2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 In numerical terms, 2008, like 2007, was not a fruitful year: only two decisions of an admiralty nature were handed down by Singapore courts. However, in terms of the development of admiralty practice and law in Singapore, the significance of one of these decisions cannot be over-stated, as will be elaborated below.

The Vasiliy Golovnin [2008] 4 SLR 994

2.2 So far as this contributor is aware, the judgment of the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR 994 is the longest decision handed down by our apex court on the area of admiralty law. It offers rich pickings on a variety of issues, ranging from duty of disclosure in *ex parte* applications (with implications beyond the narrow confines for applying for a warrant of arrest), wrongful arrest of vessels, sustainability of a cause of action as a pre-requisite to arrest and the use of the remedy of arrest to seek security for arbitration awards. It is a decision that will without doubt shape admiralty practice in Singapore for years to come as well as its attractiveness as a forum for maritime disputes.

The factual matrix

2.3 As is perhaps illustrative of the borderless character of maritime disputes, the material events had nothing to do with Singapore, taking place as they did in China, Togo and (to a lesser extent), London, even though they culminated in the arrest (found by the Court of Appeal to be wrongful) of a sister vessel, the Vasiliy Golovnin, in Singapore.

2.4 The defendant, Far Eastern Shipping Co PLC, was at the material time owner of the vessel, the Chelyabinsk, which it chartered to Sea Transport Contractors Ltd ("STC"), which in turn sub-chartered the vessel to Rustal SA ("Rustal"). Two banks, Credit Agricole (Suisse) SA ("Credit Agricole") and Banque Cantonale De Geneve SA had provided

financing to Rustal for the purchase of the cargo of rice and in consideration thereof, became the holders of the bills of lading. The appeal to the Court of Appeal was brought only by Credit Agricole. (The cross-appeal on the point of wrongful arrest was brought against both banks by the defendant.) Two of the three subject bills of lading held by the bank named Lome in Togo as the port of discharge, the remaining named "any African port" as the port of discharge.

2.5 STC, on Rustal's instructions, requested the defendant to switch the bills of lading with Rustal to alter the port of discharge from Lome to Douala but the switch never materialised. Subsequently, because of an apparent dispute between STC and Rustal with respect to the payment of hire, STC instructed the defendant not to switch the bills of lading unless further ordered by it to do so, and instructed the vessel to continue to proceed to Lome to discharge the cargo (instead of Douala).

2.6 The two banks instructed the defendant to discharge the cargo at Douala instead of Lome (the discharge port named in the bills of lading). The defendant did not comply with the instructions and proceeded instead to Lome, where various court orders were obtained by STC, Rustal and the two banks in relation to the cargo carried on board. STC wanted a court order to discharge and detain the cargo for unpaid hire; Rustal, an order to prevent its discharge, as did the two banks. After various interlocutory skirmishes, the Lome court eventually ordered the cargo to be discharged in Lome. The court also found that STC was entitled to retain the cargo as security. The defendant in compliance with these orders, accordingly, commenced and completed discharge in Lome in mid-February 2006.

2.7 The banks then arrested the Chelyabinsk in Lome on or about 18 February 2006 in respect of the same claims as the subsequent action in Singapore. On 24 February 2006, the defendant successfully set aside the arrest after full arguments before the Lome court. The vessel left Lome on 25 February 2006. The time allowed for an appeal against the Lome Release Order expired on 17 March 2006, without, significantly, any appeal being filed in Lome.

2.8 On 18 March 2006, the banks arrested the Vasiliy Golovnin, a sister vessel of the Chelyabinsk, in Singapore. The arrest was set aside by the learned assistant registrar who also struck out the writ but did not award damages for wrongful arrest. That decision was substantially upheld by Tan Lee Meng J (except for a cargo damage claim, which his Honour did not strike out).

Duty of disclosure in ex parte *applications (including applications for warrant of arrest)*

2.9 On the subject of disclosure, V K Rajah JA, who delivered the judgment of the Court of Appeal, took the opportunity to reiterate the relevant principles, enunciated in various recent Singapore admiralty decisions, such as *The Fierbinti* [1994] 3 SLR 864; *The AAV* [2001] 1 SLR 207 and *The Rainbow Spring* [2003] 3 SLR 362.

