THE MARITIME LAW YEAR IN ASIA

BY

VIVIAN ANG
ALLEN AND GLEDHILL

MARITIME LAW YEAR IN ASIA

A) Introduction

This paper seeks principally to outline some of the significant developments in maritime law that have taken place in 1998 and part of 1999 in Singapore and within selected jurisdictions in Asia, namely:

(i) China (pages 19 to 21);

(ii) Hong Kong (pages 21 to 26); and

(iii) Taiwan (pages 26 to 32).

The discussion in this paper on developments in jurisdictions other than Singapore are, unless otherwise stated, based on responses or material provided by foreign correspondents, to whom the author is greatly indebted, and the author's understanding of such responses or materials.

B) Singapore

On the legislative front, the most significant development was the enactment of the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act ("MSCLCOP Act").[1] In addition, there have also been several significant cases on various aspects of maritime law.

The legislative and selected case law developments are discussed below.

---

[1] Act 33 of 1998.

I) The MSCLCOP Act

On 18 September 1997, Singapore acceded to the International Convention on Civil Liability for Oil Pollution Damage 1992 ("CLC 92").[2] Shortly thereafter, on 31 December 1997, Singapore acceded to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 ("FC 92").[3] The MSCLCOP Act seeks to give effect in Singapore to the CLC 92 and the FC 92.

The 92 CLC seeks to make certain important changes to the International Convention on Civil Liability for Oil Pollution Damage 1969 ("CLC 69"). CLC 69 was previously given effect to domestically in Singapore by the Merchant Shipping (Oil Pollution) Act. The MSCLCOP Act *inter alia* repealed the Merchant Shipping (Oil Pollution) Act, and Part II of MSCLCOP Act now gives effect domestically to CLC 92. Some significant changes brought about by the CLC 69 are:

a) the alteration of the scope of application, e.g.:

(i) S.3 of the MSCLCOP extends the application of the act to the "territory of Singapore" which now includes the territorial sea and exclusive economic zone of Singapore, or where no such zone has been established, to an area beyond and adjacent to the territorial sea extending not more 200 nautical miles from the baselines from which its territorial sea is measured.

(ii) Under s.3 of the MSCLCOP, the owner will be liable not only where there is an occurrence which results in the discharge or escape of oil from the

---

2 *Singapore Parliamentary Debates*, Vol 69, Column 641 on the sitting on 31 July 1998.
3 *Ibid.*

ship but also an occurrence which gives rise to a "*grave and imminent threat of damage being caused*"[4].

(iii) The scope of persons to whom immunity is granted from claims for pollution damage under the 92 CLC[5] is wider than that under the 69 CLC.[6] For instance, express immunity is now given to any person performing salvage operations with the consent of the owner or operator of the ship or on the instructions of a competent public authority. The provisions for immunity under CLC 92 are given effect to in s.5 of the MSCLCOP Act. However, it is to be noted that the immunity under CLC 92 can be broken where the damage is caused by intentional or reckless acts with knowledge that any such damage or cost would probably result.[7]

b) the substantial increase in the limitation of liability from 133 Special Drawing Rights ("SDRs") for each ton of the ship's tonnage or 14 million SDRs to 3 million SDRs for ships up to 5,000 gross tonnes, plus, in the case of ships exceeding that weight, 420 SDRs for each ton of tonnage in excess of 5,000 tons up to a maximum amount of 59.7 million SDRs.[8]

c) the loss of the right to limit if it can be shown that the pollution damage resulted from a personal act or omission of the shipowner, committed with the intent to

---

4 Article 1.8 of the CLC 92 extends the scope of the word "*Incident*" beyond "*any occurrence, or series of occurrences having the same origin, which causes pollution damage*" by adding the phrase "*or creates a grave and imminent threat causing such damage*".

5 Article III.4 of the CLC 92.

6 Article III.4 of the CLC.

7 Sections 5(1) and (2) of the MSCLCOP Act.

8 Article V of CLC 92. Contrast amounts under Article 5 of CLC. The limits under CLC 92 is reflected in s.6 of the MSCLCOP Act.

cause such damage, or recklessly and with the knowledge that such damage would probably result.[9]

Since CLC 92 generally provides for limitation of the owner's liability, additional compensation is available, if needed, from the fund established under FC 92. The Fund is financed by contributions from importers and receivers of oil. Part III of the MSCLCOP Act gives effect to and provides the operational framework for FC 92.[10]

II) Heavier Penalties Under The Prevention Of Pollution Of The Sea Act ("POPSA")

With effect from 10 June 1999, heavier fines were introduced for offences under the POPSA, i.e.:[11]

a) fines for the offence relating to discharge of oil or oily mixtures from land or apparatus used for transferring oil from or to any ship into Singapore waters, under s.3 of POPSA increased from the range of S$500 to S$500,000 to the range of S$1,000 to S$1 million.

b) fines for the offence relating to discharge of oil or oily mixtures from ships into Singapore waters under s.7 of POPSA increased from the range of S$500 to S$500,000 to the range of S$1,000 to S$1 million.

c) the fine for the offence relating to retention and discharge of oil residues under s.8 of POPSA increased from S$500,000 to S$1 million.

