

Case Bulletin: 2019/10

### *Forum Non Conveniens & Appeal*

In this article, we look at the legal principles regarding the stay of proceedings for *forum non conveniens*, and the grounds on which an appellate court is entitled to interfere with the exercise of discretion of the lower courts.

In *Bright Shipping Limited v Changhong Group (HK) Limited* [2019] HKCA 1062, the Court of Appeal provided some helpful summaries of the relevant principles.

#### **I. Background**

1. The action concerned a collision at sea in the East China Sea between the Plaintiff's tanker and the Defendant's cargo.
2. The Plaintiff is a company incorporated in Belize and its tanker flew a Panamanian flag. The Defendant is a company incorporated in Hong Kong and its cargo flew a Hong Kong flag.
3. The collision resulted in an explosion, and tragically, none of the officer or crew of the Plaintiff's tanker survived the accident. Pollution also resulted from the collision and the pollutant made landfall in the PRC as well as Japan.
4. The collision was followed by a number of legal actions, including the Shanghai Maritime Court and the action in Hong Kong. The Plaintiff had not submitted to the jurisdiction of the Mainland court.
5. The Defendant's stay application was dismissed, and it appealed.

## II. Key Points

1. The leading principles was summarized by the Court of Final Appeal in *SPH v SA* (2014) 17 HKCFAR 364 at paragraph 51 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 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 that first, Hong Kong is not the natural or appropriate forum (‘appropriate’ in this context 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. Failure by the applicant to establish these two matters at this stage is fatal.*
3. *If the applicant is able to establish both of these two matters, then 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.*
4. *If the plaintiff is able to establish this, 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 is able to establish to the court’s satisfaction that substantial justice will be done in the available appropriate forum.”*

2. The grounds on which an appellate court is entitled to interfere with this exercise of discretion are limited and it cannot interfere merely because it would have reached a different conclusion had it been hearing the application at first instance. It can only interfere in three situations:

- (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.
3. The fact that the appellate court would have given more weight than the lower court 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.

### **III. Findings**

After careful analysis, the Court of Appeal did not find any error in principle or on the conclusion that the lower court judge made, and upheld his conclusion on the stage 1 analysis. On *obiter* basis, the Court of Appeal also agreed with the judge that if it was necessary to undertake the stage 2 analysis, it would have found in favour of the Plaintiff that it will be deprived of a legitimate judicial advantage if the action is tried in the PRC court. The Defendant's appeal was dismissed.

For enquiries, please contact:

**Dennis Fong & Co., Solicitors** *(in Association with Links Law Offices)*

**Adrian Lo**

Partner

Tel: +852 2592 1978

Email: [adrian.lo@llinkslaw.com.hk](mailto:adrian.lo@llinkslaw.com.hk)