3.2.5 The impact of *Bright Shipping Ltd*

In shipping jurisdictional disputes, it is common for the courts to determine whether a proceeding should be stayed on the ground of *forum non conveniens*. The decisions in Hong

[50] *The Abidin Daver* [1984] 1 AC 398 (HL).

Kong relating to *Bright Shipping Ltd* have provided clear guidance on this issue by adopting *The Spiliada* principles.

Ultimately, *Bright Shipping Ltd* evidences that the Hong Kong courts have considered a variety of factors for the issue of *forum non conveniens*. The test has been applied consistently with the two stages of analysis in jurisdictional disputes apart from shipping. One common area by adopting principles would be cross-border traffic accident claims.[51] The Hong Kong court refer to *The Spiliada* principles and take into account different factors including the nationality of the parties, the quantum of damages and the difficulty in enforcement to determine whether substantial justice will be done in other forums. As for shipping cases, a more updated case law on this issue is *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'*[52]. In that case, the court has considered all relevant factors, such as the location of evidence (both witnesses and documents) and applicable law, point to the place of the alleged commission of the tort as the distinctly more appropriate forum. The court has also evaluated the adverse impact and hardship which the parallel proceedings may have on the defendants. After all, the aim of the court is to find out a forum that is suitable for the interests of all the parties and the ends of justice. In *Pusan Newport Co Ltd*, the court ordered the proceedings be stayed after considering the above factors.

Another noteworthy matter is that in the formulation of the *forum non conveniens* puts the burden of showing that there is another available forum which is clearly or distinctly more appropriate than Hong Kong on the applicant. "Clearly or distinctly" represents a relatively high threshold and it may be arguable that this puts an applicant in an unduly disadvantaged position. In addition, the threshold for appeal is even higher, as the CA will only intervene with the first instance judge's decision if it is plainly wrong, assuming the judge has correctly applied the law and the decision in question involves balancing various factors. For example, one ground of appeal of Changhong is that Chan J did not put enough emphasis on the location of the accident. However, as in the CA judgment, the fact that the CA would have given more weight than the judge to one of the many factors to be taken into account in exercising the discretion is not a ground for interfering with the exercise of his discretion. The reluctance by the CA and the CFA to intervene with the discretion exercised by the first instance judge, while understandable from the perspective of deterring litigation and preserving public resources, may lead to excessive deference to the first instance judge's discretion and prevent a consistent application of the law across cases.

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[51] *Kwok Yu Keung v Yeung Pang Cheung & Others* HCPI 579/2004 (CFI); *Fang Guo Quan & Another v Choi Ming Sang* DCPI 1468/2008 (DC); *Wong Chi Hung v 郭國基 & Others* DCPI 1897/2012 (DC).

[52]is *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'* [2021] HKCFI 1283.

The *orbiter* comments by the CA that it was doubtful if substantial justice can be achieved in the SMC by awarding a sum that has been significantly eroded by inflation are also open to criticism. The amount of limitation represents a balance between the interests of shipowners and other stakeholders, which is determined by the legislature of a jurisdiction. The fact that the amount of limitation remains significantly lower than that of Hong Kong should not be factor considered by the Hong Kong courts, as to do so may be an indirect evaluation of the "correctness" of the law of another jurisdiction, contrary to judicial comity.

3.3. The PRC Approach

As mentioned above, Chanhong has commenced legal proceedings against Bright Shipping and NITIC in the Shanghai Maritime Court ("**SMC**"). Changhong also applied to establish in the SMC two limitation funds. NITC had applied to the SMC to challenge the jurisdictions of the SMC in these proceedings. Its arguments include **(1)** the SMC is not a convenient forum for the liability action, so it should not be a convenient forum for a limitation fund and should not docket an application for setting up a maritime limitation fund; **(2)** relevant claims arising out of the accident were filed with Hong Kong court earlier than SMC received the application for setting up the limitation funds and the mainland court may take comity doctrine into consideration to some extent; **(3)** setting up limitation funds in Hong Kong is more favorable and fairer to the impaired parties involved in the accident; and **(4)** Crystal is registered in Hong Kong and Hong Kong maritime law and litigation procedure is much more familiar to the global shipowners However, the Shanghai High People's Court dismissed NITC's case in all instances.

