



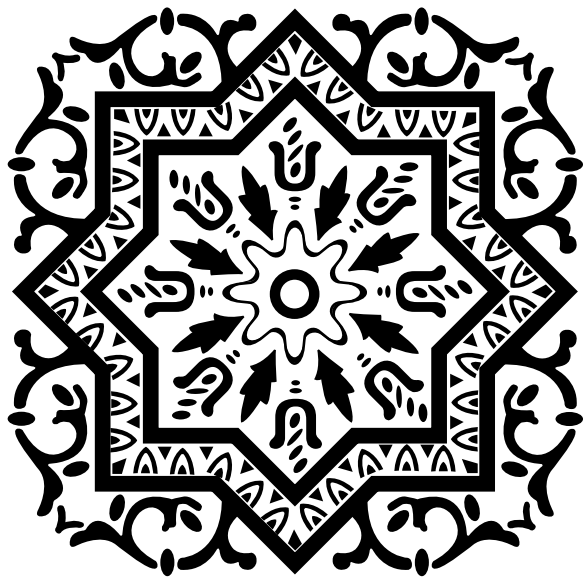
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Maritime and Transport Law news

Newsletter of the International Bar Association Legal Practice Division

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30 OCTOBER - 4 NOVEMBER 2011

DUBAI

INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

Long established as the trading and commercial hub of the Middle East, Dubai combines the excitement of a bustling commercial centre with the wide open spaces of a luxurious resort. Located at the cross-roads of Asia, Europe and Africa, and offering facilities of the highest international standards combined with the charm and adventure of Arabia, Dubai is sure to be another premier destination for the IBA Annual Conference 2011.



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Bahrain Chamber for Dispute Resolution

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From the Chair

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'The World is a country which nobody ever yet knew by description; one must travel through it one's self to be acquainted with it.'

4th Earl of Chesterfield

Very soon we will be gathering again to spend a few days together learning about legal issues that are relevant to maritime and transport lawyers around the globe. You should already have received the IBA preliminary programme and accommodation and excursions guide. I hope that you will take a few minutes to register for the Conference, and be sure to register for our Committee excursion and dinner as well. As always tickets are expected to be in short supply at the Conference for those who have not pre-registered. With those formalities out of the way, I'd like to spend a few minutes sharing with you my thoughts on the value that the IBA provides beyond the obvious educational and networking opportunities.

To me the IBA represents far more than networking and educational opportunities. It is a chance to spend time each year visiting different countries and cultures, surrounded by and sharing experiences with some of the brightest and most interesting people in the world. In my years as a member of the IBA I've visited the Sagrada Familia in Barcelona, the Acropolis in Athens, Chichen Itza on the Yucatan peninsula, the Cathedral in Toledo and the Old-New Synagogue in Prague. I've toured the Prado, the Van Gogh, and the Picasso museums in Madrid, Amsterdam and Barcelona. I've been on Dubai Creek,

the Chicago River (it was cold), the Paraná River Delta in Argentina and the Vltava in the Czech Republic. I've had drinks at the Long Bar at the Raffles Hotel in Singapore. I've shared each of these experiences with friends that I have come to know and love from Australia to Nigeria, from Hamburg to Singapore and from San Francisco to Dubai and places in between. These are the experiences that enrich a life and create the memories carried to old age.

Euripedes wrote that experience and travel are an education in themselves and the American poet laureate Maya Angelou wrote that 'Perhaps travel cannot prevent bigotry, but by demonstrating that all peoples cry, laugh, eat, worry, and die, it can introduce the idea that if we try and understand each other, we may even become friends'. As you begin planning your journey to Dubai think not just about the conference and business opportunities, but about the old friends you will see and the new friends that you will make; think of the sights, the sounds, and the smells of the spice souk, and the glitter of gold from the merchant shops in the Gold marketplace of Dubai. Let us look, laugh and eat together and appreciate that a life lived in the company of others is richness and a reward in itself.

I look forward to seeing you.

