HIGH COURT
MARSHALL ISLANDS

SYMPHONY SHIPBUILDING SA, **Plaintiff,** **v.** **SEA JUSTICE LTD., a Marshall Islands corporation,** **Defendant.**	**CIVIL ACTION NO. 2021-835** **HCT/CIVIL/MAJ** **ORDER DENYING PLAINTIFF'S MOTION TO ALTER ORDER**

Counsel:
Alejandro Mendez-Roman (alex.mendez@hfw.com)
James McCaffrey, counsel for plaintiff (james@maccafferyfirm.com)
Bruce G. Paulsen, counsel for defendant (paulsen@sewkis.com)
Brian P. Maloney, counsel for defendant (maloney@sewkis.com)
Dennis J. Reeder, counsel for defendant (dreeder.rmi@gmail.com)

I. INTRODUCTION

On March 18, 2022, the Court in its "Order Granting in Part Motion to Dismiss" ("Order") granted in part defendant Sea Justice Ltd's Motion to Dismiss for *Forum Non Conveniens*.[1]

On April 1, 2022, plaintiff Symphony, pursuant to Rule 59(e) of the Marshall Islands Rules of Civil Procedure, filed a "Corrected Motion to Alter Order" ("Motion"). In its Motion, Symphony asked that the Court to reverse itself and deny defendant Sea Justice's Motion to

[1]All abbreviation used herein are as defined in the Order.

Dismiss on grounds of *forum non conveniens* and then to stay this matter pending the outcome of proceedings in the PRC. Once the PRC proceedings are concluded, Symphony would return to this Court and seek recovery against Sea Justice of the difference between damages under RMI law and damages under PRC law. On April 22, 2022, Sea Justice filed the "Opposition of Defendant Sea Justice Ltd . . . " ("Opposition").

Having carefully considered the Court's file, the moving papers, and counsel's arguments, the Court **DENIES** the Motion.

II. THE PARTIES' ARGUMENTS

A. Symphony's Arguments

In its Motion, plaintiff Symphony makes three arguments.[2] First, because Symphony's recovery in the PRC will be much smaller than that permitted under RMI law, the PRC will not provide Symphony an adequate remedy. Therefore, the PRC is not an adequate forum for purposes of a *form non conveniens* dismissal. Motion at 1-2. Second, Symphony argues that because its damages and recovery in the PRC proceedings are as yet uncertain, this Court should stay this case pending the PRC outcome, and dismissal without conditions is *per se* an abuse of discretion. Motion at 2-3. Third, and as an extension of the second argument, should the PRC prove to be an adequate jurisdiction and liability and damages are properly decided, then Symphony would return to this Court only to seek recovery of the difference in damages under the RMI's more generous limitation law. That is, Symphony would seek to "top up" its recovery under RMI law.

---

[2]Symphony combines the first two arguments in its Motion under one heading.

B. Sea Justice's Arguments

In its Opposition, Sea Justice argues that the Court should deny the Motion for the following reasons. First, in the Motion Symphony "does not set forth a proper basis for relief under Rule 59(e) (i.e., newly discovered evidence, clear error, or an intervening change in the controlling law)." Opposition at 2. Second, Symphony impermissibly reiterates arguments that were rejected by the Court in its Order. *Id*. Third, Symphony makes a new request, i.e., that the Court retain jurisdiction pending further developments in the PRC proceedings, which request could have, and should have, been raised earlier. *Id*.

III. LEGAL STANDARD

Having carefully considered the parties' arguments and the legal authority they sited, this Court adopts as its interpretation of MIRCP Rule 59(e) the Ninth Circuits Court of Appeals' interpretation of the Rule 59(e) of the Federal Rules of Civil Procedures, upon which MIRCP Rule 59(e) is patterned.[3] [4]

The Ninth Circuit Court of Appeals, interpreting the parallel United States rule, has explained that motions for reconsideration under Rule 59(e) "should **not** be granted, absent highly unusual circumstances, **[1]** unless the district court is presented with newly discovered evidence, **[2]** [unless the court] committed clear error, or **[3]** if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (citing *389*

---

[3]Opposition at 3-4.

