THE PROBLEMS IN SINGAPORE

Good morning, Ladies & Gentlemen.

I have been given roughly 20-25 minutes to address you on THE PROBLEMS IN SINGAPORE pertaining to the arrest of the ANTWERPEN. As this is too short a time to delve with any sufficient degree of detail into the numerous issues that arose, what I propose to do is to try and cover as many of what I feel are the more salient issues briefly and leave it to the floor to pick up on any particular issue at question time for further discussion and consideration.

I have attached to the text of my speech a chronology of the sequence of events relating to the cargo discharging operations in Singapore and a summary of the Belgium liquidators' application to set aside the arrest of the ANTWERPEN. Unless you are deeply interested in the specific details or an incurable insomniac I would not particularly recommend reading the annexure.

I propose to take you through 5 main areas of concern:

(1) The legal basis for discharging cargo from a vessel under arrest and transhipping the same.

(2) Who should pay for the costs of discharging the cargo and transhipping the same.

(3) The role of the Sheriff and in particular the need for original Bills of Lading to be surrendered to him in order for the cargo to be discharged and transhipped.

(4) Other legal and practical difficulties connected with the discharging and transhipment operations and in light thereof, whether there is any need for reform to the law relating to the same which might help alleviate these problems, and lastly.

(5) The application by the Belgian liquidators to set aside the arrest.

1. Discharging Cargo from Vessel under Arrest: Legal Basis

When the ANTWERPEN was arrested in Singapore, she had onboard a little over one thousand fully laden containers. In light of the widely publicized bankruptcy of ABC, it was very quickly evident to cargo interests that the likelihood of the vessel being released and sailing on to her scheduled discharge port was next to nil. The issue of how cargo owners were to procure the discharge and transhipment of their cargo very quickly thereafter came to the fore.

In the usual case, the legal basis for cargo owners to mount an application in Court for the discharge and transhipment of their cargo would be founded on the principles of Frustration of the contract of carriage for wrongful repudiation of the same, with the cargo owners then mitigating their loss by discharging and transhipping the cargo.

A potentially tricky scenario of the arrest being set aside by the liquidators of ABC thereby freeing up the vessel to sail on to destination fortunately never materialised as the liquidators at no point postured to continue with the scheduled voyage even if they were successful in setting aside the arrest (which in any event they were not, which I shall elaborate upon later). One wonders what recourse cargo interests would have had in respect of the transhipment and discharging costs incurred (which traditionally they would try to claim from the shipowners) had the arrest been successfully set aside, for example, could perhaps the arresting party be held accountable for these costs?

Thankfully my firm representing several cargo interests never had to tackle this issue as the likelihood of the vessel sailing on to destination even if the arrest was successfully set aside was never on the cards. In any case, by virtue of the massive claims lodged against ABC and the vessel, our clients never had any real prospect of recovering any significant amount of the costs of discharging and transhipment from the vessel anyway and stood to lose little if the arrest was somehow set aside. In any event, the application for discharging and transhipment of cargo was dealt with in a routine manner by the Singapore Court which allowed the application on condition that original Bills of Lading would have to be tendered to the Sheriff.

2. **Costs of Discharging/Transhipping the Cargo: Who pays?**

Insofar as Singapore (and I believe English) Law is concerned, it is trite law that the costs and expenses relating to the discharging of cargo from a vessel under arrest and the transhipment of the same to destination is to be paid by the cargo owners themselves and does not fall to be treated as a Sheriff's expense in priority to other claims. The English decisions in **The Jogoo** [1981] 1 LLR 513 and **The Myrto (No. 2)** [1984] 2 LLR 341 clearly established this point.

In **The Jogoo**, cargo owners had intervened in an action by mortgagees after arrest of the ship. Sheen J. made an order permitting discharge of the cargo prior to judgment and for appraisement and sale. After sale, the cargo owners claimed that their discharge expenses should be a first charge on the proceeds as they should be treated as a contribution to the fund by increasing the price at which the ship could be sold. Sheen J. rejected the theory that any service to the ship after arrest meant that those who benefited from it must contribute and held as a general principle that cargo owners must bear the expenses of removal of cargo and claim against the shipowners. As a result, such expenses are subject to the same priority rules as a substantive carriage claim.

