THE MARITIME LAW YEAR IN ASIA

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Introduction

This paper seeks to set out significant developments in maritime law and arbitration in Hong Kong, Singapore, Japan, China and Taiwan over the last year.

HONG KONG

A. Improvements to the Arbitration System

1. Reciprocal Enforcement of Arbitration Awards in Hong Kong and The People's Republic of China

Prior to the handover on 1st July 1997, both Hong Kong and China were parties to the New York Convention. The UK extended the Convention to Hong Kong on 21st April 1977. China acceded to the Convention on 22nd January 1987.

Following the handover a problem arose. Whilst Hong Kong and The People's Republic of China both recognised and enforced arbitration awards issued in other New York Convention countries, they were no longer separate states and thus the New York Convention, which only applies between separate sovereign states, no longer applied. This was confirmed when the issue came before the Hong Kong Courts in Ng Fung Hong Ltd. -v- ABC (1998 1 HKC 213). In that case the parties referred a dispute to arbitration in the People's Republic of China. The successful party applied for leave to enforce the award in Hong Kong and to enter judgment in terms of the award. The application was made after 1st July 1997 and thus the award was no longer a "Convention award". The Court held that the award could only be enforced by commencing legal proceedings on the award.

The problem has now been resolved. On 15th June 1999, agreement was reached between The People's Republic of China and The Hong Kong Special Administrative Region for the mutual enforcement of arbitration awards. The new arrangement has been made "... in accordance with the spirit of the New York Convention". The arrangement will enable arbitration awards obtained in The Hong Kong Special Administrative Region to be enforced in The People's Republic of China and awards made by "... over 100 Mainland arbitral authorities" (according to the press release) will now be enforceable in Hong Kong provided that they have been "properly obtained". The amendment was approved by Hong Kong Legislative Council on 5th January 2000 and became effective on 1st February 2000.

The agreement also covered arrangements in respect of any award made between 1st July 1997 and 15th June 1999. An application to enforce any such award was permitted provided that the appropriate application was made within six months of 15th June 1999 and, insofar as an application was made prior to 15th June 1999 and this was refused, the enforcing party is entitled to make a fresh application.

The grounds for refusing enforcement under the new arrangements are almost identical to those under the New York Convention, namely where a party to the arbitration agreement was under some incapacity or was not given proper notice of the appointment of the arbitrator or was otherwise unable to present their case or where the award was not otherwise properly obtained. But the provisions add that:

Can be problem with award against COSCO [illegible]

> "The enforcement of the award may be refused if the court in the Mainland holds that the enforcement of the arbitral award therein would be contrary to the public interests of the Mainland, or the court of HKSAR rules that enforcement of the arbitral award therein would be contrary to the public policy of HKSAR."

Time limits for an application to enforce an award (other than under the transition arrangements) are governed by the law on limitation periods in the place of enforcement. In Hong Kong, the limitation period is six years from the date of the award. In The People's Republic of China, the limitation period is six months for a claim by a company and one year for a claim brought by an individual, in both cases from the date of the award.

2. Enforcement of Arbitration Awards obtained in Taiwan and Macau

The new arrangements for the reciprocal enforcement of arbitration awards in The People's Republic of China and in Hong Kong did not extend to Taiwan or Macau.

The problem concerning Taiwan arose in Chen & Others -v- Ting & Others (FACV No. 2 of 1999). Although The People's Republic of China does not recognise the Taiwanese government, it was held by a unanimous decision of the Hong Kong Court of Final Appeal that a bankruptcy order made by the District Court of Taipei was enforceable in Hong Kong. The Courts of Hong Kong would give effect to the orders of non-recognised courts where (1) the rights covered by the order were private rights; (2) giving effect to such orders accorded with the interests of justice, the dictates of common sense and the needs of law and order; and (3) giving effect to such orders would not be inimical to the sovereign's interests or otherwise contrary to public policy. It was stressed that giving effect to the order would not involve recognising the courts of Taiwan.

The position will be resolved by an amendment to the relevant section of the Arbitration Ordinance (Section 2GG), to allow for the summary enforcement of arbitration awards whether that arbitration award has been made within or outside Hong Kong. This will cover both Taiwan and Macau.

3. Maritime Arbitration

There were in excess of 150 maritime arbitrations commenced last year. The maritime sub-committee of the Hong Kong International Arbitration Centre has been particularly active. In the last twelve months it has published:

(1) A standard form arbitration clause.

(2) A list of experienced arbitrators.

(3) A small claims procedure which provides a simple and streamlined arbitration system for all disputes where neither the claim nor the counterclaim exceeds US$50,000, with no formal discovery process and no oral hearing, save in exceptional circumstances, when the hearing is limited to one day. Arbitrators' fees are fixed at a maximum of HK$15,000 (about US$2,000) and the costs of the successful party cannot exceed HK$30,000 (US$3,850). There is no right of appeal.

(4) A documents only procedure. This sets tight time limits for exchange of submission; and dispenses with the formal discovery process - each party submits only those documents upon which it wishes to rely.