So far as case law is concerned, some of the more interesting cases are highlighted below.

---

9 Article V.2 of CLC 92. This Article is given effect to in s6(4) of the MSCLCOP Act.

10 S448/98.

11 Via amendments to POPSA introduced by Act 8 of 1999.

III) Sheriff's Commission Where Sheriff Not Actively Involved In Sale Of Ship Under Arrest – *Royal Bank Of Scotland Plc v Owners Of The Ship Or Vessel "Nikolas"*[12]

A ship under arrest was sold without the sheriff being involved in the appraisement and sale of the ship.[13] The plaintiffs had found a willing purchaser (who eventually purchased the ship) and procured for the purpose of the sale a private valuation of the ship. Although the Sheriff was informed of the sale, the role of the Sheriff in relation to the sale was largely passive.

The plaintiffs sought to argue in the circumstances of the case that the Sheriff should not be entitled the commission of about 2.5% under Item 57 of Appendix B (Court Fees) of Rules of Court, which provides for the commission to be payable "*On the sale of a ship*". The court rejected the argument on the basis that Item 57 encompassed all duties of the Sheriff during the arrest and the Sheriff's responsibility in relation to arrest of a ship under was not limited to that of appraisement and sale. There were numerous other duties including ensuring the safe custody of the ship, and the preparation of certain documentation relating to the sale (including the bill of sale).

IV) Beneficial Owner Of Ship - *The Kapitan Temkin* [1998] 3 SLR 254

---

12 Judgment of Amarjeet JC dated 30 June 1999 in Adm. In Rem No 1 of 1999.

13 Provided certain safeguards are in place, it is now not uncommon, for an arresting party to try to obtain the leave of court to sell a vessel to a particular buyer thereby bypassing the need to go through a sale by private tender or public auction.

The plaintiffs, P, brought an admiralty action against B Co. asserting breach of a charterparty entered into between P, as charterer and B Co., as owner. The ship (i.e. the "Kapitan Tempkin") was arrested in the action.

A question arose before the High Court as to whether B Co. was the beneficial owner of Kapitan Tempkin. P had to establish this requirement to satisfy s4(4) of the High Court (Admiralty Jurisdiction) Act.

B Co. argued that the government of Ukraine and not B Co. was the beneficial owner. B Co. relied primarily on a certificate of registration of ownership of the ship which provided that "according to Art 30 of the Merchant Shipping Code of the USSR this certificate is to be considered as final and complete evidence of the right of property of USSR of the ship "KAPITAN TEMKIN".

Selvam J. held that B Co. was the beneficial owner. He held that:-

a) The question of the beneficial ownership of a ship was to be decided by reference to Singapore law. This is notwithstanding that the ship may be registered elsewhere. The court may, however, take into consideration foreign law as facts (as opposed to binding law) in deciding the question under Singapore law.

b) A useful starting point in determining beneficial ownership is the Lloyd's Register of Shipping. On the facts, the Lloyd's Register showed that B Co. was the registered owner of the ship.

c) A certificate of registration of a ship and the ship register maintained at the place of registration of a ship, while providing important proof of title to a ship, were not conclusive. In clear cases, the court could look beyond the register and the

certificate.

d) The certificate on the facts of the case identified B Co. as "the owners of the ship".

e) The further reference in the certificate to the ship being the property of the USSR was premised on Art 30 of the USSR Merchant Shipping Code. The court noted that there was nothing in Art 30 or any other provision of the Code that justified the proposition that the USSR or Ukraine was the owner of the ship.

It is interesting to note that in arriving at its decision, Selvam J referred to the decision of the English Court of Appeal in *The Nazym Khikmet* [1996] 2 LLR 362, in which an opposite conclusion was reached. However, Selvam J refused to follow the English decision on the basis that the decision was decided on the basis of the limited evidence before the English court as to the beneficial ownership of the ship.

V) Port Dues Recoverable As Sheriff's Expenses - *Planmarine AG v Maritime and Port Authority Of Singapore* [1999] 2 SLR 1

In *Planmarine AG v Maritime and Port Authority of Singapore*, the Singapore Court of Appeal upheld the decision of the High Court in treating port dues as part of sheriff's expenses relating to an arrest of a ship. The characterisation of port dues as sheriff's expenses was important as it would confer priority in relation to the dues out of the proceeds of sale of the ship arrested.

In dismissing the appeal, the court rejected several arguments as to why port dues should not be treated as sheriff's expenses, viz,:-

a) injustice will result to the solicitor of the arresting party who would be liable for the dues pursuant to an undertaking given, where the proceeds are insufficient to pay the sheriff's expenses. The court held that this risk did not merely arise from the inclusion of port dues as sheriff's expenses but various factors such as a poor market, damage to the vessel while under arrest and the escalation in costs for items of sheriff's expenses. Such a risk was inherent in every arrest. Where the arresting solicitor knows in advance that port dues will be treated as sheriff's expenses, there was no unanticipated risk.

b) that there was no equity, which required port dues to be treated as sheriff's expenses. The court rejected the argument holding that the practice of treating port dues as part of sheriff's expenses enabled the ship arrested to be sold free from encumbrances and thus fetch the best price. Without such a practice, the Maritime and Port Authority of Singapore may be compelled to exercise its

powers to detain the ship, thereby resulting in further delay, which may in turn lead to further deterioration of the ship and further costs in preserving the ship.

