2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 The year 2005, like 2004, was a rather lean year as far as admiralty decisions go. Two decisions concerning the setting aside of arrests raised, *inter alia*, the question of the duty of disclosure of material facts. The third involved the limitation of liability of shipowners and demonstrated, once again (see *The Sunrise Crane* [2004] 4 SLR 715), how difficult it can be for a shipowner to satisfy the requirement of absence of fault and privity.

Requirements of arrest under section 4(4) of the High Court (Admiralty Jurisdiction) Act: Duty of disclosure of material facts

2.2 The facts of *The Inai Selasih* [2005] 4 SLR 1 (HC), [2006] 2 SLR 181 (CA) were somewhat unusual. The case involved a joint-venture agreement evidenced by a memorandum of understanding ("MOU"), the object of which was to secure dredging and land reclamation works in Malaysia. The MOU envisaged the entering into of a bareboat charterparty for the vessel, *Inai Seroja*, which was, however, only for appearances' sake. The defendant, IK, was named the charterer. This was the external arrangement provided for under the MOU to satisfy certain requirements necessary for securing public dredging contracts. The vessel arrested, the *Inai Selasih*, was beneficially owned by the defendant. The arrest was for the obtaining of security for arbitration proceedings that were ongoing in Switzerland.

2.3 From the evidence adduced, the plaintiff was in possession and control of the vessel, *Inai Seroja*, at all material times and had employed the master and key members of the crew. Belinda Ang Saw Ean J held that in these circumstances, the plaintiff failed to show on a balance of probabilities that the defendant, IK, was the bareboat charterer of the vessel, *Inai Seroja*, for the purpose of s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HCA"). The charterparty was a sham which did not give rise to any legal rights and obligations and did not confer on IK the status of a charterer.

2.4 The court, however, rejected the defendant's alternative argument that even if a charterparty existed, it had been terminated by the time the cause of action arose. It also rejected the argument that the claim did not come within the purview of s 3(1)(*h*) of the HCA. The learned judge held that a joint venture involving the use of an identifiable ship was, in a proper case, capable of falling within the scope of s 3(1)(*h*) of the HCA. However, not any involvement would suffice. There must be a reasonably direct connection between the MOU and the use and hire of the *Inai Seroja*. An important indicium in ascertaining the presence of this connection was whether the use or hire of the ship was an incidental or minor part of the agreement. If it was, then it was likely that the claim was probably not within the provision. It was evident from the provisions of the MOU that there was a close connection between the MOU and the use of the *Inai Seroja*. Further, pursuant to the MOU, the parties had also worked on various projects in Malaysia in which the *Inai Seroja* was the dredger used. Therefore, the conditions of s 3(1)(*h*) of the HCA were satisfied.

2.5 As an alternative ground for setting aside the arrest, her Honour also ruled (at [26]) that because the status of IK as a charterer was "a very necessary ingredient of [the] arrest", the external and internal arrangements between the parties which had a bearing on the plaintiff's assertion that IK was the charterer of the *Inai Seroja* were material facts which should have been disclosed to the duty registrar hearing the application for the warrant of arrest. That would have enabled the registrar to determine if a warrant of arrest should be issued at all, because if IK was not a charterer, one of the requirements of s 4(4) would not have been satisfied. The court further observed that simply exhibiting the MOU (from which the internal arrangements between the parties may conceivably have been inferred) was not sufficient compliance with the duty to disclose material facts. (This finding of non-disclosure was reversed by the Court of Appeal having regards to passages in the text of the affidavit.)

2.6 The court also awarded damages in favour of the shipowner for wrongful arrest on the ground that in relying on a document (*ie*, the MOU) which it knew to be a sham, the plaintiff was acting *mala fide*. A sham document was used to mislead the court into issuing the warrant of arrest. This finding was also reversed by the Court of Appeal.