The documents only and the small claims procedures are intended to address a fairly widespread criticism within the maritime industry that dispute resolution is too expensive and too slow. There is, I think, a further criticism, which we have yet to address in Hong Kong, that too many of the panel arbitrators are lawyers rather than businessmen. Arbitration, particularly maritime arbitration, was intended as a way in which businessmen could resolve their disputes by putting that dispute to their peers rather than going through time consuming and expensive court procedures. What I believe we need in Hong Kong is more members of the business community rather than lawyers who are prepared to act as commercial arbitrators.

You can find details of the bye-laws of the Hong Kong maritime arbitration group, the documents only procedure, the small claims procedure, the list of maritime arbitrators and the standard form Hong Kong maritime arbitration clause at www.hksoa.org or www.hkiac.org.

B. <u>PROCEDURE</u>

1. <u>Improvement to sales through the Admiralty Court</u>

A new system has been introduced to address problems which have previously arisen in sales through the Admiralty Court. Frequently such sales attracted little interest and bids significantly lower than the vessel's appraised value. Two prominent of Hong Kong brokers, Clarksons and Simpson Spencer & Young, have now been appointed on an alternating basis not only to undertake an appraisal of any vessel which is to be sold, but also to use their extensive marketing networks to ensure that a much higher number of potential buyers are aware of the sale than was previously achieved through advertising in local papers and Lloyds List. The brokers receive a fee for undertaking this work, but this is set at a level which ensures that the cost of undertaking a sale through the Hong Kong Courts are now extremely competitive.

This initiative has resulted in up to five hundred shipping companies worldwide being advised of each sale. The relevant information is also posted on the website of both brokers. The brokers normally also have access to vessels' plans and other information to assist potential buyers. The first vessel to be sold under this system, the "Papua Energy" generated considerable interest.

2. <u>The District Court (Amendment) Bill 1999</u>

The District Court is our lower court. It presently determines claims where the amount in dispute does not exceed HK$120,000 (say, US$15,400). The procedure is straightforward, time limits fairly strict, there is no need to instruct a barrister to present the case in Court and the recoverable costs of the winning party are approximately one third of those awarded in the High Court.

Under the provisions of the new legislation, all disputes where the amount being claimed is less than HK$600,000 (about US$77,000) must be referred to the District Court rather than the High Court.

It is anticipated that this change, once effected, will result in significantly less delay in our High Court as some 17,000 more cases will now be heard by the District Court.

3. <u>Small Claims Tribunal</u>

There will be a consequent amendment to our Small Claims Tribunal (which handles the lowest value claims). Its jurisdiction will be increased from HK$15,000 to HK$50,000 thereby, it is estimated, transferring some 10,000 less complex cases down out of the District

4. ARREST <u>CONVENTION</u>
The does not think Hong Kong will adopt this.

Court. No legal representation is permitted in the small claims tribunal and the procedure is extremely straightforward.

C. CASES

1. Assignment of a maritime lien for crew wages

The Sparti (not yet reported)

You need to do a deal with the mortgagee, or tranship the cargo (often not practicable

The Admiralty Court in Hong Kong has recently had to consider whether a maritime lien in respect of a crew wages claim is capable of assignment.

The "SPARTI" was arrested in Hong Kong by owners' mortgagee bank in August 1998. The vessel was subsequently sold by judicial sale and the proceeds were paid into Court. A dispute then arose between the mortgagee bank and certain third parties who had also lodged claims against the vessel. The third parties had advanced wages to the vessel's crew. In return, they had taken an assignment of the crew's wages claim. The assignment also purported to transfer the benefit of the crew's maritime lien. The issue for the Court to decide was whether a maritime lien in respect of a wages claim was capable of assignment. If the maritime lien had been validly assigned, the wages claim would have priority over the claim of the mortgagee bank. If there had been no valid assignment, the wages claim would rank below the bank's claim and, in practical terms, the third parties would be unable to make a recovery.

As a matter of English and Hong Kong law, the present position appears to be as follows:-

(a) If a third party pays crew wages with the prior consent of the Court, the maritime lien will be transferred to that third party by subrogation: see for example The Leoburg (No.2) [1964] 1 Lloyds Rep 380; The Berostar [1970] 2 Lloyds Rep 403.

(b) If a third party pays wages without the prior sanction of the Court, such payment alone will probably not transfer the maritime lien: see The Petone [1917] P 198.

(c) Academic opinion also varies (Meeson does not believe that an assignment of a maritime lien would be valid; Thomas and Jackson are slightly more enthusiastic).

(d) Even if maritime liens in general are assignable, it may be that, as a matter of English law, the right of maritime lien for crew wages cannot be assigned. By Section 39 of the Merchant Shipping Act 1995, a seaman cannot "renounce by any agreement" his right to a lien for his wages. The meaning of this provision is not clear but it is arguable that the provision would even prohibit an assignment for valuable consideration.

At the time of writing, the Court's decision had still not been handed down although it is expected imminently.

