THE MARITIME LAW YEAR IN ASIA

BY

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When Tom Broadmore invited me to speak on the topic of "The Maritime Law Year in Asia", he asked me to take some time to discuss the Asian currency crisis (from which I had hoped to come to Palm Cove to escape!).

One should be forgiven for having thought twelve months ago that all eyes would now be on Hong Kong on the passing of the first anniversary of the handover. They are not and the anniversary very much came and went.

Early last year, a prominent Chinese businessman was asked "what will happen after 1997?" "1998", he replied. The business community in Hong Kong predicted that it would be business as usual after the handover, and this has very much been the case. Prior to the handover Herbert Smith extended its international shipping practice to Hong Kong and along with a number of other European and US law firms applied for a licence to practise law in Beijing.

The currency crisis

Against the US dollar in the past twelve months, the Australian, New Zealand and Singapore currencies have devalued by between 15-20%. The Thai bhat and the South Korean won by 30%, the Malaysian Ringgit by 52% and the Indonesian Rupiah by a

phenomenal 80%. The question on most lips is "when will it get better?" The usual reply is "first it will get worse".

"The Future of Asia", a forum originally conceived as a place for Asian leaders to boast their countries' economic successes reportedly took on the mantle of a post-mortem this year. Widely different levels of economic sophistication were revealed at the forum.

Despite the range of understanding displayed, a reasonably clear consensus emerged about what exactly this crisis was all about and where it was likely to be heading. The beginnings of the crisis originated many years ago when countries in the region opened their financial markets to foreign capital. This initiated a massive flow of funds from the giant developed economies of the world, as fund managers, behaving like a euphoric herd, stampeded into the region. Aggravating the crisis was economic incompetence among many of the region's rulers who failed to build the modern financial and legal systems their increasingly sophisticated economies required. These leaders worsened the crisis by failing to act when the first warning signs appeared.

Also important was the fact so many regional currencies were - and some still are - pegged to the US dollar. This worked well during the many years the dollar was weak, but became deadly as the dollar strengthened and exports began to lose competitiveness. Investors hid the problem of over-valued currencies by continuing to pump more funds into regional countries than their economies could efficiently absorb. The result was asset bubbles and over-investment in productive capacity. Eventually, hedge funds smelled blood. They were defeated during their first attack on the Thai baht in March last year, but by June Bangkok had lost the battle, blowing US$30 billion worth of foreign exchange reserves in the process, and the baht was devalued. The result was a full scale stampede as investors rushed out of Thailand and then other countries in the region.

Developments in private international law - The "KAPITAN SHVETSOV" [1997] 1 HKC 485

The Russian owned "KAPITAN SHVETSOV" and the Singaporean owned "NANTA BHUM" collided in Chao Phray River off Bangkok. The Russian vessel was more badly damaged. Neither owners wanted the proceedings brought in Bangkok, where liability for tortious damage is unlimited. The Singaporeans commenced an action *in rem* in Singapore (1957 Convention) and the Russians commenced proceedings in Hong Kong (1976 Convention). The Russians applied to the Singapore High Court to stay the Singapore action in favour of Hong Kong and lost. The Singaporean owners reciprocated in Hong Kong and won at first instance. The Hong Kong High Court held that Singapore was the more appropriate forum, that parallel proceedings in Singapore and Hong Kong would be "the nightmare of nightmares" and that the Russians had failed to put before the court "cogent evidence" that they would suffer "juridical disadvantage" if the trial was in Singapore.

The Russians appealed and won. Whilst Singapore was a more convenient forum than Hong Kong from the Singaporean's point of view, the question was not one of "mere practical convenience", it was whether there was another available forum which was "clearly or distinctly more appropriate". The court would not lightly exercise its inherent jurisdiction to stay proceedings, and would only do so if those proceedings were "vexatious or oppressive or an abuse of the process of the court". The Judge's concerns over the possibility of parallel proceedings were, the Court of Appeal held, over stated. The mere existence of parallel proceedings was no ground for the court to exercise its inherent jurisdiction to stay an action *in rem*.

