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Review of Recent Singapore Cases on *Admiralty & Shipping*

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RAJAH & TANN

Introduction

- Recent Cases:

  i. The STX Mumbai
  ii. The Sea Urchin
  iii. The Chem Orchid
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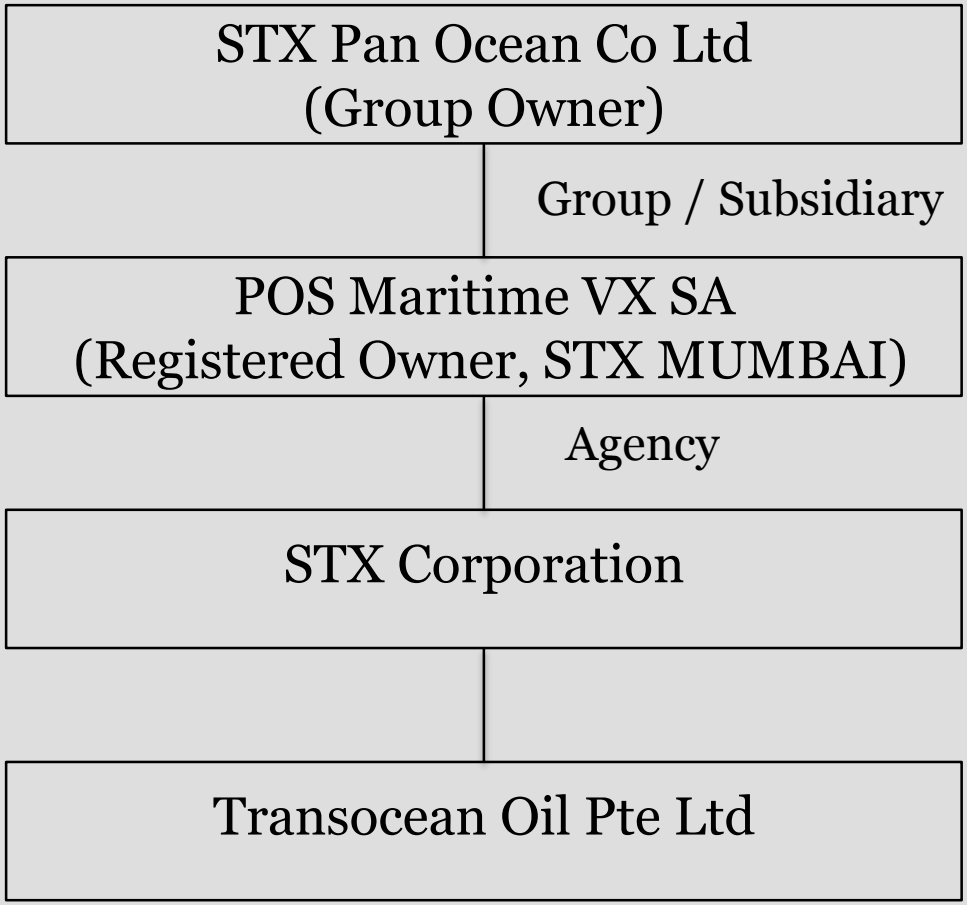
- International Arbitration in Singapore
- Singapore International Commercial Court
- Singapore Law Practice by foreign firms
- Concluding Remarks

