

**NATIONAL MARITIME CONFERENCE
9TH MARCH 2007**

**MALAYSIA AS A MARITIME NATION :
MEETING EXPECTATIONS**

**PARTICULAR ASPECTS OF
LEGAL REFORM IN MALAYSIA :
SOME COMPARATIVE STUDIES**

By Sitpah Selvaratnam*

* LLB (Wales), LLM (Cantab), Barrister-in-law (Lincoln's Inn),
Advocate & Solicitor (High Court of Malaya)
Partner, Messrs Tommy Thomas, Kuala Lumpur, Malaysia
e-mail : ss@tommythomas.net

One may well ask, “*What is the fuss over Malaysia’s maritime laws?*” After all, Malaysia ranks 20th in the world as a maritime nation¹. Port Klang and Port of Tanjung Pelepas rank amongst the top 10 best sea ports and container terminal operators². Malaysia’s trade, moving almost wholly by sea³, broke the magical RM1 trillion value in 2006. Our maritime industry is obviously in robust health!

Moreover, Malaysia has numerous maritime laws including the *Carriage of Goods by Sea Act* 1950, *The Merchant Shipping Ordinance* 1952, *The Merchant Shipping (Oil Pollution) Act* 1994, and various regulations made under these Acts. Malaysia adopts the English *Bills of Lading Act* 1855 and the English *Marine Insurance Act* 1906. The High Courts of Malaya, and of Sabah and Sarawak, exercise the English Admiralty jurisdiction, as provided by the *Supreme Court Act* 1981 of England. There seem to be sufficient laws on the statute books.

But the real question is: how relevant are these laws to 21st Century maritime activities, and how effective are they in delineating maritime rights and responsibilities and in providing for future growth? Therein lies the “fuss”.

It should be obvious that society is gauged by her laws, but if it isn’t, I need only refer to the White Paper proposing the setting up of a full time body to review laws in England and Wales in 1965, for support. It was there commented that “*One of the hallmarks of an advanced society is that its laws should not only be just but also that they be kept up to date and be readily accessible to all who are affected by them.*”⁴

Underlying every maritime transaction, whether relationship between crew and shipowner, cargo interest and vessel owner, insurer and insured, ship repairer and shipowner, ship financier and ship/cargo purchaser, are rights and responsibilities undertaken by each party. Although commerce works largely on goodwill and trust, this is always against the bedrock of laws, that nurture the firm confidence that the trust, goodwill and expectations between the parties are backed by legally enforceable rights.

A mismatch between the expectations of commercial men and the redress afforded by the law quickly brings the law into disrepute. In this era of globalize commerce, the image of a country is quickly tarnished by the inadequacy of her laws. The state of the maritime laws of Malaysia therefore dictates the regard the international community has for Malaysia as a Maritime Nation.

¹ Review of Maritime Transport 2006 released by UNCTAD as reported at www.portsworld.com/news/nst1nov27_06.htm

² MIDA’s website – Developed Infrastructure

³ 95% by sea according to NST Logistics on 20-2-2007, reporting on MIDA’s 2006 report.

Also, MIDA’s website – Developed Infrastructure

⁴ Proposals for *English and Scottish Law Commissions* 1965 (Commd 2573)

Operational and technical advancement are very important aspects of nation building. Just as important though, is the nation's civil development through the introduction and implementation of effective laws. It takes the state of the art technology, the state of the art laws and regulations, and finally the state of the art human resources to implement both the technology and the laws, for Malaysia to meet the Expectations on her, as a leading Maritime Nation.

Hence, the discontentment with regard to the maritime laws of Malaysia, despite the advanced physical dynamics of the industry.

It is in this context, that I examine 4 areas of immediate concern for maritime legal reform.

1. Carriage of Goods by Sea

A trader exporting or importing goods, the shipowner carrying these goods by sea, and the insurer underwriting the risk of either shipowner or cargo owner, would want the best protection the law can afford, in the event of a casualty, loss or damage at sea. So too, would the banker extending credit on the security of the cargo, through letters of credit. Tension will always exist between the conflicting interests of these various parties. The shipowner would wish to keep his exposure to liability to the cargo interests at a minimum, with some proportionality to the benefits he derives from carrying such cargo. The cargo owner would, in contrast, desire maximum recovery of his loss from the shipowner. A fair middle ground has to be struck by just laws, updated to current needs, to promote the growth of both, shipowners and traders.

Most of us here would know that Malaysia applies the Hague Rules⁵, implemented through the Carriage of Goods by Sea Act 1950 ("COGSA") in West Malaysia, by the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Other) Regulations 1960 in Sarawak, and The Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 in Sabah. In the 1950 and early 1960s, the Hague Rules was the prevailing international regime holding the compromised balance of rights and responsibilities between shipowners and traders, for cargo that was carried by sea under bills of lading. The exercise of rights under the Hague Rules was complemented by the English Bills of Lading Act 1855, which applies in Malaysia pursuant to the provisions of our Civil Law Act 1956⁶, by enabling third parties (taking a transfer or purchase of cargo upon a transfer or endorsement of bills of lading), to enforce contractual rights under bills of lading and the Hague Rules against the carrier-shipowner.