2.7 Notwithstanding the Court of Appeal's ruling on this point, *The Inai Selasih* provides a stern reminder to arresting parties of the duty to make full and frank disclosure. That duty goes beyond exhibiting the relevant documents – it extends to drawing the court's attention to any fact which

may be relevant to the exercise of its discretion whether or not to grant a warrant of arrest. The fact that the arrest was set aside on this alternative ground is itself sufficient as well. It shows that even if the requirements of the HCA were satisfied, the failure to observe this duty may in appropriate circumstances justify the setting aside of the warrant. It is also interesting to note that this case is the first reported Singapore decision where the ground for setting aside the arrest (alternative to that of material non-disclosure) was that the defendant was not a charterer of the offending vessel at the time the cause of action arose for the purpose of s 4(4) of the HCA.

2.8 In the recent decision of *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR 358 ("*Treasure Valley*"), the only ground relied upon for setting aside an arrest of the vessel *Seeker I* was non-disclosure of material facts. The arrest was made by her owner, the plaintiff, to regain possession of the vessel. The defendant complained that the plaintiff had deliberately portrayed, in the affidavit filed in support of the application for the warrant of arrest, the picture that the vessel was under the command of an errant master, at one time even sailing without any master and was at risk of being captured by Indonesian authorities. The undisclosed fact was that the vessel was only provisionally, rather than permanently, registered in the name of the plaintiff, who arrested the vessel for possession. Several affidavits later, the defendant sought to raise doubts as to the plaintiff's right to arrest the vessel for possession. Belinda Ang Saw Ean J dismissed the application as the defendant had, prior to the hearing of the application, taken various steps which were consistent with a valid arrest. Such steps included the concurrence with an order for the sale of the vessel. Another step taken (prior to the defendant's application being filed) was the obtaining of a court order that payment of the crew's wages was to be treated as sheriff's expenses. Once the order for sale was carried out, the arrest itself (and the application for setting aside the arrest) became moot. It became too late to impugn the arrest.

2.9 The decision illustrates to some extent the difficulties created by the escalating costs of arrest if a jurisdictional dispute is long-drawn and security for release of the ship is not provided in the meantime. With the result in *Treasure Valley*, the party challenging the arrest, who was, however, prepared to allow the judicial sale to proceed in the face of mounting costs of arrest, would have to act with great care to ensure that his conduct was not considered as an approbation of the arrest. One possible way to do this may be to make it clear to the court that the judicial sale does not in any way prejudice its challenge as regards the arrest and that if the arrest is set aside, the proceeds of sale should be paid over to the owners.

2.10 The point about non-disclosure was therefore left undecided in *Treasure Valley*. Although the decision turned on the principle of approbation and reprobation, the court nevertheless also took the opportunity to lay down a few principles on the duty to make full and frank disclosure. First, it reiterated the principle laid down in *The Rainbow Spring* [2003] 3 SLR 362 that even if an *in rem* writ is not being challenged based on the jurisdictional requirements of the HCA, a warrant of arrest may be set aside for material non-disclosure. The court further observed that non-disclosure may be innocent, negligent or deliberate; if the latter, the further element of abuse of process also exists and a court is likely to discharge the warrant of arrest. A three-step process to deal with any non-disclosure argument was also enunciated: first, the court has to ask itself if there was any non-disclosure, then whether the non-disclosure was material and if material, whether the court's discretion should be exercised for or against setting aside the order made *ex parte*. In some instances, the undisclosed facts may be so intertwined with the merits of the case that the court may exercise its discretion to order a trial, rather than set aside the arrest. That, the court concluded, would have been the order it would have made were the principle of approbation and reprobation inapplicable.

Limitation of liability

2.11 *Antara Koh Pte Ltd v Eng Tou Offshore Pte Ltd* [2005] 4 SLR 521 is a unique decision in that it is the first reported Singapore decision on a limitation action and probably the last to feature the International Convention relating to the Limitation of Liability of Owners of Seagoing Ships of 1957 ("the 1957 Convention"). The 1957 Convention was enshrined in s 136 of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) before the amendments in 2004. As a result of the Merchant Shipping (Amendment) Act (Act 56 of 2004), the regime of the 1957 Convention has been replaced by the Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention") (see s 136 and the Schedule to the Merchant Shipping Act (Cap 179, 1996 Rev Ed)). The amendments and hence, the 1976 Convention apply to any casualty which occurs on or after 1 May 2005.