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30 OCTOBER - 4 NOVEMBER 2011

DUBAI

Maritime and Transport Law Committee sessions

INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

New developments and legal issues in offshore shipping contracts

Joint session with the Maritime and Transport Law Committee and the Oil and Gas Law Committee.

This session will discuss the charter and operational contracts executed by oil majors and ship and rig owners, including the Supplytime, Heavycon and customised contractual structures. Included in the discussion will be consideration of the main contractual challenges and pitfalls when drafting such contracts and the most common areas of dispute arising from them. Indemnity clauses (included the 'knock for knock' clause), contractual rebalance, late delivery situations, frustration of charter contracts, insurance coverage implications and other interesting aspects of offshore shipping contracts will be addressed by the panel.

MONDAY 0930 – 1230

Dubai and its sister Emirates as major hubs for trade and the shipping industry

Joint session with the Insurance Committee and the Maritime and Transport Law Committee.

This session will look at the issues that surround shipping and trade, including financing, and all aspects of insurance, including cargo, hull, trade credit, political risk, piracy and war and terrorism to name but a few. This will be an interactive session with a worked example and contributions from the audience.

MONDAY 1430 – 1730

Vessel financing: ownership issues including vessel financing under Islamic law

Presented by the Maritime and Transport Law Committee.

This session will focus on the range of debt and equity sources and structures available for the financing of vessels and related equipment, including conventional bank lending, leasing, equity funds, public markets, private placements and Islamic financing techniques, as well as the comparative legal advantages and drawbacks of each choice.

WEDNESDAY 0930 – 1230

Risks and liabilities in developing offshore resources

Presented by the Maritime and Transport Law Committee.

Recognising that some of the largest marine pollution risks and incidents have occurred from vessels, including the Deepwater Horizon, the maritime and transport law committee will continue its focus on the legal risks and liabilities of offshore pollution and other environmental risks. This session will bring the maritime practitioner's experience and perspective to the legal risks and liabilities created in the development of offshore resources on a regional and international level. The session will follow the joint session of the Environment, Health and Safety Law Committee, the Mining Law Committee and the Oil and Gas Law Committee titled 'Managing environmental risks of deep sea resource extraction'. Members of all involved committees are encouraged to attend both sessions to obtain a full perspective on these issues.

WEDNESDAY 1430 – 1730

Multimodal issues including a keynote address featuring the vessel owner's and operator's views on the Rotterdam Rules

Presented by the Maritime and Transport Law Committee.

Following a keynote address featuring the vessel owner's and operator's view on the Rotterdam Rules in general, this session will focus on the relationship between the Rotterdam Rules and other international conventions in the area of transport law.

Using case studies concerning multimodal transport, the speakers will demystify the scope of applicability of the new rules and how they interface with other international instruments, inter alia, in relation to the carriage preceding or subsequent to the sea carriage.

THURSDAY 0930 – 1230

4th Asian Maritime Law Conference, Singapore 19–20 May 2011

Organised by the Maritime Law Association of Singapore (MLAS), the 4th Asian Maritime Law Conference (4AMLC) attracted over 80 participants from 11 countries. Entitled *Competition, Shipbuilding and Arbitration*, the event was held at Amara Hotel Singapore on 19–20 May. For one and a half days, professionals from the international maritime community gathered to discuss various maritime issues. Networking opportunities were aplenty, both during breaks at the conference venue and at a cocktail reception on the 19th at Maxwell Chambers. That evening, participants mixed and mingled over

drinks and finger food and were given the option to go on a tour, which gave them an insight into how the establishment makes an ideal venue for alternative dispute resolution (ADR) processes.

The IBA's Maritime and Transport Law Committee was represented by Ms Vivian Ang, Vice-Chair and Shashank Agrawal, Newsletter Editor, with Ms Ang delivering the welcome address and a brief introduction of the Committee to all delegates on behalf of the IBA.

For information on the next Asian Maritime Law Conference, please write to mail@mlas.org.sg or contact Lawrence Teh, Rodyk Singapore at lawrence.teh@rodyk.com.