⁵ The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924

⁶ Section 5

Since our COGSA 1950, much has changed at the operational level and in the international arena. Containerization was introduced. The shippers lobby for greater rights grew stronger. Carriage of cargo in bulk evolved. Long chains of intermediate traders dealing with parcels of consignment whilst in transit at sea, became a common phenomenon. Cargo often arrived before the bills of lading could reach the port of destination, contributed by navigational enhancement at sea, and multiple layers of movement of documents on land. Delays in the arrival of cargo became seriously disruptive to trade. More importantly, experience proved that the existing laws did not accommodate the true intentions of parties. More about this later.

These circumstances motivated the evolution of upgraded Rules. The Hague-Visby Rules⁷ in 1968, with its SDR Protocol in 1979⁸, were introduced to cater for containerization and consolidating articles of transport. It increased shipowners' outer limit of liability to cargo interests by reference to SDR, special drawing rights, and "per package" was identified as that packed in the container or consolidating article of transport to avoid ambiguity. It also allowed for limitation to be calculated by reference to weight, which was pertinent to the shipment of bulk cargo.⁹ The Hague-Visby Rules provided for the statements on the bills of lading to be used as conclusive evidence against the shipowner of his receipt, and the condition of the cargo as the point of shipment, when in the hands of third parties who obtained the transfer of the bills of lading in good faith.

It also stipulated for the loss of the shipowners' right to limit liability, if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result. The Hague-Visby Rules extended the application of the Rules to servants and agents of the carrier, in recognition of the growing practise in the trade to include the Himalaya clause in bills of lading.

Later, the Hamburg Rules¹⁰ appeared on the maritime scene, as a further regime available for adoption. Though drawn in 1978, it came into force only on 1st November 1992 due to the hesitation amongst many countries to adopt these Rules. The Hamburg Rules were the cargo owners' dream. It reversed the burden onto shipowners, who were presumed to be at fault for loss or damage, unless the *shipowner* could prove that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences. It granted compensation for consignments delayed at sea. It extended the carriers' period of responsibility from the moment the carrier had the goods in his custody at the port of loading to the time of his delivery of the goods at the port of discharge. Unlike the Hague-Visby Rules, the Hamburg Rules did not limit its application to the "tackle-tackle" transit phase of the carriage.

⁷ Protocol amending The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968

⁸ Protocol amending The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 21 December 1979

⁹ 666.67 SDR per package or unit, or 2 SDR per kilogramme, whichever is the higher

¹⁰ The United Nations Convention on the Carriage of Goods by Sea, 1978

The Hamburg Rules also recognized the increasing possibility of different parties performing the obligation of carriage, by defining “actual carriers” and “contracting carriers”, and provided for carrier’s liability without undue complexity in the precise identification of who was to blame for the loss. The time period for the commencement of suit against the carrier was 2 years, unlike the 1 year provided by the Hague-Visby Rules. The limit of liability imposed upon the shipowner was also greater.¹¹

The Hamburg Rules was not the favoured regime to shipowners, and hence, to nations that were pre-dominantly or historically shipowning. The Hamburg Rules has accordingly been adopted by countries who are neither established maritime jurisdictions, nor significant trading partners of Malaysia. In contrast, the Hague-Visby, whether with or without her SDR Protocol, are implemented widely including by Malaysia’s major trading partners such as Singapore, Hong Kong, Japan, Taiwan, Germany, Netherlands, India and Indonesia, and further by the United Kingdom and Canada.

Australia presents an interesting position. The Australian *Carriage of Goods by Sea Act* 1991 originally provided for two phases. Phase I, governed by the Hague-Visby Rules, and Phase II by the Hamburg Rules. The Australian statute had a built-in mechanism providing for Phase II, the Hamburg Rules, to be operative in substitution for the Phase I Hague-Visby Rules, by proclamation or upon expiry of 3 years by automatic trigger.

In 1997 though, amendments were made to the Australian COGSA to remove the automatic trigger. In its stead, provision was made for Regulations to introduce some aspects of the Hamburg Rules, that would modify Australia’s implementation of the Hague-Visby Rules.

So what is it to be for Malaysia?