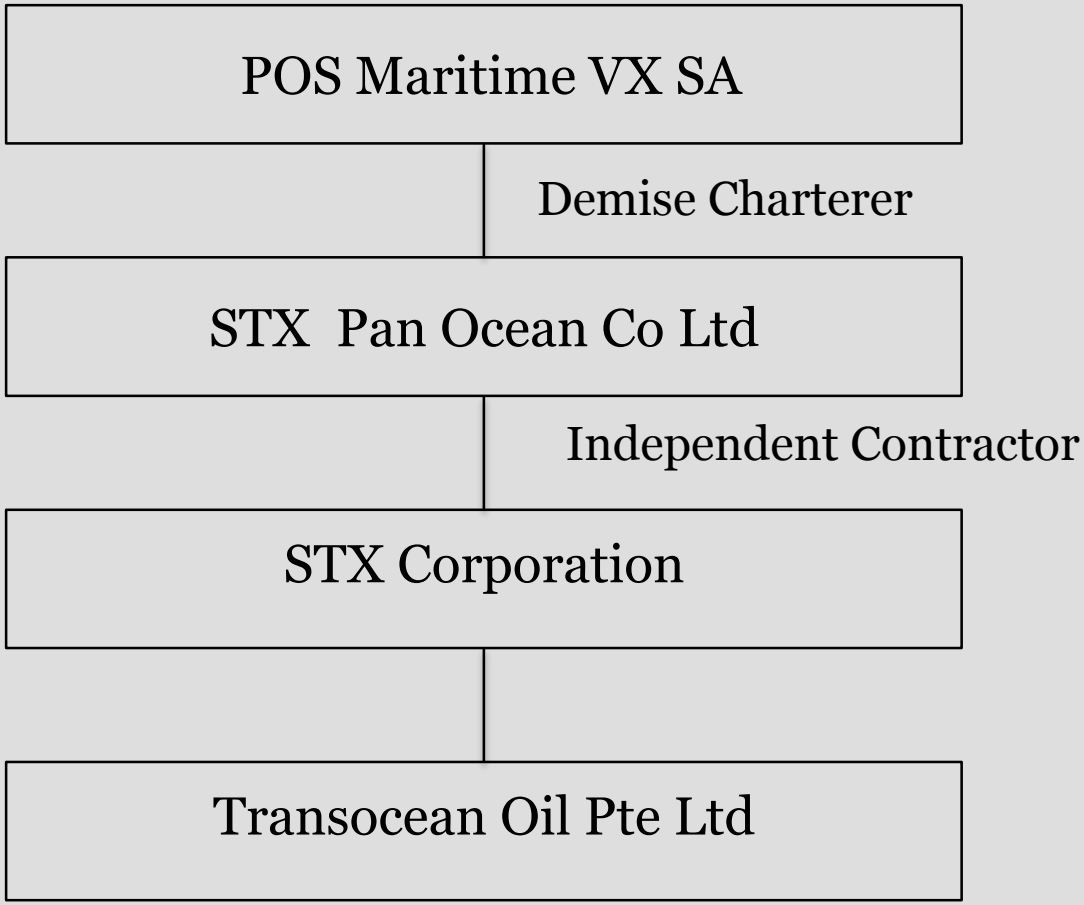
The STX Mumbai [2014] SGHC 122

- Facts
  - STX Corporation ordered bunkers for the vessel STX Mumbai with Transocean, a bunker supplier who has been supplying to STX ships in Singapore.
  - The due date for payment for the STX Mumbai supply was 16 June 2013. Transocean received news that STX Pan Ocean filed for bankruptcy in South Korea; and a vessel under STX Corporation's fleet was arrested elsewhere. Transocean also did not receive payment for the STX Alpha supply that was overdue. Transocean sent a letter of demand for their outstanding invoices, including the STX Mumbai invoice, even though it was not due.
  - On 14 June 2013, Transocean realised that the STX Mumbai was in port. Transocean issued their Writ and Warrant of Arrest, and proceeded with the arrest.
  - Transocean's arrest was challenged by Owners of the STX Mumbai on the main ground that since the invoice was not due, there was no cause of action to begin with.

Plaintiff



Defendant



- Arguments by Transocean:

  - Reasonably arguable case of agency.

  - Anticipatory repudiatory breach. Sufficient evidence of impossibility to pay on the due date due to the factual circumstances.

- Held by the Singapore High Court:

  - STX Pan Ocean's insolvency was irrelevant. The vessel STX Mumbai was not owned by that entity.

  - Non-payment of the STX Alpha invoice was also, irrelevant. The Owners of the STX Mumbai had nothing to do with that.

  - In any event, insolvency *per se* does not amount to an intention not to perform the contract.

  - For an executed contract, there is a possible exception to the doctrine of anticipatory breach. US and Canadian Courts support such an exception. UK and Australian Courts defer. Singapore is free to adopt either position, and the Judge felt inclined towards the exception.

  - Lastly, since Transocean knew full well that their invoice was not due, but decided on taking a premature action, it amounts to sufficient bad faith to warrant an award of damages for wrongful arrest.

- Significance

  - Singapore Courts are slow to pierce the corporate veil, unless it is an exceptional case.

  - Rationale of giving credit upheld, save where there are circumstances for withdrawal of credit.

  - Seems harsh on the face of background facts, but the High Court felt compelled to set aside the arrest and award damages.