2.10 These principles may be summarised as follows. It is trite law that a party making an *ex parte* application, including a plaintiff who applies for a warrant of arrest, is under a duty to disclose to the court hearing the application all material matters including, as V K Rajah JA observes, matters (as opposed to merely facts, a point elaborated on below) prejudicial to his claim. As pointed out by the Court of Appeal in *The Rainbow Spring* [2003] 3 SLR 362, the proper discharge of this duty is an important bulwark against any abuse of the process of arrest and, if breached, can be an independent ground for setting aside an arrest. In his Honour's words, full and frank disclosure would ensure that the court is "appropriately sensitised to the real merits of the application and the potentially hazardous ramifications of the remedy" (*The Vasiliy Golovnin* [2008] 4 SLR 994 at [85]) and, therefore, put the court in a position to properly exercise its discretion as to whether the warrant of arrest should be granted.

2.11 The test of materiality as enunciated by L P Thean JA in *The Damavand* [1993] 2 SLR 717 at 731, which was re-affirmed in *The Rainbow Spring* [2003] 3 SLR 362 and *The Vasiliy Golovnin* [2008] 4 SLR 994, is as follows:

> … whether the fact is relevant to the making of the decision whether or not to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made.

2.12 It is clear that the test of materiality is an objective one and is based on relevance. A fact may be material even if it does not have the effect of leading to a different decision being made on the application for a warrant of arrest.

2.13 In what appears to be an *extension* of the established principles, the Court of Appeal in *The Vasiliy Golovnin* [2008] 4 SLR 994 observes that the duty of disclosure covers defences that are plausible and not merely conceivable or theoretical. This extension is illustrated by the facts of *The Vasiliy Golovnin* itself. There was, as one would recall, an unsuccessful arrest before the Lome courts of the Chelyabinsk prior to the arrest of the Vasiliy Golovnin. Although this arrest was referred to in

the affidavit filed in support of the application, there was, in the view of the Court of Appeal and of Tan Lee Meng J at first instance, inadequate disclosure of this fact. This is elaborated below. In particular, the attention of the learned assistant registrar was not specifically drawn to this matter. Another undisclosed fact in *The Vasiliy Golovnin* was the proposed switching of bills of lading to reflect the change of the discharge port from the Togolese port of Lome to the Cameroonian port of Douala. Credit Agricole's claim was that the shipowners breached the bill of lading contract by carrying the cargo to Lome (which was the port named in the bills of lading). If the fact of the proposed switch of discharge port had been disclosed, it would have sensitised the court to the fact that the claim was without merits. This is so because, if the shipowners had a contractual duty to divert the cargo away from Lome, there would have been no need for Credit Agricole to switch the discharge port in the bill of lading. By requesting for such a switch of discharge port from Lome to Douala, Credit Agricole clearly acknowledged it had no basis for saying that the cargo should not be discharged at Lome: *The Vasiliy Golovnin* [2008] 4 SLR 994 at [102]. Credit Agricole was held by the Court of Appeal to have failed to disclose the switching and the objective behind it altogether.

2.14 V K Rajah JA warned that mere disclosure of material facts without more or devoid of the proper context does not amount to a discharge of the duty. The manner of disclosure is also important in the sense that the material facts must be presented to the court in a clear, transparent and complete manner. Thus, the applicant's counsel must draw the court's attention to the relevant matters and documents rather than merely exhibiting the latter (which was what was done in this instance). Not only must the court's attention be drawn to the relevant materials, as well as critical points for and against the applicant's case, the facts must be presented fairly. On the facts of this case, the supporting affidavit, consisting of 11 "miserly" pages of narrative in a "tome" of 400 pages, was found to be gravely wanting in at least two aspects.