The reasoning of the Shanghai High People's Court is relatively straightforward. In the limitation fund action, The High People's Court has referred to Article 102 of the Special Maritime Procedure Law of the PRC, which provided that where an application for constituting a limitation fund for maritime claims liability is to be submitted before bringing an action, the parties shall submit it to the maritime court of the place where the accident occurred, the place where the contract is performed or the place where the ship is arrested. The court has also relied on Article 30 of the Civil Procedure Law of the PRC in that the action instituted for damages for a vessel collision or any other maritime accident shall be under the jurisdiction of the people's court at the place where the collision occurs. Since the collision occurred within the EEZ of the PRC and that the Maritime Safety Administration had investigated the incident, the SMC should have jurisdiction over the matter. [53] Factors such as parallel proceedings at the Hong Kong Courts and the lower amount of limitation in the PRC were not considered relevant by the PRC Courts. Similar reasoning was applied in the inter-ship action. [54]

3.4. Comments

[53] (2018) 沪民终 370 号; (2018) 沪民终 371 号.

[54] (2018) 沪民辖终 90 号; (2018) 沪民辖终 91 号; (2018) 沪民辖终 92 号.

In contrast to Hong Kong courts' consideration of a variety of factors for the issue of *forum non conveniens*, it seems that the PRC courts have laid heavy emphasis on the location of the collision. They have highlighted the fact that the collision occurred 160 nautical miles from Changjiang Kou in the East PRC Sea and that area is within the Chinese EEZ. As a result, there is nothing wrong with Changhong establishing claims in the SMC and that the SMC has jurisdiction over the claims. The PRC courts rejected the submissions and appeals of NITC under this ground.

Moreover, with regards to the amount of limitation, the fact that the amount of limitation in the PRC remains significantly lower than that of Hong Kong may be attributable to a more protective stance taken by the PRC towards shipowners. Indeed, it seems that applications to stay proceedings in Hong Kong by virtue of limitation proceedings in the PRC are doomed to fail, as the limitation amount in the PRC is always lower.

In the present dispute, both the Hong Kong and PRC courts held that they have the jurisdiction to deal with the dispute, leading to parallel proceedings. While both courts have yet to hand down the substantive judgment on the exact liability and quantum, it is submitted that the potential uncertainty and inconsistency is not conductive to the development of the Chinese shipping industry. It is time that the limitation provisions in Hong Kong and the PRC were harmonised to realise the objective of such limitation of liability that is to encourage shipping investment and adventure.

4. INCORPORATION OF ARBITRATION AGREEMENT INTO THE BILL OF LADING

4.1. Overview

The incorporation of charterparty terms into the bill of lading has always been a difficult issues in shipping law. This is particularly so for an arbitration clause. In Hong Kong, the most relevant provision regarding the incorporation of arbitration agreements into a bill of lading is section 19(1)(6) of the Arbitration Ordinance ("**AO**"), which gives effect to Article 7 of the UNCITRAL Model Law. Section 19(1)(6) AO provides as follows: -

> "*The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract*.'

As a general rule, as repeated in *Yun Kwan Construction Engineering Ltd v Shui Tai Construction Engineering Co Ltd*[55], arbitration agreements can be incorporated by a general reference to the document that contains it and there is no need for the arbitration agreement to be specifically referred to[56]. Moreover, in *Truearns Co Ltd v Wealthy Fountain Holdings Inc*[57], it was held that the Courts should always refer the case to arbitration unless it is clear that the parties did not agree to do so.

In *OCBC*, the Hong Kong court is given the opportunity to restate and clarify its position regarding such issue.

4.2. *OCBC*

4.2.1. Facts

The defendant, in this case, was the owners of the vessel *MV Yue You 903* ("**YY903**") and the carriers of 4 cargoes in 4 tanker bills of lading for shipping from Indonesia to PRC. The plaintiff claimed to have granted facilities to a third party and obtained the original bill of lading from the borrowers. Thus, the plaintiff claimed to be the lawful holder of the bill of lading and thus entitled to immediate possession of the cargoes.