2.12 The material facts of the case are these. The tug, *Tambat*, which was towing the crane barge, *Antara Koh B8*, sank, with the loss of seven lives, when the crane mounted on *Antara Koh B8* toppled over on 15 February 2003. Default judgment was obtained against the barge owners (with the result that they were solely to be blamed for the casualty) but assessment of damages was stayed pending the limitation action brought by the barge owners. Despite pleading a number of causes for the occurrence of the

casualty, at the close of submissions, the barge owners confined themselves to merely one, that of the negligent operation of the crane by the crane operator. The tow owner argued that the casualty was caused by the failure of the crane's boom due to inadequate welding of the boom connectors. The court accepted the latter explanation and so held that the negligent act resulting in the loss of the *Tambat* was on the part of the plaintiff, its agent or servants using the crane with inadequate welding. The barge owners thus failed to establish their pleaded cause of the casualty. The barge owners did not plead the cause as found by the court as the occurrence specified in s 136(1)(*d*) of the Merchant Shipping Act. That, if it had been pleaded, would have come within the scope of the section.

2.13 The court held that this ground alone was sufficient to dispose of the limitation action. In the light of this aspect of the decision, a party seeking a limitation decree would be encouraged to plead as many causes or combination of causes as possible and to lead evidence on these causes.

2.14 In any event, the court also found that the barge owners did not establish that the casualty had occurred without their actual fault or privity. Two useful observations were made by the court in relation to the criterion of "actual fault or privity" as applied to a corporate shipowner. To begin with, the identification of particular individuals within a corporate structure as the directing mind of that company is a question of mixed fact and law. The actual fault in the case of a corporate shipowner need not necessarily be confined to the conduct of the person who is the very ego and centre of the personality of the corporation, although on the facts, such a person did exist.

2.15 Having identified the "boss" of the company, *ie*, its very ego and centre of personality, as one Koh, the court found that there were no standing orders for inspection and maintenance of the crane save for what was provided in the operator's manual. In any event, there was no system put in place by Koh to ensure that the maintenance instructions in the operator's manual were observed. The management, personified by Koh, did not check to ensure compliance with such maintenance instructions nor put in place any supervisory measures. The plant manager, who was left to do his job, admitted that there was a causal link between the failure to observe the instructions in the manual and the failure of the crane.

2.16 The court observed at [42] that Koh, identified as the company's alter ego, must go further than merely appointing a competent person to do the job: he must ensure that after the appointment, steps were taken to comply with his directions:

> Reliance on the appointee's self-discipline … is hardly enough. It is incumbent upon senior management to implement a system of checks and balances.

2.17 Koh was therefore at fault in failing to institute a proper system to ensure that the duties of the plant manager were performed. Such omission led to the failure to detect the defect in the boom, which led to the unfortunate casualty. The requirement of proving absence of actual fault or privity was therefore not satisfied. The limitation action failed on this other ground as well.

2.18 The decision is another illustration of the "illusory" protection (*per* Judith Prakash J in *The Sunrise Crane* (*supra* para 2.1) accorded to shipowners under the 1957 Convention. In view of the two Singapore decisions in quick succession, the move towards the 1976 Convention could not have been better timed. Shipowners can at least seek solace in the fact that their right to limit liability is virtually unbreakable under the 1976 Convention, even if the latter imposes higher limits of liability.

