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Shipping & Transport - Hong Kong

New Civil Justice Regime: Impact on Shipping Cases

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May 20 2009

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Introduction

The extensive revision of Hong Kong's civil justice rules seeks to allow litigants, lawyers and the courts to cooperate in order to resolve disputes in a practical, fair, time-efficient and cost-effective manner. It might be argued that shipping and transport lawyers have always followed the spirit of these underlying objectives; however, the new rules are expected to have a considerable impact on their work.

Rule 1 of Order 1A states that the rules aim to:

- increase the cost-effectiveness of practices and procedures followed in relation to proceedings before the courts;
- ensure that cases are dealt with "as expeditiously as is reasonably practicable";
- promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- ensure fairness between parties;
- facilitate the settlement of disputes; and
- ensure that court resources are distributed fairly.

Rule 2 requires that the courts seek to follow these aims when exercising their powers or interpreting the rules or a practice direction. A court must recognize that the primary aim in exercising its powers is to secure the just resolution of disputes in accordance with the parties' substantive rights. Under Rule 3, the parties and their legal representatives must assist the court in furthering these objectives; Rule 4 sets out the court's duty actively to manage cases to the same end.

Order 1A is a new order and should be read in conjunction with Order 1B, which sets out the court's case management powers.

The emphasis has changed from a wholly adversarial system whereby lawyers looked at the procedural rules as a tactical game. The rules invite - and, to a degree, compel - lawyers to look at the rules as a means of resolving disputes. Therefore, master tacticians must play by the new rules of the game. The case management provisions allow the judge to ensure that they do so, but the primary duties apply to the parties.

The rules militate against vagueness and seek to channel practitioners into a critical analysis of pleadings through a succinct summary of material facts and a more structural approach, thereby identifying the real issues. Although the rules have not formally adopted the concept of front loading, the need to identify issues at an early stage is likely to have the same effect, as resources will have to be committed upfront.

The time for filing an acknowledgment of service of writ remains 14 days, but the time for service of defence has been extended to 28 days. The purpose of the change is to give a defendant's lawyer sufficient time to investigate, take instructions and plead its client's case properly.

Front Loading

Front loading has long been a cornerstone of successful shipping and transport practice, especially in

casualty cases. Solicitors and surveyors routinely proceed to distant locations to interview witnesses (usually a ship's crew) and collect documents (if not destroyed in a casualty).

Although matters of jurisdiction and security are usually resolved early in a case and jurisdiction is established either by the issuance and service of proceedings or through a security and jurisdiction agreement,⁽¹⁾ the parties often agree a general extension of time for pleadings, usually determined upon agreed notice, in order to enable the parties to front-load the obtaining of evidence.

Pre-litigation discovery and discovery before close of pleadings

An order for ship's papers is available, but limited to marine insurance cases where there is sufficient suspicion to enable a potential defendant underwriter to plead the insured's misconduct. Even in the absence of such an order, it has long been customary for insurers' solicitors to demand extensive and far-reaching discovery relevant to the facts at issue to probe the merits of the insured's case.

Case preparation

In shipping and transport cases, particularly in admiralty and marine insurance cases, it is vital to analyze the facts and identify the issues at the earliest possible stage. Upon first notice of a casualty and once instructions have been obtained, an admiralty solicitor or manager normally proceeds at once to the location of the ship (or the crew, if the ship has sunk or been destroyed).

Only one in 10 cases goes to trial in Hong Kong. For admiralty and marine insurance cases and most carriage of goods cases, the proportion is even lower - perhaps 5% or less. No collision case on liability has been tried in Hong Kong since *The Ocean Tramp* in 1969 and there is no record of a salvage case being tried in Hong Kong in living memory. Cargo cases on the substantive merits involving nautical issues are almost never tried.

More typical is the 1996 *Pegasus Case*, a total loss of ship and cargo case involving allegations of crew incompetence, in which the defendants' nerve broke three days before trial and a handsome settlement was negotiated. No marine insurance cases went to trial in Hong Kong for around 100 years until a number of such cases were heard at the turn of this century. Marine hull insurance cases are rare and very seldom go to trial in Hong Kong, although there were a number of marine insurance fraud cases in the late 1970s during one of the shipping industry's previous downturns.