The relevant clause in the Bill of Ladings is as follows: -

> '*This shipment is carried under and pursuant to the terms of the Contract of Affreightment/ Charter Party dated 2nd March 2018 between [Kai Sen] as owner and TWIN WEALTH MACAO COMMERCIAL OFFSHORE LTD As Charterers, and all conditions, Liberties and exceptions whatsoever of the said Charter apply to and govern the rights of the parties concerned in this shipment…*' (emphasis added)

The defendant released the cargoes without presentation of the original bills of lading. Taking notice of the events, the plaintiff issued a writ of summons to seek damages against the defendant for the alleged misdelivery of the cargoes carried on "YY903" on 22 January 2019, claiming for breaches of contracts of carriage contained in the Bills of Ladings.

On 16 April 2019, the defendant, pursuant to section 20 of the AO, applied for stay of proceedings in favor of the alleged arbitration agreement incorporated into the bill of lading by reference. In addition, the defendant contended that the plaintiff has unequivocally elected to proceed with arbitration by issuing notice to commence the arbitration on 28 March 2019.

4.2.2. Issues

The Court identified 4 issues for determination: -

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[55] *Yun Kwan Construction Engineering Ltd v Shui Tai Construction Engineering Co Ltd* [2019] HKCFI 1841.
[56] *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300, 305-307.
[57] *Truearns Co Ltd v Wealthy Fountain Holdings Inc* [2019] HKCFI 1840; [2019] HKCU 2761 at [14] & [24].

1. What is the governing law of the arbitration agreement which governs the obligation to arbitrate?

2. Under that governing law, are specific words of incorporation required to incorporate an arbitration clause into a bill of lading?

3. Under Hong Kong law, are specific words of incorporation required to incorporate an arbitration clause into a bill of lading?

4. Whether OCBC's commencement of arbitration amounted to unequivocal election to arbitration?

The plaintiff relied on *TW Thomas & Co Ltd v Portsea Steamship Co Ltd*[58] and contended that arbitration clauses can only be incorporated into a Bill of Lading by express reference. Moreover, in order to decide the governing law of the obligation to arbitrate, one should reference the purported arbitration agreement and adopt the stipulated law as the governing law.

The defendant contended that the governing law should be that of Hong Kong. Moreover, it was contended that under Hong Kong law, *Astel-Peiniger* and *Thomas* cease to have effect after the adoption of Article 7 of the UNCITRAL Model Law under the AO. In any event, *Thomas* was decided some 100 years ago when the House of Lords had express reservations about ousting the jurisdiction of the Court, these reservations nonetheless cease to exist in modern-day Hong Kong.

4.2.3. Decision and Discussion

The Court, finding against arbitration, held that under English law required specific reference to the arbitration term for the said term to be incorporated into a bill of lading.

Au Yeung J proceeded by answering the first issue and found that the governing law was indeed English law as stipulated in the purported arbitration agreement. Her Ladyship in citing *Sea Power II Special Maritime Enterprises (ENE) v Bank of PRC Ltd*[59] and *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd*[60], concluded the position with regards to the governing law clauses. Her Ladyship held that the starting point in deciding the applicable law must be to first look at the particular clause and contract in question. In cases where there is an express or implied agreement on the governing law, the Court must regard the chosen law as the applicable law regardless of the lack of connection between the law and the underlying contents of the contract. Hence, since the arbitration agreement under the Charterparty stipulated English law as the governing law, it follows that the applicable law in deciding incorporation will also be English law.

