IN THE SUPREME COURT

REPUBLIC OF THE MARSHALL ISLANDS

Supreme Court Case No. ~~2015-001~~ 2016-002

High Court Case Nos. 2014-050; 2014-110; and 2015-194

CHUBB INSURANCE (CHINA) COMPANY LTD., ET AL.,

Plaintiffs,

vs.

ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED, ET AL.,

Defendants.

CHUBB INSURANCE (THAILAND) COMPANY LTD., ET AL.,

Plaintiffs,

vs.

ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED, ET AL.,

Defendants.

FEDERAL INSURANCE COMPANY KOREA, ET AL.,

Plaintiffs,

vs.

ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED, ET AL.,

Defendants.

FILED

JUN 06 2017

CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

BEFORE: CADRA, C.J., SEABRIGHT, A.J.,[1] and KURREN, A.J.[2]

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[1] Hon. J. Michael Seabright, Chief United States District Judge, District of Hawaii.

[2] Hon. Barry M. Kurren, United States Magistrate Judge, District of Hawaii.

OPINION ON REMOVED QUESTION

CADRA, C.J., with whom SEABRIGHT, A.J., and KURREN, A.J., CONCUR

I. INTRODUCTION

On July 27, 2016, the High Court referred the following questions to this Court:

> Pursuant to Article V, Section 1(4) of the Constitution and the Limitation of Liability for Maritime Claims Act, 47 MIRC Chpt. 5, is the High Court to defer to a Hong Kong limitation suit and its limitation fund constituted under the Convention on the Limitation of Liability for Maritime Claims, 1976, or, if the defendants are to limit their liability in the High Court are they required to constitute a limitation fund under the 96 Protocol relating to the 76 Convention, or otherwise be subject to the limits set forth in the 96 Protocol in their assertion of a limitation defense absent the constitution of a fund in the High Court?

July 27, 2016 Order Denying Motion to Reconsider and Amending the Question Removed (footnote omitted).

The High Court defined the dispute between the parties as follows:

> Although both the plaintiffs and the defendants agree that the Marshall Islands is a "dualist jurisdiction" -- that is, international treaties and conventions have no effect unless legislation is in force to give effect to them – the parties strongly disagree as to whether Article 9.4 of the 96 Protocol can or cannot be deemed to be domestically incorporated into Marshall Islands law as required by Article V, Section 1(4) of the Constitution.

Id. For the reasons set forth below, we hold that the High Court need not defer to the Hong Kong limitation suit and the limitation fund constituted under the "Convention on the Limitation of Liability for Maritime Claims, 1976." We further hold that defendants can avail themselves of the procedures provided by the Marshall Islands Limitation of Liability for Maritime Claims Act ("LLMCA"), Marshall Islands Revised Code ("MIRC") Title 47, Sections 501, et seq., should they choose to limit liability in these High Court proceedings.

II. FACTS AND PROCEEDINGS

For purposes of this Opinion only, we provide a brief statement of how this dispute arose to provide context for our decision.

On November 7, 2013, a collision occurred between the M/V HUENG A. DRAGON, a Korean flagged container ship, and the M/V ELENI, an RMI registered vessel, off the Vietnamese port of Phu My. The M/V ELENI, having discharged its cargo at Phu My port, off Vung Tau, was in the process of leaving Vung Tau port when it strayed from the main navigational channel. A buoy chain located outside the main navigational channel became entangled about the M/V ELENI's rudder and propeller causing loss of steering control. The M/V ELENI then collided amidship with the M/V HUENG A. DRAGON. As a result of the collision, cargo aboard the M/V HUENG A. DRAGON was washed overboard, flooded or otherwise damaged.

On November 13, 2013, the owners of the M/V ELENI effected an order of arrest against the sister-ship of the M/V HUENG A. DRAGON, the M/V HUENG A. BANKOK, in Hong Kong. On the same date, the owners of the M/V ELENI filed an action in Hong Kong to limit liability arising out of the November 2013 collision. A limitation fund was constituted in Hong Kong in accordance with "Article II of the Convention on Limitation of Liability for Maritime Claims" (hereinafter the "1976 Convention").

Various proceedings were subsequently commenced by cargo owners and subrogated insurers against the M/V ELENI in jurisdictions outside of Hong Kong where the limitation fund had been established. Hanwha General Insurance Co., Ltd., a subrogated insurer of certain cargo interests, filed an action in the High Court of Judicature at Bombay (India) Admiralty and Vice Admiralty Jurisdiction. The record references a suit also being instituted in South Africa,

although we do not know the status of that case. There may be other cases pending in other jurisdictions that arise out of the subject collision.

The plaintiffs herein, certain cargo owners or subrogated insurers, filed complaints *in personam* against defendants, ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED, both Marshall Islands non-resident domestic corporations, in the Marshall Islands High Court.

On December 8, 2014, plaintiffs filed a motion seeking a declaratory judgment that the 1976 Convention does not govern the plaintiffs' claims in this case but, rather, that the Protocol of 1996 to amend the 1976 Convention, as enacted by the Marshall Islands, applies to plaintiffs' claims.