Similarly, in **The Myrto (No. 2)**, the Court held that it was desirable to maintain a uniform practice that when a shipowner was unable to perform a contract of carriage the owner of cargo laden in his ship was entitled to take his cargo out of the ship at his own expense or abandon the cargo. Accordingly, if it was necessary for the Admiralty Marshal to supervise the discharge of the cargo he was entitled to recover the costs of discharging the cargo from the owners of that cargo in proportion to their interests. If the cargo-owners abandoned their cargo the Admiralty Marshal could sell it and recover his expenses from the proceeds of sale.

I will come back to the issue of who should pay the costs of cargo discharge and transhipment later when I touch on whether there might be a need to change the law as it now stands in this respect.

Fortunately for us, in the case of the ANTWERPEN, all our clients were sufficiently well heeled to bear their share of the costs of the discharging and transhipment of the cargo. However, due to the large number of containers involved and the fact that as things turn out there was not just one but three joint discharge operations, the costs and expenses that each cargo owners had to pay upfront to the coordinating discharging agent could not be ascertained precisely prior to each discharge.

A practical solution to the problem was found when each cargo owner agreed to deposit/advance certain sums of monies (with provision for some additional allowances) to the discharging agent, with the discharging agent agreeing to refund the cargo owners there shall be any balance monies remaining after deduction of the pro-rated discharging costs. Fortunately, common sense appears to have ruled the day and cargo interests were sensible in coming to this practical arrangement. But one cannot help but wonder what would have happened if some of the cargo interests had refused to participate in this arrangement - would they have had to go it alone? Certainly involvement of the Court and the Sheriff did not extend so far as to coordinating (and compelling) observance of a scheme such as the one adopted by the

parties in the ANTWERPEN and again one could query whether there is perhaps a need for the law to be developed whereby perhaps some a more pro-active role by the Court or Sheriff in this regards need to be had.

3. The Role of the Sheriff: the Need for Original Bill of Lading to be Surrendered to Him.

As stated above, the Sheriff in the ANTWERPEN (and indeed in most if not all case in Singapore where cargo is discharged from a vessel under arrest) generally adopted a somewhat passive stance, taking the position that he would, as the custodian of the vessel under arrest, only condone and allow the discharging of the cargo and transhipment of the same if the relevant cargo interests had obtained an appropriate Court order for them so to do. Basically, so long as the Court sanctioned the discharging and transhipment the Sheriff would comply.

The general practice that has evolved over the years for the discharging and transhipment of cargo from a vessel under arrest is for the Court to order the cargo interests to surrender their original Bills of Lading to the Sheriff before being allowed to discharge and tranship the cargo. This is predicated upon the well entrenched legal principle that cargo can only be discharged and delivered to the parties holding the original Bills of Lading and anything short of that would amount to conversion of the cargo. By natural extension of this principle, it would seem only logical that the Sheriff should likewise, as custodian of the vessel under arrest (and indirectly the cargo onboard), require parties claiming a right to discharge the cargo and tranship the same to surrender the original Bills of Lading to him so that he would be in a position to properly ascertain that the parties requesting the discharge of the cargo are indeed entitled to possession of the same.

Should the Sheriff for example be sanctioned by the Court (in the same way he is sanctioned under a general Omnibus Order to shift the vessel if required) to discharge all the containers to warehouse and charge the respective cargo interests pro-rata on the numbers of containers they own for their share of the discharging and storage costs until transhipment of the same by the cargo interests, with the traditional lien being retained on the cargo for such costs of discharging and storage pending transhipment?