2.15 Credit Agricole was held by the Court of Appeal to have insufficiently disclosed the existence of the previous proceedings in Lome in that its counsel did not directly draw the court's attention to this particular fact (especially so, given that they related essentially to the same claim as the Singapore proceedings). The Court of Appeal dismissed the argument that this was a fact that could be gleaned easily from the exhibits to the supporting affidavit. The fact that the Togolese court had considered and ruled against Credit Agricole's arrest should have been made known to the learned assistant registrar, who would in all likelihood have enquired the matter further so as to be in a position to make an informed decision. This was an instance where the form and manner of disclosure failed. It also highlights the need for counsel of the

arresting party to be fair, thorough and transparent in taking the court through the relevant evidence at the *ex parte* hearing. A practical tip: if the arrest involves complicated facts or if there are various matters and exhibits to draw to the court's attention, counsel may wish to prepare and tender outline submissions with references to the exhibits as well as arm himself with any relevant authorities at the *ex parte* hearing. This offers two advantages: one, he is less likely to miss taking the court through a material fact and two, there is a record of what was actually presented to the court.

2.16 Although the Court of Appeal emphasised the importance to comply with this duty and expounded on the relevant principles, it did not, it is respectfully submitted, intend to radically change the nature of the duty or make it overly burdensome to discharge. In the final analysis, the test on disclosure, as affirmed by the Court of Appeal, is one of reasonableness, balance and common sense. As V K Rajah JA succinctly opines (*The Vasiliy Golovnin* [2008] 4 SLR 994 at [90]):

> It cannot be emphasized enough that the scope of disclosure should be what is reasonable in the given circumstances at the time of the arrest, and this is, at the very end of the day … a matter of common sense.

2.17 While it is important to ensure that the duty of disclosure is strictly observed, it is equally imperative to ensure it is not carried to absurd lengths. The defendant shipowner should not be allowed to "invent" material facts or defences so as to mount a frivolous non-disclosure challenge. In this regard, the cautionary words of V K Rajah JA in *The Vasiliy Golovnin* [2008] 4 SLR 994 at [88] are especially pertinent:

> … [W]e think it necessary to add, that parties should not meticulously attempt to dissect the factual matrix in painstaking efforts to 'invent' missing material facts. We note that, unfortunately, all too often, in setting aside application, much unnecessary time is unhelpfully expended in dubiously making out a case of the alleged failure of a claimant to place all the material facts before the court. In many instances, these complaints amount to no more than factual peccadilloes that have no material bearing on the decision-making process or the outcome of the original application. This should be discouraged. What is material is, in the final analysis, essentially a matter of common sense.

2.18 Although it is always preferable to err on the side of more rather than less disclosure, a balance must be struck at the end of the day – an applicant is not required to disclose every relevant document, describe the facts in minute detail or search for possible but unlikely defences. The need not to push the duty of disclosure to extreme length is echoed elsewhere. Thus, in *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 at 193–194, Balcombe LJ reminding himself that the duty of disclosure

is a "judge made" rule cautioned that it "cannot be allowed itself to become an instrument of injustice".

2.19 It is trite law that even where there is material non-disclosure, the courts retain an overriding discretion not to set aside the arrest: see *The Vasiliy Golovnin* [2008] 4 SLR 994 at [84]; *Treasure Valley Group v Saputra Teddy* [2006] 1 SLR 358; *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 2 SLR 750 at 757–761. In determining whether the discretion should, nevertheless, be favourably exercised in favour of the arresting party, the court applies "the principle of proportionality in assessing the sin of omission against the impact of such default": *The Vasiliy Golovnin* [2008] 4 SLR 994 at [84]. This requires the court to take a measured assessment of the material facts as well as the circumstances in which the application has been made.

2.20 Having found that disclosure by Credit Agricole was wanting in two respects, the Court of Appeal did not exercise its discretion to maintain the arrest. Several factors were taken into account: Credit Agricole's counsel had adequate time to take instructions and ascertain the correct position; this was not a case of mere oversight or a pardonable mistake made in haste. These were, quite simply, "grave serial lapses": *The Vasiliy Golovnin* [2008] 4 SLR 994 at [110].