2. Application of Forum Conveniens Principle
Naftomar Shipping and Trading Co. Ltd. Ince. -v- Guangdong Development Bank HCCL 207/99

The Plaintiff Naftomar entered into a contract with a PRC company, Chaozhou Hua Feng Group Company of Chaozhou City, PRC to sell a quantity of LPG mixture. Payment was to be made by a revocable letter of credit . Disputes arose under the letter of credit, Naftomar were not paid and accordingly they commenced proceedings in Hong Kong for breach of the letter of credit. The Defendant bank had an established place of business in Hong Kong and could be served with legal proceedings. The bank applied for the Hong Kong proceedings to be stayed on the basis that The People's Court of Chaozhou was the natural and appropriate forum for the trial. In support of its position, the bank tried to persuade the Court that some of the issues in dispute concerned factual matters in Chaozhou and that the proper law of the letter of credit was that of the PRC. Applying the principles laid down in Spiliada Maritime Corporation -v- Cansulex Ltd. (1987) 1 AC 460 and a Court of Appeal decision in Hong Kong which applied the same tests - The Adhiguna Meranti (1987) HKLR 904, the Court held that the Defendant bank had not shown that there was an alternative forum which was clearly or distinctly more appropriate on the facts of the case and the application to stay the Hong Kong proceedings was denied.

3. Arrests / stay on basis of non-Hong Kong jurisdiction clause / forum non conveniens.

Hong Kong remains a popular jurisdiction in which to commence in rem proceedings. On average over 40,000 ocean vessels, 110,000 river cargo vessels and some 60,000 passenger ferries call in Hong Kong every year. Some 300 in rem writs are issued each year. Approximately 70 vessels a year are arrested in order to found jurisdiction and/or obtain security for a claim (or both). There are of course many other cases where these issues are resolved without the vessel being arrested.

Those representing shipowners and their P&I Clubs are reluctant to agree Hong Kong jurisdiction in circumstances where the governing contract provides for disputes to be resolved in another jurisdiction or where owners wish to argue that another jurisdiction is more appropriate (forum non conveniens). Generally, owners seek to transfer proceedings out of Hong Kong because they think they will be able to dispose of the claim on more favourable terms in another jurisdiction. Cargo interests press for Hong Kong jurisdiction as they believe will make a better recovery.

Where this issue cannot be resolved security is provided subject to the issue of jurisdiction being determined. This is then followed by an application to stay the Hong Kong proceedings on the basis of the foreign jurisdiction clause or forum non conveniens. There are a large number of such cases each year.

The Hong Kong Courts will invariably follow the principles set out in the well known English decisions, but problems can arise in connection with vessels owned by companies in The People's Republic of China.

By way of example:

4. "DA QING 436" (unreported)

A major European bank wished to pursue a misdelivery claim against Nanjing Petroleum Transportation Co. Ltd. ("NPT"). NPT were liable for the claim in personam. Investigations showed that they were recorded as the registered owners of the relevant vessel at the time the cause of action arose in Lloyds Register and this was confirmed with the China Classification Society Register with whom all PRC vessels must be classed. Accordingly, a Writ was issued against the vessel and eleven other vessels which appeared from the same sources to be in NPT's ownership at the time the Writ was issued.

One of the sister ships named in the Writ, the "NING HUA 401", subsequently called in Hong Kong. The vessel was arrested. Several days later, solicitors instructed by the owners of the "NING HUA 401" applied to the Court for service of the Writ and the Warrant of Arrest to be set aside on the basis that the owners of the vessel at the time the Writ was issued were Nanjing ChangJiang Oil Transportation Co. Ltd. not NPT. They produced evidence to this effect from the register kept by the Harbour Master at the vessel's port of registry.

In a subsequent case, when an attempt was made to obtain a photocopy of the local Harbour Master's Register or, alternatively, confirmation as to the content of that Register, this information was refused.

Similar problems arose in:

5. <u>"TIAN SHENG 8" renamed "RESOURCE 1"</u> (not yet reported) Can deal with Lowe to ascertain ownership of vsls regd in Panama.

This appeared to be a comparatively straightforward cargo claim which arose in circumstances where PRC shipowners decided, during a voyage from a northern PRC port to Bangladesh that they would prefer to avoid the risk of proceedings in Bangladesh which they believed would be commenced by cargo receivers because owners had loaded damaged cargo, but issued clean bills of lading. As a result they diverted to Hainan Island where they arranged for the cargo to be sold by the local courts. Exactly what happened to the sale proceeds, which exceeded US$1 million, has never been established. Cargo interests arrested the vessel when she subsequently arrived in Hong Kong.

Unfortunately, the ownership position was far from clear. The owner's managers appeared to have registered a Panamanian company as the owner of the vessel, although no bills of sale or other documents of title were ever lodged in Panama to prove ownership. This was done by obtaining a "provisional patente", which is no more than a temporary navigation permit, and giving an undertaking through Panamanian lawyers (which was not complied with) to lodge ownership documentation in 30 days. Such documentation as did exist suggested that the vessel may at all relevant times have been owned by a company based in The People's Republic of China.

The case raised three issues:

(i) Whether an application to challenge the jurisdiction of the courts has to be made within the period limited for filing a Defence in the proceedings. (RHC Order 12, rule 8).

(ii) Consideration of the decision of Lord Justice Donaldson in The Evpo Agnic [1988] Lloyds Rep 411 specifically, whether the Court should only look at the name shown in the Registry as being the owner of the vessel or whether it is entitled to look at surrounding documentation to establish whether that named company is in fact the owner.

(iii) Whether it is appropriate to determine such an issue on the basis of Affidavit evidence.

The case is presently before our highest court, the Court of Final Appeal. A decision is expected shortly.