In tandem with this power, should the law be reviewed as to whether all the costs and expenses incurred by cargo interests in discharging and transhipping the cargo should fall to be borne by the cargo interests themselves and not form any part of the Sheriff's expenses? Would it be too bizarre to treat just the costs of discharging the cargo and storing the same (but not the costs of transhipping the cargo onto destination on a separate vessel) as being part of the Sheriff's expenses since it is nigh well impossible for the Sheriff to sell a vessel fully laden with cargo at a good price. When one looks at the equities of the situation, a case can certainly be made out for the innocent cargo owner that he should not be made to bear the often considerable expense of discharging and transhipping the cargo all on his own (especially if he cannot raise the money to do so, as has happened) when the discharging of the cargo from the arrested vessel would obviously enhance the value of the ship for sale purposes, to the benefit of all creditors making claims on the proceeds of sale of the vessel.

Further, it would free the Sheriff to expeditiously discharge the cargo to shore without waiting for all the cargo interests to get their act together. The only problem (which exists in any event) is who will fund the Sheriff upfront for the discharging and storage costs. Perhaps a fund needs to be created by the Court out of its budget to cover this eventuality.

Another troubling issue which arose in connection with the discharging operations in the ANTWERPEN was that because of the 3 separate discharging operations, some containers that were being discharged first were in fact stacked at the bottom of the vessel and as such a lot of the containers needed to be moved and shifted in order to gain access to the containers below. Needless to say, cargo owners had to contend with the possibility of their cargo being damaged during the shifting process. Thankfully, all the cargo interests was satisfied with the coordinating agent taking out an insurance policy to cover loss and damage arising out of inter alia such shifting/cargo operations.

Insofar as the transhipment of the cargo on different vessels were concerned, the on-carriers would of course issued fresh Bills of Lading. One wonders however whether a cargo owner could effectively bring a claim against the on-carrier under the fresh Bill of Lading issued to him if the cargo was found to be damaged and/or missing in discharge, bearing in mind that there would have been no means to check the containers and the contents of the same prior to the said containers being loaded onto the on carrying vessel. As far as we know no such claims had arisen in respect of the ANTWERPEN.

5. The Setting Aside Application by Belgian Liquidators:

Although my firm was not directly involved with the Defence of the setting aside application taken by the Belgian liquidators and this is strictly speaking outside the ambit of my designated topic, I propose to touch very briefly on the nature of the application and the manner in which it was dealt with by the Singapore Court since it does throw up some interesting points for consideration.

Basically, the main thrust of the Belgian liquidators (or Trustees in Bankruptcy as they are properly so called) was that the arrest brought in Singapore should have been set aside as ABC, the owners of the vessel had by the judgment of the Belgian Court

ANNEXURE

A. The Chronology of Events relating to the cargo discharge operations in Singapore.

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1. The Chronology of events relating to the cargo discharge operations is briefly set out hereunder :

(1) According to a PSA Portnet Search, the Vessel "ANTWERPEN" ("the Vessel") arrived at the Singapore port and anchored at the Eastern Working Anchorage on or about 28 March 1996.

(2) On 10 April 1996, the Vessel was arrested in Singapore in Admiralty in Rem No. 186 of 1996 by a Korean entity known as Heung-A Shipping Co. Ltd. However, Heung-A Shipping Co. Ltd applied for the Vessel to be released on or about 24 April 1996.

(3) The Vessel was immediately re-arrested by ITC Marine Japan Limited and Interocean Trading Company Limited in Admiralty in Rem No. 224 of 1996 on 24 April 1996.

(4) Subsequent to the arrest of the Vessel, several cargo interests (represented by yvarious firms of solicitors) applied to Court for leave to discharge their cargoes laden on board the Vessel.

(5) On 26 April 1996, several solicitors (including those from our firm) representing a total of about 16 cargo interests appeared before the Court on the first hearing of the cargo interests' applications for leave to discharge the respective cargoes on board the Vessel. The applications were necessitated by the collapse and/or liquidation of ABC (coupled with the arrest of the Vessel), which meant that the Vessel would most probably not be able to continue on her voyage to the intended destinations in the foreseeable future (if at all).

(6) The respective cargo interests' applications were accordingly granted by the Court on 26 April 1996.