Irina Nychporchuk

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7th Annual International Conference 'Practice of maritime business: Sharing experience cargo', Odessa, Ukraine, 2–3 June 2011

The organisers of the Conference were International Law Offices (Interlegal), Ukraine, and Remedy Law Firm (Russia).

The General Partners of the Conference were ROSGOSSTRAKH (Russia), VTB Leasing (Russia), Insurance Company Soglassye (Russia), Insurance Company Groupama Transport (Latvia) and Odessa Commercial Sea Port (Ukraine).

The Conference was supported by the London Maritime Arbitrators Association (LMAA), IBA, Baltic and International Maritime Council (BIMCO) and Nautical Institute of Ukraine (NIU).

The issues discussed at the Conference

were dedicated to cargo and were focused on transshipment and carriages by sea. The Conference audience this year included all the participants of the transportation chain: cargo owners, traders, shipowners, forwarders, insurers, banks, representatives of container and shipping lines and terminals.

This year more than 145 delegates from ten countries came to Odessa. The Conference was a good opportunity for them to establish new relationships and to experience the Black Sea market.

On the first day of the Conference, 1 June, the attendees had a sea journey on m/v Khadsibey in the water area of the port of Odessa. It was a beautiful journey in the

course of which the guests had a chance to meet one another and admire Odessa's impressive harbour view.

The main day of the Conference was 2 June. The delegates attended the sections, case studies, roundtable, business events and Expo Area. The Special Gala Dinner was devoted to the 15th anniversary of Interlegal. The social programme of the Conference covered the third day when the participants could attend the football tournament, pool, barbeque and Odessa Opera House.

This year the Conference was honoured with presentations and speeches by famous speakers.

The partner of the law firm Remedy, Russia, Andrey Suprunenko made a welcome speech and noted the importance of such professional events for the maritime sector development.

The speech of the partners of International Law Offices (Interlegal) Arthur Nitsevych and Nikolay Melnykov, 'Modern Risks: Post-Crisis Period', caused great interest in the audience as their presentation concerned the key issues and problems of modern shipping and transport. During the presentation the speech was enlivened by interactive discussion between participants and speakers.

Alexanders Abuzyarovs, Director of Groupama Transport, highlighted the insurance issues connected with non-delivery, damage to or loss of cargo during transportation especially in high-risk regions such as the Middle East and northern Africa.

In her speech, 'Successful Projects in Financing the Industry by EBRD', Mrs Lai Chan Rasti, EBRD (UK) dwelt on the progress and development of EBRD participation in the transport industry of Ukraine and described EBRD main projects in this area.

The presentation, 'Obstacles in Competition in the Stevedore Sector', by Andrey Kuzmenko, Transinvestservice (Ukraine) was very informative. Mr Kuzmenko analysed modern tendencies and problems in the Ukrainian stevedore state and private sectors.

The presentations of the Conference regular speakers, Alberto Batini, BB&Partners (Italy), and Andrew Bicknell, Clyde & Co (UK) were, as always, practical and useful, based on actual practice and real cases.

Sergey Smolyakov from VTB-Leasing, Russia and Sergey Derevyankin, IC Soglassye presented activities of their companies through practical issues that made their presentations very interesting for the audience.

The third section of the Conference was interactive. It was divided according to the audience's business activities and preferences. Partners from Interlegal, Nikolay Melnykov and Arthur Nitsevych, moderated the most popular case study – 'Sea. Sea Leg of Transportation'. The interactive section was based on real cases from the practice of Interlegal and its partners – Remedy, Russia (represented by Andrey Shashorin) and Marine Legal Services, Latvia (represented by Julia Kazmina), well-recognised law firms that are fully involved in shipping.

Natalya Myroshnychenko and Artem Skorobogatov (Interlegal) moderated the case study 'Land. Bill of Lading and FCR as the Key to Money'. The case study 'Land' was based on the practical cases of Interlegal, mainly focused on problems with cargo during transportation: shortage, loss, misdelivery and damage caused by such issues, as well as the role of transport documents in resolving consequent disputes.

