

# FEDERAL COURT OF AUSTRALIA

## Mitsui O.S.K. Lines Ltd v The Ship: Yangze 22 (No 2) [2026] FCA 476

File number(s): NSD 629 of 2025

Judgment of: SARAH C DERRINGTON J

Date of judgment: 22 April 2026

Catchwords: **ADMIRALTY AND MARITIME** – application for stay of proceedings – whether Australia is a clearly inappropriate forum – where collision occurred in Chinese territorial waters – where several proceedings on foot in the People’s Republic of China (PRC) with the same sub-stratum of fact – where party opposing the stay submitted to jurisdiction of PRC court prior to commencing proceedings in this Court – whether party opposing stay would be deprived of legitimate juridical advantage – whether availability of action *in rem* is a legitimate juridical advantage – application granted

Legislation: *Admiralty Act 1988* (Cth) ss 4(3)(a), 15(2)  
*Limitation of Liability for Maritime Claims Act 1989* (Cth) s 6  
*Trans-Tasman Proceedings Act 2010* (Cth)

*Convention on Limitation of Liability for Maritime Claims*, opened for signature 19 November 1976, 1456 UNTS 221 (entered into force 1 December 1986), as amended by the *Protocol of 1996*, opened for signature 2 May 1996, 35 ILM 1433 (entered into force 13 May 2004), and further amended by *Resolution LEG.5(99)* of the Legal Committee of the International Maritime Organization, 19 April 2012 (entered into force 8 June 2015) art 6(1)(b)

*International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships*, opened for signature 10 October 1957, 1412 UNTS 80 (entered into force 31 May 1968)

*Maritime Law of the People’s Republic of China* Articles 21, 22, 28, 210

*Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976*, opened for signature 2 May 1996, 35 ILM 1433 (entered into force 13 May 2004)

*Sherman Act of 1890* (US)

*Special Maritime Procedure Law of the People’s Republic of China* Articles 23, 25

Cases cited:

*Anglo-Australian Foods Ltd v von Planta* (1988) 20 FCR 34  
*Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai” (No 2)* [2012] FCA 1497; (2013) 215 FCR 265  
*Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd’s Rep 286  
*Clayton v Bant* [2020] HCA 44; 272 CLR 1  
*CMA CGM SA v The Ship Chou Shan* [2014] FCAFC 90; 224 FCR 384  
*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45  
*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345  
*Freshpac Machinery Pty Limited v Ship “Joanna Bonita”* (1994) 125 ALR 683  
*GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 280 CLR 442  
*Green v Australian Investment Ltd* (1989) 25 FCR 532  
*Henry v Henry* (1996) 185 CLR 571  
*Herceg Novi (owners) v Ming Galaxy (owners) (The Herceg Novi)* [1998] 2 Lloyd’s Rep 454  
*Karpik v Carnival Plc* [2023] HCA 39; 280 CLR 640  
*Logan v Bank of Scotland (No 2)* [1906] 1 KB 141  
*Lubbe v Cape Plc (No 2)* [2000] 4 All ER 268  
*MacShannon v Rockware Glass Ltd* [1978] AC 795  
*Nelson v Couch* (1863) 15 CB (NS) 99  
*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197  
*Piper Aircraft Co v Reyno* (1981) 454 US 235  
*Puttick v Tenon Ltd* [2008] HCA 54; 238 CLR 265  
*Sim v Robinow* (1892) 19 R (Ct of Sess) 665  
*Société du Gaz de Paris v Société Anonyme de Navigation “Les Armateurs Français”* (1926) SC (HL) 13  
*Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460  
*St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382  
*Stemcor (A/Asia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391  
*The “Moschanthy”* [1971] 1 Lloyd’s Rep 37  
*The Atlantic Star* [1974] AC 436  
*The Broadmayne* [1916] P 64  
*The Cella* (1888) 13 PD 82  
*The Joannis Vatis (No 2)* [1922] P 213

*The John and Mary* (1859) Swab 471  
*The Rena K* [1979] QB 377  
*Vernor v Elvies* (1610) 6 Dict of Dec 4816  
*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

Division: General Division

Registry: New South Wales

National Practice Area: Admiralty and Maritime

Number of paragraphs: 123

Date of hearing: 9-10 February 2026

Counsel for the Plaintiffs: Mr D Reynolds with Ms O Ronan

Solicitor for the Plaintiffs: Clyde & Co Australia

Solicitor for the Defendant: Holding Redlich

Counsel for the Defendant: Mr M Scott KC with Mr C.L.W. Street

## ORDERS

NSD 629 of 2025

**BETWEEN:**            **MITSUI O.S.K. LINES LTD**  
First Plaintiff

**PROTEA NAVIGATION INC**  
Second Plaintiff

**AND:**                **THE SHIP YANGZE 22**  
Defendant

**ORDER MADE BY:** **SARAH C DERRINGTON J**

**DATE OF ORDER:** **22 APRIL 2026**

### THE COURT ORDERS THAT:

1. The proceedings be permanently stayed.
2. The plaintiffs pay the defendant's costs of the interlocutory application unless application is made to vary that order within seven days of today's date.
3. The plaintiffs have leave to appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### SARAH C DERRINGTON J

- 1 The defendant, the ship *Yangze 22* (IMO 9958212), seeks a permanent stay of this proceeding commenced by writ on 28 April 2025 seeking damages for the negligent navigation or management of the *Yangze 22* consequent upon a collision between her and the ship *Vega Dream* (IMO 9532094) on 30 December 2024 in the inbound traffic lane of the Beicao Fairway towards the Port of Shanghai in the People's Republic of China (PRC).
- 2 The *Yangze 22* was arrested on 6 May 2025 at the Port of Newcastle following an application for the issue of an arrest warrant by Mitsui O.S.K. Lines Ltd (MOL) and Protea Navigation Inc (plaintiffs), respectively the registered owner and bareboat charterer of the *Vega Dream*. She was released on 8 June 2025 by consent following the provision of conditional security. The registered owner of the *Yangze 22*, Nebula Shipping Pte Ltd, originally entered a conditional appearance to challenge the jurisdiction of the Court. It no longer presses that challenge and accepts that the conditional appearance filed on 16 May 2025 should be treated as unconditional.
- 3 At the time when the writ was issued, three related proceedings involving the same sub-stratum of fact had been commenced by Nebula in the Shanghai Maritime Court in the PRC, on 21 January, 24 January, and 11 March 2025 respectively.
- 4 Also prior to the issue of the writ, on 13 February 2025, Protea commenced proceedings in the High Court of Singapore against Nebula for loss and damage arising from the collision. That proceeding was discontinued on 29 May 2025.
- 5 Nebula contends that a stay is warranted on the grounds of *forum non conveniens*, or alternatively, on grounds of vexation, oppression, or abuse of process more broadly. At base, the dispute arises because of the difference in the amount of the limitation fund depending upon whether such a fund is established in Australia or in the PRC. Under Australian law, art 6(1)(b) of the *Convention on Limitation of Liability for Maritime Claims 1976* (LLMC) as amended by the Protocol of 1996 and the 2012 amendments thereto (together, LLMC 76) is given the force of law by s 6 of the *Limitation of Liability for Maritime Claims Act 1989* (Cth) (LLMC Act). A limitation fund established in Australia pursuant to the LLMC Act for all claims other than loss of life or personal injury, would be 24,980,987 special drawing rights (SDRs), calculated in accordance with the *Yangze 22*'s gross tonnage of 44,479 tons. As at the last

hearing date (10 February 2026), that number of SDRs was equivalent to USD 34,455,775.75 or AUD 48,700,933.78.

6 The PRC is not a party to the LLMC. It has enacted its own domestic limitation regime. In accordance with that regime, the fund which has already been established in the Shanghai Maritime Court is set at 6,903,375 SDRs, plus interest from the date of the collision until the date of the establishment of the fund. As at 10 February 2026, that number of SDRs was equivalent to USD 9,521,687.07 or AUD 13,458,267.63 – almost a quarter of what would be available under Australian law.

7 Despite the High Court’s exhortation in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 565 that, in the ordinary case, “counsel should be able to furnish the primary judge with any necessary assistance by a short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours”, such was not the case before me. Nor was I able to do no more “than briefly indicate that, having examined the material in evidence and having taken account of the competing written and oral submissions” before forming a view as to whether or not the proceedings should be stayed on *forum non conveniens* grounds. It is not an ordinary case.