As early as 1970, a draft Bill¹² was prepared in Malaysia to amend our laws, from the Hague Rules to the Hague-Visby Rules. Considering that the Hague-Visby Rules was introduced in 1968, the drafting of the Bill in 1970 was most efficient. The Bill however, was never passed. Seen in the context of the tax incentives and Cabotage policy that were implemented by the Malaysian Government in the 1970s, one speculates whether the Bill drifted into oblivion in earnestness to encourage the growth of the Malaysian fleet of ships under a regime that was less onerous on shipowners, and had lower limits of carrier liability. Despite various policies to enhance the Malaysian owned tonnage, Malaysia remains predominantly a nation of shippers, as her current trade figures of RM1 trillion (comprising about 1.06% of the share in the world’s total imports and 1.35% of world’s total exports), as compared with her vessel tonnage record of 9.63 million dwt as at 1-1-2006 (being 1.06% of world tonnage¹³), suggests.

¹¹ 835 SDR per package or other shipping unit, or 2.5 SDR per kilogramme, whichever is the higher

¹² See: Proposed Changes in Malaysian Shipping Law by Cecil Abraham in *Carriage of Goods by Sea* (Peter Koh, ed) (1986) Butterworths

¹³ http://stat.wto.org/CountryProfiles/MY_e.htm

Review of Maritime Transport 2006 released by UNCTAD as published at www.portsworld.com/new/nst1nov27_06.htm

That the Hague Rules no longer serves the Malaysian interests, is common consensus. Our container traffic is constantly on the increase; 13.6 million TEUs were handled by our ports in 2006¹⁴, and our maritime regime still speaks in terms of packages as a unit of shipment. The limit of liability of £100 per package has been interpreted by our Courts as 100 pounds sterling per package, as opposed to the value of the gold content of £100.¹⁵ Whilst valid criticism have been leveled against this interpretation, which goes against the ruling in other jurisdictions¹⁶, it does bring West Malaysia more in line with the value of limitation applied by virtue of the Regulations in East Malaysia of RM850¹⁷. In most cases, RM850 per package lost or damaged is inadequate remedy to the shipper-consignee. Enhanced limits of liability are definitely necessary.

There is further an important requirement, to have the statements in the bill of lading held as conclusive evidence against the carrier in the hands of third party purchasers/consignee endorsee acting in good faith, of the receipt by the shipowner of the cargo shipped and of the condition of the cargo as shipped. All these aspects, if reformed, would promote confidence in dealings with the bills of lading issued over consignments purchased from Malaysia, and exported out of Malaysian ports. The Hague-Visby Rules is the obvious choice in dealing with these issues.

There is however, a further question. Should Malaysia do more and accept the Hamburg Rules, as opposed to the Hague-Visby Rules, in replacing our current Hague Rules? Alternatively, should we adopt a hybrid, between the Hague-Visby and the Hamburg Rules?

Whilst the Hamburg Rules has not gained much favour, particularly due to its reversal of the burden of proof onto the shipowner, the possibility of a hybrid between the Hague-Visby and the Hamburg Rules appears to be a serious contender to the Hague-Visby Rules. Local opinion on this issue appears divided¹⁸. Suggestions for the acceptance of elements of the Hamburg Rules that provide for compensation for delay, that extend the application of the Rules beyond bills of lading to other common shipping document such as Waybills, and that enlarge the carriers' period of responsibility are attractive, especially since a few of Malaysia's trading partners such as China, Thailand, Korea and Australia appear to apply a combination of the Hague-Visby/Hamburg Rules through domestic legislation.

¹⁴ Reported at www.portsworld.com/new/nst1jan8_07.htm

¹⁵ *Sebor (Sarawak) Trading v Syarikat Cheap Hin* [2003] 2 CLJ 381

¹⁶ *The Rosa S* [1988] 2 Lloyd's Rep 574 (England); *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co. (The Nadzehda Krupskaya)* [1989] 1 Lloyd's Rep 518 (Australia); *The Tasman Discoverer* [2002] 2 Lloyd's Rep 528 (New Zealand); *Thomaseverette* [1992] 2 SLR 1068 (Singapore)

¹⁷ *Regulation 7. Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Other) Regulations* 1960 in Sarawak, applied in *Taveechai Marine* [1995] 1 MLJ 413

¹⁸ See: Carriage of Goods by Sea : Hague-Visby for Malaysia? by Jeremy M. Joseph [1998] 1 MLJ i;

Whither Malaysia : The Hague-Visby or Hamburg Rules? By Abdul Ghafur Hamid @ Khin Maung Sein INSAF (2004) XXXII II No. 4

I am however, of the view that the Hague-Visby, with her SDR Protocol, should be adopted simpliciter. Whilst it is tempting to agree that as a shipper's nation we should apply laws that provide easy access to remedy for loss, damage and delay of consignments in the carriers' custody, and that whilst we are at the drawing board of review the most complete reform should be adopted, I am finally persuaded to recommend the application of Hague-Visby Rules without any Hamburg Rules elements for both practical and ideological reasons.