By way of conclusion, if you are dealing with PRC owners, you need to be very careful to check the ownership position. Even if you carry out exhaustive checks, you run the risk that documentation will subsequently appear which shows that there was no right of arrest.

CHINA

A. The Law of The People's Republic of China on the Special Procedure for Maritime Litigation

This legislation sets out new procedures which are now available in Chinese maritime court proceedings. These include:

1. Provisions entitling a claimant to take action against the property of the person against whom he intends to pursue his claim to obtain security for that claim. This procedure appears to be similar to the mareva injunction procedure with which you will be familiar. The legislation does not, however, set out the principles upon which such an application will be granted.

2. A schedule of the claims that can be pursued against a vessel. The categories of claim are broadly similar to those in the relevant Hong Kong and English legislation although the categories are rather wider - a claim, for example, for insurance fees, including P&I Club premiums, is specifically included. The same section sets out the vessels against which a claimant is entitled to pursue their claim and contains provisions entitling a claimant to make a claim against a vessel's cargo and to arrange for that cargo to be impounded and auctioned.

3. Provisions entitling a claimant to obtain an injunction against a party who has infringed his lawful rights and interests where the claimant has a maritime claim within the definition of the legislation and "the situation is critical, and damage will be caused or extended if a maritime injunction is not immediately granted". This appears to give the maritime courts a fairly broad jurisdiction, on application by a claimant, to grant injunctions in appropriate cases.

4. Provisions concerning the preservation of maritime evidence to ensure that such evidence is preserved for the purpose of proceedings which will subsequently be commenced in respect of a maritime claim.

5. Provisions concerning maritime guarantees. These suggest that it will now be possible for a party to provide security for a claim to the PRC Courts other than by cash or through one of the few insurance companies which are presently acceptable to the PRC courts. Where, for example, a P&I Club wishes to put up security, the Club has to provide a Club letter to one of these PRC organisations who in turn provide back to back security to the court. This procedure can be time consuming and expensive as the PRC organisation charges the P&I Club an annual fee. These new provisions may mean it will now be possible for a P&I Club or other reputable institution to provide security direct to the court.

B. Arbitration

Problems persist with CIETAC arbitrations. The CIETAC arbitration procedure has given rise to a number of criticisms over the years, specifically:

(i) The appointment fee, which is calculated according to the size of the claim, is expensive and takes no account of the complexity of the claim.

(ii) Language. CIETAC now appears to insist that all documentation is translated into Chinese which adds considerably to costs and is inconvenient.

(iii) Arbitrators invariably refuse to grant the parties an arbitration hearing of more than one, or maximum two, days even if both parties have agreed that a longer hearing is necessary. A series of one day hearings at intervals of several weeks or months is unsatisfactory and considerably increases costs, particularly where a foreign, i.e. non PRC, arbitrator is involved.

(iv) Arbitrators make no or no realistic provision for legal costs in their awards.

To these problems there have recently been two examples of cases in our office of a rather more worrying trend where the two PRC arbitrators on a three person tribunal have wholly or largely ignored the third non PRC arbitrator when reaching their conclusion and in each case, produced what we regard as a highly questionable award in favour of the PRC party.

Awards are biased.

JAPAN

A. Procedure

There has been no new legislation or important developments in the Japanese arbitration system over the last twelve months.

B. Recent Decisions

1. No maritime lien against owners for misdelivery
Tokyo East Credit Union -v- SKB Marine Company Limited etc. A decision of the Tokyo Superior Court (i.e. Court of Appeal) dated 25th February 2000

In this case, the bill of lading holders sought an order to sell a vessel at auction and to satisfy their claim from the proceeds of sale on the basis that their claim gave them a maritime lien against the vessel. The claim was for damages for non-delivery of the cargo under a bill of lading. The cargo was delivered to a third party in exchange for a Letter of Indemnity.

The Court held that the bill of lading holders did not have a maritime lien on the vessel for their claim. The bill of lading holder claimed a maritime lien under Article 3 paragraph 1 sub-paragraph 1 of the Limitation Act, which provided that for a maritime lien to arise, there must be a loss of or damage to the cargo onboard the vessel or as a direct consequence of the operation of the vessel. The court found that (i) the loss of the cargo must be physical loss of the cargo and it did not include a failure to deliver, (ii) delivery of the cargo to a third party did not occur onboard the vessel, and (iii) the delivery of the cargo to a third party had nothing to do with the operation of the vessel.

2. Enforcement of Foreign Jurisdiction Clauses
Tokyo East Credit Union -v- SKB Marine Company Limited etc.
A judgment of the Tokyo District Court dated 13th September 1999

This decision concerned the same dispute.

Tokyo East Credit Union sought a judgment for damages against SKB Marine Company Limited. The defendants sought to have the claim dismissed on the grounds of lack of jurisdiction because the bill of lading contained an exclusive Malaysian jurisdiction clause.

The Court held that the defendants' application should be denied. The reason was that, if the claim were dismissed because of the exclusive Malaysian jurisdiction clause in the bill of lading, it would be "contrary to the fairness between the parties and demand for swift procedure".

This decision contrasts with a previous decision of the Japanese Supreme Court (equivalent to the English House of Lords) in <u>Tokio Marine & Fire vs. Royal Interocean Lines</u> which dismissed a bill of lading holders' claim against a carrier under the bill of lading because the bill provided that any claim under the bill of lading should be subject to the exclusive jurisdiction of the Amsterdam Court.