8 For the following reasons, the stay should be granted.

## **BACKGROUND**

9 The following matters are uncontroversial.

10 Nebula is a company incorporated in Singapore which, at all material times, was the registered owner of the Singapore-registered *Yangze 22*, a bulk carrier with a gross tonnage of 44,479 tons.

11 MOL is a company incorporated in Japan which, at all material times, was the registered owner of the *Vega Dream*, a bulk carrier with a gross tonnage of 91,468 tons. Protea, the demise charterer of the *Vega Dream*, is incorporated in Panama.

12 The collision occurred at approximately 2200 local time on 30 December 2024 in the vicinity of No 39 buoy in the deep water (northern) channel of the Yangtze Estuary Deepwater Navigation Channel in the PRC; that is, within internal Chinese waters. The *Yangze 22* was laden with chemical fertiliser and the *Vega Dream* with iron ore.

- 13 Both vessels suffered damage. The damage to the *Yangze 22* included hull breach on the starboard midship section, flooding in cargo hold No. 5, fuel oil leakage from the No. 1 starboard fuel tank, and related claims said to exceed RMB 200 million.
- 14 MOL and Protea allege that the collision was caused deliberately by a person or persons on board the *Yangze 22*.
- 15 MOL and Protea assert that fuel from the *Yangze 22* spilled into the fore peak tank of the *Vega Dream* causing them to incur emergency response costs and exposures for repair, loss of hire, cargo damage claims, and similar matters.

### **Related proceedings**

- 16 Three related proceedings have been commenced in the PRC.
- 17 *First:* on 21 January 2025, Nebula commenced limitation proceedings in the Shanghai Maritime Court to establish a limitation fund, the value of which was calculated at 6,903,375 SDRs. Nebula submits that the essential facts of these proceedings are:
- (a) By notice dated 12 February 2025, the Shanghai Maritime Court formally accepted the application to establish a limitation fund;
  - (b) Notice was given to all interested persons to object within 30 days or apply to register a claim within 60 days of publication of the last announcement of the application's acceptance;
  - (c) As at 14 February 2025, there were over a dozen interested parties including the shipper, environmental protection agencies, and clean-up organizations;
  - (d) MOL and Protea objected to the limitation, which objection was dismissed on 8 April 2025;
  - (e) MOL and Protea appealed to the Shanghai High People's Court on 11 April 2025, which appeal failed;
  - (f) On 27 April 2025, while the appeal was still pending and one day prior to commencing this proceeding, MOL and Protea submitted their application to register their claims against the fund – no purported reservation as to jurisdiction was asserted;
  - (g) On 14 May 2025, the fund was constituted by letter of guarantee dated 21 April 2025;

- (h) On 7 July 2025, MOL's and Protea's limitation application was approved and they were directed to file a "confirmation of rights" lawsuit within 7 days. (This had apparently already been done on 6 May 2025) (**MOL's & P's Claim against the Fund**);
- (i) As at 31 October 2025, 14 separate claims on the fund had been filed, relevantly by:
  - (i) MOL and Protea
  - (ii) Yangtze Navigation Channel Administration Bureau (Ministry of Transport)
  - (iii) Yangtze River Fishery Administration Office (Ministry of Agriculture)
  - (iv) Hengsha Haitang Administration Office of Chongming District of Shanghai
  - (v) Shanghai Water Conservancy and Hydroelectricity of Construction Engineering Co Ltd
  - (vi) Jiayang Environment Protection Co Ltd (Shanghai Environment Group)
  - (vii) Shanghai Haizhiyu Ship Services Co Ltd
  - (viii) Shanghai Shenmin-Resolve Marine Emergency Services Co Ltd
  - (ix) Shanghai Yuanhai Ship Pollutant Disposal Co Ltd
  - (x) Shanghai Honghao Ship Engineering Services Co Ltd
  - (xi) Shanghai Dongan Water Pollution Protection Centre
  - (xii) Shanghai Xingshen Marine Emergency Response Services Co Ltd
  - (xiii) Wusong MSA of PRC
  - (xiv) G Shanghai Water Conservancy Engineering Materials Co Ltd.

18 *Secondly*: on 24 January 2025, also in the Shanghai Maritime Court, Nebula applied to arrest the *Vega Dream* in respect of its claim estimated to exceed RMB 200 million. Nebula submits that the essential facts of those proceedings are:

- (a) The arrest application was granted on 13 February 2025 and an order of ship arrest was made by the President of the Shanghai Maritime Court, which arrest was carried out on the same day;
- (b) On 21 February 2025, MOL and Protea objected to the arrest on grounds including matters as the substantive dispute, which objection was dismissed;
- (c) On 25 February 2025, security for Nebula's claim was provided on behalf of MOL and Protea by a letter of undertaking from Ping An Property & Casualty Insurance Company

of China, Shenzhen Branch (**Ping An LOU**) which was submitted to the Shanghai Maritime Court on 27 February 2025;

- (d) On 5 March 2025, the *Vega Dream* was released (by a decision of three judges) on the basis of that undertaking.

19 *Thirdly*: on 11 March 2025, Nebula commenced proceedings in the Shanghai Maritime Court against MOL and Protea for damages in respect of the collision (**Nebula’s Collision Claim**). Nebula submits the essential facts are:

- (a) The proceeding was accepted on 18 March 2025;
- (b) On 20 March 2025, Nebula brought an application for preservation of evidence in respect of documents on board the *Vega Dream*, which application was granted on 25 March 2025;
- (c) On 9 April 2025, MOL and Protea filed an application in the Shanghai Maritime Court challenging jurisdiction in respect of Nebula’s claim, which application was dismissed with the Court holding that the claim by Nebula against MOL and Protea for liability and damages was within the exclusive jurisdiction of the Chinese maritime courts. MOL and Protea had contended in written submission to the Shanghai Maritime Court dated 6 June 2025 that the Federal Court of Australia was the most appropriate forum for the resolution of the dispute;
- (d) On 19 June 2025, MOL and Protea appealed to the Shanghai High People’s Court, arguing that “it would be more convenient for the Australian court to consolidate and adjudicate all related claims and disputes”. The appeal was dismissed on 7 August 2025 and in so doing, the Court held that the contention that the Shanghai Maritime Court is an inconvenient forum and that the case should be heard by a foreign court was “untenable”.

20 Further, on 13 February 2025, Protea commenced proceedings against Nebula for loss and damage as a result of the collision in Singapore. On 3 April 2025, Nebula sought a stay of those proceedings on the ground of *forum non conveniens* but on 29 May 2025, Protea formally discontinued the proceedings.

21 The writ in these proceedings was filed on 28 April 2025 claiming loss and damage as a result of the collision between the *Vega Dream* and the *Yangze 22*. The warrant for the arrest of the

*Yangze 22* was issued on the same day. As such, it was a proceeding commenced *in rem* on a maritime lien, being a lien for damage done by ship: *Admiralty Act 1988* (Cth), s 15(2)(b).