VI) Power Of Court To Order Security To Cover Claim In Arbitration Exercisable Only Where Application Made To Stay - *The Sunwind* [1998] 3 SLR 954

A ship that was involved in a collision was arrested by P, who were the charterers of the ship. The charterparty contained an arbitration clause, and P wanted the dispute under the charterparty to be referred to arbitration. The owners of the ship, O, disputed P's right to refer the dispute to arbitration.

In these circumstances, a disagreement arose between the parties as to the scope of the security to be provided to secure the release of the ship. P wanted the security to cover any order made by "*any court or tribunal of competent jurisdiction*", which would have included an arbitral award. O was only prepared to provide security to cover the action before the Singapore courts.

P argued that the court could order security to cover arbitration pursuant to s7 of the International Arbitration Act (IAA). Section 7 allows a court staying an admiralty action before it in favour of arbitration, to order the property arrested to be retained as security for the satisfaction of any arbitral award. Alternatively, the court may order that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.

Notwithstanding that the wording of s.7 relates to the power of the court to order security to cover an arbitration award where the court stays the action, P argued that on the purposive reading of s.7, the court had the power to order security to cover arbitration awards even where there is no stay of proceedings.

The court rejected the argument holding that under s.7 the court only has power to order security to cover an arbitration award only if it orders a stay of proceedings before it. In the absence of any application for a stay (and there was none on the facts of the case), the court could not order security to cover any arbitration award.

VII) Letter Of Undertaking Restricted To Action In Which Ship Arrested And Arbitration Proceedings - *The ICL Raja Mahendra* [1999] 1 SLR 329

P were owners of cargo on board the ship, ICL Vikraman. The ship was owned by O. The cargo sank after a collision involving the ship. In Singapore, P arrested a sister ship, ICL Raja Mahendra, belonging to O to obtain security for P's claim against O in respect of the cargo. The bill of lading in respect of the sunken cargo provided for arbitration in London.

Shortly after the arrest, the parties began negotiations in respect of a suitable letter of undertaking to secure the release of the ship under arrest. The parties were unable to agree on the wording of the letter of undertaking. In particular, P wanted a letter of undertaking in respect of a judgment for damages, interests and costs in any court or tribunal of competent jurisdiction. O was prepared only to provide a letter of undertaking in respect of liability under a judgment of the Singapore court or an award from arbitration proceedings in London. The dispute was referred to court.

The court held that ordinarily a party who invoked the admiralty jurisdiction of the Singapore court did so for the purpose of litigating and securing a judgment of the Singapore court. That being the case, the letter of undertaking should ordinarily be limited to liability under a judgment of the Singapore court. However, under the International Arbitration Act, the court may, when staying an action before the Singapore

court in favour of arbitration, order any property arrested to be retained as security to satisfy any award made on the arbitration. That being the case, the letter of undertaking may properly be sought to cover liability under an arbitration award.

In the premises, the court held that the letter of undertaking should be restricted to London and Singapore. In the result, the court held that the scope of the letter of undertaking proposed by O was more reasonable.

VIII) The Contest of Jurisdictions – Collision between MV Ming Galaxy and MV Herceq Novi

On 18 August 1996, there occurred a collision in Singapore waters between MV Ming Galaxy and MV Herceq Novi. 2 days later, the owners of Ming Galaxy, M, sued the owners of Herceq Novi, H, in Singapore.

H applied to stay the Singapore action on the basis that England was the more appropriate forum for the resolution of the dispute, relying *inter alia* on the fact H and owners of cargo had brought claims against M in England. Reliance was also placed on the fact that the limitation of liability in England was higher than that in Singapore. The Singapore limitation was based on the 1957 Limitation Convention, whereas the English limitation was based on the 1976 Limitation Convention.

Selvam J who heard the case[14] refused the application for a stay, noting that the connecting factors clearly favoured Singapore. The collision happened here. The official monitoring of the sea-lanes were done in Singapore, and official investigations had also taken place in Singapore. The masters of the ships had also been involved in criminal proceedings in Singapore and had pleaded guilty without contesting the criminal

jurisdiction of the Singapore courts. These pointed to Singapore being the appropriate forum for dispute resolution.

In addition, the court remarked that the fact that higher limitation could have been obtained in England did not detract from substantial justice being obtained in Singapore. In this respect, the argument in reliance on the higher limitation was made on the basis that it would result in substantial justice being obtained in England. Selvam J stated that the limit had been set by the Singapore parliament and had to be respected.

Finally, it is also interesting to consider the English action where the Ming Galaxy was arrested in England in an action brought by H.[15] M then applied to stay the action on the basis that Singapore was the more appropriate forum for the determination of the dispute. The judge agreed that Singapore was the more appropriate forum.

The judge, however, stayed the action in favour of an action in Singapore only to the extent of determination in Singapore of issues relating to liability for the collision and the quantum of liability. In this respect, the court was influenced by the higher limitation available in England.