Roundtable of Jose Alcantara (AMYA Abogados) gathered delegates for the RoundTable for the Lawyers, 'The Survival of the Freedom of Contract in Shipping Transport'.

Vivid discussions of the participants at all interactive events showed their great interest in the cases studied. A special option, Expo Area, was organised and operated in the course of the Conference. Expo Area became the main attraction of the Conference as the organisers and guests placed their expositions there. The types of activity of the Conference organisers were presented in detail.

The brilliant Gala Dinner devoted to the 15th anniversary of Interlegal finalised the event. Many guests, partners and clients used that chance to express respect for Interlegal, congratulate the staff of Interlegal and speak warmly of the company.

The football tournament for the Shipping Law Cup was held the day after the Conference, on 3 June. The sponsor of that tournament was the insurance company 'Groupama Transport' (Latvia). Four teams took part in the tournament: World Team, Veterans, Nortrop and Varamar. Varamar won the tournament.

The Conference's main objectives which were optimal decisions on the leg of transshipment and carriages by sea, analysis of the Ukrainian and foreign practice and establishment of new business contacts were successfully achieved

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The impact of foreign sanctions on ship financiers and insurers in Singapore*

The case of *The 'Sahand'*¹ has drawn attention to the measures taken by Singapore in response to the international sanctions and assets freezing orders by the US, the European Union (EU) and the United Nations (UN).

The US Office of Foreign Assets Control's transaction-blocking and dealing prohibitions, the EU regulations against providing insurance and reinsurance and the latest UN Security Council resolutions all have a common theme: instead of merely banning direct trade with designated Iranian entities, these measures seek to prevent access to finance, credit and insurance. Where the earlier focus was prevention of sale and supply of materials used in Iran's nuclear and military development, these financial sanctions aim to restrict access to commercial resources and increase the costs of conducting business, with severe penalties for sanction breaches.

These access restrictions, while effective in limiting trade, are complex and overlapping. Further complications arise when countries variously implement these restrictions in their local laws.

Singapore, on its part, has enacted legislation to give effect to various UN Security Council resolutions. Essentially these resolutions aim to penalise Iran by:

- listing targeted individuals or entities ('sanctioned persons'); and
- prohibiting dealings with these sanctioned persons in designated items/materials/equipment or technology that contribute and/or may contribute to Iran's nuclear or missile development programme ('designated items').

Singapore's sanctions broadly follow the UN approach but via separate regulations applying to:

- financial institutions; and
- persons within the jurisdiction of Singapore and Singapore citizens.

Financial institutions fall under the Monetary Authority of Singapore's Sanctions and Freezing of Assets of Persons – Iran

Regulations 2007. These regulations require the financial institution to:

1. Freeze the funds, assets or other economic resources owned or controlled by sanctioned persons. No economic resources are to be made available, directly or indirectly, to the sanctioned persons, with a few exceptions approved by MAS.
2. Notify the Monetary Authority of Singapore immediately if it has possession, custody or control in Singapore of any economic resources owned or controlled by a sanctioned person and to provide any further information. This obligation to notify also includes all information about any proposed transactions.
3. Refrain from providing any financial assistance (such as investing, brokering, insurance and reinsurance services) in relation to designated items to any person in Iran or any Iranian citizen if it has reasonable grounds for believe that such financial services could contribute to Iran's nuclear or missile development programme.
4. Exercise vigilance when conducting business with any entity incorporated in Iran or subject to the jurisdiction of Iran if it has reasonable grounds to believe that such business could contribute to the Iran's nuclear or nuclear weapons programme or be in violation of the UN resolutions.

In short, the financial institution has a twofold duty:

- the easier duty is imposed by clear stipulations as to what a financial institution can or can not do (for example, freezing assets owned or controlled by a sanctioned person or provision of financial assistance related to designated items); and
- the second, more onerous duty, lies in reporting information that may (or may not) provide reasonable grounds to believe that the provision of such financial assistance may fall foul of the

MAS Regulations (for example where there is a reasonable suspicion that monies in a particular account are being indirectly controlled by a sanctioned person). It would appear that the safe and key rule in response to these sanctions is for the financial institutions to 'know its customers'.