It appears that the Tokyo District Court distinguished the Tokyo East Credit Union case from the Supreme Court decision for the following reasons:

a. The defendants SKB were a Cypriot corporation which had no office or branch in Malaysia;

b. The Bill of Lading form used was not SKB's own form, but rather a form prepared by another company;

c. Although the cargo (logs) was shipped from a Malaysian port, the dispute concerned delivery of the cargo in Japan, virtually all the parties concerned were in Japan and the necessary evidence was collectable in Japan.

TAIWAN

The Taiwanese Maritime Law was amended with effect from 16th July 1999. This has resulted in a number of significant developments, as follows:

1. Limitation on Shipowner's Liability

A shipowner's liability has been increased. The new minimum liability for claims for loss of or damage to property shall not be less than an amount calculated as 54 SDR per registered ton. In respect of claims for loss of life or personal injury, compensation shall not be less than 162 SDR per registered ton.

2. Maritime Lien

The order in which claims against a vessel rank has now been amended. The new order of priority is as follows:

(i) Claims by the Master, Officers and crew for wages.

(ii) Claims against the shipowner for loss of life or personal injury directly arising from the operation of the vessel.

(iii) Salvage, wreck removal expenses and vessel's contribution to general average.

(iv) Claims against the owner for loss of or damage to property arising directly out of the operation of the vessel.

(v) Harbour charges, canal charges and pilotage dues.

(vi) Vessel mortgages.

3. Package Limitation

The package limitation upon which a carrier or owner was entitled to rely under previous legislation was NT$9,000 per package. The new legislation adopts new methods of calculation, being 666.67 SDR per package or 2 SDR per kilogram, whichever is higher. The new legislation also defines the term "package".

4. Himalayan Clause

The new legislation provides that parties who operate within a commercial harbour area, in the loading, unloading, handling, carriage, stowage, tallying, lashing and dunnage of goods are entitled to rely on the same limitations of liability and other defences that a carrier is entitled to rely on.

5. Jurisdiction and Arbitration Clause

The Courts of Taiwan used to consider jurisdiction or arbitration clauses in a bill of lading as invalid on the basis that they are imposed unilaterally by the shipowner. The new legislation recognises jurisdiction and arbitration clauses provided that the owner can demonstrate that the cargo interests agreed to the arbitration or jurisdiction clause. In practice, cargo interests will probably have an option to accept or reject an arbitration or jurisdiction clause in a bill of lading.

SINGAPORE

A. ARBITRATION

There have been no notable changes to the Singapore arbitration system in the last twelve months.

(1) **<u>Principles Governing Leave to Appeal Against an Arbitration Award</u>**
<u>American Home Assurance Co v Hong Lam Marine Pte Ltd [1999] 3 SLR 682(CA)</u>

The Singapore Courts, applying the Nema guidelines, are more ready to exercise their discretion to grant leave to appeal on points of law arising from an arbitration award where the question of law relates to the construction of a standard form contract or clause as compared with a "one-off" contract or clause. The Singapore Court of Appeal has clarified in this case the criteria for distinguishing between "one-off" and standard form contracts.

In the case of a "one-off " contract or clause, the discretion is to be strictly exercised and leave to appeal will normally be refused unless the judge is satisfied that the construction given by the arbitrator is "obviously wrong". In contrast, the courts will be more ready to entertain a question of law relating to the construction of a standard form contract or clause. In the latter category, the judge has to be satisfied as to two cumulative requirements before being prepared to consider giving leave to appeal. First, he has to be satisfied that the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of the law and secondly, that there is strong *prima facie* evidence that the arbitrator has gone wrong in his construction.

B. <u>Recent Cases</u>

1. **<u>Foreign Jurisdcition Clauses</u>**
<u>***The Jian He*** [2000] 1 SLR 8 (Court of Appeal)</u>

The plaintiff shippers shipped a consignment of electronic goods on board the defendant shipowner's vessel (the "Jian He") for carriage from Singapore to Johannesburg, South Africa. The goods were subsequently released to unknown parties on presentation of a forged bill of lading, and the plaintiffs' insurers commenced an action against the defendants pursuant to their rights of subrogation. The defendants applied for a stay of proceedings, contending that the contract of carriage contained a Chinese jurisdiction clause.

The court considered previous case law on exclusive jurisdiction clauses, and the factors enunciated by Brandon L. J. in ***The El Amria*** [1981] 2 Ll. Rep. 119. The court held that, as the defendant had no real defence to the claim, there was no dispute to be determined by the contractual forum and that no useful purpose would be served in ordering a stay.

The Court further held that, where the plaintiffs had a concurrent liability in contract as well as in tort, it was not open to the plaintiffs to contend that, as they were suing in tort, the foreign jurisdiction clause in the contract was not applicable. A concurrent or alternative liability in tort would not be allowed, if its effect would be to permit the plaintiffs to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute a tort.

2. Demise / Identity of Carrier Clauses

The Arktis Sky [2000] 1 SLR 57 (High Court)

One of the issues in this case was the identity of the contracting carrier where the vessel had been time-chartered, and where the bills of lading were issued by the time charterers. The bills were headed "Liner Bill of Lading" and were stamped with the chop of the time charterer. They were signed by the charterers' agent "As Agent only" under the agent's own rubber stamp, but otherwise there was no reference to the defendant shipowners. However, on the reverse side of the bills, there was a "demise clause" and an "identity of carrier" clause, both of which indicated that the contract of carriage was made between the plaintiff shippers and the shipowners.