Developments in the law of salvage - The "PA MAR" (unreported) English Admiralty Court Clarke J 12th June 1997

For the first time in English legal history, variations for extended services under a salvage contract were disallowed on the ground that no agency of necessity existed at

the time the variations were agreed upon. The successful cargo owners and underwriters were Chinese.

In June 1993, the "PA MAR" broke down the Red Sea. Salvors were engaged by the shipowners under the terms of LOF 90. The owners claimed that the tailshaft was damaged and that the vessel would have to be towed to Dubai, Colombo, or Singapore for dry-docking and repairs. What they did not mention was that the vessel's generators were unable to generate sufficient power to run the main engine. The vessel was hopelessly unseaworthy.

On arrival at Singapore, nothing could be found wrong with the vessel. The generators appeared to have been repaired by the owners during the course of the tow and the tailshaft problems had disappeared. No repairs were carried out and the vessel continued on her voyage to Beihai and Shantou.

The cargo owners argued that neither the LOF arbitrator nor the appeal arbitrator had jurisdiction to make an award because the owners were not a party to a salvage contract that required the vessel to be towed anywhere other than to the nearest safe port, which was either Hodeidah or Aden. They argued that the shipowners were in bad faith and that the terms of the salvage contract were unreasonable. The English Admiralty Court was ultimately called upon to decide this important question of jurisdiction.

The salvors conceded that the burden of proof was on them to establish on the balance of probabilities that there was an agency of necessity at the time the contract was formed, which justified the owners' agreeing to that particular salvage contract on behalf of the cargo owners. When the salvage contract was first agreed, no provision was made for the port of redelivery. The court therefore agreed with the cargo owners that they were bound by a salvage contract on LOF terms to the nearest safe port, being either Aden or Hodeidah. However, when the printed LOF 90 was signed by the master of the casualty at Aden, he agreed with the tug master that the port of

redelivery should be "Dubai/Colombo/Singapore owners' option". This, the court held, was a variation of the original agreement.

The court held that no agency of necessity existed to support that variation because whether dry-docking was required would have depended upon a proper investigation of the problems on board the vessel. A reasonable owner would have appreciated that the generators might have been the cause of the problems and would have investigated the situation of Aden before committing the cargo owners to such a long tow on salvage terms. Instead, the court found, the owners had decided that their own interests would be best served if they obtained towage assistance on salvage terms, proclaimed to the world that the reason for doing so was tailshaft problems that required dry-docking, and kept quiet by the generator problems, which they must have known where the real cause of the vessel's difficulties.

By finding that the cargo owners were not bound to pay for the towage to Colombo or Singapore, the court reached a decision that protected the cargo owners, but allowed the salvors to recover for that part of the service that was a genuine in salvage operation.

The dispute arose before the 1989 Salvage Convention was incorporated into English law. Article 6(2) of the Convention provides as follows:

> *... The master or the owner of the vessel shall have the authority to conclude [contracts for salvage operations] on behalf of the owner of the property on board the vessel.*

It is submitted that the master would not under the Convention have authority to bind cargo to a contract that is not for a salvage operation. It would follow from this that the master would not have authority to bind the cargo owners to a variation of an original contract for a salvage operation where the services envisaged by the variation are not salvage services. Because the "PA MAR" was in a place of safety at Aden, it is

submitted that any onward towage to Colombo or Singapore would not have been a salvage operation under the Convention. It is therefore possible that the court might have come to the same decision under the new law, albeit by a different route.

Arbitration in Hong Kong - the problem with the New York Convention

1997 will be remembered as the year of reform for International Arbitration Regulations. Inspired by developments in international dispute settlement practice and the concerns of arbitration uses, many countries have recently updated their arbitration laws. In 1995, Guatemala, Kenya and Sri Lanka adopted new arbitration legislation. Brazil, India, Malta and New Zealand enacted new Arbitration Acts in 1996. The English Arbitration Act 1996 came into force on 31st January 1997 and in Hong Kong, in June 1997, shortly before the handover, legislation was adopted to bring the Arbitration Ordinance up to date and closely the in line with the English Act. Germany has adopted a new arbitration law, which became effective on 1st January 1998 and New laws are likely to be enacted soon in Ireland and Thailand, both based on UNCITRAL model law. South Africa is also considering a new law, which is expected this year.