2.21 At first blush, it may be argued that the duty of disclosure has been made more onerous by this decision. That argument is at best only partially correct. Prior to this decision, it has never been suggested that an arresting party must disclose defences (albeit only plausible, as opposed to fanciful one) to the court when applying for the warrant of arrest *ex parte*. The Singapore decisions on the duty of disclosure in an application for a warrant of arrest, including those cited in paras 2.9, 2.11 and 2.19 above, have limited the duty as one of disclosure of material facts. To the extent that the duty now extends to disclosure of plausible defences, it is hoped that this does not lead to a floodgate of spurious applications to set aside arrests on the ground that certain defences (cleverly crafted in the aftermath) should have been disclosed to the court. It is submitted that *The Vasiliy Golovnin* provides no licence for such creativity on the part of the imaginative shipowner's lawyer. For, as V K Rajah JA stressed, the defences must be plausible ones, which it is suggested, should be defences that, on the state of the evidence known or ought to have been known by the arresting party at the time the *ex parte* application is made, must have some realistic prospects of success. In this regard, it is pertinent to recall the two material facts that were either not or inadequately disclosed. Prior proceedings in respect of the same claim culminating in an invalid arrest is plainly and obviously relevant, as the fact of proposed switching of the bills of lading, which struck at the very heart of Credit Agricole's claim that the vessel should not have carried the goods to Lome. It is submitted that

one must appreciate the factual matrix against which the Court of Appeal expounded, and in this one aspect extended, the principles on the duty of disclosure of material facts.

2.22 It is also critical to remember the observation by V K Rajah JA that disclosure is at the end of the day a balancing exercise grounded on reasonableness and common sense. The court must set its face against attempts to "invent" missing material facts and guard against factual peccadilloes that have no bearing on the outcome of the application.

Sustainability of the cause of action

2.23 At the hearing below, Tan Lee Meng J struck out all of Credit Agricole's claims (other than that relating to damage to cargo) as being plainly unarguable. Concerned that this might prejudice its position in the arbitration proceedings to be commenced in London in the form of *res judicata* or issue estoppel, Credit Agricole appealed against that aspect of the decision below which held that the shipowner could not be faulted for carrying the cargo to Lome (which was the named discharged port in the bills of lading). In particular, it was argued that the learned judge had erred in evaluating the merits of the claim, a task that should have been left to the arbitration tribunal.

2.24 This contention led the Court of Appeal to consider two matters. The first was whether the arrest was intended as a means of seeking security in favour of arbitration in London. This was summarily dismissed as an afterthought and an "imaginative argument of convenience" (*The Vasiliy Golovnin* [2008] 4 SLR 994 at [42]) since Credit Agricole did not even hint that the arrest was meant to support the arbitral process or was made pursuant to s 7 of the International Arbitration Act (Cap 143A, 2002 Rev Ed), under which the court has a discretion to order substitute security to be furnished or any security already furnished to be retained to cover any arbitration award in favour of which the Singapore proceedings are mandatorily stayed. Credit Agricole's position was not helped by the fact that it could not clearly point to a particular charterparty in the chain of charterparties in which the arbitration agreement they were purportedly relying on could be found.

2.25 If in fact Credit Agricole intended to rely on a binding arbitration agreement when it arrested the vessel, this fact was also not properly disclosed to the court when the warrant of arrest was applied. The Court of Appeal clarified that if an arrest is intended to support a prospective arbitration, that is an important factor that must be disclosed to the court when the *ex parte* application is made. *A fortiori*, if the arbitration is already underway, for which there is clear existing authority: see *The Andria* [1984] QB 477 at 490–491.

2.26 Such disclosure would enable the court to decide whether it would stay the arrest or make other directions pending the obtaining of an arbitration award under s 7 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). If the validity of the arbitration agreement is likely to be disputed, this too should be disclosed to the court. This aspect of the decision clarifies a point that has previously irked admiralty practitioners, namely, to what extent an arresting party must disclose to the court that the arrest was meant to obtain security for an arbitration that has not yet started. It is now clear that such a purpose must be disclosed. It is not sufficient for an arresting party to merely reserve its rights under the International Arbitration Act, as Credit Agricole did in this instance.

2.27 The second and meatier aspect of this issue pertains to the extent to which a plaintiff must satisfy the court as to the merits of his claim at this early, jurisdictional stage of the proceedings. There are two facets. First, and incontrovertibly, a plaintiff must show a good arguable case that his claim comes within one of the jurisdictional limbs in s 3(1) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2002 Rev Ed). This often entails some degree of inquiry into the claim itself. The plaintiff is, of course, not required to prove his claim on a balance of probabilities at this stage – but is there a minimal threshold he has to cross on the merits of his claim? The answer is affirmative, but the threshold (rightly, it is submitted) is set relatively low: a good, arguable case: *The Vasiliy Golovnin* [2008] 4 SLR 994 at [50].

