2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 In last year's Review (see (2006) 7 SAL Ann Rev 39), the decision of the Honourable Justice Tan Lee Meng in *The Vasiliy Golovnin* [2006] SGHC 188 on the preliminary point of adducing evidence of foreign law was discussed. That decision was the precursor to his Honour's judgment delivered on 31 July 2007 and reported at [2007] 4 SLR 277, which dealt with the two primary issues of setting aside of the warrant of arrest and wrongful arrest, the former being the subject of the plaintiffs' appeal, and the latter, the defendant's cross-appeal.

The factual matrix

2.2 The facts in *The Vasiliy Golovnin* [2007] 4 SLR 277 are somewhat involved. The defendant, Far Eastern Shipping Company PLC ("FESCO"), 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"). The plaintiffs, Credit Agricole (Suisse) SA and Banque Cantonale De Geneve SA ("the Banks"), 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. Three of the four subject bills of lading named Lome in Togo as the port of discharge, the remaining named "any African port" as the port of discharge.

2.3 STC, on Rustal's instructions, requested FESCO 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 FESCO 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).

2.4 On 21 December 2005, one of the Banks instructed FESCO to discharge the cargo at Douala instead of Lome (the discharge port

named in the bills of lading). FESCO failed to comply with its instructions and proceeded instead to Lome, where various court orders were obtained by STC, Rustal and the 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 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. FESCO as the shipowner accordingly commenced and completed discharge in Lome in mid-February 2006.

2.5 The Banks then arrested the *Chelyabinsk* in Lome on or about 21 February 2006 in respect of the same claims as the subsequent action in Singapore. On 24 February 2006, FESCO successfully set aside the arrest (a point which is elaborated below) and 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 any appeal being filed in Lome.

2.6 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.

2.7 Both before the learned assistant registrar and the judge, the setting aside of their warrant of arrest and striking out of their writ rested on the following grounds:

(a) Material non-disclosure

(b) Issue estoppel

(c) Absence of a sustainable cause of action

Non-disclosure of material facts

2.8 Tan J agreed with the learned assistant registrar that the warrant of arrest should be set aside on the ground of non-disclosure. Tan J reiterated the law in Singapore on what constitutes non-disclosure of material facts sufficient to set aside a warrant of arrest of a vessel. As the Court of Appeal enunciated in *The Rainbow Spring* [2003] 3 SLR 362 at [37], in an application for the arrest of a vessel, the arresting party is obliged to make full and frank disclosure of all the material facts to the court because the arrest of a vessel is a drastic remedy given on an *ex parte* basis, and so the duty to make full and frank disclosure to the court is an important bulwark against any abuse of the arrest process. Tan J adopted the oft-cited test of materiality for non-disclosure as formulated in *The Damavand* [1993] 2 SLR 717 at 731 at [30].

2.9 FESCO had submitted that the Banks had not disclosed the following five material facts in its application for a warrant of arrest of the *Vasiliy Golovnin*:

(a) The *Chelyabinsk* had been released from arrest by the Lome court following an *inter partes* hearing.

Tan J agreed with the learned assistant registrar that the Banks' counsel should have specifically drawn to the court's attention at the *ex parte* application for a warrant of arrest that there had been a contested hearing in Lome between the Banks and FESCO which resulted in the arrest of the *Chelyabinsk* being set aside. The fact that the Lome court had already considered and dismissed the Banks' arguments as to whether the vessel could be arrested by them was a material fact to be taken into account by the Singapore judge when considering whether or not to grant the Banks' application for a warrant of arrest of the *Chelyabink*'s sister vessel, the *Vasiliy Golovnin* in Singapore.

Tan J rejected the Banks' assertion that the fact that there was a contested hearing in Lome might be gleaned from the *exhibits* in the affidavit in support of the application for arrest. Citing the English decisions of *Intergraph Corp v Solid Systems Cad Services Ltd* [1993] 20 FSR 617 at 625 and *National Bank of Sharjah v Dellborg* [1993] 2 Bank LR 109 at 112, his Honour agreed with the learned assistant registrar's observation that the judge to whom the application for arrest was made might not have read the entire lengthy affidavit and all its exhibits (around 400 pages). The applicants, in this case the Banks, came under a duty to specifically point out that there had been a contested hearing in Lome; otherwise, the duty of disclosure was not discharged. This aspect of Tan J's decision breaks new ground. The previous decisions on material non-disclosure in the *ex parte* application for a warrant of arrest tended to focus on facts that were omitted from the affidavit filed in support of the warrant of arrest. This aspect of the decision goes one step further: it behoves the applicant to take the court through the material facts in the exhibits to the affidavit so that the court can properly and fully appraise the facts relevant to the exercise of its discretion. This, with respect, is undoubtedly correct. To file an extremely lengthy affidavit (such as the one filed in this case) and yet not highlight to the court a potentially relevant fact, and to expect the court to discern that fact for itself is clearly a practice the court has to set its face against.