## THE DOCTRINE OF *FORUM NON CONVENIENS*

- 22 As has been explained in various academic writings (see for example, Ardvan Arzandeh, “The Origins of the Scottish Forum Non Conveniens Doctrine” (2017) 13 *Journal of International Private Law* 130; Edward Barrett, “The Doctrine of Forum Non Conveniens” (1947) 35 *University of California Law Review* 387; Oscar Clark, “Appellate review of stays on the ground of forum non conveniens” (2025) 56 *Australian Bar Review* 1), the power to stay proceedings despite the otherwise competent jurisdiction of a court dates back to 1610 in the Scottish plea of *forum non competens*: *Vernor v Elvies* (1610) 6 Dict of Dec 4816. The plea was concerned with circumstances where, although the forum could assert jurisdiction, the parties were alien to the forum and the trial was considered inconvenient. In 1926, the House of Lords, sitting as the ultimate Scottish appellate court, first recognised *forum non conveniens* as a free-standing plea, divorced from any need to establish *lis alibi pendent*: *Société du Gaz de Paris v Société Anonyme de Navigation “Les Armateurs Français”* (1926) SC (HL) 13. By 1892, the doctrine had developed in Scotland to the point where it was established that something greater than mere inconvenience was needed to justify the grant of a stay. In *Sim v Robinow* (1892) 19 R (Ct of Sess) 665 at 668, Lord Kinnear said that such an application “can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”.
- 23 The development of the doctrine differed south of the Scottish border. In *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 and in *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, the English Court of Appeal was concerned with the propriety of the issuance of a writ *ex juris*. The Court of Appeal articulated a stronger test than that which had been adopted in Scotland. In *St Pierre* (at 398), Scott LJ said:
- In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.
- 24 The decision in *The Atlantic Star* [1974] AC 436 marked the beginning of a discrete doctrine of *forum non conveniens*, independent from the test that had arisen in the context of the issuance of writs *ex juris* and a step towards merger with the Scottish position. In that case, Lord

Kilbrandon held (at 477-8) that the terms “vexatious” and “oppressive” were not to be understood according to their natural meaning but were to be ascribed a “morally neutral meaning” devoid of overtones of moral delinquency or irresponsibility. Similarly, in *MacShannon v Rockware Glass Ltd* [1978] AC 795 at 812, Lord Diplock was not prepared to confine the consideration of any alleged injustice to a defendant strictly to circumstances of oppression or vexatiousness. Rather, his Lordship held that “the defendant must satisfy the court that there is another forum ... in which justice can be done ... at substantially less inconvenience or expense.”

25 The highpoint of the development of the doctrine of *forum non conveniens* in England was the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. Consequent upon that decision, whilst the plaintiff retains a prima facie right to invoke the jurisdiction of the English courts, a stay will be granted, per Lord Goff of Chieveley at 476:

... where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all parties and the ends of justice.

26 Thus, under English law, the first stage of the *Spiliada* test requires the court to determine whether there is another, more appropriate forum, being one “with which the action had the most real and substantial connection” judged by reference to factors including the availability of witnesses, the law governing the relevant transaction or circumstances, and the places where the parties reside and/or carry on business (*Spiliada* at 477-8). The legitimate juridical advantages for the plaintiff which had informed the traditional test could be subordinated to these other relevant factors (*Spiliada* at 482-4).

27 If the first stage of the test leads a court to conclude that there is some other available forum which is prima facie more appropriate for the trial, an English court will ordinarily grant a stay unless the plaintiff can show that justice requires that it be refused: *Lubbe v Cape Plc (No 2)* [2000] 4 All ER 268 at 275 per Lord Bingham.

28 Whilst Australian courts initially followed the English approach in *Spiliada*, a majority of the High Court ultimately rejected it in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 per Brennan, Deane, and Gaudron JJ; Wilson and Toohey JJ dissenting. The majority preferred the test stated in *St Pierre* and adopted the “clearly inappropriate forum” test. Deane J put it this way, at 248:

The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that

it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him.

29 Justice Brennan, at 239-40, held:

... that the true principle is, as Lord Simon of Glaisdale put it in his dissenting speech in [*The Atlantic Star*]: “[A] plaintiff who founds jurisdiction will not be denied a hearing unless he is misusing the forensic process so as to perpetrate injustice.” The formulation by Scott L.J. is, and should remain, the law of this country and “oppressive” and “vexatious” should be understood according to their ordinary meaning.

30 Justice Gaudron, at 266, stated her preference for the “inappropriate forum test as stated by Deane J”, subject to her view that,

... the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties.

31 In *Voth*, the appellant argued that *Oceanic Sun* should be reconsidered and the *Spiliada* test reaffirmed because of the absence of a clear majority in *Oceanic Sun* for the adoption of a particular principle or a set of principles governing the grant or refusal of a stay. That circumstance had led the dissenters in *Oceanic Sun* to observe, at 220:

It is apparent that the decision of the Court, while resolving the immediate dispute between the parties, does not yield a precise and authoritative statement of the principles that should be applied in dealing with an application to stay proceedings. That statement must await another day.

32 *Voth* concerned a plaintiff company, incorporated in New South Wales, which sued an accountant, who resided and practised in Missouri, for professional negligence in relation to its subsidiary which was established under the laws of Kansas. The consequence of the alleged negligence was that the subsidiary did not pay United States withholding tax on interest payments made to it by the plaintiff and the plaintiff lost tax deductions to which it would otherwise have been entitled under Australian law. The defendant was served with process issued out of the Supreme Court of New South Wales and applied for a stay of those proceedings.

33 The majority, Mason CJ, Deane, Dawson and Gaudron JJ, with Brennan J joining in the reasoning but dissenting on its application to the facts, rejected the “more appropriate test” determined in *Spiliada*, and adopted the “clearly inappropriate forum” test despite acknowledging (at 558) that both tests were likely to yield the same result in the majority of cases. It did so for three reasons. First, the majority was concerned that an Australian court should not be called upon to sit in judgment upon the ability or willingness of the courts of

another country to accord justice to a plaintiff in a particular case. Thus, the question of whether the forum was “clearly inappropriate” focusses only on one jurisdiction and does not require value judgments to be made about the system of courts and justice in another country.

34 Secondly, the majority reiterated (at 559) the obligation on domestic courts to exercise jurisdiction which is conferred on them unless it is established that “the forum is clearly inappropriate”.

35 Thirdly, the majority was unpersuaded that there was any international consensus on the application of the *Spiliada* test, drawing particular attention to the approach of the Supreme Court of the United States as illustrated in *Piper Aircraft Co v Reyno* (1981) 454 US 235, where Marshall J (at 241) acknowledged that a court may take into account considerations affecting the court’s own administrative problems such as congested court lists and lack of judicial resources (*Voth* at 560-561).

36 As to the principles to be applied on an application for a stay on *forum non conveniens* grounds, the majority in *Voth* (at 564) held that they are those stated by Deane J in *Oceanic Sun* at 247-8:

*The power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgement and, to a significant extent, matters of impression. The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstances of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties. The reason why that is so is that, once it is accepted that the adjectives “oppressive” and “vexatious” are not to be narrowly or rigidly construed and are to be applied in relation to the effect of the continuation of the proceedings rather than the conduct of the plaintiff in continuing them, the continuation of proceedings in a tribunal which is clearly an inappropriate forum would, in the absence of exceptional circumstances being established by the plaintiff ..., be oppressive or vexatious to such a defendant if there is some available and appropriate tribunal in another country.*

(Footnotes omitted. Emphasis added.)

37 The majority in *Voth* said (at 564-5) that Lord Goff’s discussion in *Spiliada* of relevant “connecting factors” and “legitimate personal or juridical advantage” provides valuable assistance. In his discussion (*Spiliada* at 482-483), Lord Goff made the following observations:

- an advantage to a plaintiff will ordinarily give rise to a comparable disadvantage to the defendant;
- as a general rule, a court should not be deterred from granting a stay of proceedings simply because a plaintiff will be deprived of advantages in the English jurisdiction such as: damages being awarded on a higher scale; more complete discovery procedures; power to award interest; a more generous limitation period;
- the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice.

38 Further, although agreeing with Gaudron J’s view in *Oceanic Sun* that the substantive law of the forum “is a very significant factor” in the exercise of the court’s discretion, the majority was not prepared to accord it the same weight as would her Honour. The majority said, “the court should not focus upon that factor to the exclusion of all others” (at 566). Along the way to that conclusion, the majority had rejected the weight placed upon the notion that a proceeding regularly invoked provides a prima facie right to have the proceeding continue in that forum by the decisions of Lee J in *Anglo-Australian Foods Ltd v von Planta* (1988) 20 FCR 34 and French J in *Green v Australian Investment Ltd* (1989) 25 FCR 532.

### **SHOULD THE PROCEEDINGS BE STAYED?**

39 The High Court made clear in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 280 CLR 442 at [17], that

The extreme step of the grant of a permanent stay of proceedings demands recognition that the questions whether a trial will be necessarily unfair or so unfairly or unjustifiably oppressive as to constitute an abuse of process each admit of but one uniquely right answer.

40 Thus, while the task of this Court remains evaluative in answering each question, “the law tolerates but one correct answer”: *GLJ* at [17].