2.28 The rationale, as explained by the Court of Appeal, for such a preliminary assessment of the merits of the claim, is to ensure that the drastic remedy of arrest, with all the financial implications that go with it, should not be invoked in hopeless, frivolous claims. The requirement that there must be a good, arguable case on the merits may be seen as part of the court's arsenal, together with the duty of disclosure and the availability of damages for wrongful arrest, to guard against any abuse of the remedy of arrest.

2.29 Applying these principles to the facts, the Court of Appeal found that Credit Agricole had failed to make out even a good, arguable case on the merits. Its claim was essentially that the shipowner should not have discharged the cargo in Lome, the named discharge port in two of the bills of lading, the third naming "any African port" as the discharge port related to cargo stowed under the cargo carried under the first two bills. This claim was premised on the argument that the shipowner should have followed instructions of Credit Agricole, being holders of these bills of lading, to deviate to and discharge at Douala. This argument plainly runs counter to the principle that the bill of lading contains the contract of carriage, as between the carrier and the indorsee, and in so far as the carrier is obliged to carry the cargo to a

named discharge port, that is the full extent of his obligation. This was exactly what the shipowner did: they carried the cargo to Lome and discharged it there, pursuant to the bill of lading terms. Additionally, the shipowner had in doing so complied with an order from the Lome courts to discharge all her cargo. Short of a variation of the contract of carriage, it is not permissible for a consignee to demand delivery at another port. Credit Agricole (and its advisers) clearly knew of this grave difficulty, which explained why they wanted to switch the bills of lading so that the discharge port could be renamed as Douala.

2.30 In light of this abject lack of merits to the claim and the fact that it ran counter to a basic principle on the carriage of goods by sea, it is not surprising that the court concluded that there was no good, arguable case and castigated Credit Agricole's conduct in the following terms (which ultimately led to its condemnation in damages for wrongful arrest (*The Vasiliy Golovnin* [2008] 4 SLR 994 at [151]):

> This is a case of a claimant wilfully disregarding the plain stark adverse facts. A groundless claim was pursued. Material facts were omitted. A draconian remedy was recklessly sought. There can be no gain saying, in the final analysis that the Banks' *in rem* claim and the arrest of the ship were brought unwarrantably and without foundation.

Wrongful arrest

2.31 The Court of Appeal undertook a very extensive review of the principles relating to wrongful arrest of vessels, starting with the *locus classicus* of the *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 and, as will be explained below, gave it a re-interpretation which might conceivably lead to a potentially relaxation of the difficult criterion of malice or gross negligence amounting to malice on the part of the arresting party, which a shipowner must satisfy before succeeding on wrongful arrest.

2.32 While acknowledging that the *Evangelismos* test (*The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945) has stood undisturbed for more than a century and was re-affirmed by the Singapore Court of Appeal in *The Kiku Pacific* [1999] 2 SLR 595, V K Rajah JA was quick to point out that the test is overly generous towards the plaintiff because the requirement of malice or gross negligence amounting to malice is often very difficult to satisfy. The upshot is that many a plaintiff gets away with no more than a slap on his wrist in a form of an adverse costs order even if the arrest is subsequently set aside whereas the financial distress felt by the shipowner due to the arrest of the ship is often considerably more serious.

2.33 Interestingly, the court also undertook a comparative survey as to how the harshness of the *Evangelismos* test (*The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945) has been mitigated in jurisdictions such as Australia by legislative reform. (Under s 34 of the Austrian Admiralty Act 1998, damages could be awarded to shipowners where a plaintiff "unreasonably and without good cause" arrests a ship. The statutory criterion in s 34 is perceived to be less onerous for shipowners as compared with the *Evangelismos* criterion.) However, V K Rajah JA, echoing the views of the Canadian and New Zealand courts (see *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617 and *Mobil Oil New Zealand Ltd v The Ship "Rangiora"* [2000] 1 NZLR 49 respectively), was persuaded not to depart from the *Evangelismos* test lightly given its long vintage. That having been said, his Honour made clear that the court is prepared to re-examine the continuing relevance and applicability of this test at an appropriate juncture. There is, of course, the possibility that Singapore law may go the same way as Australian law in this respect, *ie*, to have the *Evangelismos* test statutorily watered down.