The rarity of shipping and transport trials is related to the longstanding tendency of shipping and transport lawyers, especially in the casualty field, to front-load cases. Such cases are normally fact intensive and once the parties have obtained evidence upfront, they can make an early assessment of the strengths and weaknesses of their respective cases, which encourages early settlement. All evidence is collected in contemplation of the issues to be pleaded and with a view to discovery and an efficient trial. A clear correlation exists between properly prepared shipping and transport cases, which almost invariably necessitate front loading, and the likelihood of the need for a trial. Even sophisticated clients are often reluctant to pay for front loading, but it nearly always proves a sound - even highly productive - investment in terms of mitigation or payback.

In *The Gunung Klabat* an oil tanker was sunk in the East China Sea by a log carrier that suddenly altered course by 90 degrees, striking the tanker's engine room. The log carrier was arrested on calling at Hong Kong. Based on contemporaneous evidence, a court order was obtained to inspect and preserve the log carrier's steering gear and associated parts. In the subsequent limitation of liability proceedings, the opponents were pressed for full discovery of documents in the collision action, leading to the discovery of damning evidence of an inadequate steering gear repair. This led to the leveraging of a settlement involving the acquisition of title over the log carrier (which by this time had been under arrest in Hong Kong for over a year, its owners having omitted to renew hull and protection and indemnity cover), plus the limitation fund which had been paid into court.

Admiralty practitioners are frequently involved in cases that require an unconventional resolution to suit a purpose. Such cases may be beyond court management and may have to be managed with a reliance on instinct and a responsiveness to developments by practitioners in this field. Such cases can undoubtedly benefit from front loading.

Purpose of interlocutories between pleading and trial

The aim of interlocutories is to:

- establish jurisdiction;
- obtain security;
- refine facts or expert issues;
- weed out frivolous matters; and

- gather evidence.

There is already a strong tendency towards voluntary case management among shipping and transport lawyers, especially in the casualty field. Most of the underlying objectives are routinely achieved in the course of front loading and the initial stages of a case, which are almost always crucial to its success or failure.

There have long been informal methods of alternative dispute resolution, other than arbitration, which often take the form of pyramid-like structures of firms and a teamwork approach to case handling. Most firms can normally cooperate so that issues can be identified and resolved and a dialogue maintained to promote settlement at various stages. Good admiralty practice has always encouraged practitioners to self-manage cases. Before it substantially cut back its coverage, the Salvage Association was frequently involved in casualty cases, especially marine insurance cases, in which the question of hull and machinery cover might be pertinent. Frequently, such cases were approached by agreement between the firms representing the various parties and by representatives proceeding to an appropriate point or meeting onboard the vessel with a Salvage Association surveyor so that joint statements could be obtained. This was one of the forerunners of the more formal procedures of the new regime.

Jurisdiction

Jurisdiction in shipping cases is founded as of right by service in Hong Kong in person or on the ship. Leave can be obtained to serve outside the jurisdiction in certain circumstances.⁽²⁾ Jurisdiction is open to challenge on the basis of:

- the existence of an arbitration clause;
- the *forum non conveniens* principle (ie, where a court in another jurisdiction is a more suitable forum for the trial of the action);
- the existence of an exclusive jurisdiction clause; or
- a case on the same matter which is already pending elsewhere.

The revised regime includes a significant change relating to interim relief in support of substantive proceedings commenced or to be commenced in Hong Kong. It states that:

"(1) Without prejudice to Section 21L(1), the court of first instance may by order appoint a receiver or grant other interim relief in relation to proceedings which:

- (a) have been or are to be commenced in a place outside Hong Kong; and*
- (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any ordinance or at common law...*

(4) The court of first instance may refuse an application for appointment of a receiver or interim relief under Subsection (1) if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of proceedings concerned makes it unjust or inconvenient for the court to grant the application...