There are many good reasons to arbitrate. It is flexible. Its procedures, if used constructively, can often result in substantial savings of time costs. It is private. The parties' disputes are not publicised for all to see. The parties may choose to have their dispute determined by arbitrators experienced in their industry, rather than risk having their case heard by a judge with little or no practical experience. An arbitration award is generally final. Certainly in England and Hong Kong it is now extremely difficult to challenge an arbitration award. Finally, arbitration awards are much more readily enforceable (pursuant to the New York Convention) than court judgments.

A problem exists in Hong Kong in relation to the enforceability of Hong Kong International Arbitration Awards in China Mainland. The difficulty arises out of the

meaning of the word "State" in Article 1(1) of the New York Convention, which provides:

> *"1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought... It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."*

The problem (which was identified well before the handover) centres on the fact that Hong Kong and China Mainland since the handover have ceased to be separate States for the purposes of the Convention. A Chinese award cannot therefore be enforced in Hong Kong under the Convention: see *Ng Fung Hong Limited v ABC* [1998] 1HKC 213, where Findlay J called for "some simple mechanism" to be put in place "for the mutual enforcement of the arbitral awards between Mainland China and Hong Kong".

However, there can be no doubt that Chinese law and jurisdiction and Hong Kong law and jurisdiction are entirely separate. This is fundamental to Deng Zhou Ping's "one country two systems" vision. So why couldn't the word "State" in the Convention not be interpreted as meaning "Jurisdiction"? I do not believe such a definition would have offended Beijing. On the contrary, I believe Beijing would have seen it as a sensible pragmatic solution to a unique problem. Both China Mainland and Hong Kong after all are still independent parties to the Convention.

Whatever might have been, the moral of the story is that until legislation is passed to put the matter beyond doubt, if you are contracting with a China Mainland entity, by all means agree that Hong Kong law should govern the transaction, but not Hong Kong arbitration. Otherwise, once you have obtained your award, you may not be able to enforce it in China Mainland under the Convention. If you are contracting with an entity whose assets are in Hong Kong, do not agree to CIETAC arbitration, because you will not be able to enforce your CIETAC award in Hong Kong under the

Convention... at least for the present. For the avoidance of doubt, this problem is unique to the relationship between Hong Kong and China Mainland. It does not affect the relationship either "jurisdictions" have with third party States.

Developments in the industry - The Hong Kong/Taiwan Shipping Accord

One of the most important recent developments in the industry in Asia is the agreement that was reached on 24th May 1997, which enable Hong Kong and Taiwan registered vessels to continue to trade to eachother's after reunification. The solution was achieved by pragmatic and commercial negotiation. Hong Kong Shipowners Association Chairman, George Chao, was appointed by Beijing to lead a team of shipowners to negotiate a solution. The minutes of negotiation signed at the final meeting state that Hong Kong registered ships while in Taiwan ports will be required only to fly the Hong Kong SAR flag, the *"Bauhinia"*. Ships registered in Taiwan when in Hong Kong ports will not be required to fly any flag, until the pattern of a flag has been agreed.

Piracy

During 1997, there were 229 attacks reported to the Piracy Reporting Centre. These ranged from attacks against vessels in port and at anchor, to the hijacking of ships and theft of cargo. 51 seamen were killed and 412 crew and passengers were taken hostage. 14 ships were hijacked and in 119 cases the pirates were armed with guns, knives or other weapons.

The Third International Meeting on Piracy and Phantom Ships, held at Kuala Lumpur on 1st and 2nd June this year supported the ICC - International Maritime Bureau's view that it is only governments who can deal effectively with this problem. All shipping associations and organisations were encouraged to work together to bring this issue to the attention to all governmental and non-governmental organisations including the United Nations.

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12th August 1998

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George Lamplough is a partner in the litigation and arbitration department of Herbert Smith and is head of the shipping and international trade group in the firm's Hong Kong office. He is qualified in New Zealand, England and Wales and Hong Kong. He specialises in international litigation and arbitration and has a diverse practice covering all aspects of shipping law, international trade and cross-border fraud.