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IMPLICATIONS OF SINGAPORE'S IMPLEMENTATION OF THE PROTOCOL OF 1996 TO AMEND THE CONVENTION ON THE LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976

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Recent amendments to the Merchant Shipping Act (Cap 179, 1996 Rev Ed) implement the Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime Claims, 1976 ("1996 Protocol"). This article examines the impact of the new legislation. Its implementation brings Singapore on par with other maritime jurisdictions and provides legal certainty that the higher limits under the 1996 Protocol apply domestically. Unless the 1996 Protocol is universally accepted, it bears mentioning that incidents of forum shopping will still be expected, given the new gap between Singapore and the other countries that have not acceded to the 1996 Protocol.

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I. Introduction

1 On 30 September 2019, Singapore became the 60th Member State of the International Maritime Organization ("IMO") to accede to the Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime Claims, 1976[2] ("1996 Protocol").

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1 While the author is with the Maritime and Port Authority of Singapore, the views expressed in this article are her own.
2 See the International Maritime Organization's circular LLMC.3/Circ.56 for Singapore's instrument of accession.

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2 The 1996 Protocol was domestically implemented under Pt VIII of the Merchant Shipping Act[3] on 29 December 2019. This article explores the implications of Singapore's recent accession to the 1996 Protocol.

II. Background to Singapore's limitation regime for maritime claims

A. The old law under the 1976 Convention

3 Briefly, the Convention on the Limitation of Liability for Maritime Claims, 1976 ("1976 Convention") seeks to limit shipowners' and salvors' liabilities for claims of loss of life or personal injury, or loss or damage to property (including to other ships, harbour works, waterways and aids to navigation), and loss arising from delay in carriage by sea of cargo, passengers or their luggage.[4]

4 Singapore acceded to the 1976 Convention in 2005, shortly after the Court of Appeal's criticisms of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957[5] ("1957 Convention") in *The Sunrise Crane*[6] ("*Sunrise Crane*"). Under the 1957 Convention, shipowners could only limit their liability if they could prove that loss occurred without their actual fault or privity. In reality, shipowners were afforded little protection under the 1957 Convention, as the test for limiting liability imposed a very high standard which shipowners could not meet.

5 This was why many countries adopted the 1976 Convention. Its objective was to strike a balance between shipowners' and insurers' right to limit their liability, whilst permitting the satisfaction of legitimate claims. This is achieved in several ways. The 1976 Convention provides a system of limiting liability that is

3 Cap 179, 1996 Rev Ed.
4 See Art 2 of the Convention on the Limitation of Liability for Maritime Claims, 1976 (entry into force 1 December 1986) (hereinafter "1976 Convention") for the maritime claims subject to limitation.
5 Entry into force 31 May 1968.
6 [2004] 4 SLR(R) 715.

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almost unbreakable. A shipowner will only lose the right to limit liability if it is proved that the loss resulted from the shipowner's personal act or omission, committed with the intention to cause such loss, or recklessly and with knowledge that such loss would probably result.[7] This test replaced the earlier "actual fault or privity" test under the 1957 Convention. At the same time, the 1976 Convention also provides for much higher limits.

B. The new law under the 1996 Protocol

6 The 1996 Protocol was adopted by the IMO on 2 May 1996 and entered into force on 13 May 2004. As its name suggests, the 1996 Protocol amends the 1976 Convention, by substantially increasing shipowners' limits of liability for maritime claims. One objective of the 1996 Protocol was to ensure that values of the limits were not eroded by inflation since the adoption of the 1976 Convention.[8] The legal test for breaking limitation remains the same as the test under the 1976 Convention.

7 It also introduces a tacit amendment procedure[9] for future amendments of the limits under the 1996 Protocol. The purpose of the tacit amendment procedure is to facilitate timely revision of the 1996 Protocol. Amendments would be deemed as accepted if Contracting States do not object to proposed amendments within the given period to accept or reject the proposed amendments. In accordance with this procedure, further revisions were made to increase the limits of liability by approximately 51% on 19 April 2012, which later entered into force on 8 June 2015.[10]

7 Convention on the Limitation of Liability for Maritime Claims, 1976 (entry into force 1 December 1986) Art 4.

8 Comite Maritime International, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at pp 404 and 480–482.

9 Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (entry into force 13 May 2004) (hereinafter "1996 Protocol") Art 8. To summarise, under the tacit amendment procedure, Contracting States will be notified of any amendment to the 1996 Protocol, and the amendment will enter into force 18 months after its acceptance, subject to the amendment not being objected to by 25% of the number of Contracting States.

