Report on maritime developments in South East Asia

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Maritime Developments in South-East Asia

In this talk, I intend to cover recent developments in Singapore and Hong Kong as these are the jurisdictions in which you are most likely to have disputes. Both jurisdictions also have legal and arbitration systems which will be familiar to you as they are also based on the English legal system.

HONG KONG AND CHINA

An overview

The Hong Kong shipping community and certainly the shipping lawyers have enjoyed something of a renaissance in 2005. For years, shipping was the poor relation of a law firm's litigation practice. There were a limited number of disputes, probably too many shipping lawyers and, as a result, rather limited prospects for the bright young maritime lawyer.

All this has changed fairly dramatically in the last twelve months. Maritime lawyers have had a busy year; partly, no doubt, as a result of the gradual reduction in the number of maritime lawyers in Hong Kong and the closure of several maritime practices. Principally, however, it has been the significant rise in maritime and trade disputes, caused by China's booming economy. Freight rates in 2005 have been at an all time high, fuelled by the enormous quantities of bulk commodities being shipped into China.

Charter disputes

When the difference between charter rate and market rate was at times as high as US$70,000 - US$80,000 per day, legitimate last voyage disputes were arising regularly. A typical legitimate last voyage dispute would be for the carriage of iron ore from Australia to China where the voyage is about five to six weeks, giving rise to a dispute where the claim was often in the order of US$3 million. The owner, keen to obtain redelivery of his vessel, would examine the voyage instructions for the last voyage under a time charter with considerable care to see whether there were any grounds for arguing that the orders were not valid, because they would result in the vessel being redelivered after the agreed charter period. Time charterers for their part, who had probably sub-chartered the vessel at a rate considerably higher than the rate they had chartered from owners, were extremely keen to squeeze in a final voyage with the substantial profit that this would generate, before they were obliged to redeliver the vessel. Not infrequently, they would instruct their lawyers to prepare for the immediate arrest of the vessel in the event that the owners wrongly - at least in the charterers' view - refused a legitimate last voyage order.

As the market has declined, we have the opposite problem. As market rates fall below charter rates, time charterers and subcharterers look to redeliver vessels early, calculating that the compensation they will have to pay to owners as a result of wrongful early redelivery (assuming, of course, that they have any assets with which to meet a subsequent arbitration award) will be less than the financial losses that they will incur in performing a last voyage. Prudent owners, aware of the financial risks of commencing arbitration against impecunious charterers, are renegotiating lower rates mid-charter.

Soybean Problems

2004 saw significant problems with Brazilian soybean cargoes. Allegations were made that the crop had been contaminated by the addition of soybeans, which should have been planted in the ground to produce the soybean crop and which were, for this reason, coated with a special toxic chemical to prevent them from being eaten by pests in the ground.

In some way, a comparatively small quantity of these beans, which were brightly coated pink, found their way into the soybean cargoes which were shipped from Brazil to China. Chinese receivers rejected these cargoes and the government banned the importation of Brazilian soybeans. There are ongoing disputes both under the relevant sale contracts, in London arbitration, in addition to disputes between owners and charterers as to who is responsible for the delay to the vessels, whilst they waited off Chinese discharge ports until the problem was resolved.

Wet work

There has also been a considerable rise in wet work - collisions and salvage - as a result of the increase in trade with China and the historically high freight rates for bulk carriers, which has resulted in many old vessels being taken out of lay up, because of the significant profits that they can earn for their owners.

Hong Kong flag

One of the biggest success stories in recent years has been the growth of the Hong Kong shipping register. According to government statistics, the register has now passed the 29 million GRT mark with over 1,070 vessels registered, making it the 5th largest registry in the world with 7% of global tonnage.