M appealed, and the English Court of Appeal allowed the appeal. The court held that given the finding that Singapore was the appropriate forum, the entire action should have been stayed unless the effect of the stay was to deprive H of some legitimate juridical advantage. The court held that the fact that H may not be able to rely on the 1976 Convention was not a good ground in itself to refuse a full stay of the English action.

---

[14] The judge rendered a judgment on 10 September 1998 in Admiralty *In rem* No. 514 of 1996.

[15] [1998] 2 LLR 454.

The court held that it could not properly be said that the 1976 Convention was preferable over the 1957 Convention.

Further, the court remarked that it was impossible to say that substantial justice was not available in Singapore. The court noted that there was a significant body of agreement among civilised countries as to the law administered in Singapore.

IX) Priorities– Whether Ship Repairer's Lien was lost when they applied and obtained an order for the appraisement and sale of the vessel without reserving their right to a lien- *Pan-United Shipyard Pte Ltd v The Chase Manhattan Bank ("Alpha 601")*[16]

Ship repairs were carried out by P on a ship belonging to D. In December 1995, the total amount outstanding in respect of the repair works was in excess of S$700,000. By an agreement reached between P and D, it was agreed that D would pay a discounted sum in instalments. In the event of default, the entire sum became payable. D subsequently defaulted in payment, and in July 1996, P commenced an *in rem* action claiming a debt for the repair works. In March 1997, P arrested the ship and served the writ on her. The endorsement of claim made no mention of any claim for a possessory lien in respect of the repair charges. Subsequently, in May 1997, P applied for and obtained an order that the ship and the bunkers on board be appraised and sold free and clean from all liens, encumbrances and claims. The sheriff then instructed appraisers, who boarded and inspected the ship for the purpose of appraisement and sale.

In June 1997, C, the mortgagees, intervened in the action commenced by P. After C had intervened, P applied for an order that the appraisement and sale of the ship be effected without prejudice to P's possessory liens.

During the hearing of the application, C conducted certain investigations which revealed that the ship was in fact not in P's yard but in adjoining waters.

After hearing submissions by the parties, the High Court found that P never had a possessory lien to begin with as they lost possession of the vessel when they moored her in the adjoining waterfront. Secondly, even if, they had such a lien, they had lost it when they applied for the vessel to be appraised and sold without preserving their lien.

P appealed against both the above findings to the Court of Appeal.

P maintained that:-

a) they had possession of the ship from the day it was brought to the yard till the date of sale and they did not lose their lien when they moored the ship at an adjoining waterfront.

b) they did not lose their lien from the moment the order for appraisement and sale was made, and continued to have the possessory lien until the actual sale of the ship.

---

[16] Judgment of the Singapore Court of Appeal dated 12 March 1999 In Civil Appeal No. 237 of 1998.

C contended in short that:-

a) the question whether or not P had maintained their lien was one of degree and on the facts, in mooring the vessel in adjoining premises with no form of security, no one on board and no means of easy access to the vessel themselves except by launch, they had failed to maintain sufficient possession over the vessel.

b) further or alternatively, in applying and obtaining an order to have the vessel appraised and sold, free and clean of all liens and encumbrances, without any reservation of rights whatsoever, P had taken a step which was inconsistent with their right to a possessory lien as by such action they effectively lost the control over the vessel which was essential for the purposes of maintaining their lien.

The Court of Appeal noted that it was well established in law that the question of whether a ship repairer has established or maintained possession over a chattel to assert a possessory lien, is one of fact and degree. The degree of control which the repairer has over the chattel is an important factor in determining whether possession is established or maintained. The fact that a party is able to prevent a chattel from being taken away without its permission is indicative of the right of possession of that person. Finally, the court accepted that the fact that a ship is moored at an adjoining waterfront, is not conclusive of the fact that possession has been lost.

The Court of Appeal held that the mere arrest of a ship did not extinguish the ship repairer's possessory lien. The admiralty sheriff's custody over an arrested ship is as a matter of law, a lesser right and had to be distinguished from a ship repairer's exclusive and actual possession of a ship. The court, however, accepted that a lien may be lost or destroyed *inter alia* by waiver, loss of possession or by abandonment.

The court then held that the mere making of an order for appraisement and sale does not result in possession being lost. In the court's view, the granting of such an order does not have the effect of adding to the sheriff's custody, the element of possession. Possession is only lost when the sheriff takes physical possession of the ship, such as in order to transfer possession to a purchaser upon completion of a sale of the ship.[17] In the result, the court held that P was entitled to take steps to preserve its lien, and allowed the appeal.

X) Court Of Appeal Clarifies Test For Wrongful Arrest - *The Kiku Pacific* [1999] 2 SLR 595

In *The Kiku Pacific*, the plaintiffs, P, who through a series of contracts, supplied bunkers to a ship, arrested the ship when it did not receive payment. The defendant shipowners, D, claimed that the arrest was wrongful and that damages for wrongful arrest was payable.

The main dispute in this case arose as to when a court would order damages for wrongful arrest. There was no dispute that the test for wrongful arrest was *mala fides* or gross negligence, implying malice. However, it was also submitted that malice could be inferred where there was no reasonable or probable cause for arrest. The court after carefully considering the argument rejected the same, noting that an inference from the absence of reasonable or probable cause may dilute the higher standard needed to make out a claim for damages for wrongful arrest. On the facts, the claim for damages for wrongful arrest was not allowed.