First, Malaysia has a lot of ground to cover to regain confidence in her maritime laws. The reform therefore must inspire confidence by promoting certainty and uniformity. In Jindal Iran v Islamic Solidarity¹⁹, Lord Steyn restated Lord Mansfield's observation in Vallejo v Wheeler²⁰ that:-

"In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."

and stressed that this consideration remains relevant and was recently affirmed by Lord Bingham in The Starsin²¹.

That the Hague-Visby Rules are applied in most of the Commonwealth Countries, and by Malaysia's major trading partners is very pertinent. Our laws would then be compatible with established maritime nations like England, Singapore, Hong Kong, India, Canada, Japan, Taiwan and Germany. Traders and shipowners are familiar with their application, and seemly have greater faith in laws that are adopted in England! A hybrid of the Hague-Visby/Hamburg Rules in contrast, would introduce a "fear of the unknown" factor in shipowners and traders. Ships cannot then be blamed for choosing to call at Singapore, to avoid Malaysian ports of loading to prevent their carriage from being governed by unfamiliar Malaysian laws. This could leave us feeding off transshipment traffic, as oppose to full fledged transnational shipments; contrary to our national vision to progress into a dominant maritime nation.

Secondly, Malaysian Courts have historically found, and still continue to find, decisions of Courts in the Commonwealth of much persuasive value. Malaysia would derive considerable benefit from the development of legal jurisprudence from these countries, if we applied the Hague-Visby Rules. Ultimately, we are working towards making Malaysia a choice forum for maritime disputes resolution. Having laws and systems that are widely accepted and uniformly applied, take us a long way in fulfilling this objective. Our shipowners and traders can with confidence, incorporate appropriate jurisdictional and choice of law terms in bills of lading and trading contracts, to promote Malaysia as a forum for dispute resolution.

¹⁹ [2005] 1 All ER 175, 184

²⁰ (1774) 1 Cowp 143, 153; 98 ER 1012, 1017

²¹ [2003] 2 All ER 785 at [13]

Thirdly, and this is relevant to the first and second grounds, the primary reason for choosing to apply international uniform laws, such as the Hague, Hague-Visby or Hamburg Rules, is to promote certainty and uniformity in the determination of rights and responsibilities. By unilateral variation of these Rules by individual nations adopting a hybrid regime, the very purpose of the adoption of international rules become significantly diluted. The Rules immediately lose the element of international predictability and uniformity. This is an especially important consideration in the shipping industry, since disputes are very likely to be determined in a foreign jurisdiction, where the Malaysian vessel is arrested, or the damaged consignment received. Laws that are readily recognized and accepted internationally with little local content would facilitate consistent and certain resolution of disputes. The following words of Lord Macmillan in Stag Line v Foscolo, Mango and Co. Ltd²² expressed in the context of the Hague Rules as early as 1932, was recalled by Dunn L.J. in The Benarty²³:

“...It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.”

The Honourable Sir Anthony Mason, Chancellor of the University of New South Wales and former Chief Justice of the High Court of Australia in the FS Dethridge Memorial Address 1997, when commenting on the Australian amendments to their COGSA in 1997 which endorsed the hybrid approach, said this²⁴:-

“The problem is, however, whether unilateral action amending the Hague-Visby Rules by one nation is a desirable development. Does the sacrifice of the advantages of uniformity and harmonisation bring benefits of greater value in the form of the amended provisions? Arriving at a balance is an extremely difficult task. The amendments necessarily introduce elements of uncertainty. One element of uncertainty is the interpretation of the new provisions. That element of uncertainty will work itself out and is not a matter of major concern. The other element is more significant and that is the problem which will arise in a variety of situations of determining whether the Australian version of the Hague-Visby Rules will apply to a contract or whether the unamended Rules adopted in another jurisdiction will apply. ...

.... In commercial and maritime matters, especially in the realm of international trade, certainty is of fundamental importance. Uniformity and harmonization lead to certainty. Accordingly, they should not be lightly discarded. ...”

²² [1932] A.C. 328, 350

²³ [1984] 2 Lloyd's LR 244, 252

²⁴ Harmonisation of Maritime Laws and the Impact of International Law on Australian Maritime Law
<http://www.mlaanz.org/docs/99journal2a.html>

I turn to my fourth reason. It has taken us 56 years from our last Carriage of Goods laws to implement reform. I fear that the process of working the precise balance in a hybrid of Hague-Visby/Hamburg Rules, will only delay us further, leaving Malaysia with neither the Hague-Visby nor the “perfected” Hague-Visby/Hamburg Rules. It must be observed that though Australia, China, Korea and the Nordic States²⁵ apply a hybrid, there is no standard or uniform “hybrid” that is applied. Each of these countries pick and choose the combination of the two regimes that it desires.²⁶ So, the process of selecting the “cocktail” (an apt term used by MA Clarke)²⁷ of Rules will not only be time consuming, but may not at the end of the process align us with any “Hybrid World”.