(b) Banque Cantonale had offered a letter of indemnity to FESCO on 21 December 2005 in consideration of the cargo being discharged at Douala instead of Lome.

Tan J further agreed with the learned assistant registrar that the letter of indemnity was a material fact to be taken into account in deciding whether or not to order the arrest of the *Vasiliy Golovnin*. This was because the letter of indemnity went towards establishing whether an agreement had been reached between the parties to discharge the cargo at Douala instead of Lome and whether FESCO was in breach of contract for discharging the cargo in Lome. This undisclosed fact fell, with respect, on the borderline. At first blush, it went towards the merits of the claim, rather than the jurisdictional requirements of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed). An overly strict duty of disclosure of facts pertaining to the merits of a case can impose on an applicant an excessively onerous duty of disclosure, particularly since the court's discretion whether to issue a warrant of arrest is exercised (usually but not exclusively) by determining whether the jurisdictional requirements of the High Court (Admiralty Jurisdiction) Act are satisfied. That having been said, it is submitted that a fact pertaining to merit can at times be relevant and therefore be the subject of disclosure. For instance, if a claim is time-barred, that could impact on the court's decision as to whether the remedy of arrest should even be granted since the claim would ultimately be struck out. Facts pertaining to the merits which would completely negate (or "directly impugn" to use the language of the learned assistant registrar at the hearing below) the claim might have to be disclosed for the same reason and it appears that this underpins the court's reasoning in concluding that this particular fact and the one discussed below were material and had to be disclosed. A further instance where disclosure pertaining to merits may be warranted is if such facts also go towards showing that any of the limbs of s 3(1) relied upon may not in fact be satisfied. For further discussion on this point, see Toh Kian Sing, "Striking the Right Balance in the Exercise of Admiralty Jurisdiction in Singapore" in *Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood gen ed) at pp 806, 814–818.

(c) The purpose of switching the bills of lading in question was, among other things, to change the port of discharge from Lome to Douala.

Tan J disagreed with the learned assistant registrar that this was not a material fact that need not be disclosed. Tan J was of the view that this was an important fact because the purpose for the switch was to change the port of discharge from Lome to

Douala. Without the switch, FESCO had correctly performed the terms of the contract of carriage by complying with what was recorded in the bills of lading, by carrying the cargo to Lome, which was stated in the bills of lading as the port of discharge. The logical corollary is that if that fact were disclosed, the merits of the claim based on breach of contract for failing to comply with the order of the bill of lading holder would be shown to be completely untenable.

(d) Lome was the contractual port of discharge under three of the four bills of lading. The remaining bill of lading provided for the discharge of the cargo in respect of which it was issued at "any African port".

(e) After failing to persuade FESCO to discharge the cargo at Douala, Banque Cantonale had sought FESCO's confirmation that the cargo would be discharged in Lome according to its instructions.

2.10 Tan J agreed with the learned assistant registrar that FESCO's assertion that these two facts (paras 2.9(d) and 2.9(e) above) were material but not disclosed were unsubstantiated. The fact that Lome was the contractual port of discharge was a material fact which had been drawn to the attention of the judge in the Banks' application for arrest. The other fact was not a material non-disclosure as it did not unequivocally point to Banque Cantonale desiring to take delivery in Lome but could just as well point to them making the best of the situation in the circumstances.

Issue estoppel

2.11 It is well established that a foreign judgment can give rise to an issue estoppel so as to prevent a party to that foreign action from vexing another party to that action by seeking to reopen an issue in a subsequent action already resolved by the foreign court: see *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241. It is also an abuse of process to ask a court to rule on an issue that has been resolved by a foreign court when the parties to both the actions are the same as in the foreign proceedings.