---

[17] Quare: When does this point of time arise? In practice, after the vessel is arrested, there is no point of time as such when the Sheriff ever takes physical possession of the ship again prior to or upon the completion of the sale. The sale is completed by the payment of the purchase price and execution of the Bill of Sale by the Sheriff and thereafter the new buyer takes over the physical possession of the vessel.

XI) *In rem* Judgment Available Notwithstanding Defendant Shipowner Dissolved - *Dauphin Offshore Engineering & Trading Pte Ltd Inc v Owners Of The Vessel Capricorn* [1999] 2 SLR 390

The plaintiffs (P) provided works and services on a ship belonging to the defendant ship owners (D), a corporate entity established in Netherland Antilles. D failed to pay the amount claimed by P. P issued a writ *in rem* in November 1993 and arrested the ship, which was still in P's possession. The ship was released after D provided security for the claim.

During the trial, the court was referred to a declaration by the head of the Curacao Commercial Register that D was dissolved and liquidated on 20/9/95. Soon thereafter, D's solicitors discharged themselves. However, at the request of the court, D's previous solicitors addressed the court as amicus curiae.

The question then arose as to whether P could proceed with the action and obtain an *in rem* judgment against D in view of the fact that the latter had been dissolved.

In response to the argument the fact that D had been dissolved meant that judgment could not be entered against D, P argued that the fact of dissolution did not prevent an *in rem* judgment from being entered. The court agreed with P. Further, it was held that the court could proceed to hear the action notwithstanding the fact that D's solicitors had discharged themselves. In the view of the court, the fact of discharge was really no different from a case where a defendant fails to appear at a hearing. The court may proceed to hear the action notwithstanding the non-appearance.

The court then went on to hear the action and entered judgment *in rem* in favour of P.

P being dissatisfied with the judgment appealed to the Court of Appeal.[18] The Court of Appeal upheld the decision of Rajendran J holding that the fact that D had been dissolved did not preclude P from proceeding *in rem* against the ship and that an *in rem* judgment could be entered. In this connection, the court held that the entry of an appearance by D merely meant that the action also proceeded *in personam*. However, the *in personam* characteristic of the action did not subsume the *in rem* aspects of the action. The continued existence of the *in rem* characteristic, in the view of the court, allowed the action to proceed and judgment to be entered notwithstanding the fact that D had been dissolved.

XII) Arresting Party Should Be Prepared at Time of Arrest to Quantify Claim - *Admiralty Action in Rem Against the Ship or Vessel "H 156"*

The plaintiff P, arrested, a ship belonging to the defendant, D seeking security for P's claim for repudiatory breach of a charterparty that P alleged D was a party to. When the ship was arrested about 6 months after the repudiatory breach occurred, no amount was given of the damages that was claimed. 10 days later, P asserted a claim of about US$1.5 million inclusive of interest and costs. In addition, P further mentioned that there would be an additional claim, which had not been quantified. 12 days later, P quantified the security required at about US$2.2 million. There was a lack of particulars given as to how the amount was calculated. Further, at no point of time was the full amount for security given.

The court, on application of D, ordered the release of the ship even though no security had been provided. In the view of the court, P ought to have a firm idea of the security

[18] Judgment dated 2 July 1999 in Civil Appeal No. 273 of 1998 (unreported).

required when the writ was issued or at least when the ship was arrested. In making the order, the court was keenly aware that the release of a ship without security was a drastic step and to this end, the court gave leave to P to apply to fix security or re-arrest the ship when P was in a position to formulate the quantum of damages.

C) China

Based on the response from Ms Lu Min of Romax Law Office in Shanghai, China, so far as they know, there has not been any significant developments in the area of maritime law within China in the year of 1998 to 16 August 1999.[19]

For one, the judicial practice, and the court's position on the subject of arrest of ships appears to be the same as before. China does not give effect to the International Convention for the Unification of Certain Rules Relating To The Arrest of Seagoing Ships concluded in Brussels on 10 May 1952.

The Chinese Rules on Pre-Trial Arrest of Ships by Maritime Courts ("Pre-Trial Arrest Rules") and the Rules on Maritime Courts Auction of the Arrested Ships in Settlement of the Claims ("Auction Rules"), both of which were promulgated by the Supreme Court in 1994 and have force of law, still dominate in the current judicial practice in the area of arrest of ships.

It is worth noting, however, that there exists a degree of inconsistency between the two regulations thereby creating a considerable degree of uncertainty to the judicial practice. For instance, the Pre-Trial Arrest Rules provides that an arrest may be effected on ships owned by the owners and/or the managers and/or the charterers of or managed and/or

chartered by the owners and/or the mangers and/or the charterers who are responsible for the claims. The Auction Rules provide that the owner of the ship that may be auctioned for sale, must be the defendant in an action against whom the claim is brought and be responsible for the maritime claim.

Thus, the Pre-Trial Arrest Rules would cover the case of the bareboat-chartered ship, whereas the Auction Rules would not. A problem would then arise in a situation where an action is brought against a bareboat chaterer, the bareboat-chartered ship is arrested pursuant to the Pre-Trial Arrest Rules, and the charterer refuses to provide security. In such a case, the ship cannot be sold by auction pursuant to the Auction Rules.