(7) Subsequent to the time the Court on 26 April 1996 first granted leave to the "first batch" of cargo interests to discharge cargoes, numerous other applications were made to Court by various cargo interests for leave to discharge their respective cargoes.

(8) Pursuant to the granting of the aforesaid Orders of Court, solicitors for the various cargo interests met on a few occasions to ascertain how and when a joint cargo discharge operation could be effected/co-ordinated in the interest of saving costs and time. During this period, the Port Authority of Singapore ("the PSA") indicated its desire to be consulted on the mechanics and timing of the cargo discharge operations (eg. berthing/unberthing requirements, storage/warehousing of the cargoes on the PSA's wharf prior to their transhipment, etc) as well as details relating to the payment of the PSA's port-related charges.

(9) At a meeting held at the PSA's premises on or about 6 May 1996 (attended by various interested parties) during which the PSA's aforesaid requirements were discussed, the Sheriff of the Supreme Court announced that he would

officially appoint M/s Eagle Corporation (Pte) Ltd ("M/s Eagle Corporation") (whose representatives were also present at the said meeting) to be the Sheriff's agent for the cargo discharge operations.

(10) On or about 11 May 1996, the 1st joint cargo discharge operation was effected and/or co-ordinated by M/s Eagle Corporation. We understand from M/s Eagle Corporation that a total of about 202 containers were discharged on this occasion. Some of the cargoes discharged on this occasion belonged to cargo interests represented by us.

(11) On 6 June 1996, the 2nd joint cargo discharge operation was effected. We also represented some cargo interests who participated in the 2nd joint cargo discharge operation. We understand from M/s Eagle Corporation that a total of about 802 containers were discharged on this occasion.

(12) We understand from M/s Eagle Corporation that a total of about 17 containers were discharged on or about 28 September 1996 during the 3rd and final joint cargo discharge operation.

(13) We further understand from M/s Eagle Corporation that as a result of the aforesaid 3 cargo discharge operations, a final total of about 1021 containers (representing all containers previously on board the Vessel) had been discharged.

2. The Court usually hears motions (including motions of the nature involved in the present case, ie. for leave to discharge cargo) in the Open Court every Friday of the week, except in cases of real urgency. However, pursuant to special leave granted by a Judge who usually hears admiralty matters, we understand that various solicitors had by prior appointment attended before the said Judge in Chambers on various days of the week in respect of their cargo interests' applications. We do not, however,

have the precise dates of these individual hearings, as these individual hearings were usually not attended by solicitors for the other cargo interests (who would have basically no grounds to oppose the intended cargo interests' applications which seek essentially the same or similar reliefs as those already granted to the other cargo interests).

3. Although there were more than 1000 containers on board the Vessel, the said containers were discharged on 3 separate occasions. Essentially, the cargo interests (represented by various firms of solicitors) had to comply with the following requirements prior to the discharge of cargo :

(1) Obtain the necessary Order of Court authorising leave to discharge specific containers numbers.

(2) Submit a copy of the Order of Court together with the original bills of lading (representing the containers numbers to be discharged) to the Sheriff of the Supreme Court. The Sheriff would then endorse on the original bills of lading, acknowledging receipt of the same, and would retain the original bills of lading.

(3) A copy of the original bill of lading (marked with the Sheriff's endorsement thereon) was then to be delivered to M/s Eagle Corporation together with the payment of the estimated pro-rated share of discharge costs. Transhipment details are also furnished to M/s Eagle Corporation (ie. the transhipment destination and the identity of the transhipment carrier/agents).

(4) All other cargo discharge matters or details would be attended to by Eagle Corporation, and were primarily not the cargo interests' concern.

4. (1) M/s Eagle Corporation had to submit the containers numbers which were to be discharged on each occasion to the port authorities at least 24 hours prior to the actual discharge operation. The port authorities would then plan the discharge sequence of the containers via their computer systems, taking into consideration any stability issue. We understand that no stability problems were highlighted to M/s Eagle Corporation by the port authorities during each of the 3 discharge operations.