On a final note, Singapore has made a timely update to its MAS Regulations to give effect to the latest UN Security Council Resolution 1929 (2010), which enhances economic sanctions against Iran. This has given greater clarity as to the scope of obligations imposed on a

financial institution operating in Singapore. Nevertheless, it is still important for financial institutions to conduct regular checks for any updates on the list of sanctioned persons or designated items that are subject to the UN Security Council Resolutions.

Notes

- * This article was first published in *Starboard Maritime News*, April 2011, www.rodyk.com/starboard/apr_2011/english.
- 1 *The 'Sahand' and other applications* [2011] SGHC 27. View our case report at: www.rodyk.com/starboard/apr_2011/english/index_08.html.

Singapore extends existing Block Exemption Order*

Following recommendations from the Competition Commission of Singapore the Ministry of Trade and Industry has extended for shipping lines the Block Exemption Order (BEO) from competition laws till the end of 2015.

Giving as a reason the recovering global economy and that these exemptions remain the international norm, the Ministry said that it will not follow the decision of the European Union (EU) to withdraw block exemption from shipping line conferences. Instead, it will take a 'wait and see' approach and review the impact of the EU decision.

Although some in the shipping community, such as the Singapore Shipping Association, welcome this extension others, including legal experts, advise caution in reliance on the BEO. Shippers should be aware that the BEO operates only on shipping lines between Singapore and destinations where there are

no competition laws.

However, such collective tariff arrangements are not shielded from competition law prohibitions on shipping lines to Europe and other jurisdictions which have recently adopted more stringent competition regimes eg China and Indonesia. Shippers should also note that even in other jurisdictions with similar shipping lines exemptions, Singapore's BEO is more liberal in terms of combined market share, prior registration, notice period for withdrawal from the agreement and regulatory oversight.

Thus, even though the BEO has been extended, shipping lines should check with their legal advisers to avoid unwanted and costly scrutiny and competition law enforcement.

Note

- * This article was first published in *Starboard Maritime News*, April 2011, www.rodyk.com/starboard/apr_2011/english.

The Singapore sale form and the Asian ship resale market*

One thousand four hundred used ships were sold in 2010, a fourfold increase on 2009. Chinese owners, second highest spenders to the Greeks in the global second-hand market, acquired 175 ships for almost US\$12bn and €3bn.

The Maritime and Port Authority and the Singapore Maritime Foundation, recognised this growth in ship sale transactions with an Asian nexus. They also saw an opportunity to offer greater choice in the provision of regional legal, arbitration and finance services. This would be in tandem with plans to transform Singapore's trans-shipment port business into a competitive international maritime centre. It was thought that the Asia-based shipping community would choose regional service providers who understood modern ship sale transactions and maritime, finance and regulatory practices.

The Singapore Maritime Foundation commissioned the Centre of Maritime Studies at the National University of Singapore to draft a new ship sale form. The new Singapore Ship Sale Form (SSF) was developed in partnership and consultation with maritime lawyers, bankers, ship-brokers, ship managers and owners. The Singapore Maritime Foundation also worked closely with the Singapore Shipping Association and the Asian Shipowners' Forum and held consultation sessions in Hong Kong, Shanghai, Tokyo and Taipei.

The SSF was launched in January 2011. It is a form that seeks to overcome many if not all of the issues and difficulties encountered in BIMCO's Norwegian Sale Form 1993 (NSF 1993) and also provides for Singapore as the default venue for arbitration with a choice of either Singapore or English law

as the governing law. Parties, though, can choose some other venue or governing law in the form. The SSF is distributed free (www.singforms.com).

Since the launch, the Singapore Maritime Foundation conducted briefing and explanatory sessions on the SSF in Seoul and Mumbai, and continued these familiarisation efforts at gatherings of the international maritime community, such as the Sea Asia Conference, on 12 April 2011 in Singapore.