The Court, in allowing the plaintiffs' claim, ruled that the contract was made with the shipowners as carriers, rather than the time-charterers. In interpreting the contract evidenced by the bills of lading, the court followed the approach laid out in ***The Ines*** [1995] 2 Ll. Rep. 144, and more recently ***The Fletcha*** [1999] 1 Ll. Rep. 612. In these two cases, the courts gave effect to the "demise" and "identity of carrier" clauses, rather than on the contents of the signature box on the face of the bill of lading to determine who the contracting carrier was. The Singapore Court concluded that the contracting carrier was the shipowner, notwithstanding the fact that the bills of lading were issued by or on behalf of the charterers and signed by their agents.

(Note: ***The Fletcha*** has been departed from by Coleman J. in ***The Starsin*** [2000] 1 Ll Rep 85. Coleman J. shifted the emphasis from the printed clauses on the reverse side of the bill, to what the reasonable shipper would construe on reading the contents of the signature box. ***The Starsin*** has not been referred to in any reported Singapore cases to date.)

3. Incorporation Of Arbitration Clause (1)
Concordia Agritrading Pte Ltd. v Cornelder Hoogewerff (Singapore) Pte Ltd Os No 581 of 1999 (Registrar's Appeal No 282 of 1999 (HC)

The Plaintiffs entered into a Service Agreement ("SA") with the Defendants pursuant to which the Defendants were appointed to oversee offloading, transportation, storage and delivery of the Plaintiffs' commodities. Clause 8 of the SA provided that the liability of the Defendants to the Plaintiffs in respect of any claims for loss or damage to or expenses arising from *inter alia* the commodities would be governed by the Defendants' Warehousing and Forwarding Conditions ("WFC") to the extent that it was not specified by the SA. The SA did not contain an arbitration clause. However, clause 38 of the WFC referred all disputes which might arise between the Defendants and their customers (which included the Plaintiffs) to arbitration under the relevant provisions of the Arbitration Act.

The issue was whether the arbitration clause in the WFC was incorporated into the SA. The court noted that the issue of incorporation was a question of construction. Taking a restrictive approach, the court found that the words of the SA were not sufficiently clear or specific to incorporate the arbitration clause in the WFC to the SA.

4. Incorporation of Arbitration Clause (2)
Mancon Investment Holding v Heng Holdings Suit No. 1348 of 1999 (HC)

The Singapore High Court took the view that specific reference to an arbitration clause in a document was not necessary for incorporating that arbitration clause into another document.

In this case, a joint venture agreement (JVA) was entered into between the plaintiff and the defendants. Clause 16 of the JVA provided that any dispute or difference between the parties should be referred to arbitration. Subsequently, the parties entered into a Supplemental

Agreement (SA) which stated that the expressions contained in the JVA should be adopted for use in the SA and bear the same meaning. Clause 8 of the SA further stated that except for the amendments, modifications or variations as might be necessary to make the JVA consistent with the SA, the JVA should remain in full force and effect and should be read and construed together with the terms of the SA.

A dispute arose and the plaintiff commenced an action against the defendants. The defendants applied for a stay of the action relying on the arbitration clause. The principal contentions put forward by the plaintiff were that the arbitration clause had been rendered inoperative by the termination of the JVA (as the defendants allegedly failed to fulfil certain preconditions to the operation of the JVA) and the signing of the SA, and that the arbitration clause in the JVA was not properly incorporated in the SA.

The court held that both these contentions failed. The court noted that, even if there was a breach of the JVA and the entire agreement had been brought to an end, the parties' rights and liabilities still had to be construed according to the terms of the JVA. Assuming there were disputes (the court later found that there were), clause 16 of the JVA (which referred disputes to arbitration) would govern the mode of resolution of such disputes. If the whole contract disappeared upon breach, then the rights and liabilities or even the question whether there was at all a breach could not be determined. Thus, the court held that a valid arbitration agreement existed. Since the arbitration in question was an international arbitration and a stay of court proceedings was mandatory in such arbitrations, the court stayed the proceedings.

5. <u>Ship's Certificate Only Prima Facie Evidence Of Ownership</u>
<u>Natol Shipping Ltd v The Owners of and/or other persons interested in the ship or vessel "Ivanovo" Admiralty in Rem No 334 of 1999 (HC)</u>

The Singapore High Court restated the view that a ship's certificate of registration offers only *prima facie* evidence of its ownership.

The State of Ukraine (the State) (as interveners) applied to set aside a writ issued under the Singapore High Court (Admiralty Jurisdiction) Act (the Act) and to release a vessel which had been arrested under a warrant of arrest issued pursuant to the writ. The writ was issued by the Plaintiffs who had chartered the vessel and were seeking damages for breach of charterparty. The charterparty named Azov as the shipowner. The State intervened on the grounds that it was the legal and beneficial owner of the vessel, and that Azov was only operating the vessel under a leasing contract.