[4]*See Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 104 (1988) ("Rule 19 of the Marshall Islands Rules of Civil Procedure mirrors Rule 19 of the Federal Rules of Civil Procedure (FRCP). As such, MIRCivP Rule 19 carries the construction placed upon it by the Federal Courts.")

Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)) (emphasis added); see *id*. at 1255 n.1 ("[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.") (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995).

It is axiomatic that the purpose of Rule 59(e) is not to provide litigants with a "second bite at the apple." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). Thus, a Rule 59(e) motion "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Further, "rehashing" arguments that were previously raised is also not a valid basis for reconsideration under Rule 59(e). *Rotherham v. Am. Red Cross*, No. 04-cv-1172, 2007 U.S. Dist. LEXIS 106268, at *8 (S.D. Cal. Dec. 3, 2007); *see also Ausmus v. Lexington Ins. Co.*, No. 08-cv-2342 L, 2009 U.S. Dist. LEXIS 63007, at *4 (S.D. Cal. July 15, 2009) ("A [Rule 59(e) motion] is not another opportunity for the losing party to make its strongest case, reassert arguments, or revamp previously unmeritorious arguments."); *Gibson v. Ada County*, No. CV05-263-S, 2006 U.S. Dist. LEXIS 104448, at *2 (D. Idaho June 6, 2006) ("[w]here Rule 59(e) motions are merely being pursued 'as a means to reargue matters already argued and disposed of . . . such motions are not properly classifiable as being motions under Rule 59(e)' and must therefore be dismissed."); *Stigall v. Day*, No. Civ. 2-00-429, 2001 U.S. Dist. LEXIS 13783, at *5 (E.D. Cal. Aug. 16, 2001) (finding motions to alter are not "vehicles permitting the unsuccessful party to 'rehash' arguments previously presented" and that "after thoughts" or "shifting of ground" are not proper grounds for reconsideration); *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 605 F. Supp. 6, 7 (N.D. Ill. 1983) ("asserting a new position

as a purported basis for 'reconsideration'. . . is . . . not one of the circumstances in which a motion for reconsideration is appropriate.") (emphasis in original).

III. ANALYSIS

As noted above, courts should not grant Rule 59(e) motions for reconsideration absent highly unusual circumstances, i.e., unless (i) the court is presented with newly discovered evidence, (ii) the court committed clear error, or (iii) if there is an intervening change in the controlling law. Symphony, however, has not presented newly discovered evidence, has not shown that the Court has committed clear error, and has not pointed out an intervening change in the controlling law. Instead, Symphony impermissibly attempts to "rehash" rejected arguments and to raise arguments for the first time that could have been raised earlier in opposition to the defendant's *forum non conveniens* motion.

A. Symphony's first argument

Symphony's first argument is that because its recovery in the PRC will be much smaller than that permitted under RMI law, the PRC will not provide Symphony an adequate remedy; hence, the PRC is not an adequate alternative forum for a *forum non conveniens* dismissal. This argument merely reiterates arguments that the Court rejected in its Order. Order at 9-13. As noted above at 3-4, "rehashing" arguments that were previously raised is not a valid basis for reconsideration under Rule 59(e).

B. Symphony's second argument

Symphony's second argument is that because its damages and recovery in PRC proceedings are uncertain, this Court should stay this matter pending their outcome and dismissal without conditions is *per se* an abuse of discretion. This argument is one that it could have made

earlier. However, as noted above at 3, Rule 59(e) may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.

Moreover, this Court rejects the Fifth Circuit Court of Appeals decision in *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 908 (5th Cir. 1997) (holding "that the failure to include a return jurisdiction clause in an f.n.c. dismissal constitutes a per se abuse of discretion."). Instead, this Court adopts the Ninth Circuit's analysis in *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001):

> We have not imposed an inflexible test requiring conditional dismissals [in order to establish amenability to process] . . . Our willingness to impose conditions in some cases, however, does not create an inflexible requirement that a trial court must impose similar conditions across the board. [*Ceramic Corp. v. Inka Maritime Corp.*, 1 F.3d 947, 949 (9th Cir.1993) and *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir.1990)] held that conditions were sufficient to establish an adequate alternative forum, but these cases do not hold that conditions must always be established. A district court can be required to impose conditions *if there is a justifiable reason to doubt that a party will cooperate with the foreign forum*.