Hong Kong arbitration

There have been no significant developments in the last 18 months in arbitration law in Hong Kong. Hong Kong remains a reliable, but, in my view, underused arbitration centre in Asia. It is difficult to compile statistics about the nature and number of arbitrations in Hong Kong because arbitration tends to be confidential, but in broad terms, Hong Kong handles between 250 and 300 arbitrations each year, of which perhaps 10% are related to shipping. There are a number of bodies which continue to promote Hong Kong arbitration and the intention of those bodies is to continue to build Hong Kong as an arbitration centre.

Busiest Container Port?

Hong Kong remains one of the busiest container ports in the world - in 12 of the last 13 years it has been, statistically, the busiest container port in the world, but continued competition from the expanding ports of Asia and particularly from ports just across the border from Hong Kong in China is likely to result in Hong Kong losing the title of the busiest container port this year. By way of example, between 1997 and 2005, the throughput of Hong Kong port increased from 14.57 million TEU to 21.98 million TEU. This growth, whilst impressive, looks rather pedestrian when compared with Shenzhen, a port just across the border from

Hong Kong, which has increased from 1.14 million TEU in 1997 to 13.66 million TEU in 2005.

Hong Kong Cases

There have not been any ground breaking decisions in respect of shipping and trade matters in the last twelve months, but there have been a number of important decisions which have restated existing legal principles.

Examples include:

(1) Forum Non Conveniens
Mayar (HK) Ltd. -v- Narotum Sayal (not yet reported May 2005)

This case concerned a dispute between a Plaintiff, a Hong Kong registered company and a Defendant, who was Indian national. The Plaintiff's claim was based on a profit sharing agreement between the parties. The agreement provided that any dispute should be governed by the laws of Hong Kong. There was a rather unusual arbitration clause which stated that, in the case of a dispute arising between the parties, the decision of the Plaintiff as to the country in which the arbitration was to be held should be final and binding. The position was further complicated by other claims between the parties which were not directly related to the profit sharing agreement.

The Defendant commenced the proceedings in India. The Plaintiff commenced proceedings in Hong Kong. The Defendant applied for a stay of the Hong Kong proceedings in favour of India.

The Judge applied the principles set out by the House of Lords in the English decision of Spiliada Maritime Corp. -v- Cansulex Ltd. (the "Spiliada") 1987 1 AC460, as applied in Hong Kong by the Hong Kong Court of Appeal in the Adhiguna Meranti (1987) HKLR 904 and in the "LANKA MUDITHA " (1991) HKLR 741.

Applying these principles, the court held that the natural forum, applying the test of Lord Keith of Kintel in the "Abidin Daver" 1984 AC398, was Hong Kong, as this was the forum with which the litigation had the most real and substantial connection. Accordingly, the application to stay the Hong Kong proceedings in favour of India was refused.

The case provides a useful and detailed summary of the relevant English and Hong Kong authorities on an application for Forum Non Conveniens.

(2) Is a barge, a ship?

The owners of the cargo lately laden on board the vessel "LUEN SHUN" -v- the owners of the vessel "LUEN SHUN" and three other barges.

This was a short judgment of the Admiralty Court arising from the arrest of the barge "LUEN SHUN". The claim was for damage to cargo on board the barge. Proceedings were issued on behalf of cargo interests and an application was made to arrest the barge in question.

The issue which the court had consider was whether the barge was a "ship" within the meaning of the legislation, which sets out the grounds upon which an arrest is permissible.

Under the relevant legislation, "ship" is defined as including "any description of vessel used in navigation and includes ... a hovercraft".

The court examine the two concepts set out in this definition namely:

(1) Vessel

(2) Used in navigation.

Reference was made to the English judgment of Sheen J. Steedman -v- Schofield (1992) 2 Lloyd's Rep 163:

"A vessel is usually a hollow receptacle for carrying goods or people. In common parlance "vessel" is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transportation on water."

The barge in question was described as having a mast, lights, sound, crew, crew quarters, and was registered and licensed. Its main use, not surprisingly, was to carry cargo from one place to another within Hong Kong and adjacent waters. The Judge concluded that the barge was "... undoubtedly a vessel because it is certainly a receptacle for carrying goods, is larger than (a) rowing boat and is used as a means of transportation on water." He was, therefore, satisfied that the first limb of the test was satisfied.