Fifthly, whilst we are predominantly a shipper’s nation, we should constantly be striving to strike a balance. It would be a significant loss in national revenue if freight and hire continue to be paid to foreign shipowners. In this context, the Hague-Visby/Hamburg Rules hybrid, with its attendant uncertainties discussed above, would not encourage the enlargement of our Malaysian fleet.

I therefore support the adoption of the Hague-Visby Rules, with the SDR Protocol, to be implemented pursuant to a local Carriage of Goods Act that gives the Hague-Visby Rules the force of law, including Article X thereof, and additionally to be applicable over all shipments out of any port in Malaysia, to enhance its application in other jurisdictions when seized of the dispute, and to reduce issues of conflict of laws.

2. Bills of Lading Act

It must be observed that for a complete and effective working of either the Hague-Rules, or the Hague-Visby Rules, the provisions of (or similar to) the Bills of Lading Act 1855 are vital. The Bills of Lading Act allows the contractual rights under bills of lading issued by shipowners-carriers in favour of the shippers, to be transferred to the consignees or endorsees of the bills of lading. The purchaser of the cargo from the original shipper can thereby enforce those contractual rights against the shipowner-carrier for any loss or damage to the goods whilst in sea transit.

The Bills of Lading Act, was warmly welcomed as resolving the problems of privity of contract in the nineteenth century. It has now been found to be inadequate in reflecting the dealings and intentions of the industry. The Law Commission of England and Wales, jointly with the Scottish Law Commission, undertook a review of the issues posed by the Bills of Lading Act in the early 1990s. After wide consultation with the maritime industry, the Law Commission reported on the incompatibilities between the demands of current trade practices, and the rights recognized by the Bills of Lading Act.

²⁵ Denmark, Finland, Norway and Sweden

²⁶ See : Uniformity or Unilateralism in the Law of Carriage of Goods by Sea? By Paul Myburgh (2000) 31 VUWLR 355, at page 369, and generally on the deharmonisation of international maritime law brought about by unilateral adoption of hybrid regimes

²⁷ As referred in Paul Myburgh’s paper in n.26 above

For those undertaking a similar study in Malaysia, the Law Commission report is a ready made critical appraisal of the position that prevails now in Malaysia, which is in need of urgent reform.

In essence, its deficiency lies in linking the transfer of property in the goods carried by sea, with the transfer of contractual rights under the bills of lading. Section 1 of the Bills of Lading Act transfers contractual rights enforceable against the shipowner to the new holder of the bill of lading, provided property in the goods (which is the subject matter of the bill of lading) passes “upon or by reason” of the endorsement of the bill of lading to the holder of the bill of lading. Increasingly found is the situation where the goods concerned are cargo shipped in bulk; for instance, commodities such as palm oil. Section 18 of the Malaysian Sale of Goods Act 1957 (as with the English Sale of Goods Act 1893 and its successor, the Sale of Goods Act 1979 in its original unamended version), stipulates that no property in goods may be transferred to a buyer unless and until the goods are ascertained.

The difficulty arising is this. Quantities of palm oil are shipped in bulk, and commingled with other parcels, such that they are not appropriated to particular bills of lading. The specific cargo under the respective bills of lading are not identified or “ascertained” at the point of shipment, when large quantities of palm oil in bulk are pumped into the ship’s tanks, and several bills of lading are issued by the shipowners to the various shippers. The cargo may continue to remain in this state, and unascertained, at the time of the endorsement of the bill of lading in favour of third party purchasers. The purchasers of the various parcels of palm oil may then find themselves unable to sue the shipowner-carrier for incidents occurring at sea.

Although endorsement of the bill of lading and the transfer of property need not be simultaneous, there must be a definite connection between them for the transfer of the contractual rights under the bill of lading²⁸. The fulfillment of this requirement is sometimes thwarted by the wrongdoing shipowner, for example, by misdelivery of the cargo in a manner that results in the cargo never becoming appropriated to a particular bill of lading; and therefore, never ascertained. The contractual right of action by the third party purchaser/endorsee against the shipowner for such misdelivery under the bill of lading is then placed in significant doubt. The end result could well be that the shipowner escapes liability altogether, even under the tort of negligence²⁹, if title in the cargo had not passed to the third party purchaser at the time of misdelivery by operation of law.

Also, traders continue to deal with bills of lading as if they were the goods. They keep passing the bills of lading down the chain of sale and purchase, even after the cargo has reached its destination and has been discharged. Yet, in law all endorsements of the bill of lading after the end of the voyage will not operate to transfer contractual rights to indorsees, as was the case in The Delfini. The end purchaser who has taken delivery of the damaged cargo before the arrival of the bill of lading, and who is obliged by the terms of the letter of credit to pay the price of the cargo in full, cannot sue the carriers for loss or damage of the cargo whilst in transit.