Id. (emphasis added).

The Ninth Circuit's analysis is particularly applicable here, because, just as in *Leetsch*, defendant Sea Justice has already expressly represented that it is "amenable to proceeding with this action on the merits in the forum where it should proceed." Declaration of Zheng Yongmin dated August 26, 2021 at ¶ 18 (expressly agreeing that Sea Justice "will accept service of papers from Plaintiff in this action arising from the circumstances alleged in the Amended Complaint if timely filed in the applicable Chinese court, and will not assert any defence on the basis of personal jurisdiction or the venue of the action in China, keeping all other defences and objections to the lawsuit."). Indeed, Sea Justice and Symphony are already litigating in the PRC

forum, and plaintiff Symphony has not alleged that defendant Sea Justice has acted in the PRC courts contrary to Yongmin's declaration. Accordingly, there is no justifiable reason to doubt that Sea Justice will cooperate in the foreign forum, making a "return jurisdiction" clause such as the one contemplated in *Robinson* unnecessary. Symphony can have its day in court in the PRC.

Finally, denying a *forum non conveniens* motion to dismiss, merely because an alternate jurisdiction has not completed its proceedings, undermines the purpose of the motion. In almost all cases, the alternate jurisdiction would not have completed all its proceedings when the motion is granted. Once cases before a foreign court are completed and a judgment rendered, then a plaintiff can file a motion for recognition and enforcement of judgment, as opposed to re-litigating the case. It seems that if a plaintiff were to attempt to re-litigate a case in a new forum, the plaintiff would face a motion to dismiss based upon *rea judicata* and collateral estoppel.

C. Return for a "top up"

Symphony's third argument (or expression of intent) is that the Court should retain jurisdiction so that Symphony can return to the RMI after PRC proceedings are concluded to "top up" its recovery. This argument fails for at least two reasons.

First, Symphony's request for a stay to return to "top up" its PRC recovery is a new request that could have, and should have, been addressed in Symphony's opposition to Sea Justice's Motion to Dismiss.

Second, in support of its argument, Symphony relies upon the RMI Supreme Court's decision in *Chubb Insurance (China) Co. Ltd, et al. v. Eleni Maritime Ltd. and Empire Bulkers Ltd. et al.*, SCT Case No. 2015-002, which held:

> 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 of 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.

Id. at 2. Further, Symphony points out that *Chubb* Court went on to hold, "*[t]here is no statutory provision that the court defer to a limitation proceeding with lower limits pending in some foreign court*." *Id*. at 7. Hence, pursuant to RMI law, the High Court in *Chubb, et al. v. Eleni, et al.*, HCT 2014-050, 2014-110, and 2015-194, was not required to defer to any limitation action proceedings that had been filed in Hong Kong. The High Court has subject matter jurisdiction, and jurisdiction over both parties and is free to apply RMI limitation law to this case.

However, the Supreme Court in *Chubb* did not hold that the High Court may not properly dismiss a maritime case on grounds of *forum non conveniens*, but instead must stay the proceedings and allow the plaintiff to return to the RMI and "top up," if plaintiff's recovery under the RMI's limitation law higher than under the law of an adequate alternative jurisdiction. The *Chubb* case also differs from the current case before this Court in that the *Chubb* plaintiffs and subrogated insurers did not file actions in the PRC as Symphony has done, but instead filed actions in India, South Africa, the RMI, and possibly other jurisdictions. They did not avail themselves of the PRC (i.e., Hong Kong) courts. Accordingly, the Supreme Court's decision in *Chubb* differs from this one and does not require that the Court reverse its decision to dismiss on grounds of *forum non conveniens* and instead stay this case pending well-advanced proceedings in PRC, the site of the subject allision or collision.

IV. CONCLUSION

For the above reasons, this Court denies plaintiff Symphony's Corrected Motion to Alter Order.

So ordered and entered.

____
Carl B. Ingram
Chief Justice, High Court
Date: May 16, 2022