Defendants opposed plaintiffs' motion for declaratory judgment on April 14, 2016, arguing, *inter alia*, that the Marshall Islands and Hong Kong have only the 1976 Convention in common and that, pursuant to Article 9, Section 4, of the 1996 Protocol ("Protocol Article 9(4)") to which the Marshall Islands is a party, the High Court must defer to the Hong Kong limitations proceeding and limitation fund established under the 1976 Convention.

Soon thereafter, on April 29, 2016, defendants filed a motion for summary judgment which was opposed by plaintiffs on June 6, 2016.

The issue pivotal to both plaintiffs' motion for declaratory judgment and defendants' motion for summary judgment is whether Protocol Article 9(4) has been incorporated into the domestic law of the Marshall Islands – the parties agree that if Protocol Article 9(4) is part of the domestic law then the High Court would be required to defer to the Hong Kong limitation proceedings and limitation fund established under the 1976 Convention.

Oral argument on the issues presented by the High Court's Removal Order was held on April 12, 2017. Christopher Hannan, of Baker Donelson Bearman Caldwell & Berkowitz, PC, New Orleans, LA, argued on behalf of the plaintiffs. David Lowe, Lowe & Cerullo, Honolulu, HI, argued on behalf of the defendants.

III. DISCUSSION

A. The High Court need not defer to the Hong Kong limitation proceeding and limitation fund established under the 1976 Convention.

The Marshall Islands is a signatory to both the 1976 Convention and the 1996 Protocol. Neither the 1976 Convention nor the 1996 Protocol has been denounced by the Marshall Islands. Thus, international obligations under these conventions may be owed to other signatory States by the Marshall Islands. And where a nation is signatory to the 1976 Convention but not the 1996 Protocol, Protocol Article 9(4) provides:

> Nothing in this Protocol shall affect the obligations of a State which is a party both to the Convention and to this Protocol with respect to a State which is a party to the Convention but not a Party to this Protocol.

The issue in this case arises because Hong Kong, where defendants limited liability, is a signatory to the 1976 Convention but not a signatory to the 1996 Protocol (at least at the time the limitation fund was established). Plaintiffs subsequently filed the instant lawsuits in the Marshall Islands which is signatory to both the 1976 Convention and the 1996 Protocol. Thus, pursuant to Protocol Article 9(4), the obligations of the Marshall Islands with respect to Hong Kong would be governed by the common agreement between these two nations, which would be the 1976 Convention. The parties agree that if Protocol Article 9(4) applies to this case then the court would be bound by the Hong Kong Limitation suit because the Marshall Islands and Hong Kong have only the 1976 Convention in common. The question thus becomes to what extent the

Marshall Islands' treaty obligations to Hong Kong effect the rights of private parties in the instant lawsuit filed in the High Court.

1. The domestic law does not require the High Court to defer to the Hong Kong proceeding.

The Marshall Islands Constitution, Article V, Section 1(4) provides:

> No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic.

The parties agree that the Marshall Islands is a "dualist jurisdiction" by virtue of Article V, Section 1(4). In a "dualist jurisdiction" the country remains sovereign in adopting its own legislation. On the domestic level, the courts will apply only the legislation in effect -- that is, the laws passed by the competent legislative bodies (e.g., the Nitijela) -- and they will not consider intrinsic treaty provisions. While applying domestic legislation may have the effect of placing a country in contravention of the provisions of a treaty, a domestic court is not obliged to consider such consequences when it hands down its decision.[3] It is the duty of the courts to apply the law as laid down by the Parliament whether that would involve the state in breach of an international agreement or not.[4] Because the parties agree the Marshall Islands is a "dualist jurisdiction" our inquiry whether the 1976 Convention and the 1996 Protocol are part of the Marshall Islands' domestic law begins with an examination of the statutes enacted by the Nitijela.

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[3] *See, generally,* Daniel Dupras, NAFTA: Resolving Conflicts Between Treaty Provisions and Domestic Law (1993) discussing effect of North America Free Trade Agreement on Canada, a dualist jurisdiction's domestic law. *See also* Dr. Brahm Agrawal, Enforcement of International Legal Obligations in a National Jurisdiction ("...India's obligations under an international treaty cannot be enforced unless such obligations are made part of the law of this country by means of appropriate legislation.").

[4] *See, R. (on application of Pepushi) v. Crown Prosecution Service,* [2004] LWHC 798 (admin.).

Although the Marshall Islands is a signatory to both the 1976 Convention and the 1996 Protocol, neither international agreement has been enacted in its entirety as part of the domestic law. The LLMCA, 47 MIRC § 501, et seq., sets forth the domestic law applicable to the right of limitation in the Marshall Islands courts. The Nitijela, while legislating some of the provisions of the 1996 Protocol into the domestic law, did not enact Article 9(4) into the LLMCA. The inquiry ends here. Because Protocol Article 9(4) has not been legislated into the Marshall Islands domestic law, it has no effect in these proceedings by private litigants. There is no law requiring the High Court to defer to the Hong Kong limitation suit and limitation fund established under the lower limits of the 1976 Convention. We conclude the High Court need not do so.