10 International Maritime Organization resolution LEG.5(99) (adopted 19 April 2012).

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8 Given the above, Singapore's implementation of the 1996 Protocol saw a significant increase in the liability limits under domestic legislation, from those under the 1976 Convention to the further updated limits in 2012. These updated limits were adopted in the Merchant Shipping Act (Amendment of Schedule) Order 2019,[11] which also came into force on 29 December 2019.

III. Legal certainty that higher limits of liability apply

9 In addition to acceding to the 1996 Protocol, Singapore also denounced the 1976 Convention. The effect of denunciation is important, as Singapore is no longer bound by the provisions of the 1976 Convention as a Contracting State.[12]

10 Notably, the majority of countries which are party to both the 1976 Convention and 1996 Protocol have not denounced the 1976 Convention. One implication of not denouncing the 1976 Convention is that the lower limits of the 1976 Convention would continue to apply between a Contracting State that is party to both the 1976 Convention and the 1996 Protocol, and a Contracting State that is only party to the 1976 Convention.[13] Suppose a vessel flying Country A's flag is involved in a maritime incident occurring in Country B's waters. If Country A is party to only the 1976 Convention, and Country B is party to both the 1976 Convention and 1996 Protocol, courts in Country B would be bound to apply the lower limits in relation to an incident, if Country B did not denounce the 1976 Convention. Although Country B has already implemented the higher limits, Countries A and B's mutual

11 S 816/2019.

12 Article 9(2) of the 1996 Protocol states: "A State which is Party to this Protocol but not a Party to the Convention shall be bound by the provisions of the Convention as amended by this Protocol in relation to other States Parties hereto, but shall not be bound by the provisions of the Convention in relation to States Parties only to the Convention."

13 Article 9(4) of the 1996 Protocol states: "Nothing in this Protocol shall affect the obligations of a State which is a Party both to the Convention and to this Protocol with respect to a State which is a Party to the Convention but not a Party to this Protocol."

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obligations are owed to each other under the 1976 Convention, and not the 1996 Protocol.[14]

11 Of the 53 and 60 Contracting States to the 1976 Convention and 1996 Protocol, respectively, only 12 countries (including Singapore)[15] have denounced the 1976 Convention. As Singapore is only bound by the provisions of the 1996 Protocol, there is no doubt now that only the higher limits of the 1996 Protocol apply in Singapore.

IV. Parity with other 1996 Protocol jurisdictions

12 One obvious benefit of accession is that it has put Singapore on equal footing with other major maritime hubs (such as the UK and Hong Kong, China), which had acceded to the 1996 Protocol earlier. As the highest limitation limits for maritime claims are now part of domestic law, Singapore would become a more attractive jurisdiction for claimants to commence limitation actions. In the long term, this could contribute to Singapore's goal of becoming a reputable maritime dispute resolution centre.

13 It also reduces the need for claimants and shipowners to forum shop, since a jurisdiction with higher limits would appear relatively more favourable to claimants, as would a jurisdiction with lower limits be to shipowners. The concerns associated with differing limitation regimes came to the forefront in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd*[16] ("*Evergreen*"). The plaintiffs were the registered owners of the vessel *Everglory*. Even though the plaintiffs had already commenced a limitation action and were granted a decree of limitation in Singapore, the defendants arrested the sister ship of the *Everglory* in Belgium, as Belgian courts applied the higher limit based on the 1976 Convention. Had the 1996 Protocol been in place at the time of *Evergreen*, it is doubtful that the defendants would have

14 See also Jude P Benny & S A Durai, "Clash of the Conventions", *Singapore Law Gazette* (March 2000).

15 These countries include Australia, Denmark, Finland, Germany, Japan, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden and the UK.

16 [2004] 2 SLR(R) 457.

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commenced proceedings in a forum with higher limits to protect their claim.

14 Claimants in Singapore would also be afforded higher compensation in real terms under the new law, as the limits under the 1996 Protocol better reflect the current value of life and property. The Court of Appeal case of *The Seaway*[17] illustrates why limitation limits should be consistently evaluated. In that case, a dredger, the *Seaway*, had hit and damaged a wharf, causing damage of approximately $16,150,000. However, the tonnage limitation under the 1957 Convention then was valued at $607,927.68 only. Especially for large claims, it is apparent that the higher limits of the 1996 Protocol would better protect claimants' interests in ensuring that their claims are compensable.