2.12 Tan J observed that the arrest in Singapore of a vessel which was previously released from arrest in another jurisdiction by a court order is, without more, not an abuse of process. However, his Honour held (at 286) that it might well be an abuse of process "if a plaintiff were to seek to arrest a vessel in respect of the same claim in one jurisdiction after another", citing *The Tjaskemolen* [1997] 2 Lloyd's Rep 476 at 481. Therefore, his Honour concluded that there will be an abuse of process

if a vessel is arrested on grounds in respect of which there is issue estoppel.

2.13 Tan J stated that there were three requirements to be satisfied for issue estoppel to arise with respect to the arrest of the *Vasiliy Golovnin* in Singapore and found them to have been satisfied on the facts:

(a) The Lome court was one of competent jurisdiction and its judgment was final and conclusive on the merits of the case.

It was not disputed by the parties that the Lome court had competent jurisdiction, since the Banks themselves had invoked the Lome court's jurisdiction to seek relief. A decision on the merits of the case is one which "establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned": *The Sennar (No 2)* [1985] 1 WLR 490 at 499. Tan J held that the Lome court did in fact consider the merits of the case before ruling that the vessel had to be released. For a judgment to be final and conclusive, it had to be one that could not be reopened by the court that pronounced it. As the Lome Release Order could only have been overturned by the Lome Court of Appeal, Tan J held that it was, without more, final and conclusive.

Therefore, the decision of the Lome court was one capable of giving rise to an issue estoppel.

(b) The parties in the foreign action must be the same as those in the present action.

It is self-evident that the Banks and FESCO were parties to both the Lome proceedings regarding the arrest of the *Chelyabinsk* and the present proceedings regarding the arrest of the chartered vessel's sister ship, the *Vasiliy Golovnin*.

(c) The issues before the court were identical to those considered by the Lome court.

The Banks had tried to argue that the issues in both courts were not identical because the Singapore court was only required to determine whether or not it is entitled to and ought to exercise its admiralty jurisdiction over the vessel intended to be arrested and that the merits of arrest were considered against the procedural and substantive requirements of each jurisdiction. Tan J held that this is an unmeritorious argument for if it were correct, no issue estoppel could even arise and the arresting party could resurrect all the arguments already rejected by an earlier foreign court.

2.14 This is yet another aspect of the decision which is ground breaking: issue estoppel being used as a basis for setting aside an arrest on the ground that it is an abuse of process for an arrest to be allowed when it has been set aside previously in another jurisdiction in respect of the same claim. It is rare for issue estoppel to be raised at an interlocutory or jurisdictional stage of an action but in principle, there is no reason why that cannot be so.

No sustainable cause of action

2.15 The Banks' arrest of the *Vasiliy Golovnin* was based on ss 3(1)(*g*) and 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed). The Banks' claim had two aspects to it:

> (a) The non-delivery of the cargo that was carried on board the *Chelyabinsk* to them, who were the lawful holders of the original (not switched) bills of lading and the named consignees on the bills of lading; and
>
> (b) The damage suffered by the cargo whilst it was in the care and custody of FESCO.

2.16 Tan J reiterated the principle that the court would not exercise its discretion to strike out a writ or pleading under O 18 r 19 of the Rules of Court (Cap 322, R 5) or under its inherent jurisdiction unless the plaintiffs' case is wholly and clearly unarguable. He then went on to examine the two aspects on which the Banks' claim was based.

The non-delivery of the cargo to the Banks

2.17 The Banks were the endorsees of the original bills of lading. Tan J reiterated the well-established principle that as against an endorsee, the terms of a bill of lading were, without more, the only terms that govern the endorsee's contract of carriage with the carrier. Therefore, antecedent arrangements between the shipper and the carrier do not bind an endorsee of a bill of lading.

2.18 Under the terms of the bills of lading, FESCO's duty was to deliver goods at the port of discharge named in a bill of lading. Three of the four bills of lading named Lome as the port of discharge while the remaining bill of lading provided for the discharge of the cargo in respect of which it was issued at "any African port". Tan J held that in so far as the three bills of lading that named Lome as the port of discharge were concerned, FESCO was correct in carrying the cargo to Lome as it was performing the terms of the said bills of lading.