2.34 Although the court did not on this occasion depart from the *Evangelismos* test (*The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945), it did, nevertheless, re-interpret the test such as to give less weight to the criterion of malice or gross negligence amounting to malice and more weight to the frequently ignored question posed by the Privy Council in *The Evangelismos* (at 359), which is this:

> The real question in this case … comes to this: is there or is there not, reason to say, that the action was so *unwarrantably brought, or brought with so little colour, or so little foundation*, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it? [emphasis added]

2.35 This would henceforth be the real focus of the "*Evangelismos* test" (*The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945) (*The Vasiliy Golovnin* [2008] 4 SLR 994 at [136]) in that if an arrest was so "unwarrantably brought", or brought with so little colour, or so little foundation, then there would follow a finding of malice or gross negligence amounting to malice. Given the focus on the aforesaid test in *The Evangelismos*, a more objective enquiry into the circumstances prevailing and the evidence surrounding the arrest of the vessel would be carried out so as to determine if the admiralty action and the arrest was so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that it was brought with malice or gross negligence amounting to malice. The shift in focus from the criterion of malice or gross negligence amounting to malice to the objective enquiry as to the action which was so unwarrantably brought, or brought with so little colour, or so little foundation as to imply malice or gross negligence amounting to malice, may potentially lighten the task of a shipowner seeking to establish wrongful arrest. This re-interpretation of

the *Evangelismos* test would, to some extent, therefore, address the persistent concern of shipowners that it is very difficult to get damages for wrongful arrest. That having been said, the door to damages for wrongful arrest is not now wide open. V K Rajah JA emphasised that a finding of wrongful arrest "should never be lightly made": *The Vasiliy Golovnin* [2008] 4 SLR 994 at [138]. In particular, an incorrect interpretation or perception of events which leads a plaintiff to arrest a vessel may not point to a lack of good faith in the arrest.

2.36 Departing from the decision of the learned assistant registrar and Tan Lee Meng J, the court found that the two banks' arrest of the vessel was in fact wrongful. In arriving at this conclusion that the claim was so unwarrantably brought, or brought with so little foundation, the court was influenced by three considerations:

(a) the arrest in Singapore followed closely after the unsuccessful arrest of the sister vessel in Lome and the provision of full security for the lone surviving claim of damage to the cargo;

(b) the claim brought in Singapore was entirely without merits, substance or foundation; and

(c) there was inexcusable failure to disclose material facts at the *ex parte* application to arrest the vessel.

2.37 The court was particularly dismissive of the two banks' attempt to arrest the Vasiliy Golovnin in Singapore after its arrest of the Chelyabinsk was set aside in Lome and it failed to appeal against that decision or to apply for a stay of execution of the release of the Chelyabinsk. Against this backdrop of the failed Togolese proceedings, the arrest in Singapore was clearly an abuse of process, which was all the more so given that their claim was completely unsustainable. The final nail to the two banks' coffin, as it were, was the failure to disclose two material facts at the *ex parte* application without any credible explanation. In a word, there was no honest belief on the part of the two banks that they could validly arrest the vessel. Accordingly, they were condemned to damages for wrongful arrest.

The Duden [2008] 4 SLR 984

2.38 The facts of *The Duden* [2008] 4 SLR 984 fall within a narrow compass. It concerns a claim for damage to a cargo of solar salt shipped from Kandla Port, India to Qingdao, China. The bills of lading, of which the plaintiffs were holders, incorporated terms including the arbitration agreement in an unidentified charter.

2.39 The vessel was arrested in Singapore and security was duly provided. A stay application in favour of arbitration in London was then taken out and granted subject to the conditions that security be retained to answer any award in favour of arbitration and that the defendant shipowner waive any defence of time bar, which had accrued by virtue of Art III r 6 of the Hague Visby Rules. It was against the second condition to the stay that the appeal to Andrew Ang J was brought.