²⁸ The Aramis [1989] 1 Lloyd’s Rep 213; The Delfini [1990] 1 Lloyd’s Rep 252

²⁹ The Elafi [1981] 2 Lloyd’s Rep 679; The Aliakmon [1986] 2 Lloyd’s Rep 1

Further, because the transfer of contractual rights against the shipowner-carrier are linked to transfer of property in the goods, banks who take bills of lading as security for financing under letters of credit, and are therefore not the owners of the goods, find themselves (when the borrower/purchaser of the cargo fails to make payment to collect the relevant bills of lading) having to search for an alternative right to sue the shipowner (under the Brandt v Liverpool principle) independent of the Bills of Lading Act³⁰. This arises by virtue of the kind of interest the banks obtain in the cargo. Theirs is considered a special property interest of a pledgee, and not that of a true, full proprietor. Such independent right of suit may not be easy to establish for instance, when freight has been prepaid, as noted by the Law Commission when reproducing the observation of Staughton J, at first instance, in The Aliakmon³¹.

“The doctrine of Brandt v Liverpool Steam Navigation Co. Ltd. is far more often pleaded than established by judicial decision.”

England has repealed the Bills of Lading Act and replaced it with the Carriage of Goods by Sea Act 1992, which now complements England’s application of the Hague-Visby Rules under the Carriage of Goods by Sea Act 1971.

The provisions of the English Carriage of Goods by Sea Act 1992 permit rights of suit by lawful holders of bills of lading, independent of any passing of property. They empower banks as pledgees to enforce contractual rights against the carrier under the bills of lading. The bills of lading would be capable of effective endorsement and transfer of rights even after the arrival and discharge of the cargo, provided the endorsement is pursuant to arrangements made before such delivery. The problems relating to shipment of bulk cargo, banker’s rights of suit and chain transactions causing bills of lading to arrive after discharge of cargo, would thus be resolved. It also enables the transfer of contractual rights, not just under bills of lading, but pursuant to other shipping documents such as sea waybills and ships’ delivery orders.

Singapore too has amended its Bills of Lading Act in 1999 which is now *pari materia* with the English Carriage of Goods by Sea Act 1992. Hong Kong has similarly, adopted the provisions of the English Carriage of Goods by Sea Act 1992 by its Bill of Lading and Analogous Shipping Document Ordinance 1997. There is every reason, particularly in terms of similarities of commerce and legal framework, for Malaysia to jettison reliance on the English Bills of Lading Act 1855, in favor of laws in terms of the English Carriage of Goods by Sea Act 1992.

³⁰ Sewell v Bardick [1884] 10 App Cases 74; Brandt v Liverpool and River Plate Navigation Co. Ltd [1924] 1 KB 575

³¹ [1983] 1 Lloyd’s Rep, 203, 207

3. Admiralty Jurisdiction - Arrest for Arbitration

As most of us here today would appreciate, obtaining security for a maritime claim is high priority to maritime traders, and is commonly enforced by an arrest of a ship. The international nature of shipping trade, with ships moving from country to country, utilizing services and creating obligations at short intervals of time, and departing ports without leaving any assets upon which unfulfilled obligations may attach, prompted the historical formulation of this right.

The right of arrest in many countries is derived from provisions of International Convention; particularly The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels 1952, commonly known as The Arrest Convention. The primary purpose of The Arrest Convention is to regulate the ability to arrest ships, whether or not the arresting country accepts jurisdiction to hear the dispute on its merits. The arrest is to lend efficacy to the legal system of recovery of maritime debts, and enforcement of maritime claims, regardless of the forum in which the dispute is ultimately to be determined.

Malaysia has neither acceded to, nor ratified, The Arrest Convention. Instead, Malaysia adopts, by Section 24 of the Malaysian Courts of Judicature Act 1964, the Admiralty jurisdiction as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981. The Arrest Convention is implemented in England through The Supreme Court Act 1981, which stipulates the instances when an Admiralty action in rem may be commenced against a ship, which forms the basis for the arrest of that ship as security for the maritime claim. So it is, that a ship may be arrested in Malaysia if the provisions of the English Supreme Court Act 1981 are satisfied.

Maritime disputes are commonly referred to arbitration. Charterparties, bills of lading and shipbuilding contracts almost always stipulate for arbitration. Notwithstanding the arbitration agreement, the dispute remains a maritime dispute, and security for the maritime disputes remains high priority.

However, following the decision of the Malaysian Supreme Court in The Vinta (1993 unreported), the current position in Malaysia is that a ship cannot be arrested in Malaysian waters as security for a maritime claim that is referred to arbitration, save for very limited circumstances. This position has since been crystallized in several other Malaysian cases³², and it results from our adoption of the English Supreme Court Act 1981 on Admiralty jurisdiction.