2.19 As for the cargo covered by the fourth bill of lading, it was not disputed by the parties that the said cargo was stowed under the other cargo, which was to be discharged at Lome. As such, it would be convenient that the cargo due for Lome be discharged first. It was also not disputed that when the *Chelyabinsk* reached Lome, she was ordered by the Togolese court to discharge all her cargo at that port. Tan J held that in view of this, FESCO had no option but to discharge all her cargo, including that shipped under the African port bill of lading, at Lome. A refusal by FESCO to discharge all the cargo at Lome would have amounted to a contempt of the Togolese court. The discharge of the cargo covered by the African port bill of lading did not involve a breach of contract by FESCO.

2.20 The Banks tried to argue that had FESCO avoided Lome altogether, it would not have had to contend with the Lome court order to discharge all its cargo at Lome. They alleged that FESCO knew that STC would seize the cargo if the *Chelyabinsk* entered Lome and that FESCO had been expressly warned by the Banks' solicitors that the cargo would be arrested by STC. The Banks further alleged that FESCO knew, or must have known, that under the terms of the "freight pre-paid" bills of lading between FESCO and the Banks, STC had no right whatsoever to arrest or exercise a lien over the cargo at Lome and that exercise of such a lien would be clearly wrongful. Therefore, in view of this, they argued that FESCO had a duty to deviate from Lome and proceed to another port to discharge the cargo.

2.21 Tan J rejected the Banks' argument that, notwithstanding the terms of the bills of lading, FESCO should have avoided Lome altogether. He further held that FESCO had not breached the contract by discharging the entire cargo of rice at Lome. Tan J highlighted that even if a dispute arose between the lawful holders of bills of lading and third parties over the cargo, the carrier had to perform its obligations under the bill of lading, and leave it to the disputing parties to seek appropriate relief from the courts at the place of discharge. Otherwise, he warned, contracts of carriage by sea could not be performed properly if a bill of lading holder was entitled to order the carrier to divert to another port for his own purposes. This aspect of the decision, with respect, accords with good commercial and legal sense. A carrier should not be put in an invidious position to potentially having to follow inconsistent instructions from the bill of lading holder and his own charterer.

2.22 Tan J further rejected the Banks' argument (made without any supporting authority) that FESCO should have obeyed the instructions of Rustal as the last subcharterers in the chain instead of STC when the bills of lading were in the hands of a transferee. Tan J also dismissed the

Banks' argument that there was a binding agreement to switch the bills of lading.

2.23 It is not entirely clear if this aspect of the case is based on the point that the claim was so hopelessly misconceived that it should be struck out in *limine*. There is clearly some support for this reading of the case: after all, the judge referred to the striking out provision of O 18 r 19 and the Singapore *locus classicus* of striking out authorities, *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] SLR 798. Yet it must be remembered that the defendant's submissions were premised on the argument that ss 3(1)(*g*) and 3(1)(*h*) were not satisfied (which provisions the court reproduced at p 290 of the judgment). This facet of the decision appears to have conflated a jurisdictional protest and an (almost pre-emptive) challenge to the merits of the claim.

The damage suffered by the cargo

2.24 In light of the above, Tan J therefore held that all claims against FESCO, save for the claim for damage to the cargo, should be struck out. On the issue of the damage to the cargo, Tan J repeated that the Lome court had found that sufficient security had been furnished for this claim. Therefore, he held that although the Banks' claim for damage to the cargo discharged at Lome could be maintained, it could not be a ground for arresting the *Vasiliy Golovnin*, since that claim had already been secured in the Lome proceedings. Tan J further observed that although this claim could not be the basis for an *in rem* action against FESCO, it could have been pursued as a claim *in personam*. However, this part of the Banks' claim is unlikely to be heard in Singapore as the parties have agreed to resolve their differences by means of arbitration in London.

Damages for wrongful arrest

2.25 In regard to FESCO's cross-appeal on wrongful arrest, it is trite law that, for damages for wrongful arrest to be awarded, the claimant must establish that there was *mala fides* or *crassa negligentia* amounting to malice on the part of the arresting party: see *The Evangelismos* (1858) 12 Moo PC 352, *The Kiku Pacific* [1999] 2 SLR 595 at [30] and *The Inai Selasih* at [2006] 2 SLR 181 at [28].