The Sea Urchin [2014] SGHC 24

- Facts

  - The mortgagee Bank, Alpha Bank S.A., arrested the "Sea Urchin" on 30 October 2013, after the shipowner, Keel Marine Company Limited, defaulted on a loan agreement that was secured by a first priority mortgage of the "Sea Urchin".

  - At the time of arrest, the "Sea Urchin" was fully laden with a cargo of soya beans in bulk for discharge in Qingdao.

  - The Bank applied for judicial sale of the Vessel and sought the Court's approval for a direct private sale – the purpose was to allow the Vessel to carry and discharge the cargo in Qingdao under new ownership. As an alternative to a direct judicial sale, the Bank's fall-back application was for the usual sale order, which is for the vessel to be sold by the Sheriff by public auction or sealed bids.

- The Owners also applied to set aside the warrant of arrest and to stay the action in favour of the Greek courts, including a temporary release of the vessel to enable the Vessel to continue her voyage to China to discharge the cargo on board.

- By the time the Bank's application came on for hearing, the Owners reached a private arrangement with the Bank, and the Bank's application for a direct sale was unopposed by the Owners and other interested parties to the action.

- Main Issues

  - Whether the facts of this case constitute special circumstances to warrant a direct judicial sale to a named buyer at a specified price.

  - Whether the costs of discharging cargo are to be borne by the cargo interests or treated as part of Sheriff's expenses.

- Arguments by the Bank

  - The offer price of US$17.5 m by the named buyer of the "Sea Urchin", Okeanos Shipping Inc, is US$1.5 m more than the value of the Vessel, which the Plaintiff claimed to be US$16 m;

  - Okeanos Shipping's subsidiary was willing to carry the cargo to China for delivery to the Intervener, and to sign on existing crew members under new ownership for the voyage to China.

  - The cargo was worth US$40 m and is deteriorating with each passing day.

  - The cargo could not be landed in Singapore as there were no storage facilities. There were also difficulties in finding a suitable transhipment vessel.

- Delays occasioned by transhipment could adversely affect the cargo.

- Costs of discharge was estimated at S$2.28 m and costs of transhipment was about US$700,000. Such expenditure which would eat into the sale proceeds, thereby reducing the pool of sale proceeds available to in rem creditors.

- Held:

  - In its earlier decision in The Turtle Bay [2013] 4 SLR 615, the Court has observed that a direct judicial sale at a pre-determined price to a named person is generally not the accepted way to sell a vessel under arrest. A direct judicial sale departs from the normal order that the Sheriff sells a vessel under arrest – by appraisement, advertisement, and inviting bids to purchase the vessel.

  - A judicial sale gives the purchaser a clean title to the vessel that is free from all liens and encumbrances. The usual sale order is for the Sheriff to sell the vessel by public auction or submission of sealed bids.

  - Because of the unique advantage which is conferred by a judicial sale, any application which seeks to depart from the usual procedure would come under close scrutiny by the Court, so as to ensure that the rights of all parties interested in the vessel are protected.

- The applicant seeking judicial confirmation of a private direct sale has to produce cogent evidence of the *"powerful special features"* or *"special circumstances"* of the case in order to persuade the Court to grant the order sought.

- Examples of *"powerful special features"* or *"special circumstances"* discussed in The Turtle Bay:

  i. necessary for preservation of long-term contract for the vessel; age of the vessel and ability to attract buyers; intended buyer able to operate the long-term contract: see *The Union Gold [2013] EWHC 1696*.

  ii. cargo of sulphur onboard at arrest; may cause severe corrosion, very expensive to off-load – mortgagee's buyer willing to buy the ship and carry cargo to disport: *The Nel* (1997) 140 FTR 271.

- The Vessel was under arrest but not the cargo. The Intervener who asserts rights over the cargo would have to off-load the cargo at its expense, and not at the Sheriff's expense, unless the equities of the case justify treating the costs of discharge as Sheriff's expenses.

- Therefore, costs of discharging would not eat into eventual sale proceeds and is irrelevant to determination of whether to grant direct sale *pendente lite*. On the same basis, it follows that transhipment expenses should not be paid out from sale proceeds.

- The alleged "special circumstances" are in reality a typical consequence of an arrest of a cargo-laden vessel. The Vessel was capable of trading until 2017 and there was no urgency to recoup whatever value remaining in the Vessel.