The Chinese courts' position and practice in this connection are varied, thus making it difficult for the legal practitioners to decide on the appropriate legal action or to properly advise their clients. One view is that where a bareboat chartered vessel is arrested and the court finds that the charterer instead of the owner of ship liable for the claim, the ship is to be released by the court and the on-going arrest is deemed inappropriate. Another view is, however that where the charterer is found liable, the court can, after the expiry of a statutory period, nevertheless proceed to force sell the ship and use the proceeds in settlement of the sum adjudged to be due.

D) Hong Kong[20]

I) Arrest Of Ship And Mandatory Stay Of Action In Favour Of Arbitration - *The Britannia* [1999] 1 HKC 221

---

[19] The response is contained in a letter dated 16 August 1999.

[20] The discussion on developments in Hong Kong is based on the author's understanding of material provided by Mr David Coogans of Messrs Richards Butler, Hong Kong.

The defendant charterer, C, defaulted in payment of hire and crew wages and failed to deliver the ship back to the plaintiff shipowner, P. P issued an *in rem* writ claiming the return and damages for the detention of the ship. P also caused an arrest of his own ship. An arbitrator was then appointed in London by both the plaintiff and the defendant pursuant to an arbitration clause in the charterparty. C applied for a stay of the proceedings in reliance on an arbitration clause in the charterparty. The issue that arose was whether the court has jurisdiction to maintain an arrest despite a mandatory stay provided for by the Hong Kong Arbitration Ordinance.

On the basis of the English cases of *The Tuyuti* [1984] 1 QB 838, *The Rena K* [1979] QB 377 and *The Bazias 3* [1993] QB 673, the court held that the mandatory stay of proceedings does not take away the jurisdiction of the court in an *in rem* action to arrest or maintain an arrest of a ship. The arrest was perfectly legitimate and proper for the purpose of providing security for the judgment in the action *in rem*, when the stay might be lifted because of D's failure to honour the arbitration award or to redeliver the vessel back to the owners. D's application for a stay was therefore dismissed.

II) Towage Or Salvage? - *The Dragon Sunrise* [1998] 3 HKC 633

The engine of a ship broke down and the plaintiff, P, was called in to send a tug and assist the ship and bring her to Hong Kong for an agreed sum of HK$150,000. The tug was sent out but was only able to locate the ship after searching for 7 hours. The ship was in danger of colliding with nearby wrecks and vessels and would be grounded if not rescued. The tug towed the ship to a safe berth in Hong Kong.

P issued an invoice for the agreed sum but no payment was received. The ship was subsequently arrested and sold by the court for almost HK$4 million. P obtained default judgment *in rem* for HK$150,000. A mortgagee of the ship claimed a sum of more than HK$10 million.

The issue that arose was whether the services of P were that of towage or salvage. P would rank in priority over the mortgagee if it had performed the services as a salvor. However, if the service were that of towage, the claim of the mortgagee would rank in priority.

The court held that the contract was one for salvage as the what was agreed was for the plaintiff to send out a tug for assistance to the vessel rather than for a mere towage from a stated position to Hong Kong. The vessel was in open sea, without power and drifting and was therefore exposed to danger and it was necessary to give her such assistance as might be necessary to enable her to be brought back to safety in Hong Kong and that thus the plaintiff enjoyed a higher priority than the mortgagee. Alternatively, even if the contract was originally one of towage, the nature of the contract changed from towage to

salvage under the circumstances of the case. P had provided services beyond what was required by an ordinary contract of towage. Additionally, the court held that the public policy of encouraging efforts to save a ship would be better served by conferring priority on P's claim.

III) Issuance Of Warrant Of Arrest Before Writ - *The Dragon No. 1* [1998] 3 HKC 684

The plaintiffs, P, brought an *in rem* action against the defendant shipowner, D, for damages resulting from a collision between P and D's ships. A warrant of arrest of D's ship was granted, on application by P, by the court upon an urgent application before a writ could be issued. The writ was issued and served the next day. D applied to have the warrant of arrest discharged on the ground that the court had no jurisdiction to grant the warrant.

The issue was whether the court has jurisdiction to grant the warrant before a writ was issued and whether the court ought to exercise its discretion to grant a second warrant of arrest should the first warrant be set aside.

The court held that the court had not wrongly issued the first warrant. Ord. 75 r.5 of the Hong Kong Rules of the High Court (which provides for arrest after a writ is issued, affidavit filed and notice of the action sent to the consul) was not, in the view of the court, a strict statutory requirement which absolutely prohibits the court from exercising its discretion to grant the warrant before the writ is issued.

Further, the court held that if the first warrant of arrest had been improperly issued, a second warrant of arrest could properly be issued on the facts of the case.

