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Left for dead

Who picks up the tab for abandoned ships?

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Admiralty jurisdiction in international waters

Shipping matters by their very nature have an international flavour: invariably, the shipper, consignee and carrier of goods are based in different countries, hence different jurisdictions. But what happens when a maritime claim arises? Andrew Clark, partner at Cox Yeats Attorneys, tackles this issue.

If a maritime claim arises, the parties will have to elect in which jurisdiction their claim is to be legally enforced and ultimately determined. This is an important choice to make as it may impact on the prospects of making a financial recovery, the defences available to the carrier and the costs of the proceedings.

Claimants are sometimes accused of 'forum shopping' when considering where to hold their admiralty proceedings, but from the court's perspective, it is important that it is not dealing with the same substantive issues that might be dealt with by another court or forum in a foreign country.

In most cases, the proceedings start when a vessel is arrested in South Africa for the enforcement of a maritime claim. The Admiralty Jurisdiction Regulation Act extends the court's jurisdiction to hear and determine any maritime claim, irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

Although such an arrest may give rise to the preliminary jurisdiction of a South African court, this will not necessarily mean that such a court is the correct jurisdiction within which the dispute is ultimately determined.

It is therefore important to distinguish between the proper law of the dispute, which is a substantive issue, and the jurisdiction or forum in which the dispute is to be determined, which is a procedural issue.

The proper law governing the dispute is generally determined by reference to the contract between the parties or the place where the delict occurred.

In a claim based on a bill of lading or a Charter-party, the proper law of the contract will usually be determined by reference to the applicable clause on the reverse of the bill of lading or in the

Charter-party, on the basis that the parties have agreed to such law governing their contract.

The issue of jurisdiction may also be agreed between the parties in the relevant bill of lading or Charter-party clause, but if not, it becomes a question of the most appropriate forum in which the dispute is to be resolved.

Most shipping related contracts which include *inter alia* bills of lading, contracts of affreightment and Charter-parties, contain clauses identifying the jurisdiction in which disputes arising out of those contracts are to be resolved.

The effect of this is that, by agreement, the parties to these contracts have determined the forum in which the dispute is to be resolved.

The reality, however, is that very often the consignee or receiver of the goods, who was not responsible for concluding the contract of carriage in the first instance, is subject to a clause in terms of which it must enforce its claim in a foreign jurisdiction.

In South Africa, as a matter of policy, this is seen to be unfair on the consignee, particularly having regard to the fact that the carrier's delivery obligation is within the jurisdiction of the South African courts.

Section 3(1) of the Carriage of Goods by Sea Act provides a legislative inroad into a bill of lading exclusive law and jurisdiction term in that, a person carrying on business in the Republic and the consignee under, or holder of, any bill of lading may bring an action in the South African courts relating to those goods, notwithstanding any exclusive law and jurisdiction clause in the bill of lading. Therefore, in respect of shipments of goods into South Africa, an exclusive law and jurisdiction clause is overridden and a local consignee may pursue its claim in a South African court. However, the same position does not hold for shipments of goods out of South Africa.



In those cases, the shipper or exporter would have to comply with an exclusive jurisdiction clause unless it could persuade the carrier to agree to submit to the South African law and jurisdiction in respect of the claim.

If the shipper nevertheless decides to proceed with an action against the carrier in South Africa, the carrier could apply for a suspension or postponement of the proceedings in terms of section 7(1)(b) of the Admiralty Jurisdiction Regulation Act.

In summary, this section provides that a court may suspend or postpone any South African proceedings if it has been agreed

A (local) court may decline to exercise its admiralty jurisdiction on the basis that another court, arbitrator, tribunal or body elsewhere will exercise jurisdiction

between the parties in their contract of carriage that the matter in dispute be referred to arbitration or the high court's proceedings in another jurisdiction.

The main risk to the shipper in these circumstances is that if a court suspends or postpones the South African proceedings pending the determination by the foreign court or arbitration tribunal, and the shipper has not taken timeous steps in the foreign jurisdiction to enforce its claim, that claim will be time barred and the shipper will be left without remedy.

Furthermore, any security that the shipper has obtained for its claim after the arrest of a vessel in South Africa may be discharged, although usually in such circumstances, an order is granted that the security is to stand for the foreign proceedings if they happen within reasonable time.

A South African court may also decline to exercise its admiralty jurisdiction on the basis that another court, arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the maritime claim.

This is provided for in section 7(1)(a) of the Admiralty Jurisdiction Regulation Act and is based upon an assessment of which forum is the most appropriate forum for determination of the dispute. This is often referred to as a *forum non conveniens* (Latin for 'forum not agreeing' is a common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties).

In determining whether to decline to exercise its admiralty jurisdiction, the court will take into account a number of factors, for example:

- The availability of witnesses.
- The places where the parties to the dispute reside or carry on business.
- The costs that will be incurred in enforcing the claim.

- The law governing the claim.
- The prospect of the claimant obtaining justice in the foreign forum.

Our courts have followed the principles set out in the English case of *The Spiliada*.

In the South African case of *Great River Shipping Inc versus Sunnyface Marine Limited*, the court held that the onus only shifts to the party relying upon the arrest of a vessel to establish the court's jurisdiction once the party applying for the court to decline to exercise its jurisdiction has discharged the onus that there is another forum available for the resolution of the dispute which is *prima facie* more appropriate.

The onus to prove these factors is not as simple as it sounds, so much so that Burman J regarded the onus as a "heavy" one.

However this is not an exhaustive list of factors and the courts do have the discretion to take into account any other factors that they regard as relevant in any particular case.

Ultimately, of course, each case must be determined on its own facts.

The choice of jurisdiction is an important one for the parties to make at the outset of a case.

For the claimant, it is important to ensure that it takes sufficient steps in the correct jurisdiction to prevent the claim from becoming time barred and to ensure that it is able to retain any security for its claim obtained following the arrest of a vessel.

For the carrier it may be to its advantage to have the court either suspend or postpone the proceedings or decline to exercise its admiralty jurisdiction, so as to avoid liability for the claim and achieve the return of security furnished following the arrest of a vessel.

Finally, it is important for the court to know that it is not dealing with the merits of a matter that will be heard by another foreign court or forum.