- Further, Okeanos Shipping's offer and the terms of the offer were uncertain. There was nothing in writing from Okeanos Shipping stating its willingness and readiness to purchase the Vessel at US$17.5 m and on the Sheriff's terms and conditions.

- There was no evidence that the Bank had casted its net wider in order to attract the best price for the Vessel. Okeanos Shipping was a subsidiary of the Bank's customer.

- Evidence of the expenses of maintaining a vessel under arrest and the value of the vessel must be presented before the Court. In the absence of such evidence, the Court cannot decide if the vessel under arrest is or is likely to be a wasting asset if she is not sold *pendente lite*.

- The valuation certificate obtained by the Plaintiff was unsatisfactory as the valuation of US$16 m was specifically for 10 December 2013 and not any other date. In the absence of a satisfactory valuation undermined the Plaintiff's application.

- Significance

  - The Turtle Bay is the first Singapore decision on the issue of a direct judicial sale to a named buyer. The position in Singapore is now aligned with that in UK (*The Union Gold [2013] EWHC 1696*) and Hong Kong (*The Margo L [1997] HKEC 767*), where it is only in exceptional circumstances that direct judicial sales were permitted.

  - In the usual process, a judicial sale is conducted by way of a public auction, or submission of sealed bids. In mortgage enforcement actions, the banks prefer a direct judicial sale for commercial reasons: (a) wipe out all *in rem* liabilities of the vessel; (b) enable the bank to work with owners to restructure the business.

  - The Turtle Bay and The Sea Urchin show that it will not be easy to persuade the Court to sanction direct sales. The Sea Urchin further highlighted the importance of placing sufficient evidence before the Court to justify the special circumstances that call for a direct judicial sale.

The Chem Orchid [2014] SGHCR 1

- Facts

  - The Owners of the vessel "Chem Orchid", Han Kook Capital Co. Ltd ("HKC") entered into a Vessel Lease Contract with Sejin Maritime Co. Ltd ("Sejin") for 108 months. Vessel Lease Contract was governed by Korean Law, and was akin to a charter by demise.

  - In December 2010, the Vessel Lease Contract was transferred to HK AMC Co. Ltd ("HKA"), an entity formed to deal with the bad debts of HKC. A Notice of Credit Transfer was given by HKC to Sejin on 24 December 2010.

  - On 4 April 2011, HKA issued a letter titled 'Lease contract termination notice', which the Owners argue had terminated the Vessel Lease Contract.

- On 28 July 2011, Winplus Corporation commenced an action in ADM 184/2011 against Sejin, the demise charterers of the Vessel for unpaid bunkers supplied to the "Chem Orchid" on or about 13 June 2011 in Indonesia at the request of Sejin. The Vessel was arrested in Singapore on 28 July 2011.

- On 8 August 2001, 3 other Writs were filed against the Owners and/or demise charterers of the vessel "Chem Orchid" in Singapore by other claimants:

    - ADM 197/2011: Claim by Frumentarius Ltd for damages for breach of contract and/or duty and/or negligence in and about the carriage of cargo of palm oil/products from Indonesia to Russia in or about 4 June 2011 under a charterparty dated 13 May 2011.

- ADM 198/2011: Claim by KRC Efko-Kaskad LLC for damages for breach of contract and/or duty and/or negligence in connection with the Defendants' carriage of the cargo from Indonesia to Russia in or about 4 June 2011.

- ADM 201/2011: Claim by Mercuria Energy Trading SA in connection with a cargo shipped onboard the vessel on or about 11 June 2011.

- The Owners of the Vessel applied to set aside the Writs, service thereof and all subsequent proceedings in the said actions on the ground that the admiralty jurisdiction of the Court was not properly invoked as Sejin was no longer the demise charterers at the time the Writs were issued.

- In respect of ADM 198 and ADM 201, the Defendants also applied to strike out the Plaintiffs' respective claims.