2.40 It is trite law that s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) imposes a mandatory stay but the court is vested with the discretion to attach "such terms or conditions as it may think fit" to the stay order. The importance of this decision lies in the guidance that it provides in the exercise of this discretion, both in relation to waiver of a time bar defence and generally.

2.41 The court reiterated the position set down in *Splosna Plovba International Shipping and Chartering d o o v Adria Orient Line Pte Ltd* [1998] SGHC 289 that the statutory discretion under s 6 to impose conditions is an unfettered one, but it must be exercised judiciously. As Andrew Ang J aptly observed (*The Duden* [2008] 4 SLR 984 at [14]):

> The corollary to a wide discretionary power is the great caution with which it should be exercised.

2.42 The waiver of an accrued time bar as a condition to a stay order, an issue which was also raised in *The Xanadu* [1998] 1 SLR 767, can only be justified in very special circumstances for it deprives the defendant of a substantive defence. It is usually the defendant's conduct (or that of parties acting in conduct of their defence) that supplies the justification for such a discretion to be exercised in favour of the plaintiff. The facts of *The Duden* [2008] 4 SLR 984 illustrate this.

2.43 The defendant shipowner's Protection and Indemnity Club took a month to respond to an initial letter of demand and more than a year to investigate it. During this period, no reference was made to any binding arbitration agreement, although the reverse side of the bill of lading incorporated the terms and conditions, including (expressly) the arbitration clause of a charterparty that was, however, not identified on the face of the bill of lading. Such a lack of identification is, unfortunately, a common occurrence in bulk shipments, which are frequently characterised by a chain of charterparties. In this instance, the chain in fact consisted of five charterparties.

2.44 It was long after the time bar had occurred that the shipowner took the position that the arbitration clause (in favour of London) in the second of the chain of charterparties was incorporated and as no notice of arbitration was given within a year from the date of delivery, the claim was time-barred. There was then a change in the defendant

shipowner's position: they took the view that a charterparty further down the chain was in fact the one whose terms, including a London arbitration clause, were incorporated. Neither charterparty was brought to the plaintiff's notice prior to the accrual of the time bar. Matters were further complicated by the existence of a fixture note which erroneously named the wrong parties.

2.45 Against this factual background, it is easy to see why the court's sympathy rested with the plaintiff. They could not reasonably be expected to meet with the time bar by giving notice of arbitration if the defendant themselves were confused as to which charterparty was the one which supplied that binding arbitration agreement. Such ambiguity *vis-à-vis* the arbitration agreement in fact amounted to a "compelling reason" (*The Duden* [2008] 4 SLR 984 at [22]) for requiring a waiver of the time bar.

2.46 That the defendant should raise the time bar defence in the arbitration was, in the view of Andrew Ang J, a reflection of their general approach to try to frustrate the claim and to avoid a proper adjudication of its merits by all ways and means (including an earlier and equally unmeritorious challenge on the renewal of the admiralty writ).

2.47 On the facts of the case, this decision is, with respect, clearly beyond reproach. However, the fact that the court observed that "very special circumstances" are called for before it imposes a waiver of the time bar defence should reinforce the message that this discretion, however wide, is not lightly exercised. A claimant who simply overlooks the need to commence arbitration in time (without, for instance, being handicapped by any ambiguity in the arbitration agreement) can expect much less, if any, judicial sympathy.

SHIPPING LAW

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2.48 Carriage of goods by sea spawned a couple of cases before the Singapore courts in 2008. The substance of the disputes was not the thrust of these cases. Both cases were decided on procedural or jurisdictional grounds, but they touched on the realities of the underlying transactions.

2.49 In *The Vasiliy Golovnin* [2008] 4 SLR 994, the defendant shipowners applied to set aside the arrest and claimed damages for wrongful arrest. In that case, there was a dispute between the head charterers, "STC", on one side and the sub-charterers, "Rustal", and their financing banks, BCG and Crédit Agricole ("the banks"), on the other, over the payment of hire for the vessel *Chelyabinsk*.

2.50 The defendant shipowners, "FESCO", received conflicting instructions from STC and the banks. STC instructed *Chelyabinsk* to sail for Lomé, Togo, while the banks instructed that the cargo be discharged at Douala, Cameroon, in exchange for a letter of indemnity. Two of the three pertinent bills of lading stated the port of discharge to be Lomé, Togo, and the third was "any African Port".