But was it "used in navigation"?

The court then considered the characteristics of the barge in deciding whether it was used in navigation. The court held that the barge was "a craft or vessel with movement"; that it (had) on board "all the various objects which are normally associated with navigation (including)" ... the mast on board the vessel, the various lights that are required for navigation and for navigation safety, the ability to project sound for safe navigation, for example, when there is fog or mist. The barge carries crew and crew accommodation and it is licensed ... by the Marine Department ... The barge is registered and, more importantly, it is a vessel equipped for, intended for, actually used regularly for, carriage of cargo on water from one place to another place."

The Judge further held that in carrying goods, the barge was conducting navigation in a planned or ordered movement from one place to another and it was, therefore, a ship under the relevant legislation. The cargo interests were, therefore, entitled to arrest the barge for damage to their cargo.

(3) Letters of Credit - the fraud exception

GNT Oil Co. Ltd. -v- Hana Bank

This case is of interest to those who are involved in disputes concerning international sale of goods and letters of credit, particularly when dealing with companies in The People's Republic of China.

The Plaintiff, GNT Oil, was pursuing a claim against Hana Bank on the grounds that the Defendant, Hana Bank, had wrongfully failed to make payment under an irrevocable letter of credit issued by Hana Bank in favour of GNT Oil, as beneficiary. The bank sought to raise various defences, the most important of which was whether the bank was able successfully to invoke the "fraud exception", as the basis of its refusal to make payment under the Letter of Credit.

The Defendant bank raised four grounds on which they sought to avoid payment under the letter of credit. The first three did not meet with judicial approval:

> "I reject the submission, which was but faintly argued."
>
> "I can see nothing in this argument, which transparently is without merit."
>
> "This point is hopeless. I reject it."

As you can see, our commercial judges in Hong Kong are nothing if not forthright when they recognise a bad argument.

The main issue in the case was whether the bank was entitled to refuse payment under the letter of credit on the grounds of fraud.

Reference was made to Jack on Documentary Credits 3rd Edition 2001 (paragraphs 9-29 to 9-31 which states "If a beneficiary is refused payment under a credit, he should be entitled to summary judgment ordering payment without any detailed investigation of the evidence and disclosure of documents, unless on the material available to the bank on the hearing of the application for summary judgment, the bank can establish that there is a real prospect of proving that the only realistic inference is that the beneficiary was guilty of fraud."

The court held that, "Plainly an allegation of fraud is a serious matter and, under our system at least, not one that is lightly made". After examining the evidence, the court held that there was no evidence of fraud enabling the fraud exception to be invoked. Accordingly the bank was ordered to make payment to GNT Oil under the letter of credit.

(4) Application to extend the validity of a Writ - Indian Overseas Bank -v- the Owners of the vessel "ORIENTAL LILY" and twelve other vessels in the same ownerships.

A short and rather unhappy decision for the Plaintiff's solicitors.

The Plaintiffs, Indian Overseas Bank, were the holders of original bills of lading issued by the Defendants, who owned some 13 vessels. The Writ was issued in May 2004, the Plaintiffs' solicitor sought to renew the Writ on the basis that there had been no reasonable opportunity for them to serve the Writ in the previous twelve months.

After some five Affidavits seeking to support this contention, it was clear to the court that there had been between two and four occasions when one of the Defendants' vessels had come into Hong Kong waters. As a result, it would have been possible to have served the Writ, or to have arrested the vessel, or both, in the previous twelve months.

The Plaintiff sought to argue that they would not have been able to serve the Writ as the vessels only called in Hong Kong for between 12 and 26 hours on each occasion. They also suggested that it was difficult to follow the movement of vessels coming into Hong Kong and/or that it was a costly exercise to do so.