SHIPPING LAW

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Introduction

2.19 Singapore jurisprudence on shipping law continued to be developed at the highest level, before the Court of Appeal during the year under review. It was evident that some problematic practices continued to haunt carriers, such as delivery of goods without production of bills of lading and the use of switched bills of lading. In *Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 3)* [2005] 2 SLR 144, a sub-charterer had furnished two letters of indemnity to the disponent owner for release of goods carried on board a vessel without the original bills of lading. When the vessel was arrested by disgruntled bills of lading holders, the sub-charterer found itself at the wrong end of an injunction compelling it to take steps to procure the release of the vessel. In *UCO Bank v Golden Shore Transportation Pte Ltd* [2006] 1 SLR 1, the shipowner had issued switched bills of lading without the knowledge of the consignee bank who held the original bills of lading. When the bank sued on the original bills of lading, the shipowner unsuccessfully

argued before the Court of Appeal that the bank did not have title to sue. The Court of Appeal clarified the criteria of a "lawful holder" under the Bills of Lading Act (Cap 384, 1994 Rev Ed) ("BLA"). In *AP Moller-Maersk A/S v Special Entertainment Events, Inc* [2005] 1 SLR 603, some Star Trek exhibits ventured from Europe but failed to boldly go beyond a godown in Singapore. The Court of Appeal considered appropriate interim orders as the shipowner was stuck with accumulating Port of Singapore Authority ("PSA") storage charges while various cargo interests fought over the right to the cargo.

Letter of indemnity for delivery without production of bills of lading

2.20 In *Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 3)* (*supra* para 2.19), Projector voyage chartered the vessel *Dynamic Express* from Marubeni for the carriage of gas oil from Taiwan to South Korea. Marubeni were themselves time charterers from the head owners. On arrival at South Korea, Projector obtained delivery of the cargo without the production of four bills of lading by providing Marubeni with two letters of indemnity (LOIs) as consideration.

2.21 After the cargo had been discharged, Marubeni was informed of a claim from holders of the bills of lading and a threatened arrest of the vessel. Through solicitors, Marubeni asked Projector to produce all the original bills of lading and take all steps to prevent an arrest of the vessel, including preparing funds demanded by the Korean banks.

2.22 The vessel was arrested by the holders of the bills of lading. Marubeni applied for, and obtained, an *ex parte* interim mandatory injunction requiring Projector to pay certain sums into the South Korean court to procure the release of the vessel. The payment was made and the vessel was released. The Singapore High Court ordered that the cash deposit in the South Korean court be retained to abide by the outcome of proceedings in Korea. Projector appealed, arguing that the injunction had been improperly obtained and that it had not been given reasonable time to furnish the security. Projector argued that the court below should have undertaken a proper balancing exercise to determine whether damages would have been adequate instead of issuing the injunction.

2.23 The appeal was dismissed by the Court of Appeal. Under the LOIs, Projector had a clear duty to take all reasonable steps to prevent the arrest of the vessel, or to take all necessary steps to obtain its release if the vessel was arrested. This obligation was not dependent on whether the claim or arrest was justified.

2.24 The court held that the principle which governs the grant of interlocutory relief, the interlocutory mandatory injunction in this case, was to consider which course appeared to carry the lower risk of injustice. In this case, the obligation under the LOIs meant that the issue of an injunction was, on the face of it, in order. Also, the arrest and detention of the vessel would cause loss and damage to all who had dealings with the vessel, including owners of cargoes to be loaded at subsequent ports, and thus there was a lower risk of injustice if the injunction was granted.

2.25 The relief was interlocutory in nature. The actual propriety in the grant of the injunction and whether there should be an inquiry as to damages were deferred to the trial of the action, when the court could more closely scrutinise the factual issues. However, the dispute was eventually settled by the parties before it came to trial.

Title to sue: "Holder of a bill of lading"

2.26 In *UCO Bank v Golden Shore Transportation Pte Ltd* (*supra* para 2.19), Golden Shore, which owned the carrying vessel *Asean Pioneer*, issued four bills of lading which were made out to the order of UCO Bank. Golden Shore subsequently issued another set, the switched bills of lading, at the request of the shipper. Golden Shore later delivered the goods to the holders of the switched bills of lading.

2.27 The shippers presented the four original bills of lading to the negotiating bank for payment under the letters of credit without indorsing them. The negotiating bank in turn delivered the bills of lading without indorsement to UCO Bank, which was the issuing bank. UCO Bank paid under the letters of credit but when the shippers did not reimburse it, UCO Bank sued Golden Shore for failing to deliver the cargo.