21N. Supplementary provisions as to interim relief in the absence of substantive proceedings

(1) In exercising the power under Section 21M(1), the court of first instance shall have regard to the fact that the power is:

- (a) ancillary to proceedings that have been or are to be commenced in a place outside Hong Kong; and*
- (b) for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings.*

(2) The court of first instance has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under Section 21M as if the order were granted under Section 21L in relation to proceedings commenced in Hong Kong."

This effective abolition of the *Siskina* principle means that it is no longer necessary to establish a substantive cause of action in Hong Kong, provided that the court is satisfied that proceedings exist that are capable of giving rise to a judgment or award which would be enforceable in Hong Kong.

The Siskina [1979] AC 210 concerned a Mareva injunction granted by the Commercial Court in London in a case involving non-payment of freight and, notwithstanding that no substantive cause of action could be established in the jurisdiction, the making of an order for service of notice of a writ outside the jurisdiction and a Mareva injunction to restrain removal or disposal of the defendant's assets within the jurisdiction.

However, on application by the owners to set aside the writ and injunction, Justice Kerr held that:

"(1) The authorities established that in a writ served out of jurisdiction, it was not permissible to include claims which did not fall within any of the sub-rules of [Order 11 of the Rules of the Supreme Court (RSC)] and if there was jurisdiction under sub-rule (i), the claims for damages and interest had to be struck out of the writ so that the only maintainable claim would be the claim for the Mareva type of injunction.

(2) Apart from the claim for the interim injunction, there is nothing which is properly before the court. The plaintiffs have no claim to the insurance money which they seek to restrain the defendants from receiving and removing out of the jurisdiction... [F]or the purposes of Order 11 and for the reasons already explained, their writ contains no cause of action whatever against the defendants, since the claim for damages and interest [either] must be struck out (as I have already held) or admittedly fails to provide any basis of jurisdiction for serving the defendants in Greece. In these circumstances one is simply left with a claim for an interim injunction relating to a fund which the plaintiffs cannot and do not claim as such. Accordingly, since the writ contains no cause of action against the defendants, at any rate for the purpose of Order 11, it is simply strikeable out. It follows that this is not a Mareva type of case at all, but something entirely novel and in my view contrary to the principle, though it might well be desirable to confer upon the courts a discretionary power of this kind by legislation. Meanwhile, it seems to me that everything that has ever been said about the need for caution in giving leave under Order 11 applies in this case par excellence.

(3) This was not a Mareva type of case and the notice of a writ and all subsequent proceedings would be set aside."

In its innovations in the new regime, the Hong Kong legislature has done what Kerr thought might be desirable - it has conferred upon the Hong Kong courts a discretionary power by legislation. However, the likely application of the new provisions should be appraised cautiously.

As of April 2 2009, it has been possible in Hong Kong to obtain interim relief by way of Mareva injunctions or Anton Piller orders in relation to proceedings which are taking place or will take place outside the jurisdiction and where no such substantive proceedings have been contemplated in Hong Kong. However, the jurisdiction to grant interim relief in aid of foreign arbitration or foreign proceedings will be limited to proceedings and arbitrations which would lead, in the ordinary course, to a judgment or arbitral award which could then be enforced in Hong Kong.⁽³⁾ Moreover, there is a strong element of court discretion.

In bringing applications for Mareva and Anton Piller orders, the emphasis is on:

- a good, arguable case against the defendant;
- the presence within the jurisdiction of assets belonging to the defendant;
- a real risk that unless the injunction is granted, judgment will go unsatisfied; and
- full and frank disclosure.

A Mareva injunction will usually be made only where the claimant can show that there is at least a good, arguable case that it would succeed at trial, and that the refusal of an injunction would involve a real risk that a judgment or award in its favour would remain unsatisfied.

Where, as often, the Mareva order is combined with an Anton Piller order, it can be disastrous for the defendant, as the effect of the orders is draconian and can destroy a business by freezing most of its assets and revealing information to competitors. The court treats such applications with great caution - as should plaintiffs' lawyers.