A similar result was reached by the Bombay (India) court in *Hanwha General Insurance Co., Ltd. v. M.V. ELENI.*[5] The court noted that India, although it had signed both the 1976 Convention and 1996 Protocol, had not enacted the entire Convention as part of the domestic law. The court found the absence of enacting the entire Convention as part of the domestic as evidence of an intent to exclude certain provisions of the convention from the domestic law. The court reasoned "Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows that Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act."

We find the Nitijela was aware of the presence of Article 9(4) when legislating portions of the 1996 Protocol into domestic law because the Marshall Islands had acceded to the 1996 Protocol and other specific provisions of that Protocol were incorporated into the domestic law,

[5] A copy of that opinion is found in the record.

the LLMCA. We find the absence of Protocol Article 9(4) from the LLMCA was a conscious decision by the Nitijela not to incorporate or transform that provision into the domestic law.

2. Protocol Article 9(4) is not incorporated into domestic law by virtue of 47 MIRC 155 and 156

Defendants argue that Protocol Article 9(4) is incorporated into Marshall Islands domestic law by virtue of 47 MIRC §§ 155 and 156. Section 155 provides:

> The international conventions and agreements to which the Republic is or may become a State Party, shall be complied with by all vessels documented under the laws of the Republic which are engaged in foreign trade and, to the extent determined applicable, to domestic watercraft as defined in Chapter 9 of this Title, fishing vessels and yachts. The foregoing international conventions and agreements, as may be amended, shall have effect as if specifically enacted by statute and fully set forth herein.

Section 156 requires the Maritime Administrator to publish a list of all the international treaties, conventions, protocols, codes, regulations, and agreements that have come into force and to which the Republic is a party. Both the 1976 Convention and the 1996 Protocol appear on that list.

We find that the broad incorporation provision of Section 155 and listing pursuant to Section 156 is insufficient to incorporate Protocol Article 9(4) into the domestic law. First, Section 155 deals with "vessels," not "shipowners" or "salvors" within the meaning of the LLMCA. Second, the Nitijela's specific incorporation of the limitation limits and other sections of the 1996 Protocol to the exclusion of other sections, such as Article 9(4), indicates a clear intent not to adhere to the lower limits of the 1976 Convention or adopt the provisions of Protocol Article 9(4) which would require the court to defer to the Hong Kong proceeding and limitation fund. Under the canon of statutory construction "*generalia specialbus non derogard*" -- the "principle that the specific overrides the general," courts are to assume the legislature

intended specific provisions to prevail over more general ones when statutes conflict. That is, the more specific of two conflicting provisions "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *See, e.g., Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016). The Nitijela legislated specific statutes in the LLMCA governing the right to limit liability in the Marshall Islands. If the Nitijela intended to incorporate the entirety of the 1976 Convention and the 1996 Protocol by virtue of the general provisions of Sections 155 and 156 it would not have needed to have legislated the LLMCA at all. Again, we find the Nitijela intended the LLMCA to govern limitation of liability in the Marshall Islands. There is no statutory provision that the court defer to a limitation proceeding with lower limits pending in some foreign court.

B. Defendants Are Subject to the Limits Set Forth by the LLMCA Should They Avail Themselves of the Limitation Defense.

Section 525(1) of the LLMCA provides:

> This Chapter shall apply whenever any person referred to in Section 502 of this chapter, seeks to limit his liability before a Court of the Republic or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Republic.

Defendants argue that the LLMCA does not even apply to this case because they have not sought affirmatively to limit liability in the Marshall Island courts. While it is true the defendants have not invoked the defense of limitation of liability under the LLMCA in these proceedings, it is clear they are seeking to reduce their exposure to the claimed damages by seeking the High Court's deference to the limitation fund established by the Hong Kong limitation proceeding and seeking dismissal of plaintiffs' claims. That is, Defendants are clearly seeking to limit liability in the Marshall Islands based on the Hong Kong action. They do, in fact, seek to limit their liability in this jurisdiction.

While defendants are not required to avail themselves of the defense of limitation of liability in these Marshall Islands cases, they may do so pursuant to Section 520 of the LLMCA. Plaintiffs concede that defendants may limit liability even without constitution of a second limitation fund provided they pay any judgment in the Marshall Islands up to the amount required under the 1996 Protocol and the LLMCA, Section 510, subject to any credit or offset paid out under the Hong Kong limitation fund.

IV. CONCLUSION

We conclude that the 1976 Convention and the 1996 Protocol may obligate the Marshall Islands to treaty obligations with Hong Kong. The domestic law of the Marshall Islands, however, is that specifically codified in the LLMCA, 47 MIRC §§ 501, et seq. Protocol Article 9(4) has not been made part of the domestic law and the High Court need not defer to the Hong Kong limitation proceedings or fund.

Dated: 6/3/17

Daniel Cadra, Chief Justice

Dated: 6/3/17

J. Michael Seabright, Associate Justice

Dated: 6/3/17

Barry Kuffen, Associate Justice