- Ownership requirements under the Singapore High Court (Admiralty Jurisdiction) Act

  Section 4(4) of the Act provides:

  In the case … of any such claim as is mentioned in section 3 (1) (d) to (q), where -

  (a) the claim arises in connection with a ship; and

  (b) ***the person who would be liable on the claim in an action in personam*** *(referred to in this subsection as the relevant person)* ***was, when the cause of action arose, the*** *owner or* ***charterer of, or in possession or in control of, the ship****,*

  an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –

  (i) ***that ship, if at the time when the action is brought the relevant person*** *is either the beneficial owner of that ship as respects all the shares in it or* ***the charterer of that ship under a charter by demise****; or*

  (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

- Main issues

  - Whether Sejin was the demise charterer of the Vessel at the time of the issuance of the respective Writs

    - Did HKA have authority to terminate the Vessel Lease Contract?
    - *Whether a valid notice of termination had been issued?*
    - *Whether redelivery was required to terminate the Vessel Lease Contract?*

  - The key issue in dispute was whether the Vessel Lease Contract was terminated prior to the commencement of each of the actions. In particular, whether redelivery is required to terminate a demise charterparty.

- Arguments by the Owners

  - The right to terminate the Vessel Lease Contract had been transferred from HKC to HKA, or in the alternative, HKC had authorised HKA to terminate the Vessel Lease Contract.

  - A notice of termination had been given in compliance with the requirements of the Vessel Lease Contract.

  - Notice of termination is sufficient to terminate the Vessel Lease Contract and re-delivery is not required.

- Applicable principles

  - No particular form of words or notice is required to terminate a charter, but there must be a clear and unequivocal statement from the Owners to the charterers stating the Owners' intention to terminate the charter.

  - Essence of a demise charterparty is that the Owners confer on the charterer possession and control of the ship so as to place the charterers in the same position as the Owners for the duration of the demise charterparty. Subject to the terms of the charterparty, termination of a demise charterparty requires withdrawal of both possession and control.

  - For HKA to have authority to terminate the Vessel Lease Contract, HKC must have transferred to HKA the right to terminate, or HKC authorised HKA to terminate the agreement on its behalf.

    - *Actual authority can be express or implied. Apparent authority requires a representation made by the principal that the agent had authority, and reliance on the representation.*

- Held:

  - The right to terminate was not one of the rights transferred from HKC to HKA under the Vessel Lease Contract but HKA had authority, actual or apparent, to issue the notice of termination.

  - A valid notice of termination was issued by HKA. It was clear that the intention of the notice was to terminate the Vessel Lease Contract.

  - Both a notice of termination and redelivery are required to terminate a demise charterparty so that control and possession by the demise charterer may be brought to an end. However, a demise charterparty is essentially a contract and parties are free to include terms on how possession of a ship is to be terminated.

- Here, the Vessel Lease Contract provided that it would remain in force and effect until the Owners confirm the return of the Vessel. Therefore, possession of the vessel was not terminated when notice of termination is issued and the demise charter would only be terminated when the vessel is redelivered.

- Redelivery can be by way of actual or constructive delivery of possession. There was constructive redelivery of the Vessel when the Sejin acknowledged and accepted the termination in mid-April 2011.

- Accordingly, Sejin was not the demise charterer at the time of the commencement of the various actions. The Writs were set aside.

- Significance

  - A recent decision where the Singapore Court considered the issue of whether there is a valid termination and redelivery of a Vessel under demise charter.

  - This decision illustrates the risks often encountered by claimants in a demise charter arrest. Claimants are typically not privy to the relationship between the Owners and demise charterers; demise charters may not be registered; difficult for claimants to verify if demise charter was still in force at the time of issuance of Writ. The fact that the Vessel has yet to be physically redelivered is not conclusive.

  - The Court will examine the terms of the demise charterparty and the conduct of the parties to determine whether possession and control of the vessel have been withdrawn.

The Reecon Wolf [2012] SGHC 22

- Facts
  - The “Captain Stefanos” and “Reecon Wolf” collided in the Straits of Malacca.
  - “Reecon Wolf” commenced action in the High Court of Malaya and arrested the “Captain Stefanos”. Subsequently, “Captain Stefanos” commenced action in Singapore and arrested the “Reecon Wolf”.
  - “Captain Stefanos” applied to stay the Malaysian proceedings in favour of Singapore whereas “Reecon Wolf” applied to stay the Singapore proceedings in favour of Malaysia.
  - Pending hearing of the appeal in Singapore, the Malaysian Court dismissed “Captain Stefanos” stay application.

- Main Issue

  - Whether the Singapore proceedings should be stayed in favour of Malaysia on the ground of *forum non conveniens*.