2.51 FESCO followed STC's express instructions and proceeded to Lomé to discharge the cargo. Unfortunately, on discharge, a portion of the cargo was damaged. FESCO's P&I Club provided security for the damage to the cargo. The banks, meanwhile, secured a court order in Lomé to arrest the vessel for the damage to the cargo and FESCO's refusal to effect discharge at Douala. After a hearing at which both parties were represented, FESCO succeeded in setting aside the arrest in Lomé.

2.52 The banks did not appeal this decision but instead applied to arrest the *Vasiliy Golovnin*, a sister vessel of the *Chelyabinsk*, in Singapore. The arrest was set aside by the Singapore High Court at first instance. On appeal, the Court of Appeal affirmed the setting aside and further held that the arrest was wrongful, leading to damages being awarded.

2.53 The grounds and tests for these reliefs are more appropriately covered in the Admiralty Law section. What is interesting for the shipping context is the finding of the Court of Appeal on the merits of the dispute.

2.54 The Court of Appeal held that Crédit Agricole did not even have a "good arguable case" because FESCO had no duty to obey Crédit Agricole, the holder of the bills of lading and named consignee, in deviating to Douala from Lomé, Togo. To do so would have made FESCO liable for breach of the head charterparty and breach of the contracts of carriage evidenced in the bills of lading. It would also have compromised existing insurance arrangements. Furthermore, unless the charterparty provided otherwise, the master was obliged to obey all instructions from the time charterer (STC), which was entitled to give employment instruction to the shipowners.

2.55 The other case was also decided on a procedural issue, namely, stay of action in favour of arbitration. In *The Duden* [2008] 4 SLR 984, the plaintiffs were the lawful holders and/or endorsees of the bill of lading dated 27 September 2004, under which 24,500 m t of Indian solar salt was shipped on board the vessel, *Duden*, on a voyage from Kandla Port, India to Qingdao, China. On discharge at Qingdao in early November 2004, the cargo was found damaged. Surveyors for the cargo interests found that the damage was caused by rust at the vessels' bulkheads and the bottom of the vessels' holds, and the cargo interests accordingly held the defendant shipowners responsible as contractual and actual carrier.

2.56 The plaintiffs commenced action against the defendant shipowners in Singapore in 2005 for their loss under the bill of lading, but only managed to serve the writ and arrest the vessel in November 2007. The vessel was released on the provision of security.

2.57 The shipowners applied to stay the Singapore action in favour of London arbitration, on the basis that the reverse of the bill of lading incorporated "all terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause." There was no identification of the charterparty on the front of the bill of lading. The plaintiffs were only told by the shipowners that there was a London arbitration clause in the relevant sub-charterparty after the one-year time limit for claims under the applicable Hague-Visby Rules had expired; even then, they were initially wrongly informed which sub-charterparty applied, as there was a string of charterparties.

2.58 At first instance, the assistant registrar granted a stay of court proceedings in favour of arbitration in London on two conditions, namely:

> (a) The security obtained by the plaintiffs from the arrest of the vessel be retained as security for the arbitration proceedings in London.
>
> (b) The defendants waive the defence of time bar (available under the Hague-Visby Rules) in the arbitration proceedings in London.

On appeal, Andrew Ang J dismissed the appeal and upheld the conditions. He found that s 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) allows the court to impose "such terms or conditions as it may think fit" when ordering a stay. In this case, justice demanded the imposition of the condition that the defendants waive the defence of time bar in the English arbitration proceeding. There was uncertainty and confusion surrounding the identity of the charterparty referred to in the bill of lading. It would have been unreasonable to

expect the plaintiffs to comply with an arbitration agreement found in a charterparty, if the shipowners themselves were not certain which charterparty was applicable. In fact, the plaintiffs were only informed of the identity of the relevant charterparty after the expiry of the one-year time limit for instituting proceedings (bearing in mind that the plaintiffs were not privy to *any* charterparty).

AVIATION LAW

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2.59 In 2008, no cases on aviation law were reported in the Singapore Law Reports.