(2) The Vessel was anchored at the Eastern Working Anchorage, and berthed at the Tanjong Pagar Container Terminal for each of the 3 discharge operations. The berthing/unberthing and shifting of the Vessel, together with the actual discharge operation whilst at the berth, took about 1 day each for the 1st and 2nd discharge operations, and about half a day for the 3rd discharge operation.

(3) The berthing/unberthing operations were handled by the port authorities, with the assistance of pilots and tugs.

(4) The actual discharge operations whilst the Vessel was at the berth were also handled by the port authorities, with the use of shore cranes.

(5) Apparently, the port authorities had initially intimated that it may require the cargo interests to settle the outstanding port dues owing in respect of the Vessel. However, at the meeting with the port authorities at their premises on or about 6 May 1996 (prior to the 1st cargo discharge operation), the port authorities indicated that they would not be requiring settlement of the outstanding port dues as a pre-requisite to the use of the port authorities' berthing and other facilities. There was therefore no major issue/problems relating to the port-related charges.

(6) No bulk cargo was on board the Vessel.

5. Solicitors for the owners of the Vessel appeared in Court on 26 April 1996, and informed the Court that they had just been instructed to act for the Trustees in Bankruptcy of ABC Container N. V. and/or the Defendants. The said solicitors indicated that their clients had no objections to the respective cargo interests' applications, provided that the original bills of lading representing the respective cargoes were surrended to the Sheriff of the Supreme Court, prior to the discharge of the cargoes.

6. The containers that were discharged during the 1st discharge operation belonged to cargo interests who had complied with the requirements/conditions set out in paragraph 3 above in time for the said discharge operation. The 1st cargo discharge date was basically fixed/scheduled by mutual understanding between M/s Eagle Corporation and the solicitors for the main cargo interests.

7. However, although several orders of Court for leave to discharge cargoes had been obtained by various cargo interests since 26 April 1996, the 2nd joint cargo discharge operation was not effected until on or about 6 June 1996, largely because the Sheriff of the Supreme Court had to await the surrender of the original bills of lading before the discharge operation could be effected.

8. We understand from M/s Eagle Corporation that since M/s Gurbani & Co represented the bulk of the cargo interests who wished to participate in the 2nd discharge operation, the 2nd discharge date was primarily arrived at by mutual understanding between M/s Eagle Corporation and M/s Gurbani & Co.

9. We did not encounter any problems in obtaining the original bills of lading from cargo interests represented by us for submission to the Sheriff. We would reasonably assume, however, that M/s Gurbani & Co may have required more time to procure

all the relevant original bills of lading from their cargo interests as they represented a larger number of cargo interests (ie. involving more than 600 containers).

10. Cargo interests who had not obtained the relevant Order of Court or submitted the original bills of lading to the Sheriff in time for any of the scheduled cargo discharge operations had to await and participate in the following cargo discharge operation.

11. There was no deliberate distribution or allocation of the discharge of the containers on board the Vessel into the 3 cargo discharge operations. Cargo interests who had satisfied the pre-requisites for discharge prior to and in time for any particular scheduled discharge operation and who wished to participate in the said discharge operation, could have their containers discharged on that occasion.

B. Some legal issues relating to the setting aside interlocutory application which was taken out by the owners of the "ANTWERPEN" during the course of the cargo discharge operations

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1. On 4 May 1996, the Trustees in Bankruptcy of ABC filed an application in Court to, inter alia, set aside the Warrant of Arrest.

2. The grounds for the application by the Trustees in Bankruptcy were mainly as follows:

(1) that the owners of the "ANTWERPEN" (alleged by the Defendants to be Antwerp Bulkcarriers N.V.) are not the party liable in personam;

(2) that under Belgian liquidation law, the Plaintiffs ceased to have any right to arrest the Defendants' vessel in any jurisdiction after the Belgian Court had pronounced a Judgment on 5 April 1996 whereby the Defendants were decreed to be bankrupt.