The State contended that the High Court of Singapore had no jurisdiction over the vessel under s4(4) of the Act. Section 4(4) provides *inter alia* that the High Court may invoke its admiralty jurisdiction only against the person who "beneficially owned all the shares" in the ship in question. The court explained that the quoted words would refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. It would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein.

It was common ground that, if Azov was the owner of the vessel, the Plaintiffs were entitled to arrest the vessel. If the State was shown to be the owner, the Plaintiffs' action would not be entitled to arrest.

The Plaintiffs relied on the vessel's classification certificate and ship's certificate in both of which the shipowner was stated to be Azov. The latter certificate also declared that, according to the Code of Merchant Shipping of Ukraine, the certificate was to be considered as final and complete evidence of the right of property of the State of Ukraine in the vessel. Azov and the State adduced evidence in support of the State's claim of ownership.

The central issue was the status and effect of a ship's certificate of registration as evidence of its ownership. The Plaintiffs contended that such a certificate was accepted in international maritime law and practice as evidence of a vessel's ownership, and since the certificate showed Azov to be the owner, the ownership of the vessel was established.

The court held that a ship's certificate offered *prima facie* evidence of its ownership. However, the court was of the view that any conclusion to be drawn from a ship's certificate must be drawn from the whole document. A certificate which identified Azov as the owner, while the right of property in the vessel belonged to the State should be read to take in both statements without preferring one over the other. On the facts, Azov and the State had adduced clear evidence that Azov was not the beneficial owner of the vessel, and there was no evidence from the Plaintiffs to contradict that the court set aside the writ and ordered the release of the vessel.

6. **<u>Filing of Caveat Against Release Does not Secure Claim</u>**
<u>Elinoil-Hellenic Petroleum Co SA v Wee Ramyah & Partners [1999] 4 SLR 513 (HC)</u>

Solicitors' professional negligence.

The Singapore High Court held that the mere filing of a caveat against release does not secure a claim against a ship arrested by another party. As such, solicitors who were required to secure an admiralty claim, but failed to do so, were liable for damages.

The Plaintiff, who supplied bunkers to a ship, was not paid. The Plaintiff then instructed the Defendants, a firm of solicitors, to arrest the ship if it called at Singapore. The ship was subsequently arrested by the mortgagees of the ship. The Defendants filed a caveat against release of the ship in Singapore. The Defendants did not file an admiralty writ on the basis *inter alia* of an assumption that the ship could not be sold while it was under arrest. In fact, without knowledge of the Plaintiff or the Defendants, the ship was sold by private treaty. Subsequently, the mortgagees applied to release the ship from arrest and it was then that the Defendants learned that the ship had been sold.

As the ship had been sold and was no longer within the ownership of the party to whom bunkers were supplied, the Plaintiff's claim could no longer be secured against the ship. The Plaintiff then brought a claim in negligence against the Defendants arguing that the Defendants should have issued an admiralty *in rem* writ to secure the Plaintiff's claim. In reply, the Defendants argued that there was no negligence as a caveat against release had been filed and a ship could not be sold while under arrest. In this respect, the filing of the caveat against release meant that prior notice was required to be given to the Plaintiff, or the Defendants as the Plaintiff's solicitors, before the ship could be released from arrest.

The court upheld the Plaintiff's claim. It held that the mere filing of a caveat was not adequate to secure a maritime claim. A caveat against release was a substitute for a second arrest but not the issuance of a writ *in rem*. The court further held that the fact of arrest did not necessarily prevent a sale of the ship. Thus the Defendants should have filed an *in rem* writ to secure the Plaintiff's claim and were negligent in not doing so.

7. **Court of Appeal Clarifies Test for Wrongful Arrest**
The Kiku Pacific [1999] 2 SLR 595 (CA)

The plaintiffs supplied bunkers to a ship. They arrested the ship when they did not receive payment. The defendant shipowners claimed that the arrest was wrongful and counterclaimed damages for wrongful arrest. Both the claim and the counterclaim were dismissed by the trial judge. The owners brought an appeal against the trial judges' dismissal of their counterclaim for damages for wrongful arrest.

There was no dispute that the test for wrongful arrest was *mala fides* or gross negligence, implying malice (*The Evangelismos*). However, it was submitted by the appellants that malice could be inferred where there was no reasonable or probable cause for arrest. In considering all the relevant authorities, the court rejected this argument noting that, adopting such a test, would state the threshold for wrongful arrest of a vessel at too low a level and would discourage potential plaintiffs from pursuing their claims because of the heavy damages which might follow if they were unable to prove their claim. On the facts, the Court of Appeal concluded that, as there was no malice or gross negligence in bringing the action, the claim for damages for wrongful arrest was not allowed.

8. **High Court awards damages for wrongful arrest**
Palmstone Tankers & Trading Pte Ltd v Owners of the ship or vessel "AA V" Admiralty in rem no 259/1999 (HC)

The plaintiffs arrested the vessel "AA V", a tug , for the price of marine gas oil supplied and delivered to the defendants. Subsequently, the defendants applied to set aside the writ of summons and the warrant of arrest. In deciding to set aside the arrest and awarding damages for the wrongful arrest of the tug, Prakash J considered several issues. First, she decided that, where there was material non-disclosure in the *ex parte* application for the arrest of the vessel, the warrant of arrest could be set aside regardless of the court's decision if it had known the facts, as long as it was entitled to know the facts before coming to that decision. Secondly, she accepted that the non-disclosure of the material facts was intentional and malicious and awarded damages for wrongful arrest to the owners of the tug. This is one of the rare instances where the court awarded damages for wrongful arrest and it gives guidelines as to when the test for wrongful arrest is met.