Au-Yeung J then went on and considered the second issue and held that express reference to the term is necessary for the arbitration agreement to be incorporated into the Bills of Lading. The

[58] *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1.
[59] *Sea Power II Special Maritime Enterprises (ENE) v Bank of PRC Ltd* [2016] 2 HKC 566.
[60] *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262; [2011] HKCU 1340.

leading authority on incorporation is *Thomas* where it was held that general words of incorporation in a Bill of Lading will not normally be sufficient for incorporation. Contrary to the defendant's contentions, *Thomas* remains good law following the decision in *The Delos*[61]. There were likely good reasons to continue the rule in *Thomas* besides the "express reservations" from the House of Lords. A Bill of Lading is usually a negotiable instrument that may pass through a lot of hands internationally which in turn will give rise to jurisdictional consequences, see Bingham LJ's comments in *The Federal Bulker*[62]. A Charterparty often contains clauses that are not relevant to the carrier and receiver. Hence, the terms that are incorporated are those that are germane to matters covered by the Bill of Lading which does not include arbitration agreements[63]. Given that the Bills of Lading, in this case, did not specifically refer to the arbitration agreement, the agreement was not incorporated, regardless of whether the plaintiff had knowledge of the terms of the Charterparty.

Although Au-Yeung J opined that the consideration of the third issue was unnecessary, her Ladyship nonetheless affirmed the effect of *Thomas* in Hong Kong and held that there would be no difference even if the governing law was the law of Hong Kong. By citing two decisions from the Privy Council[64] and also *Astel Peininger*, Au-Yeung J held *Thomas* remains good law in the limited scope of Bills of Ladings and opined that *Thomas* principles in relation to Bills of Ladings occupied a "special corner of the law"[65].

Proceeding to the fourth issue, in citing *The Amazonia*[66], Au-Yeung J held that a person must make his objections clear at the start if one wishes to preserve his rights by taking part in an arbitration under protest. Her Ladyship eventually found in favor of the plaintiff given their express reservation of right to continue claims in the Courts of Hong Kong in their cover letter of the notice to commence arbitration.

4.3. The PRC Approach

Article 95 of Chinese Maritime Code broadly stipulates that if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charterparty shall apply. In PRC judicial practice, however, the Chinese courts adopt a strict standard regarding the effective incorporation, which means that specific requirements for incorporation must be met.

To effectively incorporate the terms of charterparty into the Bill of Lading, Chinese courts adopt the view that the incorporation clause must be manifest enough for the holder of Bill of Lading to realize the existence of such incorporation clause and clear enough for the holder of Bill of Lading to identify which charterparty has been incorporated[67]. Further, with considering Article 98 of the *Explanations concerning Relevant Issues of Foreign Related Commercial and Maritime Trail Practice* which was published by the Fourth Civil Court of the Supreme People's court, the

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[61] *The Delos* [2001] 1 Lloyd's Rep 703.
[62] *The Federal Bulker* [1989] 1 Lloyd's Rep 103, 105.
[63] *Siboti K/S v BP France SA* [2003] 2 Lloyd's Rep 364, [24].
[64] *The Pioneer Container* [1994] 2 AC 324 and *The Mahkutai* [1996] 2 HKC 1, pp 15I-16A.
[65] *The Varenna* [1983] 2 Lloyd's Rep 592, 594.
[66] *The Amazonia* [1990] 1 Lloyd's Rep 236, 243.
[67] (2015) Civil IV Others No. 45

PRC courts apply much stricter rules for the incorporation of some special clauses, e.g. law and arbitration clauses as ancillary provisions. This can be demonstrated in the cases below:

The SPC held in the case of *YDM Shipping Co., Ltd v. Jiangsu Huajian Energy Group Co.,Ltd.*[68] thtat unless the incorporation clause expressly states that the arbitration clause, jurisdiction clause and applicable law clause of a charterparty shall be incorporated into the bill of lading, those clauses shall not bind the holder of the bill of lading.

Moreover, the words of incorporation for the arbitration clause must be stated on the front page of the Bill of Lading. This was the case in *Chongqing Xinpei Food Co Ltd v Strength Shipping Corporation, Liberia*[69] where the SPC held that a general clause referring to the charter party and the arbitration clause on the reverse side of the Bill of Lading is also insufficient for the incorporation of the clause. The position has been also confirmed by several PRC higher people's courts[70].