Not surprisingly, the court held that it was the duty of a reasonable Plaintiff to take all reasonable steps to effect service within the twelve month period before the Writ expired; the Plaintiffs and their solicitors had clearly failed to take all reasonable steps and the Writ would not be renewed.

The Hong Kong Marine Department has a very efficient computerised system which is available on line which enables any party who wishes to effect service on a vessel and/or arrest a vessel to monitor the vessel's arrival in Hong Kong.

(5) <u>Security for costs</u>

<u>World Fuels (Singapore) Pte Ltd. -v- the owners of the vessel "LIBERTY CONTAINER".</u>

The usual position with regard to security for costs in Hong Kong is that, where proceedings are commenced against a Defendant in Hong Kong by a Plaintiff who is ordinarily resident outside Hong Kong, the Hong Kong courts have a discretion to require the non-resident Plaintiff to provide security for the legal costs that the Defendant will incur in defending the action, to be assessed by the courts in default of agreement between the parties.

The granting of such security is discretionary, but the general rule in the Commercial and Admiralty Courts is that such security will be ordered, save in exceptional circumstances, the most usual of which is where the court is satisfied that the Plaintiff is impecunious and that the effect of an order for security for costs would be to stifle a claim, which would otherwise stand a good prospect of success.

The present case was interesting in that the court, on a preliminary view of the matter, determined that the Plaintiffs had an overwhelming case on the facts; that the Plaintiffs were a substantial company with known assets; that they were based in Singapore, that there is reciprocal enforcement of judgments between Singapore and Hong Kong; and that it would be simple for the Defendant to enforce any successful costs order against the Plaintiff. Accordingly, the application for security for costs was refused.

This is an interesting decision, which may well be of relevance to Australian or New Zealand plaintiffs who commence proceedings in Hong Kong given that there are also reciprocal enforcement arrangements between Australia, New Zealand and Hong Kong. Provided, therefore, that the Australian or New Zealand plaintiffs are substantial; that they have a strong case on the merits and that they can demonstrate this, it would appear that there is a reasonable prospect that security for costs would not be ordered.

(6) Penalty Interest

First Commercial Bank and five other banks -v- the Owners of the vessels "MANDARIN CONTAINER" "KINGDOM CONTAINER" and "LIBERTY CONTAINER".

The issue in this case was a short one. The Plaintiffs were mortgagee banks who had obtained judgement in default against the owners of the three vessels. The issue before the court was whether the default interest rate, which was of 2% above the applicable rate under the loan agreements, was a penalty and, therefore, unenforceable.

Perhaps not surprisingly, the court held that "Having regard to the circumstances of (these loans) the 2% uplift is clearly in my view not extravagant nor exorbitant nor excessive". Accordingly it was held not to be a penalty and the mortgagee banks were entitled to interest at this rate.

The case provides a useful summary of the relevant English and Hong Kong decisions on the issue of what that does and does not amount to a penalty, starting with the English leading case on this issue, Dunlop Pneumatic Tyre Co. Ltd. -v- New Garage and Motor Co. Ltd. (1915) AC76.

Singapore Cases

(1) Damages for wrongful arrest - Pan-United Shipyard Pte. Ltd. -v- The Owners of the vessel Dilmun Fulmar -v- Hailisen Shipping Co. Ltd.

This was a decision of the Singapore High Court. The Plaintiffs, Pan-United Shipyard Pte Ltd., a firm of ship repairers, were pursuing a claim against the owners of the vessel "DILMUN FULMAR" in respect of repair work. The Plaintiffs commenced an action in rem against the vessel and arrested her.

After the arrest, the Plaintiffs and Defendants entered into a settlement agreement which required payment of the agreed settlement sum of S$310,000 in three instalments. The vessel was released following payment of the first instalment. The Defendants defaulted on the next two instalments, totalling S$170,000.