41 It is uncontroversial that Nebula bears the onus of proving that this Court is a clearly inappropriate forum and that the continuation of the proceedings in this Court would be oppressive or vexatious in the sense explained by Deane J in *Oceanic Sun* (at 247-8) and endorsed by the High Court in *Voth* (at 564).

42 It is for Nebula to satisfy this Court that it is so inappropriate a forum for the determination of these proceedings (being proceedings brought *in rem* but now proceeding both *in rem* and *in personam*) that their continuation will be oppressive and vexatious to it. Nebula points to the Shanghai Maritime Court not merely as a foreign tribunal to whose jurisdiction Nebula is amenable and which would entertain the proceedings at the suit of MOL and Protea but as the foreign tribunal that *is seized* of the *in personam* dispute at least.

43 I deal first with the factors on which Nebula relies to discharge its burden.

#### **Factors relevant to the application**

44 Nebula points to the following eight factors in support of its application for a stay.

45 *First*, Nebula submits that as the dispute concerns the liability of the *Yangze 22* interests to the *Vega Dream* interests arising from a collision, this Court is a clearly inappropriate forum in circumstances where the Court is not seized of the whole controversy and where only the Shanghai Maritime Court can determine the competing claims, which include the apportionment of liability, the assessment of damages, and the possibility of “breaking the limit” under the provisions of the Chinese Maritime Code.

46 MOL and Protea submit it is premature to weigh this factor in the balance in circumstances where no pleadings have yet been filed, Nebula having rejected a proposal by MOL and Protea to agree to orders for the filing of pleadings prior to hearing of this application. They submit that it is “unrealistic” to suggest that the present proceedings would require this Court to determine all competing claims as arise in the Shanghai Maritime Court proceedings or the myriad alleged forms of environmental damage arising on the claims against the limitation fund established in the PRC. As has already been observed, the converse submission was made before the Shanghai High People’s Court when, in June 2025, MOL and Protea argued that this Court was the most appropriate in which to consolidate and adjudicate all related claims and disputes.

47 This Court is seized of an action *in rem* against the *Yangze 22* herself and, since its unconditional appearance, also an action *in personam* against Nebula brought by MOL and Protea for damages arising from the collision. If the proceedings continue in Australia, and the plaintiffs ultimately succeed, they have security for their claim in the form of a letter of undertaking issued by Nebula’s insurer, Assuranceforenigen Skuld (Gjendsidig), on 8 June 2025 in the amount of USD25,375,672.00 (**Skuld LOU**).

48 The Shanghai Maritime Court is seized of 17 claims, in the nature of *in personam* claims, including: the claim brought by MOL and Protea against Nebula and the claim brought by Nebula against MOL and Protea (both of which necessarily involve the question of apportionment); a collision claim filed by the Yangtze Navigation Channel Administration Bureau; and 15 claims filed by various parties described as “ship pollution damage claims”.

49 Further, two funds have been established in the Shanghai Maritime Court in relation to the collision. The first is a limitation fund on behalf of Nebula by letter of guarantee dated 21 April 2025. The second is the security provided on behalf of MOL and Protea by the Ping An LOU.

50 The risk of inconsistent findings as to liability, apportionment, and quantum should both this Court and the Shanghai Maritime Court proceed to determine liability for the collision is obvious.

51 **Secondly**, Nebula points to the uncontroversial fact that the collision occurred in Chinese territorial waters and, relatedly and **fourthly**, that the *lex causae* is Chinese law.

52 The subject matter of the 17 claims of which the Shanghai Maritime Court is currently seized occurred in China. None has any relevant connection to Australia. For this reason, the *lex causae* is Chinese law.

53 MOL and Protea submit that these factors of themselves cannot render an Australian court a clearly inappropriate forum merely because the Court would be required to apply foreign law. They point to the observations of the plurality (French CJ, Gummow, Hayne and Kiefel JJ) in *Puttick v Tenon Ltd* [2008] HCA 54; 238 CLR 265 at [31]:

The very existence of choice of law rules denies that the identification of foreign law as the *lex causae* is reason enough for an Australian court to decline to exercise jurisdiction.

54 Their Honours went on to note, however, in the context of the alleged negligence having occurred in New Zealand:

Moreover, considerations of geographical proximity and essential similarities between legal systems, as well as the legislative provisions now made for the determination of some trans-Tasman litigation, all point against treating the identification of New Zealand law as the *lex causae* as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute.

55 The same observations cannot be made in the present case. As the expert witnesses have both opined, the Chinese legal system is one based on civil law, not common law. Further, there is

no geographical proximity, nor is there any legislation similar to the *Trans-Tasman Proceedings Act 2010* (Cth).

56 Moreover, in addition to the *lex causae* being Chinese law, the PRC is also “the natural and obvious forum” for the resolution of the dispute, given that the collision occurred within the territorial waters of the PRC. Whilst it might be argued that questions as to the “natural and obvious forum” have no part to play in the application of the *Voth* principles, because that suggests resort is being had to the “more appropriate forum test”, in *CMA CGM SA v The Ship Chou Shan* [2014] FCAFC 90; 224 FCR 384, the Full Federal Court (Allsop CJ, Besanko, and Pagone JJ) held, at [62], that no error had been made by the primary judge in arriving at the conclusion that China was the natural and obvious forum in circumstances where the collision had occurred about 100 nautical miles from the Chinese coastline and within the Exclusive Economic Zone of the PRC. The primary judge’s conclusion was held to be “both defensible in fact and relevant to the assessment of suitability of Australia”.

57 The collision in the present case having occurred in Chinese territorial waters and having allegedly caused pollution damage in Chinese internal waters, the claim to China being the obvious and natural forum for the resolution of the dispute is even stronger than that in *Chou Shan*.

58 **Thirdly**, Nebula contends that the case involves “real” evidence in connexion with the collision in the Yangtze River and the environmental damage which followed. It submits that a “view” may be necessary or appropriate in order for lay and technical witnesses to explain to the Court what happened and what conclusions should be drawn from their observations.

59 MOL and Protea contend that there is no real basis for such a submission. They say they have already furnished video and other electronic evidence which illustrates the collision, including the Automatic Identification System data, Electronic Chart Display and Information System playback recordings, CCTV footage from the bridge of the *Vega Dream*, and the Voyage Data Recorder data of the *Vega Dream*.

60 Little turns on this issue.

61 **Fifthly**, Nebula points to witness considerations as militating in favour of a stay. It is submitted that all relevant lay witnesses are likely to be located outside of Australia and indeed are likely to be located in China. It is also submitted that expert witnesses in proceedings concerning a collision in Chinese waters are likely to be located in China.

62 MOL and Nebula accept that the costs and logistics associated with witnesses located in China being required to give evidence in Australia may be expected to be higher and more complex, but that is not something unknown to this Court, particularly in the exercise of the Admiralty jurisdiction. Apart from that contention, no serious challenge was mounted to Nebula’s submission that all witnesses are all likely to be based in China, except perhaps for the crew of both vessels who are multi-national.

63 Mr Yang Wengui, a partner in the Shanghai office of the firm Beijing Hai Tong & Partners appointed to act on behalf of Nebula deposed to the “key non-party witnesses who may be called” to give evidence in the dispute between Nebula on the one hand and MOL and Protea on the other hand, and who are located in China, as including: relevant personnel from the Shanghai Maritime Safety Authority; the Shanghai Shengmin Ocean Engineering Co Ltd; key representatives of the ship yards where repair works to both the *Yangze 22* and the *Vega Dream* were carried out; various personnel involved in the rescue, clean-up operations, inspection and investigation; and experts on collision liability (Affidavit of Yang Wengui filed 23 July 2025 (**First Yang Affidavit**) at [42]).

64 Mr Yang also deposed to it being a requirement under Chinese Civil Procedure Law that all factual witnesses are generally required to “present before the court and be cross examined by the parties and are inquired by the judge” (First Yang Affidavit at [42(vi)]).

65 Further, Mr Yang deposed that various pieces of relevant documentary evidence were in China, including: the evidence gathered pursuant to Nebula’s application for preservation of evidence (which can only be disclosed to all parties when the Shanghai Maritime Court proceedings on collision liability have commenced); reports that may be issued by the Shanghai Maritime Safety Administration; the reports from the six oil-spill clean-up companies and from the Yangtze River Fishery Administration on the extent of pollution damage; reports on inspection of the vessels; and documents evidencing repairs to the vessels (First Yang Affidavit at [43]).