2.26 Tan J (at [74]) adopted the test for awarding damages for wrongful arrest as enunciated in *The Evangelismos* (1858) 12 Moo PC 352 at 359 and approved by the Singapore Court of Appeal in *The Kiku Pacific* [1999] 2 SLR 595:

> The real question in this case, following the principles laid down with regard to actions of this description, 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?

2.27 Tan J agreed with the learned assistant registrar's finding that the Banks had honestly believed that they had valid claims against FESCO that had not been protected in Lome. In *The Inai Selasih* [2006] 2 SLR 181, the Singapore Court of Appeal noted that where an applicant for arrest had been wrong in its interpretation or perception of arrangements, it does not follow that there is malice. Tan J also agreed with the learned assistant registrar's decision that the Banks' non-disclosure of material facts in the present case was neither deliberate nor calculated at misleading or distorting the truth. The rejection of the wrongful arrest claim echoes the result reached in recent Singapore cases on the point: see *The Kiku Pacific* [1999] 2 SLR 595 and *The Rainbow Spring* [2003] 2 SLR 117.

2.28 In short, Tan J upheld both aspects of the learned assistant registrar's decision in setting aside the arrest and in refusing to find that there was wrongful arrest. One wonders if this decision (like a couple of others before it) evinces a nascent trend in which the Singapore courts are attempting to balance the competing concerns of arresting parties and shipowners by imposing on the former a strict (and a seemingly increasingly stricter) duty of disclosure on pain that the arrest may be set aside if such a duty is not complied with but not penalising him with damages for wrongful arrest unless a very clear case of malice or *crassa negligentia* is demonstrated. The decision of Tan J was appealed to the Court of Appeal which heard submissions on 19 February 2008 and reserved judgment. The next issue of the review will undoubtedly carry a commentary on the Court of Appeal's decision.

SHIPPING LAW

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Introduction

2.29 In *PT Soonlee Metalindo Perkasa v Synergy Shipping Pte Ltd* [2007] 4 SLR 51, the High Court examined several issues commonly arising in the carriage of goods by sea, namely, seaworthiness; the incorporation of bill of lading terms into a contract of carriage and

clauses exempting or limiting liability. It serves as a cautionary tale to carriers who issue non-negotiable bills of lading to their shippers, while keeping the originals to themselves. Terms appearing on the reverse side of the originals which are not on the non-negotiable bills may not apply.

2.30 The Court of Appeal rendered its decision on interpretation of a Vegoilvoy Tanker Voyage Charterparty in *The Asia Star* [2007] SGCA 17. Both the High Court and the Court of Appeal decisions have been discussed in the previous *Annual Review* ((2006) 7 SAL Ann Rev 39 at 45).

Seaworthiness and defences under bill of lading terms

2.31 In *PT Soonlee Metalindo Perkasa v Synergy Shipping Pte Ltd*, the plaintiffs were the owner of 300 bundles of steel bars which were lost overboard during a voyage from Singapore to Batam. It was alleged that the loss was caused by the unseaworthiness of the carrying barge.

2.32 The defendants were the contracting carrier. The goods were carried on deck on the barge "Limin XIX" owned by the third party, Freighter Services, towed by the tug "Fajar Putra". The plaintiffs sued the defendants for loss of its goods and the defendants claimed an indemnity against the owner of the barge, Freighter Services.

2.33 The contract of carriage was initiated by a quotation issued by the defendants and signed by the plaintiffs' agent, term 3 of which subjected the carriage to the terms and conditions stipulated in the defendants' bill of lading. This bill of lading was endorsed on the front and back with the clause "SHIPPED ON DECK AT SHIPPER'S RISK". On the front and back was also cl 64(c) which "limits liability to £100 British Sterling per package." On the back of the bill of lading was cl 9(c) which expressly excluded "liability for any loss, damage or expense connected with deck cargo howsoever caused and whether due to negligence, unseaworthiness or otherwise." However, the plaintiffs never received or saw an original bill of lading. As was its practice, the defendants kept the original and sent a non-negotiable copy to the plaintiffs' agent. The back of the non-negotiable copy was blank, so cl 9(c) was not seen by the plaintiffs.