3. The Defendants' aforesaid application came up for adjourned hearing before the Assistant Registrar in Chambers on 28 June 1996 (by which time almost all containers, save for about 17 containers had been discharged). The Assistant Registrar reserved her decision at the end of the hearing. On 8 July 1996, the Assistant Registrar dismissed the Defendants' application with costs. No written grounds of decision was delivered.

4. The Defendants filed an appeal against the said decision of the Assistant Registrar on 19 July 1996.

5. On 29 August 1996, the Trustees in Bankruptcy's appeal was argued before the appeal Judge between the solicitor for the Trustees in Bankcruptcy and the solicitor for the Plaintiffs only. We understand that the appeal Judge dismissed the Defendants' appeal with costs, but did not give any reasoned grounds for his decision.

6. The Defendants had argued that the Vessel was under demise by the Defendants (alleged to be Antwerp Bulkcarriers N.V.) to Maritime Carriers Luxembourg at the material time, and that the demise charterer ought therefore to be the party liable in personam.

7. In response, we understand that Plaintiffs submitted that so far as the Plaintiffs were concerned, the party liable in personam would be the owners/beneficial owners of the Vessel, whoever they may be. The Plaintiffs submitted that the identity of the beneficial owners of the Vessel was not entirely clear from the documents available, and could be either one of the following 3 parties :

(1) Antwerp Bulkcarriers N. V.

(2) ABC Container N.V.

(3) Oceancarriers Shipholding N. V.

8. In view of the uncertainties relating to the identity of the beneficial owners/persons liable in personam, the Plaintiffs submitted that the nature and structure of the various companies ought to be further investigated, and that the Plaintiffs' Writ ought not to be set aside at that stage of the proceedings.

9. Insofar as the Belgian liquidation proceedings were concerned, the Plaintiffs submitted that the fact that the owners of the Vessel had been put into liquidation by the Belgian Court did not bar the Plaintiffs from arresting the Vessel, and that the Trustees in

Bankruptcy ought rather to have carried out ancillary winding up proceedings in Singapore as permitted under the Singapore Companies Act. The authority of *In re Suidair International Airways* [1950] 1 Ch 165 ("**Suidair**") was relied upon.

10. The facts of the **Suidair** case are as follows :

(1) Suidair, a company incorporated in South Africa with an office in England, owed money to the applicants for goods sold.

(2) On 18 November 1949, the applicants commenced proceedings against Suidair in England.

(3) On 31 December 1949, a South African creditor presented in Africa a petition to wind up Suidair's office there.

(4) On 14 January 1950, the applicants entered judgment in default against Sudair in England.

(5) On 18 January 1950, a provisional winding up order was made against the debtor company in South Africa and a liquidator was appointed.

(6) On 24 January 1950, the applicants issued execution proceedings against Suidair in England.

(7) On 24 February 1950, the liquidator in South Africa claimed the goods seized by the Sheriff in England. The Sheriff in England then took out interpleader summonses.

(8) On 28 March 1950, a creditor in England (other than the applicants) presented a winding up petition in England and obtained a winding up order on 24 April 1950.

(9) On 6 April 1950, the applicants asked for an order that they should be entitled to entitled to retain against the (English) liquidator the benefit of the execution proceedings.

11. The English liquidator argued that since the main liquidation is the liquidation in South Africa, the applicable law in the English liquidation proceedings ought to be South Afircan law. Evidence was given to the effect that under South African law, all execution proceedings issued subsequent to the date of presentation of the petition in South Africa would be void. Accordingly, the English liquidator submitted that the applicants' application should be dismissed.

12. The Court in the Suidair case held that for the purposes of the administration of the assets of the South African company which are within the English jurisdiction, the Court administers only the English law (and not South African law) as regards issues of substance and/or procedure. The Court held that the relevant law was therefore as stated in the English Companies Act 1948.

13. Based on the authority of the Suidair case, the Plaintiffs in the "ANTWERPEN" case similarly argued that the Singapore Court ought not to apply Belgian law, but Singapore law.

14. Although the Singapore Court did not deliver any grounds of decision, it may reasonably be assumed that some (if not most) of the Plaintiffs' submissions would have been accepted by the Court.