66 **Sixthly** and **seventhly**, Nebula submits that to the extent that any witness is not within a party’s control and may need to be compelled to give evidence, such evidence would be required to be taken on commission in China with the associated expense and inconvenience that would necessarily follow. Additionally, there may be issues associated with document production. Nebula submits that, even if MOL and Protea are amenable to orders for discovery, that does not mean that Nebula will be able to obtain third-party documents other than by enlisting the assistance of the Chinese Government (see *Stemcor (A/Asia) Pty Ltd v Oceanwave Line SA*

[2004] FCA 391 at [12] where Allsop J commented on the inappropriateness of a court making orders to overseas third-parties where such orders were no more than empty threats absent foreign governmental cooperation).

67 Again, MOL and Protea did not seriously challenge that there would likely be additional expense in compelling the participation of foreign witnesses and in procuring third party documents by compulsory means, particularly from State agencies, as contended by Nebula in its fifth, sixth and seventh propositions in favour of a stay.

68 ***Eighthly***, Nebula submits that regardless of what happens in this Court, the proceedings in the Shanghai Maritime Court will continue and will determine questions of liability, limitation, apportionment, damages, and priority of competing claims according to Chinese law. It submits that there is an obvious risk of inconsistent findings, as well as vexation, in circumstances where the following issues currently before the Shanghai Maritime Court would be replicated in this Court:

- (a) Nebula's Collision Claim secured by the Ping An LOU in connexion with the Chinese arrest proceeding and held by the Shanghai Maritime Court to be within the exclusive jurisdiction of the Court;
- (b) MOL's and P's Claim against the Fund;
- (c) the apportionment of liability between the *Yangze 22* and the *Vega Dream*;
- (d) MOL's and P's Claim against the Fund more broadly as a claimant on the limitation fund;
- (e) Nebula's liability to all other claimants on the Chinese fund;
- (f) the quantification of those claims against the fund in the Chinese limitation proceeding; and
- (g) the priority ranking of claimants in the Chinese limitation proceeding.

69 In pressing its assertion that the proceedings are in any event oppressive and vexatious, Nebula points to the fact that these proceedings were commenced by MOL and Protea one day after registering their claim in the Chinese limitation proceeding and submits that this was done for no other reason than as a pretext to "prop-up" otherwise duplicative proceedings and obtain conditional security in respect of the duplicative proceedings. It is submitted that such an inference is reinforced by the fact that MOL and Protea commenced and then abandoned a proceeding in Singapore.

70 MOL and Protea submit that the extant proceedings in the Shanghai Maritime Court do not weigh in favour of a stay of the proceedings in this Court. They submit that they had no choice but to conditionally register a claim in the Shanghai Maritime Court proceedings; failure to do so might have deprived them of the opportunity to proceed in any court. Further, commencing these proceedings only one day after registering its claim against the limitation was also necessary to protect their interests. Had MOL and Protea failed to register their claims by the deadline, their rights would have been “deemed as having been waived” under Chinese law.

71 MOL and Protea point also to the circumstances that their arrest of the *Yangze 22* on 28 April 2025 occurred *prior* to the constitution of the limitation fund in the Shanghai Maritime Court and *before* they were aware of that court having received any letter of undertaking or guarantee, albeit *after* the commencement of MOL’s & P’s Claim against the Fund.

72 MOL and Protea submit any overlap “is easily managed” because they have offered an undertaking to seek to withdraw their claims against the limitation fund in the Shanghai Maritime Court, and further, not to seek to enforce any judgment issued by this Court against that limitation fund, should a permanent stay be granted. MOL and Protea observe that a similar undertaking was given and accepted by Rares J (*Atlasnavios Navegacao LDA v The Ship “Xin Tai Hai” (No 2)* [2012] FCA 1497; (2013) 215 FCR 265 at [119] and [145]).

73 However, unlike the circumstances that pertained in *Xin Tai Hai* where both the Chinese and the Australian proceedings were commenced by the same party as plaintiff, here both ship parties are plaintiffs in parallel Chinese proceedings but only MOL and Protea are plaintiffs in the Australian proceedings. There is no certainty that MOL and Protea will be permitted to withdraw as plaintiffs from MOL’s & P’s Claim against the Fund, nor as defendants in Nebula’s Collision Claim.

74 In his Expert Report dated 25 July 2025 (**First Song Report**), Professor Song opined that the Shanghai Maritime Court has duly exercised its jurisdiction over Nebula’s Collision Claim and that the proceedings will continue (unless Nebula withdraws its claim) (First Song Report at [24]). He opines further that, in Nebula’s Collision Claim, the Shanghai Maritime Court will decide the apportionment of liability and the parties’ entitlement to damages arising from the collision (First Song Report at [27]). Professor Song also expressed the opinion that, unless Nebula withdraws its claim in the Shanghai Maritime Court, it is unlikely that any Australian judgment determining the relatively liability of each party and/or their entitlement to damages can be recognised and/or enforced in China (First Song Report at [45]).

75 As to a party's ability to withdraw, Professors Song and Li were agreed that it is possible to withdraw a claim as a plaintiff, or as a claimant on a limitation proceeding, but this is subject to the approval of the court, which may refuse if there has been an illegal act done by the party seeking to withdraw or if the proceeding has reached the "debating" stage, which I understood to mean the stage of oral argument before the court. It is, however, not possible to withdraw as a defendant. Consequently, the undertaking offered by MOL and Protea is not certain as concerns MOL's & P's Claim against the Fund, and not possible as concerns Nebula's Collision Claim.

76 Further, in their oral testimony, both Professors Song and Li were agreed that in a case where other claimants allege to have suffered loss or damage as a result of the escape of oil from the *Yangze 22* then those claims are within the exclusive jurisdiction of the Shanghai Maritime Court

77 In *Xin Tai Hai*, Atlasnavios Navegacao LDA (**Atlas**), owners of the bulk carrier *B Oceania*, attempted to resist a stay of proceedings sought by the owners of the *Xin Tai Hai*, **China Earth** Shipping Inc, following a collision between the two ships in the Straits of Malacca on 29 July 2011. Atlas had caused the arrest of the *Xin Tai Hai* at Port Hedland, Western Australia, on 2 May 2012 pursuant to a writ issued on 4 November 2011. At the time of the arrest, proceedings had already been commenced in the Qingdao Maritime Court by the cargo owners, Hangzhou Cogeneration Import and Export Company Ltd, Atlas, and China Earth. Shortly after issuing the writ in this Court, still on 4 November 2011, Atlas filed an application to register its claim against the limitation fund sought to be established by China Earth in the Qiongdao Maritime Court proceedings. On 26 November 2011, Atlas filed a statement of claim against China Earth in the Qingdao Maritime Court (*Xin Tai Hai* at [1]-[2]).

78 In the present case, MOL and Protea, who now seek to resist the stay, filed their writ on 28 April 2025 and the *Yangze 22* was arrested on 6 May 2025. By that time, proceedings had been on foot in the Shanghai Maritime Court since 21 January 2025. Unlike in *Xin Tai Hai*, there appears to be no dispute that the Shanghai Maritime Court proceedings were commenced before the writ was issued in this Court (cf *Xin Tai Hai* at [124]-[125]).

79 MOL and Protea had unsuccessfully objected to the establishment of the limitation fund (8 April 2024); appealed to the Shanghai People's Court (11 April 2025); and submitted their application to register their claims against the fund (27 April 2025). Further, Nebula had applied to arrest the *Vega Dream* (24 January 2025); MOL and Protea had unsuccessfully

objected to the arrest (21 February 2025); MOL and Protea had provided security for Nebula's claim (27 February 2025); Nebula had commenced its substantive proceedings against MOL and Protea for damages (11 March 2025); and MOL and Protea had filed an appeal in the Shanghai Maritime Court challenging jurisdiction in respect of the claim. The aborted Singaporean proceedings had also been commenced by Protea (13 February 2025). Against this background, MOL and Protea can be said to have submitted to the jurisdiction of the Shanghai Maritime Court only on 27 April 2025, one day prior to issuing the writ.