³² The Norma Splendour [1999] 6 MLJ 652; The Swallow [2003] MLJU LEXIS 237

The old English position was that a ship could not be arrested as security for a maritime claim resolved by arbitration. In the 1970s and early 1980s under The Supreme Court Act 1981, the Admiralty jurisdiction of the English High Court to arrest a ship was to be exercised only in support of the Court's jurisdiction to hear and determine the maritime claim. The Admiralty Court's right to arrest could not be invoked to obtain security where the substantive claim was not to be determined by the arresting Court, but by arbitration.

Several consequences could result dependant on whether the arbitration agreement was domestic or non-domestic, and whether arbitration had commenced before the ship was arrested. Claimants had to resort to subtle arguments that became known as The Rena K³³ principle, to justify an arrest in the context of an arbitration. The delicate reasoning of The Rena K required the arresting party to satisfy Court that the Defendant was financially unsound, and that there was a likelihood that the arbitration award would remain unsatisfied. Absent the element of arbitration, these factors would otherwise have been irrelevant to an arrest. This position in law made the arrest of a ship in the context of an arbitration agreement very difficult, and was inconsistent with the intention of The Arrest Convention 1952.

In practical terms this meant that where there was either an arbitration agreement, or arbitration was actively pursued, an arrest of a ship as security was vulnerable to challenge; a significant derogation of the fundamental right of a maritime claimant to security.

England cured this deficiency by bringing into effect on 1st November 1984, Sections 25 and 26 of The Civil Jurisdiction and Judgment Act 1982, and later Section 11 of the English Arbitration Act 1996. There is however, no corresponding provision under Malaysian law. As the liberalization of arrests in England was captured in Acts of Parliament other than The Supreme Court Act 1981, it was not drawn into Malaysian laws under Section 24 of the Malaysian Courts of Judicature Act 1964.

At present, to arrest a ship in Malaysia whilst arbitration is afoot could amount to an abuse of process, and the claimant liable in damages for wrongful arrest. Damages could run into a few million Ringgit depending on the length of time the ship is under arrest. This obviously deters an arrest within Malaysian waters. Potential litigants wait instead, for the ship to call at another jurisdiction that allows for an arrest as security for arbitration.

The new Malaysian Arbitration Act 2005 does not appear to remedy the situation. Although Section 11 of the Arbitration Act 2005 permits a party to apply to the High Court for interim measures, including an Order to secure the amount in dispute, it remains in serious doubt if an arrest of a ship, as security for arbitration is empowered by this provision. The Arbitration Act 2005 does not seem to alter the substantive jurisdictional position on the issuance of a warrant of arrest in an Admiralty action in rem.

³³ [1979] 1 All ER 397

An arrest of a ship is dependant on the existence of a Writ in Rem. Such Writ in Rem is issued by the High Court pursuant to its Admiralty jurisdiction, as defined by The Supreme Court Act 1981. The right of arrest under such Admiralty jurisdiction is limited, by judicial interpretation, to circumstances where the arrest is towards satisfaction of a Judgment granted by Court in the Admiralty Writ in Rem.

Without specific reference in Section 11 of the Arbitration Act 2005 to the Court's powers to arrest as security for claims heard and determined by arbitration, the limitations to the powers of Court to arrest under the Admiralty jurisdiction would remain unaltered.

It is hoped that the issue of arrest for arbitration is addressed when amendments are made to the Arbitration Act 2005, and specific reference to arrest as security for arbitration is incorporated, akin but not identical to Section 7 of the Singapore Arbitration Acts or Section 11 of the English Arbitration Act 1996. In the light of decisions in England³⁴ where the statutory provisions were extended through judicial interpretation, it would be preferable to have these implied rights specifically incorporated as express statutory provisions in Malaysia.

As a suggestion, the desired result may be achieved by an amendment to The Arbitration Act 2005, introducing a fresh section 10A (1) and (2) and amending the current section 11 to read as follows:-

“Court’s powers on stay of admiralty proceedings

10 A. Where a court stays admiralty proceedings under section 10, the court shall, if in those proceedings property has been arrested or bail or other security has been given to prevent arrest or obtain release from arrest, order that –

- (a) the property arrested be retained as security for the satisfaction of any award made on the arbitration; or*
- (b) the stay be conditional on the provision of equivalent security for the satisfaction of any such award;*

wherever the seat of such arbitration may be.

(2) Subject to the Rules of Court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of an order under this section as would apply if it were held for the purposes of proceedings in the court which made the order.

³⁴ *The World Star* [1986] 2 Lloyd’s Rep 274; *The Jalamatsya* [1987] 2 Lloyd’s Rep 164; *The Bazias 3* [1993] 2 All ER 964

11. (1) *A party may, before or during arbitral proceedings, wherever the seat of such arbitral proceedings may be, apply to a High Court for any interim measure and the High Court may make the following orders, notwithstanding the absence of substantive proceedings in Court, for:*

.....