Besides, it seems that the date of the charter party and the names of the parties must be stated. In the case of *China Pacific Property Insurance Co Ltd Shanghai Branch v Sunglide Maritime Ltd, Ocean Freighters Ltd, and the United Kingdom Mutual Steam Ship Assurance Association*[71], the term "*All terms, (including arbitration clause), conditions as incorporated herein as is fully written, anything to the contrary contained in this bill of lading notwithstanding*" was insufficient to incorporate the arbitration clause since the parties were not named and the charter party was not dated.

4.4. Comments

It can be seen that the PRC Courts are very restrictive in their reading on the incorporation of arbitration agreements into the Bills of Lading. Although the approach in Hong Kong requires the parties to specifically refer to the arbitration clause, the requirements are less stringent when compared to that of the PRC.

The importance of the law regarding the incorporation of arbitration clauses is that it would directly affect the enforceability of arbitral awards in that particular jurisdiction. Given the restrictive approach of the PRC Courts, it will be increasingly difficult for a party to enforce the arbitral award in China, for example in the case of *Hanjin Shipping Co Ltd v Guangdong Fuhong Oil Co Ltd*[72]. Indeed, even if an applicant succeeded in a foreign court or arbitration clause on the incorporation issue, the respondent may raise such issue again at the PRC courts at the enforcement stage, should the enforcement proceedings take place in the PRC.

It is arguable that the extent of incorporation of terms in the charterparties into the bill of lading is not only a matter of legal rules, but it also represents the balance of interest between the bill of lading holders and the charterers and/or the shipowners. While it is of utmost importance that a

[68] (2013) Min Shen Zi No.69
[69] [2006] Min Si Ta Zi No. 26.
[70] (2015) E Min Si Zhong Zi No. 00194
[71] [2008] Min Si Ta Zi No. 50.
[72] *Hanjin Shipping Co Ltd v Guangdong Fuhong Oil Co Ltd* [2005] Min Si Ta Zi No. 53.

party should be drawn to terms of the contract before being bound by them, consideration should also be given to the commercial reality that such incorporation clauses have been used in the shipping industry for a long time and the different parties are well accustomed to them. It is suggested the Hong Kong's approach is to be preferred over that of the PRC. The court should not impose arbitrary requirements that would hinder the parties' intention. This means that if the arbitration clause is expressly referred to, there is no need for arbitrary requirements for the clause to be stated on the front page or for the charter party to be dated. Ambiguity due to the lack of date of the charter party can usually be solved by reading the term in context. It should be sufficient if the bill of lading holders' attention is adequately drawn to the arbitration clause and the arbitration clause to be applied can be reasonably ascertained by them in the situation.

In addition, the PRC being a party of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards should follow the other State Parties and prevent an overly restrictive approach in incorporating the arbitral award. For example, in Hong Kong and the UK, as cited by Au-Yeung J in *OCBC*, only requires a specific reference to the arbitration clause but has no arbitrary requirements for the clause to be on the front page; in the US, the arbitration clause is treated the same with the clauses of the charter party, in effect the arbitration clause can be incorporated by a general reference to the charterparty[73]. Therefore, it is argued that the PRC should loosen its restrictive approach and follow the international standard to ensure the competiveness of the Chinese market.

5. CONCLUSION

To conclude, the recent three Hong Kong decisions laid down clear principles and afforded guidance with regards to the **(1)** limitation of liability with regards to shipwreck removal claims; **(2)** jurisdiction of the Hong Kong Courts, and **(3)** incorporation of arbitration agreements into the bills of lading. The approach of the PRC Courts in addressing these issues is also explored. Given the difference in legal history and system, it is without surprise that the Hong Kong and PRC Courts analyse the issues differently and, in some instances, provide different outcome.

Given the ever increasing ties between Hong Kong and Mainland China, harmonisation of laws, particularly in the area of international conventions entered into, is to be preferred as this can prevent forum shopping and potential inconsistency in judicial decisions in the two jurisdictions. In the meantime, however, it is important for maritime law practitioners to be aware of the differences in maritime law in the two jurisdictions when drafting relevant contracts and preparing for litigations.

[73] *Continental UK Ltd. v. Anagel Confidence Compania Naviera*, 658 F. Supp. 809 (S.D.N.Y. 1987).