80 Subsequent to the issue of the writ, and on the same day as the arrest of the *Yangze 22*, 6 May 2025, MOL and Protea filed a "confirmation of rights" lawsuit in the Shanghai Maritime Court, the process by which evidence of its claim is assessed and it is determined whether or not the claim is limitable.

### **Legitimate juridical advantage**

81 MOL's and Protea's primary contention in opposition to a stay is that they should not be deprived of the legitimate juridical advantage they say inheres in the Australian proceedings. The advantage is said to be threefold. First, MOL and Protea point to the higher limits of liability available in this jurisdiction. Secondly, the ability to bring an action *in rem* in Australia. Thirdly, the existence of the security in their favour pursuant to the Skuld LOU. They submit that to grant a permanent stay would be to extinguish these rights, which are only available in this jurisdiction, and work an injustice to the plaintiffs to the benefit of Nebula alone. They contend such a course would be vexatious and oppressive to them as plaintiffs.

82 However, simply being deprived of an advantage in one jurisdiction is not determinative of the outcome. As Lord Goff said (and whose observations were acknowledged to be of assistance in *Voth* at 564-5), "regard must be had to the interests of all parties and the ends of justice" (*Spiliada* at 483).

83 The most significant legitimate juridical advantage available to MOL and Protea in this Court is the much higher limit of liability available pursuant to the LLMC Act as compared with that available under Chinese law. Despite the submission put on behalf of Nebula that Chinese law would be applied by an Australian court in determining the relevant limits of liability, that proposition did not seem to be seriously arguable. Whatever role Chinese law has to play in the resolution of substantive questions of liability, were the proceedings to be prosecuted in this Court, the issue of limitation would necessarily be resolved in accordance with Australian law applying the LLMC Act: *Karpik v Carnival Plc* [2023] HCA 39; 280 CLR 640 at [21]-

[22]. As has already been explained, the difference between what might be available to MOL and Protea to recover in the Shanghai Maritime Court as compared with pursuing their claim in this Court, assuming the distribution of the fund *pari passu*, is approximately USD 20 million. MOL and Protea submit that this is an overwhelming factor against the grant of a permanent stay. They submit further that the Shanghai Maritime Court is not a sufficient forum in which to vindicate all claims “because the only jurisdiction in which the plaintiffs can advance their claim for the full quantum of their damages, available to the full level of the statutory limitation prescribed by the LLMC Act, is *this* jurisdiction; that claim is *unavailable* before the SMC”.

84 The corollary to this submission is that the commencement of the proceedings in this jurisdiction is calculated, albeit not illegitimately, to prevent Nebula from pursuing the remedy available to it under Chinese law of limiting its liability in accordance with the LLMC 76 amounts as enacted by the *Maritime Law of the People’s Republic of China (CMC): CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 402.

85 It is as well to observe that there is no universally accepted view of what the limits of liability should be. This was the point made by the English Court of Appeal in *Herceg Novi (owners) v Ming Galaxy (owners) (The Herceg Novi)* [1998] 2 Lloyd’s Rep 454 when considering whether the loss of increased security under the LLMC 76, were the proceedings in England to be stayed in favour of Singapore where the *International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (LLMC 57)* with its lower limits was then in force, was decisive in favour of the grant of a stay. As at 10 February 2026, the LLMC 76 had been acceded to by 54 States, and the 1996 Protocol by 61 States. The limits in Article 210 of the CMC accord with those in the LLMC 76. Those who participate in maritime commerce know the vagaries of international dispute resolution. Just as MOL and Protea have sought a legitimate juridical advantage in arresting the *Yangze 22* in a Contracting State to the LLMC Protocol of 1996, so too has Nebula in establishing a limitation fund in a jurisdiction that adheres to the LLMC 76 limits, albeit not as a Contracting State.

86 Consequently, when considering the interests of all the parties and the ends of justice (*Voth* at 564-5), the fact that higher limits are available in this jurisdiction is not an overwhelming factor against the grant of a permanent stay.

87 MOL and Protea point to the commencement of their action *in rem* in this Court to submit that the issues sought to be vindicated in this Court are not identical to those in the Shanghai

Maritime Court. They submit this is because “this Court alone will be capable of making orders to the effect that the Plaintiffs are entitled to the full extent of their claim, whereas the [Shanghai Maritime Court] will not, by reason of the limitation”. MOL and Protea seek to pre-empt their allusion of an available claim with the availability of the quantum of damages by submitting that the underlying *claim* was not the same in each proceeding, the claim in this Court having been commenced *in rem*. They contend “it is only in this proceeding that the Plaintiffs can bring, and do bring, a claim *in rem* against the ship itself, as distinct from a claim against its owner”. So much may be accepted at a theoretical level.

88 MOL and Protea have, however, failed to distinguish between the underlying claim itself, being one for liability for damages arising from the collision, and the three-fold function of an action *in rem* as an instrument to found jurisdiction, to bring the owners of (or others interested in) the *res* before the court, and to create or give effect to a positive security interest enabling the enforcement of that interest through the arrest process and the consequent judicial sale. The fact that the action *in rem* is available in this jurisdiction does not change the character of the underlying claim in tort.

89 Professors Song (Expert Report of Song Dihuang dated 24 October 2025 (**Second Song Report**) at [7]) and Li (Expert Reports of Henry Hai Li dated 9 October 2025 (**Li Report**) at [1.44]) were *ad idem* that the action *in rem* is unknown to Chinese law. MOL and Protea submit that this fact prevents a conclusion that it is improper to bring proceedings in Australia, relying on the observations of Rares J in *Xin Tai Hai* at [137]:

I reject the ship parties’ argument that Atlas’ purpose in bringing its proceedings here was in some way improper. Atlas’ right to arrest the ship, and her presence as a party in proceedings *in rem* in this Court were not available to it in China. Once the limitation fund had been established under the domestic law of China, Atlas could not attain the status of a secured creditor there; nor could it treat the ship as a party there. Because China has not ratified the LLMC 1976 or 1996, the existence of the limitation fund in the Maritime Court of itself does not inhibit anyone from arresting the ship in an action *in rem* anywhere else (unlike the position under Art 13 of the LLMC 1976). Of course, Atlas had submitted to the jurisdiction of the Maritime Court and so has become subject to the operation of Chinese law, including its provisions to protect the property of the shipowner, or a person in China Earth’s position, who had established a limitation fund on which Atlas had sought to make a claim.

90 Although the plaintiff in that case admitted, and Rares J acknowledged (at [104]), “that [its] dominant purpose was to avail itself of the jurisdiction of this Court and the benefit of the internationally recognised provisions of LLMC 1996”, his Honour nevertheless rejected the application for a stay. His Honour found that the writ commencing the Australian proceedings

was issued *before* the plaintiff submitted to the foreign jurisdiction, which it did so only because the time limit for participation in the Chinese proceedings had expired before the *Xin Tai Hai* arrived in Australia (at [50]-[51], [130]). That being so, the principle articulated in *Cigna Insurance* was of no application.

91 There are several differences between the circumstances that pertained in the *Xin Tai Hai* as compared with the present case. First, the *Yangze 22* could have been subject to pre-litigation seizure (arrest) in the PRC pursuant to Article 2 of the *Special Maritime Procedure Law of the People's Republic of China (SMPL)* and *Nebula* could be party to, and indeed is, in proceedings on the collision claim before the Shanghai Maritime Court (Affidavit of Xu Jun filed 10 October 2025 (**Xu Affidavit**) at [55]).

92 Secondly, unlike the circumstances that pertained in the *Xin Tai Hai*, the writ in these proceedings was issued (on 28 April 2025) *after* MOL and Protea had submitted to the jurisdiction of the Shanghai Maritime Court (at the latest 27 April 2025) when their application to register claims against the fund was filed (Xu Affidavit at [52]). Whilst they may have done so on that date to preserve their rights because of the impending time bar, there is no evidence that they otherwise sought to reserve whatever rights they intended to pursue in Australia in these proceedings. By that document, MOL and Protea reserved “all substantive rights of defense, including the right to challenge [*Nebula*’s] entitlement to limit liability” (Xu Affidavit: Exhibit XJ-1, Tabs 16 and 17).