The United Sing

The United Sing emphasizes the evidential difficulties facing a cargo claimant in establishing a good, arguable case, even where upfront evidence is available from which a court can draw an inference of unseaworthiness. After the vessel became stranded on the coast of China, a Mareva injunction was obtained by the cargo interests in relation to the vessel's hull and machinery proceeds in Hong Kong. An application was brought by the shipowners to discharge the injunction on the grounds that the cargo interests could not establish the necessary good, arguable case. Notwithstanding its approval of the arguments in *The Makedonia*, the Court of Appeal failed to decide on the issue of seaworthiness before considering the issue of due diligence by requiring the shipowners to establish on a balance of probabilities the exercise of due diligence in selecting and supervising a competent officer. It was established on evidence that the third officer, following an exchange of charts, misinterpreted the latitude scale on two occasions and wrongly plotted the position of the vessel, despite having previously obtained two radar fixes. This directly caused the stranding of the vessel. The crucial question for the court in considering the discharge of the Mareva injunction was whether the carrier had failed to exercise due diligence in providing a competent third officer in the circumstances. The court held that the cargo interests had failed to establish an arguable case,

despite the third officer's manifest repeated errors.

Taking into account the exposure which a plaintiff faces pursuant to the undertaking in damages and the difficulties inherent in obtaining Mareva injunctions and Anton Piller orders (even though it is no longer necessary to establish jurisdiction, subject to certain constraints), it is worth establishing whether there are real prospects of establishing court jurisdiction, either *in personam* or *in rem*.⁽⁴⁾

It remains to be seen whether the innovations in the regime with regard to interim relief will result in an equivalent of the French concept of '*saisie conservatoire*' or Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims in the US Federal Rules of Civil Procedure.

Orders for Inspection

Where Hong Kong court jurisdiction is founded, court orders for inspection may well provide safer and more predictable remedies than interim injunctions.

Order 29, Rule 2 states that:

"2. (1) On the application of any party to a cause or matter, the court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under Paragraph (1) to be carried out the court may by the order authorize any person to enter upon any land or building in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.

(4) An order under this rule may be made on such terms, if any, as the court thinks just.

(5) An application for an order under this rule must be made by summons or by notice under Order 2(7).

(6) Unless the court otherwise directs, an application by a defendant for such an order may not be made before he acknowledges service of the writ or originating summons by which the cause or matter was begun."

Such applications may be made in shipping cases and non-shipping cases, regardless of whether they fall within or outside Order 75.

The watershed of these varieties of order is the court's power under its inherent jurisdiction to secure, by orders, a just and proper trial of the issues, and is thus similar to the jurisdiction to grant Anton Piller orders. Anton Piller orders complement the jurisdiction specifically provided in Order 75 and should be considered in conjunction with them. Such principles, established in the inherent jurisdiction of the court to secure a just and proper trial, are reinforced by the objectives of Order 1A - they encourage cost effectiveness, expeditious handling, procedural economy and fairness, and facilitate settlement and court management (eg, marshalling of evidence) by orders, helping to ensure a just and proper trial of the issues while the evidence remains fresh and within the court's jurisdictional power.

The extension of Order 29(2) in admiralty proceedings states that:

"Without prejudice to its powers under Order 29(2) and (3) and Order 35(8), the court may, on the application of any party, make an order for the inspection by the assessors (if the action is tried with assessors) or by any party or witness, of any ship or other property, whether real or personal, the inspection of which may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action."

Orders 29(2) and 75(28) have been underused in Hong Kong shipping cases since the early 1980s; however, both assume new relevance in the context of the revised regime.

Order 75(28) will be exercised only where the party seeking the order can demonstrate that it is necessary to obtain full information and evidence on any issue in the action, such as unseaworthiness. If it cannot be shown that the inspection will assist the court or if the application is a 'fishing expedition' (ie, an opportunistic attempt to uncover as yet unknown information that may be useful to a party's case), the order will not be