IV) Material Non-Disclosure And Arrest - *The Tat Yau 8* [1998] 4 HKC 108

In *The Yat Yau 8*, 12 containers containing television picture tubes were shipped on board a ship belonging to O. Seven of the containers were subsequently stolen. Arising from this incident, three actions were commenced, namely:-

I) an *in rem* action by the cargo interests, I, against O in bailment, negligence and conversion for the loss of the goods (first action);

II) an *in personam* action by I against individual owners of the vessel and against the carrier, C, who had issued bills of lading in respect of the goods (second action). In the second action, C provided I with security for I's claim against C; and

III) an *in rem* action by C against O in bailment, negligence and conversion and for O to indemnify C against any liability C had incurred or might incur to any third parties.

In July 1997, the ship belonging to O was arrested in the third action. To secure release of the ship, O provided C with a bail bond as security for the claim in the third action.

In March 1998, the ship was arrested again, this time in the first action. O applied to set aside the arrest on the basis of alleged material non-disclosure on the part of I when applying *ex-parte* to the court to arrest the ship. O alleged that I should have disclosed the fact that the second action had been commenced by I and that I had obtained security in that action.

Alternatively, O sought to vary the bail bond provided in the third action on the basis that O should only be required to put up a single bail bond in respect of all claims arising

from the same incident.

The court rejected the argument that there had been material non-disclosure on the part of I. The court held that the benchmark for materiality in the context of an application for an arrest of a ship was the satisfaction of the statutory jurisdictional requirements to bring the action *in rem*. The non-disclosure did not go into the *in rem* jurisdiction .

The court accepted that I's claim in the first action against O in tort was distinct from the second action in contract against a different party, C. The security provided by C was for the second action. C's security would then not satisfy the claim for which the first action was commenced, and the ship arrested. As a result, the existence of C's security did not affect the jurisdiction of the court to arrest the ship in the first action. There was therefore no material non-disclosure.

Finally, the court held that a bail bond was personal to an action. In addition, it was held that the court had no jurisdiction to interfere with the wordings of a bail bond provided in a separate action. That being the case, the court held that no amendment could be permitted to the bail bond provided by O in the third action to cover the claims by I in the first action.

IV) Judicial Sale of ship to Named Purchaser - *The Margo L* [1998] 1 HKC 217

P, the mortgagees of the vessel "Margo L" arrested the vessel and applied for judgment in default of acknowledgement of service and for a private sale of the vessel to a named purchaser at a proposed price of US$3.4m. To justify departure from the usual course of appraisement and public tender, the bank relied on three brief valuation certificates, the highest of which valued the vessel at US$3.2m.

Judgment was entered for the plaintiff but the judge refused to order the proposed private sale on the ground that to ensure protection for all admiralty claimants, the court should normally order an appraisement of the vessel so as to determine the minimum selling price. Further, even if valuation was done in the most convincing way, the court would still order a sale by public tender in order to obtain the best price possible for the vessel and nothing in the case justified departure from this normal procedure.

E) Taiwan

Based on the response dated 20 August 1999 from Mr C.V Chen of Messrs Lee and Li of Taiwan, the most significant development was the enactment of new Maritime Law of the Republic of China (R.O.C.).

The Amendment on the Maritime Law of the Republic of China (the "new Maritime Law") was promulgated on 14 July 1999, and took effect on 16 July 1999. The new Maritime Law adopts many principles provided by international maritime conventions, such as the Hague-Visby Rules of 1968; Convention on Limitation of Liability for Maritime Claims ("LLMC 1976"); Liens and Mortgage, 1967; International Convention on Salvage, 1999; 1979 S.D.R. Protocol; and the York-Antwerp Rules.

I) Chapter One: General Provisions

The amendment to Chapter One focuses mainly on the provision regarding enforcement proceedings against a ship. According to the new Maritime Law, no precautionary proceedings (i.e., provisional seizure and preliminary injunction) may be imposed on a ship from the time when the preparations for commencement of her voyage are completed to the time the ship reaches her next port of call. However, claims relating to obligations

required to be performed for the purpose of making the voyage possible, and indemnification of damages resulting from a collision, are explicitly excluded from the limitation on precautionary proceedings. In contrast to precautionary proceedings, conclusive enforcement proceedings (e.g. enforcement under a conclusive and final judgment) are not prohibited and can take place at any time.

It is noteworthy that in the absence of *in rem* proceedings in the Republic of China, compulsory execution petitioners must name the shipowner as the defendant in order to impose any provisional seizure or conclusive seizure of the ship. Additionally, in the case of precautionary proceedings, the creditor (the petitioner) would have to post a bond, the amount of which is designated by the court (normally between one third of and the full amount of the claim; in special cases, it may be the value of the ship).

However, the court also allows the defendant to post a security bond to lift such provisional seizure, the amount of which is normally the full amount of the claim.

II) Chapter Two: Ships

a) *Limitation of Shipowner's Liability*: The new Maritime Law was enacted with reference mainly to LLMC 1976. It provides the method of calculation of limitation tonnage. It also narrows the causes upon which a carrier/shipowner may cite limitation of liability, and adds, by reference to Article 3 of LLMC 1976, four events that are not subject to liability limitation.

b) *Maritime Lien*: The Maritime Law relating to maritime liens was amended mainly with reference to the Brussels Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1967. The new Maritime Law adds, and excludes some maritime liens, and adjusts some of the priorities among the claim. It also provides, in principle, that the maritime lien will be extinguished if not exercised within one year after the obligation occurred.

c) *The Right of Detention*: The expenses for ship repair are not a subject matter of maritime liens under the new Maritime Law, instead, they give rise to a right of detention over a ship. Such rights have priority over the mortgage of the ship.