93 In assessing the extent of the juridical advantage said to flow from having commenced *in rem*, it is pertinent to note that some characteristics of the Chinese procedural law mirror characteristics of the action *in rem*. As Professor Song explained (Second Song Report at [8]), Article 25 of the SMPL provides that in applying for the arrest of a ship, the application can proceed even where the party against which the arrest application is sought cannot be named. He refers to this procedure as “having a “sense of action *in rem*” or more generally a “quasi action *in rem*”. Professor Li explains the SMPL provides for the arrested ship to be taken as the property of the respondent against whom the preservation measure is taken and the underlying claim is preserved (Article 23) (Li Report at [1.44]). Article 23 provides further that:

A maritime court may arrest other ships owned by the shipowner, bareboat charterer, time charterer or voyage charterer who is held responsible for a maritime claim, when the arrest is executed, with the exception of the claims related to ownership or possession.

94 There therefore seems to be little of substance that distinguishes the position under Chinese law, at least so far as the procedural consequences of the action *in rem* are concerned, from those as understood in this jurisdiction. As Professor Song explains, on 24 January 2025, Nebula applied for “pre-litigation seizure” (arrest) of the *Vega Dream*. The Shanghai Maritime Court granted that application, required the owner or bareboat lessee of the *Vega Dream* to provide a guarantee of RMB 200 million, and ordered that Nebula file its claim for damages (being a claim entitled to a maritime lien) as a result of the collision within 30 days of the ruling (First Song Report at [4.8]-[4.10]). The ship was seized on 13 February 2025 (First Song Report at [4.11]). On 27 February 2025, the Ping An LOU in the amount of RMB 200 million was issued, and the *Vega Dream* was released from seizure on 5 March 2025 (First Song Report at [4.13], [4.16]).

95 It was not suggested that MOL and Protea could not have similarly applied for pre-litigation seizure of the *Yangze 22* in the Shanghai Maritime Court and have caused security to be required for its release upon the filing of their claim for damages (being a claim entitled to a maritime lien) resulting from the collision, albeit that the amount of any such security would be limited by the provisions of Article 210 of the CMC.

96 Instead, MOL and Protea caused the arrest of the *Yangze 22* in this jurisdiction on the basis of their collision claim, being in this jurisdiction also a maritime lien for damage done by a ship. Nebula has entered an unconditional appearance. As has already been said, under Australian law, the action therefore proceeds both *in rem* and *in personam*. Security has been given for the release of the ship, which security represents the plaintiffs’ reasonably arguable best case (taking into account the limit calculated in accordance with LLMC Act) plus interest and costs assessed on a standard basis: *The “Moschanthy”* [1971] 1 Lloyd’s Rep 37 at 44; *Freshpac Machinery Pty Limited v Ship “Joanna Bonita”* (1994) 125 ALR 683 at 686-7. It is true that, under the terms of the Skuld LOU, the security will expire if the proceedings in this Court are permanently stayed. No doubt that is a disadvantage to MOL and Protea, but the very existence of the Skuld LOU is predicated on MOL’s and Protea’s ability to invoke the higher limits of the LLMC Act, which I have already found is not an “overwhelming” factor against the grant of a stay.

97 For present purposes, it is not the commencement of the action *in rem* itself that has secured MOL and Protea any legitimate juridical advantage; security could have been provided in place of the ship in China as it has been in Australia. Further, one of the features of the action *in rem*

is that it often compels the appearance of the owner, as has been the case with *Nebula*. There is apparently no need for that feature in Chinese law because the proceeding is always against the natural person even if the action is commenced without knowledge of the identity of the owner or bareboat charterer. The legitimate juridical advantage that MOL and Protea have secured is the remedial consequences that flow should they be successful in this Court because of the higher limit of liability.

98 MOL and Protea point, however, to the peculiar feature of the action *in rem*; namely that a judgment *in rem* does not merge in a judgment *in personam*, and vice versa: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45 at [110]. As Allsop CJ said, at [128]”

Until the High Court of Australia says otherwise, the law of Australia is that the action *in rem*, **at least prior to the unconditional appearance of a relevant person**, is an action against the ship, not the owner or demise charterer of the ship. After the appearance, it continues as an action *in rem* and also as if it were an action *in personam* against the relevant person who appears.

(Footnotes omitted. Emphasis added.)

99 Consequently, MOL and Protea submit that the grant of a permanent stay would terminate not only MOL’s and Protea’s *in personam* claim in this jurisdiction but also their separate claim *in rem*, thus denying them the right to pursue successive claims in two jurisdictions.

100 It is well established that a plaintiff who has an unsatisfied judgment *in personam* can proceed by an action *in rem*. There would be little advantage in so doing so unless there had been a change in ownership of the vessel, otherwise the plaintiff could employ ordinary methods of execution. This was explained by Banks LJ in *The Broadmayne* [1916] P 64 at 77:

The position is, I think, quite clearly indicated in the passage from Clerke [*Praxis Curiae Admiraltatis*], cited with approval by Jeune J. [sic] in *The Dictator*, where the writer says that after appearance the case proceeds “ut in actione institute contra personam debitoris” — that is to say, that the action is to proceed as if, but only as if, it was an action *in personam*. The advantage of the action being an action *in rem* still remains in the sense that, **should the exceptional occasion arise**, the Court in a proper case **would no doubt still have jurisdiction to order the arrest of the vessel**.

(Footnotes omitted. Emphasis added.)

101 Similarly, it is a long-standing proposition that a plaintiff who has proceeded *in rem*, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action *in personam*: *The John and Mary* (1859) Swab 471; *Nelson v Couch* (1863) 15 CB (NS) 99; *The Cella* (1888) 13 PD 82, *The Joannis Vatis (No 2)* [1922] P 213; ***The Rena K*** [1979] QB 377. In *The Rena K*, Mr Justice Brandon said, at 405:

It has, however, been held that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment *in personam*, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied.

102 MOL and Protea rely on the decision in *Clayton v Bant* [2020] HCA 44; 272 CLR 1, a family law dispute involving the “substantial difference in the coverage” of the rights pertaining to property settlement and spousal maintenance orders as between the United Arab Emirates and Australia, of which the wife was a citizen, as an example of where it was held to be permissible to pursue successive claims in two jurisdictions where the *relief* is not co-extensive. MOL and Protea submit further that *Henry v Henry* (1996) 185 CLR 571 (another divorce proceeding involving one spouse who was domiciled in Australia) is authority for the proposition that a permanent stay is appropriate only where “the identical issue or the same controversy is to be litigated in different countries”. The High Court was, however, slightly more nuanced than that submission might suggest. The plurality (Dawson, Gaudron, McHugh, and Gummow JJ) said, at 591:

It is *prima facie* vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue. And although there are cases in which it has been held that it is not *prima facie* vexatious, in the strict sense of that word, to bring proceedings in different countries, *the problems which arise if the identical issue or the same controversy is to be litigated in different countries which have jurisdiction with respect to the matter are such*, in our view, *that, prima facie, the continuation of one or the other should be seen as vexatious or oppressive* within the *Voth* sense of those words.

It does not follow that, because one or other of the proceedings is *prima facie* vexatious or oppressive within the *Voth* sense of those words, the local proceedings should be stayed. However, *it does follow that the fact that there are, or, even, that there may be simultaneous proceedings in different countries with respect to the same controversy is highly relevant to the question whether the local proceedings are oppressive* in the sense of “seriously and unfairly burdensome, prejudicial or damaging”, or, vexatious, in the sense of “productive of serious and unjustified trouble and harassment”. And it also follows that courts should strive, to the extent that *Voth* permits, to avoid that situation.

(Footnotes omitted. Emphasis added.)

103 It is necessary to examine the proceedings that have been commenced in this Court and in the Shanghai Maritime Court.

104 In this Court, the cause of action is a claim for damages caused by the collision between the *Vega Dream* and the *Yangze 22*. The parties to the cause of action are MOL and Protea as plaintiffs and the *Yangze 22* and *Nebula* as defendants. Although the action was commenced *in rem*, because collision damage founds a maritime lien (*Admiralty Act* s 15(2)) (and a

statutory action *in rem* (s 4(3)(a)) in this jurisdiction, as I have already observed, it is now a cause of action both *in rem* and *in personam* because Nebula has entered an unconditional appearance.