9. Security Wording
The 'ICL RAJA MAHENDRA' [1999] 1 SLR 329

The parties were unable to agree on the extent of the wording of a letter of undertaking, as security for the release of the vessel. The Plaintiffs wanted the letter of undertaking to encompass 'any competent forum or tribunal' whilst the Defendants wanted to limit the scope of the undertaking to a judgment of the High Court of Singapore or an arbitration award in London, since these were the only two likely places for adjudication of the dispute.

The Court held that, when the Singapore Court's jurisdiction was invoked to arrest the vessel, it was to secure a judgment or arbitration award. Therefore, to give effect to Section 6 of the International Arbitration Act (Cap 143A), the wording of the letter of undertaking must be limited to either the country in which the arbitration had been agreed or Singapore, where the vessel was arrested.

10. Arrest outside Singapore jurisdiction
The 'Trade Resolve' [1999] 4 SLR 424

The Plaintiffs obtained a warrant of arrest and proceeded to enforce the arrest whilst the vessel was outside port limits. The Defendants entered an appearance in the action and then applied to set aside service of the writ on the basis that the service was defective, and that the arrest was wrongful, unlawful and ineffective for the want of jurisdiction, being an arrest effected outside of Singapore's territorial waters.

The Court held that, by deliberately effecting the arrest outside port limits, the admiralty jurisdiction was not properly invoked and the Court did not have jurisdiction to try and hear the action *in rem*, notwithstanding the Defendants' appearance in the matter. Insofar as the Court may have *in personam* jurisdiction, by reason of the Defendants' appearance in the matter, the Defendants were not precluded from arguing that the vessels' arrest was wrongful, unlawful, and ineffective for want of jurisdiction.

C. Procedure

There has been an important amendment to Order 21 Rule 2 of the Singapore Court rules. A new sub-paragraph has been added which provides that an action will be deemed to be discontinued if a year has elapsed since the last proceeding in that action. The rule took effect on 15th December 1999. The time for calculating a "year" begins on 1st January 2000. If, therefore, nothing happens in an action for more than a year with effect from 1st January 2000, the action is automatically discontinued. This amendment has yet to be considered in the Courts. There is however a direction for the Courts to reinstate the action on such terms as it thinks fit.

D. Limitation of Shipowners' Liability

Singapore is presently a participating country to the International Convention of Limitation of Liability of Owners of Sea-Going Ships 1957. There are, however, indications that Singapore may in the near future accede to the Convention on Limitation of Liability for Maritime Claims 1976.

E. Amendments to the Legal Profession Act ("the Act")

The Act was amended this year to provide for Joint Law Ventures and Formal Law Alliances between Singapore and foreign law firms. The amendment came into force on 5th May 2000. The Act was also amended to provide for law firms to be formed as law corporations with limited liability.

Joint Law Ventures ("JLV")

Below are some of the conditions to be satisfied by foreign and Singapore law firms applying to be registered as JLVs:-

a. the foreign and Singapore lawyers must have at least 5 years relevant legal expertise and experience in banking and finance work;

b. if the JLV is constituted as a partnership, the number of equity partners in the foreign law firm and resident in Singapore shall not at any time be greater than the number of equity partners in the Singapore law firm;

c. if the JLV is constituted as a corporation, the number of directors nominated by the foreign law firm shall not at any time be greater than the number of directors nominated by the Singapore law firm;

d. the foreign and Singapore law firm shall submit a satisfactory business plan describing the objectives of the JLV and the implementation of the business plan and no material modification shall be made to the plan without the written approval of the Attorney General.

A foreign lawyer who is employed by or who is a partner or director of a JLV may be registered to practise Singapore law but shall not represent any party before any judicial, arbitral or regulatory tribunal or body in Singapore.

Formal Law Alliances ("FLA")

Foreign and Singapore law firms may apply to be registered as FLAs if the following conditions (among others) are satisfied:-

a. the foreign and Singapore lawyers must have at least 5 years relevant legal expertise and experience in banking, finance, corporate, technology or telecommunications work;

b. the foreign and Singapore law firms have agreed on a written plan to transfer their legal and other related skills, expertise, know-how or technology to the Singapore law firm and submitted a copy of such plan to the Attorney General and no material modification shall be made to the plan without the prior written approval of the Attorney General.

A foreign lawyer who is a partner, director or an employee of the FLA may prepare all the documents in a transaction involving the law or regulatory regime of more than one country or jurisdiction, except that any legal opinion relating to Singapore law must be given by a Singapore lawyer who has in force a practising certificate.

The authorities have indicated that the initial number of JLV licences which may be granted is limited to 5, but numbers may subsequently be increased, if necessary.

Chris Howse
Richards Butler, Hong Kong
July 2000

I would like to acknowledge the contributions from the law firms in Singapore, Taiwan and Japan who kindly provided information regarding developments in their own jurisdictions. I have worked with all these firms for many years and I would have no hesitation in recommending them. Their details are:

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