III) Chapter Three: Carriage

The new Maritime Law does not amend the provisions of the old Maritime Law regarding carriage of passengers and towage of ship, and only revises the provisions regarding the carriage of goods.

a) *Jurisdiction and Arbitration*: Under the new Maritime Law, if either the port of loading or port of discharge specified in a bill of lading is in the ROC, the ROC

court has jurisdiction over the dispute resulting from such bill of lading. If both parties to the contract agree upon an arbitration clause provided in the bill of lading, the dispute can be submitted to arbitration in the ROC, and contrary provisions regarding the place and the applicable rules of arbitration provided in the bill of lading are not binding on the parties.

b) *Governing Law*: If the port of loading or port of discharge specified in a bill of lading is in the ROC, the applicable law of the dispute resulting from such bill of lading should be decided by the ROC Conflict of Law Rules. However, if the ROC Maritime Law provides better protection for a ROC shipper or consignee, the ROC Maritime Law will apply.

c) *Notice of Damage*: Under the old Maritime Law, unless otherwise provided by the law, once the goods have been delivered to the person entitled to take delivery, the carrier is "deemed" to have effected complete delivery of the goods in accordance to the Bill of Lading; proof of the contrary is not admissible. Based on the 1968 Hague-Visby Rules, the new Maritime Law confers the consignee the right to prove incomplete delivery of goods by the carrier.

d) *Statute of Limitation*: The new Maritime Law stipulates that claims of the carrier's or shipowner's liability for cargo damages or losses shall be barred by prescription if no lawsuit is instituted against them within one year from the date of taking delivery of the goods or the date on which the delivery should have been taken, regardless of whether the damage/loss is partial or total.

e) *Calculation of Package Limitation*: Under the old Maritime Law, where the nature and value of the goods have not been declared by the consignor prior to loading or have not been inserted in a bill of lading, the liability of the carrier or shipowner for indemnity with respect to the damage or loss of the goods was limited to nine thousand New Taiwan Dollars per package. It was not clear what constituted a "package" for the purposes of limitation. The new Maritime Law, in light of 1968 Hague-Visby Rules, raises the package limitation to the amount to be calculated at 666.67 SDRs per package or 2 SDR per kg, whichever is the higher. It also provides that where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed as the number of packages or units for the purpose of package limitation. Further, to protect the cargo interest, the new Maritime Law clearly stipulates that if the damage or loss of goods is caused by an intentional act or gross negligence of the carrier or shipowner, neither the carrier nor the ship owner shall be entitled to the benefit of the limitation of liability.

f) *Himalaya Clause and the Scope of Its Application*: The new Maritime Law stipulates clearly that unless the loss, damage or delay of goods is caused by an intentional act or gross negligence of a carrier's agents or employees, such agents or employees are entitled to the benefit of the carrier's defences and liability limitation set out in Chapter 3 Section 1 (i.e., carriage of goods). However, such a "Himalaya Clause" is limited to a special class of persons engaging in loading, discharging, carriage, custody, guarding, stowage and tally, etc. within the area of

the commercial harbor, and is not to be extended to people in an inland container terminal.

IV) Chapter Four: Collision of Ships

To be compatible with maritime practice, the new Maritime Law provides that "the court agreed upon by the parties" also has the jurisdiction over collision matters, In addition, the new Maritime Law allows an application for the lifting of seizure and such application will normally be granted if a guarantee to cover the amount of the claim is issued by an appropriate bank or insurer.

V) Chapter Five: Salvage

The new Maritime Law adopts the provisions of the 1989 Salvage Convention, especially Articles 12 to 14. For instance, the right of a salvor to claim for remuneration for its salvage or assistance shall be extinguished if not exercised within two years from the date on which the salvage or assistance was completed. Further, there is provision for special remuneration for salvors where the salved ship or cargo endangers the environment.

VI) Chapter Six: General Average

The provisions regarding general average in the Maritime Law was enacted mainly with reference to the 1974 York-Antwerp Rules, especially with regard to the definition, the calculation of compensation for sacrifice in general average, general average fee and the calculation of the contributory value of a ship, goods, and freight, etc.

VII) Chapter Seven: Marine Insurance

The old Maritime Law has become rather out-of-date and impractical. Accordingly, the new Maritime Law was also amended with practical needs in mind. The amendments include minimising losses clauses, duration clause and unrepaired damage clause etc. The calculation of the insurable value of a ship, goods and freight is detailed in the Amendments. The period for exercising the right of abandonment is shortened from four months to two months from the date when the insured is able to exercise the right after becoming aware of the causes of abandonment.

(VIII) Application

The new Maritime law is not retroactive. If the cargo was damaged before the new Maritime law took effect, and the claimant files a lawsuit against the carrier after the new Maritime law takes effect, the old Maritime Law will nevertheless apply.

VIVIAN ANG
ALLEN & GLEDHILL
10 September 1999*

* This Paper was prepared with the assistance of the Research Department of Messrs Allen & Gledhill, and in particular Mr Andrew Chan who is a member of that Department.