105 In the Shanghai Maritime Court, there are two relevant causes of action, each of which also founds a maritime lien in the PRC. The first (Nebula’s Collision Claim) was commenced on 11 March 2025 between Nebula as plaintiff and MOL and Protea for damages arising from the collision between the *Vega Dream* and the *Yangze 22* (First Yang Affidavit at [29]). The second (MOL’s and P’s Claim against the Fund) was commenced on 6 May 2025 between MOL and Protea as plaintiffs and Nebula claiming damages arising from the collision between the *Vega Dream* and the *Yangze 22* (Xu Affidavit at [55]; Affidavit of Yang Wengui filed on 3 November 2025 at [34]).

106 Despite the relevant causes of action founding maritime liens, MOL & Protea remain concerned that their claim would not be accorded the same priority by the Shanghai Maritime Court as compared with this Court. That submission was grounded on the evidence of both experts that limitation funds are distributed *pari passu*, other than claims for loss of life and personal injury and claims in respect of damage to harbour works, basins and waterways, and aids to navigation (Li Report at [1.58]; First Song Report at [58]). In that respect, the position under the CMC is not substantially different from that under the LLMC 76 which, in art 12(1) provides that subject to the provisions of paragraphs 1, 2 and 3 of art 6 and of art 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund. Further, as Professor Li made clear at [1.58(a)], “the rules under the CMC are identical to those under the [LLMC 76]”. Article 210 of the CMC and art 6 of the LLMC 76 both provide that where the amount calculated in accordance with the [prescribed amounts in respect of claims for loss of life or personal injury] is insufficient to pay those claims in full, the amount calculated in respect of any other claims shall be available to pay those claims and shall rank rateably or pro rata with the other claims.

107 What was not explained by the expert evidence was the relevance of the existence of a maritime lien to the manner in which a creditors’ meeting provided for in Articles 117 and 118 of the SMPL would agree to the distribution of the fund.

108 Professor Li explains that Chinese law recognises the maritime lien as a unique right of maritime claimants, together with claims relating to ownership, mortgages, and possessory liens (Li Report at [1.44(e)]). Article 22 of the CMC defines a maritime lien to include “claims

for salvage payment” and “compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship”. Article 21 provides:

A maritime lien is the right of the claimant, subject to the provisions of Article 22 of this Law, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.

109 Article 28 provides that “A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.”

110 Professor Li explains that maritime liens are “classified or grouped as real rights or *jus in re*, and among which the maritime lien, mortgage, and possessory lien are further classified or grouped as rights in another person’s thing or *jus in re aliena*” (Li Report at [1.44(e)]). He continues:

Therefore, under PRC law, a maritime lien in essence is **a security right of a maritime claimant against the person who is liable for the special maritime claim** (but not the ship per se which gave rise to the maritime claim secured by the maritime lien). **The right includes the application for arrest of the ship and for the auction of the ship** (when necessary), and **to have the claim satisfied by the proceeds of the ship in priority** as provided by Article 23 of the CMC.

111 Neither Professor Song nor Professor Li was asked directly about whether the status of a claim as a maritime lien made a difference to distribution of the fund. I observe, however, that Professor Song says (First Song Report at [58]), “Proportional distribution is the fundamental principle within the scope of **claims of the same legal nature** under limitation of liability” (emphasis added). It would be mere speculation to posit that maritime liens may not be considered to be “claims of the same legal nature” as other claims when it comes to the distribution of the fund under Chinese law.

112 Even so, accepting that the parties in this Court are not *identical* with those in the Shanghai Maritime Court, given the unconditional appearance of Nebula in this Court, and in the absence of any suggestion that Nebula would be unable to satisfy any successful claim in the PRC, the significance of the *in rem* proceeding falls away.

113 What remains are three separate proceedings based on the same cause of action between the same parties (albeit the *in rem* claim has not merged) and in which the same remedy is being pursued. Granted the scale of the remedy is more limited in the PRC than in Australia, but that does not change the essential sameness of the causes of action and the remedies sought in each proceeding.

114 The nature of the test for *forum non conveniens* in similar circumstances was considered by the High Court in *Cigna Insurance*. The case concerned pending proceedings in the Supreme Court of New South Wales and the United States District Court (New Jersey) respectively relating to the liability of certain insurers to indemnify the appellant (**CSR**) and its American subsidiary (**CSR America**) in respect of claims for asbestos-related damage allegedly suffered by third parties. The respondent (Cigna Australia) applied for an anti-suit injunction to restrain CSR and CSR America from taking any further steps to prosecute the proceedings pending in the United States District Court. CSR and CSR America subsequently sought a permanent stay of the Supreme Court proceedings on *forum non conveniens* grounds. For present purposes, it is relevant that treble damages were potentially available under the *Sherman Act of 1890* in the US proceedings.

115 The plurality (Dawson, Toohey, Gaudron, McHugh, Gummow, and Kirby JJ) said at 400-401:

In cases such as the present, where different issues are involved in the local and foreign proceedings, albeit that the different proceedings arise out of the same sub-stratum of fact, the question is not whether the Australian court is a clearly inappropriate forum for litigation of the issues involved in the Australian proceedings. Rather, the question must be whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the *Voth* sense of those terms, namely, that they are “productive of serious and unjustified trouble and harassment” or “seriously and unfairly burdensome, prejudicial or damaging”.

(Footnotes omitted.)

116 In the circumstances of this case, where unlike those that pertained in the *Xin Tai Hai*, China is the obvious natural forum for the resolution of the dispute and where: the *lex causae* is the law of the PRC; three extant proceedings are before the Shanghai Maritime Court, in which two security funds have been established; the writ in these proceedings was served *after* MOL and Protea had submitted to the jurisdiction of the Shanghai Maritime Court; most, if not all, of the witnesses (and documents) are located in China; it is impossible to have all matters pending in the Shanghai Maritime Court transferred to this Court because of the exclusive jurisdiction of that court in respect of several claims; and there is a significant risk of inconsistent findings, it would be vexatious and oppressive to Nebula to be required to litigate the same sub-stratum of fact in this Court and in the Shanghai Maritime Court. This Court is a clearly inappropriate forum for the proceedings that have been commenced by MOL and Protea arising out of the collision between the *Vega Dream* and the *Yangze 22* in the Beicao Fairway on 30 December 2024.

## A HALF-WAY APPROACH

117 MOL and Protea submit that, in the event the Court was minded “to make some form of order in light of Nebula’s application”, two alternatives should be considered. The first alternative was referred to as the “*Caltex* staged approach”. This approach is said to be modelled on that taken by Clarke J in *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd’s Rep 286. In that case, Caltex commenced proceedings against BP for damage caused when its ship, *British Skill*, collided with Caltex’s jetty in Singapore waters. BP applied for a stay of those proceedings. It had already commenced limitation proceedings in Singapore in which it had admitted liability. Singapore was at that time still a party to the LLMC 57 whereas the UK had enacted the higher limits of the LLMC 76.

118 Mr Justice Clarke was persuaded (at 300) that there was “in principle a special circumstance which may require that the action proceed in England, namely the disparity between the plaintiffs’ claim and the 1957 Convention limit, which will apply in Singapore”. Mr Justice Clarke reached this conclusion because: it was the policy of the International Maritime Organisation that countries should ratify the LLMC 76; the United Kingdom being a party to the LLMC 76, it can fairly be regarded as part of English public policy which the courts should take into account and so should apply the LLMC 76 where possible; and while on the one hand it increases the amount of the shipowner’s limited liability, on the other hand it makes it much easier to limit so, viewed objectively, the interests of both parties and the ends of justice are best served by achieving a solution consistent with the LLMC 76 (at 298-9).

119 Mr Justice Clarke’s decision was of course made within the context of the *Spiliada* test, not the *Voth* test. It was, in any event, subsequently repudiated by the English Court of Appeal in *The Herceg Novi* at 460.

120 Having already taken into account the juridical advantage MOL and Protea may have in this Court, and nevertheless having concluded that this Court is a clearly inappropriate forum, no room remains for the staged approach posited by Mr Justice Clarke in *Caltex*.

121 For the same reasons, a temporary stay is inappropriate.

## DISPOSITION

122 For these reasons, it is appropriate to order that these proceedings be stayed permanently.

123 MOL and Protea must pay Nebula’s costs of the interlocutory application.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington.

Associate: 

Dated: 22 April 2026