Additionally, Chinese and Japanese translated guides for the SSF were released on 3 March 2011. According to David Chin, executive director of the Singapore Maritime Foundation, these guides will further encourage use of the SSF by maritime companies in China and Japan. Although these companies frequently enter into sale and purchase contracts in English, the Singapore Maritime Foundation understands that it is common practice for the contracts to be translated for their native Chinese and Japanese speaking management.

As a result of these marketing efforts, there has been a notable uptake of the SSF. According to recent reports, the SSF is endorsed by the Federation of ASEAN Shipowners' Association, and it has been used in more than 40 used-ship transactions since it was launched.

It is interesting to note that after the launch of the SSF, BIMCO announced plans to complete revising and updating the NSF 1993 and requested Singapore's participation in a launch in October 2011.

Note

* This article was first published in *Starboard Maritime News*, April 2011, www.rodyk.com/starboard/apr_2011/english.

Your client has been sued in the US – now what?

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Scenario

You have just been advised that your client, a Brazilian company, has been sued in Miami Federal Court by a US buyer, a California corporation with offices in Miami, for failure to deliver product. The buyer has sued for breach of contract and fraud, and demanded compensatory and punitive damages.

The buyer purchased 100,000 units of swimwear for US\$500,000 from seller, with headquarters in Rio de Janeiro and a worldwide network of offices. Negotiations were conducted in person, in Miami where the parties met at a trade show, and in Los Angeles a short time later. The buyer has never set foot in Brazil. CIF terms and other conditions were exchanged by e-mail, with delivery in Miami. There was no formal written contract – the buyer sent a ‘purchase order’ and the seller sent an e-mail confirmation.

The seller has no presence in Florida; it has no office or staff nor does it advertise there. The president claims his company has sold swimwear to only one other Florida buyer although it has sold product to California buyers over the years, and says the product was shipped months earlier.

What is your goal in the US?

You must decide whether to: (a) defend the lawsuit or negotiate a settlement in the US; or (b) try and have the case dismissed from the US court and take the risk of being sued in another jurisdiction. Answering this question requires a US lawyer familiar with international law issues, and it will take a team effort to guide the US lawyer on what would be the best outcome for the client.

Stand and fight

On the one hand, it may be tactically beneficial and cheaper in the long run to defend the case in the US. For example, the seller may have good defences to the claim, which can be developed with the advantage of US style-discovery, including depositions and production of e-documents. And the client may be able to file a counter-claim against the

buyer or ‘set-off’ damages on the transaction.

If so, you will want to consider the following to see if it will be helpful or harmful to your case:

- **Discovery** This involves: (a) taking depositions (questioning by the opposing lawyer under oath, before a court reporter, possibly video-recorded) of the buyer and its witnesses, as well as your client’s deposition and witnesses – often conducted outside the US in your client’s jurisdiction and your law offices; and (b) getting documents from the buyer, including electronic documents like e-mails and draft versions of the purchase order.
- **Contract 28 USC §1782 action.** This requires a filing in a US court, requesting discovery in the US for use in a foreign proceeding or arbitration.
- **Governing law** US federal courts can apply foreign or non-US law. For example, if the contract contains a choice of law clause, or even if there is no such clause a US court can determine (under a point-of-contact analysis) which law should govern the contract – foreign law can be presented by an expert witness via affidavit or in-person testimony.
- **Attorneys’ fees** There is no automatic recovery in the US by a prevailing party, referred to as the ‘American Rule’ versus the generally accepted ‘Common Law Rule’ adopted by many other countries, unless it is properly stated in the contract or applies under foreign law.
- **Enforcement of US Judgment** If the seller loses the case, does it have assets in US against which a judgment can be levied. If not, can the US judgment¹ be domesticated in another jurisdiction where it *does* have assets, or does the case have to be re-tried and a local judgment obtained to be enforceable, thereby requiring the buyer to spend more legal fees if it wants to pursue the case?