V. Case law as a means of regulating forum shopping

15 Although Singapore's accession has closed the gap between Singapore and the other 59 Contracting States, courts will still be confronted with attempts at forum shopping for as long as the 1996 Protocol is not universally subscribed to. At the time of writing, only 60 countries have ratified or acceded to the 1996 Protocol, representing 69.44% of the gross tonnage of the world's total fleet.[18]

16 Despite criticisms of Singapore's late accession[19], the arrival of the 1996 Protocol has somewhat contributed to the development of domestic jurisprudence in this respect. As Singapore's implementation of both the 1976 Convention and

17 [2004] 2 SLR(R) 577.

18 International Maritime Organization, "Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions" (7 April 2020) at p 394.

19 See *Parliamentary Debates, Official Report* (14 January 2019), vol 94 (Dennis Tan Lip Fong, Non-Constituency Member). The debate during the Second Reading of the Merchant Shipping (Miscellaneous Amendments) Bill noted that Singapore could have accepted the 1996 Protocol earlier, since other maritime hubs such as the UK and Hong Kong, China had done so already.

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1996 Protocol trailed behind that of other major maritime hubs,[20] Singapore courts have had to consider the issue of forum shopping, in the context of differing limitation of liability regimes as between Singapore and other jurisdictions.

17 The following key legal principles distilled from case law involving forum shopping[21] remain equally relevant for lawyers, when advising clients on jurisdictional options even after Singapore's accession, as it is unlikely that the 1996 Protocol will ever be universally subscribed to:

> (a) **Application of the doctrine of *forum non conveniens*.** It is trite law that the test for determining the natural forum in *Spiliada Maritime Corp v Cansulex Ltd*[22] ("*Spiliada*") applies in Singapore. The test involves the identification of another available forum that is more appropriate than the current forum. If that other forum is determined to be more appropriate, courts have the discretion to stay proceedings in favour of that other forum. This is notwithstanding competing limitation regimes in both forums. In *The Reecon Wolf*,[23] the court emphasised that looking favourably upon a party which had selected a forum with higher limits would go against the *Spiliada* principles.
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> (b) **Importance of international comity.** To avoid the risk of inconsistent judgments, courts are ready to grant a stay of proceedings in the interest of international comity, especially if a foreign court has already assumed jurisdiction. In *The Reecon Wolf*, the Singapore court granted the defendant's application to stay the proceedings in Singapore in favour of proceedings that had commenced in Malaysia. In arriving at this decision, additional weight was given to the fact that the Malaysian courts had already

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20 The UK implemented the 1996 Protocol on 13 May 2004, and the 1976 Convention on 1 December 1986. Hong Kong, China implemented the 1996 Protocol on 03 May 2015 and the 1976 Convention on 1 July 1997.

21 See, for example, *The Owners of the Ship or Vessel Ming Galaxy v The Owners of the Ship or Vessel or Property Herceg Novi* [1998] SGHC 303; *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457; and *The Reecon Wolf* [2012] 2 SLR 289.

22 [1987] AC 460.

23 [2012] 2 SLR 289.

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decided that Malaysia was a more appropriate forum and had refused to stay the proceedings in Malaysia. However, the learned judge, Belinda Ang Saw Ean J, clarified that where international comity interests and public policy interests conflict, courts will prioritise the need to give effect to matters of public policy.

(c) Matter of public policy. Limitation of liability is a matter of public policy, and not a matter of justice. In *The Owners of the Ship or Vessel Ming Galaxy v The Owners of the Ship or Vessel or Property Herceg Novi*,[24] the court noted that if Parliament had legislated lower limits, the court must give effect to those limits and the merits of the legislation are not justiciable. To give effect to the policies of the Legislature, and to protect the court's jurisdiction, the court can and may grant anti-suit injunctions to restrain action in another forum. In *Evergreen*, the court granted an anti-suit injunction to protect Singapore's public policy interests – the defendants had commenced proceedings in another jurisdiction to escape the limitation regime in Singapore, and the courts of the other forum did not recognise the limitation decree that had been properly obtained in Singapore.

(d) No personal or juridical advantage. The courts have also clarified that the existence of different limitation regimes is not considered a personal or juridical advantage under the *Spiliada* test. A lower limitation regime may be less favourable to the claimant, but that does not mean that substantial justice is not available to the claimant in that forum.

VI. Mandate compulsory insurance coverage up to the 1996 Protocol limits?

18 Going beyond the implementation of the 1996 Protocol, consideration should be given to legislate the maintenance of compulsory insurance for maritime claims, up to the 1996 Protocol

24 [1998] SGHC 303.