- (e) *securing the amount in dispute, whether by way of arrest of property, or bail or other security pursuant to the admiralty jurisdiction of the High Court, or otherwise.”*

4. The Merchant Shipping Ordinance 1952 **– Limit of Shipowners’ Liability**

The Merchant Shipping Ordinance 1952 has over 500 sections dealing with a wide range of matters including ship registration, welfare of master and seamen, safety, pollution, wreck and salvage, port and port officers, and liability of shipowners. I restrict my discussion to reform of limits of liability of shipowners thereunder.

Sections 358 to 365A of *The Merchant Shipping Ordinance* implement limitations of liability pursuant to the 1957 Limitation Convention³⁵, and provide for the exclusion and limitation of ship-owners’ liability in certain circumstances. The exclusion of liability operates for loss or damage to merchandise by reason of fire, or for the theft of items of gold, silver, jewels and the like. The limitation of liability is generally in instances where loss or damage is caused in the navigation or management of the ship, or in loading, carriage and discharge of her cargo. In either case of exclusion or limitation, the shipowner must prove the absence of his actual fault and privity in the incident causing loss of life, injury, loss or damage. The limit of liability is then based on the tonnage of the vessel. Two common problems arise in practise.

First, in dealing with the concept of actual fault and privity. This requires proof by the shipowner that the controlling mind of the company that owns the ship was not personally at fault in the manner of management of the vessel, or in the systems adopted to maintain the vessel. This extends to the system of repair and maintenance of the vessel, and of management and training of officers and crew manning the vessel. The identification of the controlling mind of the shipowner can become complicated, particularly when management companies are delegated the responsibility of safe maintenance and management of the vessel, and recruitment and training of crew.³⁶ The extent of systems required to be adopted does cause uncertainty. In the event the shipowner is unable to establish the absence of actual fault and privity, the shipowner is liable to the full extent of damage or loss suffered.

³⁵ International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, signed in Brussels on 10 October 1957

³⁶ *Liong Ung Kwong v Kee Hin Sdn Bhd* [1998] 1 AMR 368

Secondly, the tonnage used in calculating the limit does not fit soundly with the tonnage computation under The Tonnage Convention 1969³⁷. The Merchant Shipping Ordinance of 1952 speaks in terms of the addition of any engine room space deducted for the purpose of ascertaining the tonnage. The Tonnage Convention 1969 as adopted in Malaysia pursuant to the Merchant Shipping (Tonnage) Regulations 1985 however, is not premised on the deduction of engine room space. A rule of thumb has apparently evolved in practise of computing the limiting tonnage by calculating the aggregate of the net registered tonnage of the vessel, plus 1/3 of her gross tonnage. However, where the vessel is not registered in Malaysia, the net tonnage is used in computing the limit³⁸. The difference in application of the limiting tonnage, dependent on whether the vessel is Malaysian or a foreign ship is not acceptable.

The 1976 Limitation of Liability Convention³⁹ although providing for a higher limit of liability⁴⁰ (based on a sliding scale calculated on the gross tonnage of the vessel), concurrently provides the shipowner with greater certainty of limiting liability. Certainty is an immensely valuable commodity. It reduces disputes and encourages the settlement of differences. To displace the limit of liability under the 1976 Limitation of Liability Convention, the claimant has the burden of establishing that the loss resulted from the shipowner's act or omission committed with the intent to cause loss, or recklessness and with the knowledge that loss would probably result. The language adopted to break limit is therefore similar to that used in the Hague-Visby Rules. This is a legal concept more readily applied, though less often capable of proof.

United Kingdom adopted the 1976 Limitation of Liability Convention, with the 1996 Protocol through its Merchant Shipping Act 1995. So too Singapore, Hong Kong and Australia. It is hoped that Malaysia will go the same way.

Conclusion

These are 4 of the immediate reform that will bring Malaysia's maritime laws in line with that of the international maritime community. Such reform would align our laws with most of the progressive maritime societies; lending uniformity, certainty and acceptability. These legal reform would reflect Malaysia's commitment to protect and preserve maritime interests. They would inspire confidence, draw investors, and enhance maritime dealings with Malaysia. They would facilitate Malaysia's development as a forum for maritime dispute resolution. Our shippers CIF terms of sale, and our shipowners bills of lading can more readily provide, with greater acceptability, for the application of Malaysian laws, and choice of Malaysia as a forum for dispute resolution.

Malaysia would then be better positioned to maximize leverage on her vibrant trade, to place her legal systems and her nation, on the world maritime map.

³⁷ International Convention on Tonnage Measurement of Ships, 1969

³⁸ Section 360(2)(c) cf. Section 360(2)(e) and Section 2(e) Merchant Shipping Ordinance 1952

³⁹ Convention on Limitation of Liability for Maritime Claims, 1976, and her Protocol signed in 1996

⁴⁰ 333,000 SDR for vessels not exceeding 500 tons, for loss of life or personal injury
167,000 SDR for vessels not exceeding 500 tons, for loss and damage to goods