- Applicable principles – the *Spilliada* test

  The Spiliada principles encompass a two-stage process:-

  - At Stage 1, the burden is on the defendant to show *both* that Singapore is not the natural or appropriate forum for the trial of the action, and that there is another available forum which is clearly or distinctly more appropriate than Singapore.

  - If the court concludes that *prima facie* there is a clearly or distinctly more appropriate forum, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted. At Stage 2, all the circumstances of the case will be considered, and the burden of proof is on the plaintiff.

- Arguments by “Reecon Wolf”

  - The tort (i.e. the collision) occurred in Malaysian territorial waters.

  - “Reecon Wolf” had commenced in rem proceedings against “Captain Stefanos” and arrested her in Malacca.

  - The governing law of the tort is Malaysian law.

  - Collision investigations were carried out by the Malaysian Marine Department.

  - The evidence and witnesses are located in Malaysia.

  - Multiplicity of proceedings.

  - Lack of connection to Singapore.

- Held:

  - Applying Stage 1 of the *Spiliada* test, Malaysia was clearly the more appropriate forum:-

    (i) The place where the tort was committed i.e. Malaysia was *prima facie* the natural forum.

    (ii) The convenience and compellability of witnesses is a neutral factor. Most of the witnesses were foreign and would have to travel to give evidence, whether to Singapore or Malaysia.

    (iii) Considerations of international comity; regard ought to be given to the Malaysian Court's decision not to stay the Malaysian proceedings.

(iv) There is also a real risk of conflicting judgments due to multiplicity of proceedings.

- The fact that Malaysia is party to the 1957 Limitation Convention which provided for lower limits of liability does not constitute a personal or juridical advantage under Stage 2 of the *Spiliada* test. Appeal allowed and stay granted.

- Significance

  - This recent decision shows how the Singapore Court apply the *Spiliada* principles in jurisdictional battles arising out of a collision.

  - Such jurisdictional battles arise frequently in this region, as the territorial boundaries between Singapore, Indonesia and Malaysia remain unsettled and all 3 countries have different limitation regimes. 1st mover's advantage is of the essence.

  - Where a collision has occurred, it is important for the shipowners to have a broad assessment of the apportionment of liability and who is the nett paying / receiving party, so that the shipowners can make a tactical decision and commence proceedings in a favourable jurisdiction. Until all three countries' limitation regimes are aligned, there will exist scope for forum shopping and jurisdictional disputes.

International Arbitration in Singapore

- International arbitration in Singapore may be conducted on an ad hoc basis or under the hospices of the Singapore International Arbitration Centre (SIAC) or the Singapore Chamber of Maritime Arbitration (SCMA).

- In the past 2 decades, SIAC has established itself as a reputable centre for international arbitration. According to a survey by White & Case, SIAC is considered the next most preferred arbitration institution in the world, after similar bodies in London, Paris and New York.

- SIAC has tripled the annual number of new cases it handles since its launch in 1991. The increasing volume of trade and business involving Asian parties have seen an increase in the caseload and profile for SIAC, with parties choosing SIAC as a neutral arbitration venue, which allows for disputes to be resolved in a transparent and efficient manner.

- A Singapore arbitration clause is now available for use with BIMCO documents. Where the clause makes reference to arbitration in Singapore, the dispute may be brought under the SCMA Arbitration Rules. This marks Singapore's recognition as an international maritime centre.

- Singapore has excellent support facilities to assist the smooth and efficient running of arbitrations. Maxwell Chambers is Asia’s largest integrated dispute resolution complex with state of the art hearing facilities.

- Parties have a freedom of choice of counsel, regardless of nationality.

  - No restriction on foreign law firms engaging in and advising on arbitration in Singapore.

  - Non–residents do not require work permits to carry out arbitration services in Singapore.

Singapore International Commercial Court

- Singapore is setting up a Singapore International Commercial Court (SICC), likely to be launched within this year.

- The SICC builds on Singapore's strengths as an international arbitration centre and seeks to enhance Singapore's position as a leading forum for legal services and commercial dispute resolution in Asia and beyond.

- Singapore connectivity and geographical location are added conveniences which encourage parties to choose Singapore as a venue for dispute resolution.