The vessel was rearrested. The vessel had been sold in the interim. The new owners intervened claiming that the warrant of arrest should be set aside. They also sought damages for wrongful arrest. The Singapore court held that, as the claim in respect of which the second arrest was made, was a claim under the settlement agreement for the balance due under the settlement agreement, not a claim for repairs to the vessel, there was no right of arrest, as a claim under a settlement agreement did not fall within the category of claims for which a vessel could be arrested. Accordingly, the re-arrest of the vessel was made in bad faith and the Plaintiffs were ordered to pay damages for wrongful arrest.

(2) Duty of care when handling dangerous goods - is notice to an independent contractor sufficient? - The "SUNRISE CRANE"

This is an interesting case involving the discharge of a contaminated cargo of nitric acid in Singapore.

The "SUNRISE CRANE" was a chemical tanker. On its arrival in Singapore to discharge a cargo of nitric acid, part of the cargo was found to be contaminated. The contaminated cargo had to be disposed of by safe means, since nitric acid is an extremely dangerous substance due to it highly corrosive nature.

The owners of the vessel "SUNRISE CRANE" engaged an independent contractor, Pink Energy, to arrange for the disposal of the cargo. Pink energy engaged Pristine Maritime Pte Limited the owner of the vessel "PRISTINE " to remove the contaminated cargo. Pink Energy were aware of the nature of the cargo, but they failed to tell the owners of the "PRISTINE". The contaminated nitric acid was transferred on to the vessel "PRISTINE". The "PRISTINE" very rapidly corroded and capsized.

The owners of the "PRISTINE" brought an action against the owners of the "SUN RISE CRANE" claim, alleging that the owners of the "SUNRISE CRANE" owed a duty to the owners of "PRISTINE" to advise them of the nature of the cargo notwithstanding the fact that the owners of "SUNRISE CRANE" had engaged independent experts to arrange the discharge. It was accepted that the independent experts were well aware of the nature of the contaminated cargo.

The Singapore High Court found that the owners of "SUNRISE CRANE" did owe a duty of care to the owners of "PRISTINE" as the law expected more care to be exercised where a highly dangerous substance was involved. The instruction of an independent contractor did not protect the owners of "SUNRISE CRANE".

The case also considered the issue of limitation of liability under the old 1957 Convention - "actual fault or privity." and held that, as the owners of "SUN RISE CRANE" did not give any evidence as to the management system which it had adopted to ensure that the vessel had implemented and followed industry standards of practice, it was not entitled to limit liability.

(3) The obligation of seaworthiness - Application of exclusion clauses

Sunlight Mercantile Pte. Ltd. and another -v- Ever Lucky Shipping Co. Ltd.

Ever Lucky Shipping Co. Ltd., an inappropriately named shipping company in the context of this case, carried a cargo of logs from three West African ports to India. Part of the cargo was shipped on deck and the relevant bills of lading contained clausing to the effect that the deck cargo was "ship on deck at shippers risks; the carrier not being responsible for loss of damage howsoever arising".

The vessel experienced numerous problems and eventually had to be towed to the port of discharge. The owners incurred general average expenditure which they sought to recover from cargo interests. The cargo interests refused general average contribution on the grounds that the vessel was unseaworthy.

The trial judge found that the vessel was unseaworthy when she left for her contractual voyage, but the clausing on the bills of lading for the deck cargo relieved them of liability for unseaworthiness.

The Court of Appeal strongly disagreed and held that an exception that was intended to relieve a shipowner from the consequences of unseaworthiness of the vessel at the commencement of the voyage should have been "express, pertinent and apposite" in view of the shipowner's absolute obligation at common law to send a ship out to sea in a seaworthy state of the commencement of the agreed voyage.

(4) Foreign jurisdiction clauses

Golden Shore transportation Pte Ltd. -v- UCO Bank and another.

This was a claim arising from switched bill of ladings.

Cargo interests procured the issuance of a second set of bills of lading - the switched bills - by promising the shipowner that the original bills of lading would be returned. The shipowner discharged the cargo in India against the switched bills. The original bills, of course, were never returned.