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limits. In *Sunrise Crane*, the learned judge, Judith Prakash J, expressly stated that the purpose of the limitation statute is to assist shipowners in procuring adequate insurance coverage to cover possible losses, and to ensure that claimants are paid at least some part of their losses. Mandating compulsory insurance would further support the intent and purpose of the 1996 Protocol, by ensuring that shipowners truly have the financial ability to meet their liabilities in the event of a maritime incident.

19 Under the 1996 Protocol, there is no legal requirement to maintain compulsory insurance. This is in contrast to the compulsory insurance requirements for oil pollution damage and wreck removal under the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001,[25] the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969[26] and the Nairobi International Convention on the Removal of Wrecks, 2007[27] (all of which have been implemented domestically).[28]

20 In 2009, the European Union adopted its own compulsory insurance requirements, mandating shipowners to maintain insurance, to "cover maritime claims subject to limitation under the 1996 Convention".[29] Ships trading in the European Union would also have to carry an insurance certificate on board providing evidence of the insurance cover, or risk refusal of port entry.[30]

25 Entry into force 21 November 2008.
26 Entry into force 30 May 1996.
27 Entry into force 14 April 2015.
28 Compulsory insurance is also a feature of other liability conventions such as the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (adoption 30 April 2010) and the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (entry into force 23 April 2014). At the time of writing, Singapore is not party to either convention.
29 See Art 4(3) of Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims (hereinafter "Directive 2009/20/EC").
30 Article 5(2) of Directive 2009/20/EC states: "If the certificate referred to in Article 6 is not carried on board, and without prejudice to Directive 2009/16/EC providing for detention of ships when safety issues are at stake, the competent authority may issue an expulsion order to the ship which shall be notified to the Commission, the other Member States and the flag State concerned. As a result of the issuing of such an expulsion order, every Member State shall

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The UK, for instance, has prescribed the legal requirement for compulsory insurance under the Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012.[31] Regulation 4(3) requires the insurance to cover at least the maritime claims subjected to limitation under the 1996 Protocol. Regulation 4(4) ensures that the amount of insurance for each ship per incident is at least equal to the maximum limit of liability under the 1996 Protocol.

21 Although there is presently no such requirement in Singapore, it is reasonable to expect that shipowners outside the European Union already have insurance coverage of up to the 1996 Protocol limits, especially if their ships ply and trade within the European Union.

22 Practically speaking, requiring the maintenance of compulsory insurance would not be overly onerous for shipowners. In any case, since shipowners are faced with greater financial exposure under the increased limits, it is only wise to maintain adequate insurance coverage in the event of a maritime incident. If a case like the *Pacific Adventurer*[32] should occur again, claimants would at least be partially compensated up to limits under the 1996 Protocol.

VII. Conclusion

23 At the Second Reading of the Merchant Shipping (Miscellaneous Amendment) Bill,[33] the Senior Minister of State for

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refuse entry of this ship into any of its ports until the shipowner notifies the certificate referred to in Article 6."

31 SI 2012 No 2267.

32 See Australia Maritime Safety Authority website, "Response to the *Pacific Adventurer* Incident – Strategic Issues Report" (12 February 2009) <https://www.amsa.gov.au/sites/default/files/amsa43-incident-report-pacific-adventurer-strategic-issues-2010.pdf> (accessed 15 June 2020). In 2009, approximately 270 tonnes of heavy fuel oil were spilt in Australian waters, arising from damage to the bunker tanks of the general cargo vessel, the *Pacific Adventurer*. Even though Australia was party to the 1996 Protocol, the clean-up costs of the oil spill was estimated to be over A$30m, which far exceeded the liability limit of A$17.5m.

33 See *Parliamentary Debates, Official Report* (14 January 2019) vol 94 (Dr Lam Pin Min, Senior Minister of State for Transport).

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Transport explained that Singapore had not acceded to the 1996 Protocol earlier, due to the shipping industry's concerns with the increase in shipowners' liabilities. Members of the Singapore Shipping Association had given their support for Singapore's implementation very recently, as their members were now generally insured up to the limits under the 1996 Protocol.

24 Regardless of the reason for the later accession, Singapore's implementation of the 1996 Protocol is certainly a welcome change to the limitation landscape. Claimants can finally take comfort in the knowledge that another major maritime hub has joined the 1996 Protocol. Apart from implementing these higher limits, Singapore could also take guidance from other jurisdictions to consider mandating the maintenance of compulsory insurance, to mitigate the risk of shipowners failing to meet their liabilities in face of a maritime claim.

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