- With the robust cross-border investment and trade in Asia, the number and complexity of cross-border disputes is expected to increase, and the SICC is set up to ensure that Singapore is well-positioned to attract and aid in the resolution of an increasing number of cross-border disputes

Recent Developments in the Singapore Legal Landscape

- A foreign law practice may choose to set up an office in Singapore using any one of the following structures :
  - Licensed Foreign Law Practice (FLP)
  - Qualifying Foreign Law Practice (QFLP)
  - Joint Law Venture (JLV) and Formal Law Alliance (FLA)
  - Representative Office (RO)

- Licensed Foreign Law Practice (FLP)

  - Branch of foreign law firm; only licensed to practice foreign law.

- Qualifying Foreign Law Practice (QFLP)

  - Allowed to practise Singapore law in permitted areas of legal practice through hiring Singapore lawyers with Practising Certificates or foreign lawyers who hold the Foreign Practitioner Certificate.

- Joint Law Venture (JLV)

  - JLV offering legal services covering foreign law as well as Singapore law in the permitted areas of legal practice. The practice of the "permitted areas of Singapore law" must be done through Singapore lawyers with Practising Certificates or foreign lawyers who hold the Foreign Practitioner Certificates.

- Formal Law Alliance (FLA)

  - An alliance between a Singapore law practice and foreign law practice, including the benefit of co-branding, and sharing of office premises, resources and client information. Both firms however remain distinct entities and may only provide legal services that the respective firm and their lawyers are competent to provide.

- Representative Office (RO)

  - An office set up by a foreign law practice that does purely liaison work only, and is not allowed to provide any legal services or conduct any other business activities in Singapore.

- "Permitted areas of legal practice" are mainly commercial areas of law, and exclude domestic ring-fenced areas of legal practice such as

  - constitutional and administrative law
  - conveyancing
  - criminal law
  - family law
  - succession law, including wills, intestate succession and probate and administration
  - *conduct of litigation*

Law firms chided for 'inaccurate picture' on scope of work

By ANDREA ONG

A TOP foreign law firm and the local firm it tied up with have been chided by the Law Ministry for presenting an "inaccurate picture" that could suggest the foreign partner can do litigation work in Singapore.

They had done it in media statements and publicity materials.

But yesterday, Law Minister K. Shanmugam made clear that such domestic legal work "remains and must remain the province of Singapore lawyers and Singapore law firms".

The two firms are London-based Clifford Chance and Singapore's Cavenagh Law. They entered into a Formal Law Alliance (FLA) last year, after the law was amended to further enhance tie-ups.

Mr Shanmugam, in his reply to to Mountbatten MP Lim Biow Chuan, who is also a lawyer, referred to an article in Legal Business magazine, published in July.

It quoted a partner of Clifford Chance saying it is "the first full service firm in Singapore offering litigation advice".

Similar statements promoting the FLA, called Clifford Chance Asia, as "the first international firm with a full service, integrated law practice in Singapore" were repeated in earlier press releases.

Mr Shanmugam said these statements could be read to mean a foreign law firm can now practise litigation in Singapore, but "that would not be accurate".

Senior ministry officials had called in the partners of both firms and told them their statements "conveyed an inaccurate picture and should be stopped", he said.

Under an FLA, local and foreign law practices may collaborate as two free-standing firms. They can share office premises, resources and client information as well as engage in co-branding and billing.

Lawyers may hold concurrent partnerships in both practices, subject to the Attorney-General's approval.

However, specific areas of domestic law – such as litigation, criminal law, family law and conveyancing – are "ring-fenced" and can be handled only by Singapore firms, through lawyers called to the Singapore Bar, Mr Shanmugam said.

The local firm in the FLA must use its own letterhead and file court papers in its own name for these legal areas.

Mr Shanmugam urged local and foreign law firms in FLAs to exercise restraint in their publicity and refrain from overstating the facts. "Clever wordplay" should be avoided, he added.

His ministry will also not condone arrangements where the local law firm is acting as a proxy of the foreign firm, he said.

A Clifford Chance spokesman said yesterday the FLA allows its firm and Cavenagh Law to provide the broadest range of Singapore and international legal services from a single platform, with local litigation representation provided through Cavenagh Law.

"The FLA, approved by the Ministry of Law and the Attorney-General's Chambers, has at all times fully complied with all applicable regulations and will continue to do so," she said.

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Concluding Remarks

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Thank You