The Defendant bank, UCO Bank, who held the first set of bills of lading, sued the owners for wrongful delivery of the cargo without production of the original the bills of lading.

The shipowner sought to rely on the jurisdiction clause which required any dispute to be determined at the port of delivery and applied for a stay of the Singapore proceedings in favour of India.

The case sets out in some detail the various decisions on this issue starting with the "EL AMRIA" (1981) 2 Lloyd's Rep 119 under both English and Singapore law. The same tests would, incidentally, be applied in Hong Kong.

The Singapore court was not satisfied that a stay in favour of India was appropriate. The trial judge was satisfied that there were exceptional circumstances why the Singapore court should exercise its discretion and refuse a stay. There was a suspicion that the court took the view that the owners did not really seek a genuine trial in India. The Singapore Court of Appeal upheld this decision.

(6) Limitation action - and anti-suit injunctions

Evergreen International SA -v- Volkswagen Group Singapore Pte Ltd. & Others

An interesting case concerning limitation of liability and an anti-suit injunction granted by the Singapore courts.

The Plaintiffs, Evergreen, were the registered owners of the vessel "EVER GLORY". The Defendants were the owners of the cargo on board the vessel "HUAL TRINITA". A collision occurred between the "EVER GLORY" and "HUAL TRINITA" in Singapore territorial waters. In rem proceedings were commenced by the "EVER GLORY" against "HUAL TRINITA" in Singapore and a settlement on liability was concluded.

The owners of "EVER GLORY" then commenced a limitation action in Singapore against all persons including the owners of the cargo on board "HUAL TRINITA". a decree of limitation was granted by the Singapore courts. The amount of the limitation fund was established and was paid into the Singapore courts. The cargo interests were kept advised throughout the limitation proceedings, but took no part in the limitation action. Instead, they started proceedings in Belgium by arresting another vessel in the same ownership as "EVER GLORY" in order to take advantage of the fact that the Belgium courts would apply the higher limits of liability under the 1976 Convention to which Singapore was not, at that time, a party.

The Plaintiffs applied to the Singapore courts for an anti-suit injunction to restrain the cargo interests from continuing their action in Belgium. The Singapore courts granted this application on the basis that they believed that the cargo interests' action in commencing proceedings in Belgium was frivolous and oppressive.

Changes to legislation in Singapore

(1) The introduction of the 1976 Limitation Convention in Singapore.

The International Convention on Limitation of Liability for maritime claims 1976, commonly referred to as the 1976 Convention, came into force in Singapore on 1st May 2005.

Under the previous convention, the 1957 Convention, before a shipowner could limit his liability, he had the burden of proving that the loss or damage caused by the negligent navigation or management of the vessel took place without his "actual fault or privity".

The 1976 Convention adjusts the balance between shipowner and claimant. The limitation amount is now raised but, in return , the burden of disproving the right to limit liability now falls on the claimant who has to show (under Article 4) that the loss resulted from some personal act or omission committed with the intent to cause loss, or recklessly and with the knowledge that such loss would probably result - a much more difficult test. Consequently, it will be much more difficult for claimants to break limitation.

The introduction of the 1976 Convention apparently also resolved a long standing lacuna in Singapore law regarding the way in which one should calculate the limitation tonnage due to ambiguities in the wording of the previous legislation.

(2) Amendment to the right of arrest

The Singapore legislation, which gives a Plaintiff the right to arrest a vessel in certain circumstances, has been amended to bring Singapore in line with the position under English law.

Prior to the amendment, a ship could only be arrested if the party who was liable in personam was the beneficial owner at the time when the action was brought. If that party was the demise charterer of the ship, no right of arrest would accrue as against that ship. Following this change in the legislation, a ship can be arrested if the party liable in personam was the demise charterer of the ship.

The information on Singapore cases and maritime law was kindly provided by Ian Koh and Bryan Tan of Messrs. Drew & Napier.

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