Seaworthiness

2.34 Judith Prakash J held that for a vessel to be seaworthy, she must be able to meet the expected conditions of the voyage. If its condition was such that something was bound to give way during the voyage, then the vessel had to be considered unseaworthy. A relevant factor in assessing seaworthiness was whether or not the vessel was going to be

carrying cargo and if she was, whether she was fit to carry such cargo safely having regard to the circumstances the vessel would probably meet during the voyage. The learned judge found that the barge was in an unseaworthy condition when it left Singapore. Its structure was generally in a very poor condition with many parts seriously corroded. The condition of the barge when it left Singapore was so bad that something did give way during the voyage, thus allowing water to enter the vessel's tanks on the way to Batam.

2.35 Although the exact cause of the loss of cargo could not be determined, Prakash J was prepared to hold that on the balance of probabilities, the loss was due to the unseaworthiness of the barge.

2.36 As the duty of seaworthiness arises by reason of the contract of affreightment and not by reason of ownership of the vessel, the defendants were found liable for failing to provide a seaworthy barge for the voyage.

2.37 Consequentially, Freighter Services was in breach of its contractual obligation to the defendants to provide a seaworthy barge. There was neither acquiescence nor waiver by the defendants in relation to the barge's poor condition. The defendants' employees were on the barge not for the purpose of inspecting its physical condition, but for loading operations. Moreover, they were not sufficiently qualified or experienced to determine if a barge's condition was so bad that it might not be seaworthy.

Incorporation of bill of lading terms into contract of carriage

2.38 Judith Prakash J held that although there was no contract of carriage when the quotation was signed, the terms of the quotation were intended to be part of the terms of any contract of carriage that might subsequently be concluded. Once the quotation was accepted on the plaintiffs' behalf, it had contractual force. The plaintiffs must be taken as having accepted term 3 of the quotation which incorporated the bill of lading terms. Accordingly, the bill of lading was incorporated into the contract of carriage through the quotation. Prakash J, however, qualified this by deciding that only the terms on the face of the bill of lading were incorporated as the plaintiffs never had the opportunity to see the clauses on the reverse side.

Construction of the phrase "at shipper's risk"

2.39 The learned judge held that the clause "Shipped on Deck at Shipper's Risk" was not sufficient to exclude liability for unseaworthiness, following the Court of Appeal decision in *Sunlight*

Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd [2004] 1 SLR 171 that this phrase referred to risks other than that of breach of the shipowner's fundamental obligation to provide a seaworthy ship.

The limitation of liability clause

2.40 The plaintiffs argued that cl 64(c) which "limits liability to £100 British Sterling per package" on the front and back of the bill of lading was neither clear nor wide enough to cover the defendant's breach. Prakash J disagreed. The courts did not regard limitation clauses with the same hostility as they did clauses of exclusion. She noted that although limitation clauses must be read *contra proferentum*, there was no ambiguity in this case. This limitation clause was a declaration by the carrier as to the extent of the responsibility it was willing to bear in the light of the agreed freight rate and the agreed voyage. "Liability" was not qualified in any way and was wide enough to limit any type of liability regardless of how it arose, as long as it was in relation to the carriage. The only exception to this would be if the damage had been deliberately caused. The defendants were, therefore, entitled to limit their liability accordingly.

Express exclusion of liability for unseaworthiness

2.41 Clause 9(c) expressly excluded "liability for any loss, damage or expense connected with deck cargo howsoever caused and whether due to negligence, unseaworthiness or otherwise." However, it was found only on the back of the bill of lading. As the learned judge found that the terms on the reverse of the bill of lading, which were never given to the plaintiffs, were not incorporated into the contract of carriage, cl 9(c) was of no avail to the defendants.

Cargoworthiness under a Vegoilvoy charterparty

2.42 *The Asia Star* [2007] SGCA 17 involved a dispute arising out of a Vegoilvoy charterparty. As this case was discussed in the 2006 *Annual Review* (7 SAL Ann Rev 39 at 45–46), the Court of Appeal decision which was rendered in 2007 will be briefly summarised. The dispute arose out of a substantial failure of epoxy coatings in the tanks of a vessel, which had been fixed on Vegoilvoy charterparty terms. The Court of Appeal held that the contractual option in the charterparty giving the shipowner the right to cancel if repairs to defective tanks could not be repaired within 24 hours at reasonable expense did not apply where there was breach of an express obligation to provide epoxy-coated tanks.

AVIATION LAW

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2.43 There were no cases on aviation law reported in the *Singapore Law Reports* in 2007.