2.28 Golden Shore applied to the Singapore court to determine a preliminary question of law, namely, whether UCO Bank had title to sue under the original bills of lading. It was held by the Court of Appeal that UCO Bank was a holder of the original bills of lading under the BLA and had title to sue, notwithstanding the lack of indorsement.

2.29 The original bills of lading were "to order" bills which were transferable and were therefore governed by the BLA. Once the named consignee, namely UCO Bank, came into possession of the bills of lading, the consignee, pursuant to s 5(2)(*a*) of the BLA, became the lawful holder of the bills of lading even without any indorsement by the shippers. This was not

limited to a direct transfer by the shippers to the consignee. The Court of Appeal found that there was no authority that s 5(2)(*a*) could not apply where a bill of lading was received by the named consignee through a negotiating bank, nor that, in the absence of an indorsement, the named consignee would not have the rights of suit under the bill of lading.

2.30 The Court of Appeal observed that the object behind the BLA was to transfer the right to sue from the shipper to the specified categories of persons. It was to promote international trade and to facilitate the enforcement of rights by third parties against the carrier. The court held that it was not appropriate to go behind the facts as they appear on the face of the bill of lading. It did not matter if the intermediary bank was a collecting bank or a negotiating bank. The position contended for by Golden Shore would only lead to uncertainty and dispute, which the English Carriage of Goods by Sea Act 1992 (c 50) (on which the Singapore Act is based) intended to avoid.

Liability for Port of Singapore Authority storage charges

2.31 In *AP Moller-Maersk A/S v Special Entertainment Events, Inc* (*supra* para 2.19), a cargo of articles for a "Star Trek" themed exhibition ("the cargo") arrived in Singapore from Holland and the UK where they were stuck in a PSA godown due to disputes between various parties over entitlement to the cargo. The shipowner, AP Moller-Maersk A/S ("Maersk"), took out an interpleader summons to determine which of the claimants should be entitled to delivery of the cargo, with a prayer for an order requiring the person entitled to the goods to pay for, *inter alia*, the freight, demurrage and storage charges. The court made an interim order, pending the adjudication of the cargo claims, that Maersk pay PSA upfront for the storage charges, that the cargo be delivered to whoever furnished security for Maersk's claim, and that the cargo so delivered be stored pending determination of the opposing claims between the cargo claimants.

2.32 Maersk appealed against the order requiring it to pay the outstanding storage charges upfront to PSA. The main argument was that it was too onerous and inequitable a burden to require it to pay the PSA charges upfront, which was in fact the responsibility of the cargo claimants. Instead, the claimants should resolve the question of storage charges directly with PSA.

2.33 The Court of Appeal acknowledged that, under both the common law and the express terms of the contract of carriage contained in the bill of lading, the party who was ultimately adjudged to be entitled to the cargo

would be required to pay the freight and storage charges before release of the cargo. Maersk had a lien on the cargo for freight and all charges necessarily incurred to discharge and warehouse the goods. But the Court of Appeal upheld the interim order because the order did not place the ultimate liability of bearing the storage charges on Maersk, nor did it impose a new obligation on Maersk. PSA had billed Maersk for the storage charges and would look to Maersk if the cargo owners defaulted. The effect of the order was merely to replace the form of security for Maersk's claim. A banker's guarantee would be furnished instead of Maersk maintaining its lien over the cargo. The Court of Appeal, however, increased the security amount by adding finance costs of 6% per annum over a period of 18 months to cover the time required for trial of the entitlement issue and any appeal therefrom.

AVIATION LAW

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2.34 There was only one case on aviation law that was reported in the Singapore Law Reports in 2005. This case, *Ang Ming Chuang v Singapore Airlines Ltd* [2005] 1 SLR 409, has already been reviewed in last year's Annual Review (see (2004) 5 SAL Ann Rev 22 at paras 2.56–2.83).