Fight and run

On the other hand, you may prefer to try and have the case dismissed from the US court, thereby forcing the buyer to look for

another opportunity to re-file the lawsuit in a friendlier forum.

In that case, you will want to consider and investigate the following issues:

- **Service of process** How did your client find out about the lawsuit? For example, was it served with legal process? If so, was this by personal service, mail or agreement via fax or e-mail? Maybe service was improper, insufficient or should have been conducted via The Hague Convention or the Inter-American Convention through 'letters rogatory'. Did your client agree to and/or accept service of process?
- **Personal Jurisdiction** What 'contacts' does the seller have with place where it was sued? For example, is it registered in Florida as a company, does it have office/staff/registered agent; if not, the court may lack personal jurisdiction.² Bear in mind US courts generally have personal jurisdiction over a non-resident defendant that has 'minimum contacts' with the state and where jurisdiction would not violate 'traditional notions of fair play and substantial justice'.³
- **Forum Non Conveniens** Is there a more convenient forum re witnesses and documents? If so, a US court has discretion to dismiss the case and allow buyer to re-file in seller's country.⁴ There is a two-part test:
 1. The buyer must show there is an 'adequate alternative forum' where the lawsuit can be filed – this should be fairly easy to meet, unless Brazil does not have established court system, buyer's claim would not be recognised, or the courts are so congested that the case could not be heard for 15 years or more.
 2. There is a balancing test on a list of *private* and *public* interest factors to determine if litigation in the US would be too burdensome; if on average factors tip towards inconvenience, the case is dismissed.⁵
- **Default Judgment** Is it a good idea to do nothing and let the buyer take a default judgment, without your client's participation? This could be risky, unless your client has no assets worth pursuing in US, never intends to do further business there, and such a judgment would not be enforceable in the seller's country.

Are there any other considerations?

There may already be a lawsuit on the same or related transaction or occurrence in

process in your client's country. In that event, you could consider an 'anti-suit injunction' in the US court, asking that the US case be dismissed in light of the prior filed Brazilian lawsuit. But if there is no prior suit, you may consider filing a new parallel action in another forum, based on advice from US counsel on whether the US court would enjoin your client *in its court* from proceeding with the foreign action (provided the court considered it had jurisdiction over your client).

There may be an arbitration clause that requires the buyer to arbitrate rather than litigate the dispute. If so, do you want to enforce that clause? Your client may be in a country that is a signatory to the New York Convention and its enforcement proceedings. Bear in mind it is relatively easy to domesticate a foreign arbitration award into a US award.

Once you have analysed all of the above and armed yourself accordingly, your client can decide whether to stand and fight, or fight and run and possibly fight another day. Of course, someone might have a lot of swimsuits for sale on hand, or a lot of insurance money in hand, but that is another story.

Notes

- 1 Since fraud has been alleged, with a request for punitive damages under US law, this may be reason to try and incorporate Brazilian law as the governing law, since it may not allow for such damages, or litigate elsewhere.
- 2 Personal jurisdiction can be *general* or *specific*. former requires 'substantial, continuous and systematic' contacts that do not have to be connected to a business relationship with forum; latter requires: (1) defendant to have 'purposefully availed itself of forum benefits'; (2) controversy to be 'related to or arise out of defendant's contacts' with the state; and (3) personal jurisdiction to constitute 'fair play and substantial justice'.
- 3 Should the seller make a 'special appearance' to contest personal jurisdiction or face consequences of a US judgment and probable enforcement efforts elsewhere in the world? Here, there may not be general personal jurisdiction but there may be specific personal jurisdiction – case arose out of contact with forum (seller agreed to ship product to US company with offices in Florida, with delivery in Florida); it purposefully availed itself of benefits of the forum (contracted with US company in Florida for sale of swimwear and failed to ship it to Florida); and the transaction (US\$500,000) was substantial by almost any definition.
Note: US courts have a strong interest in enforcing contracts that provide for performance within their boundaries. They consider that a seller can protect itself by insisting on an appropriate forum in the event of a dispute via a forum selection clause in the agreement, before shipping goods to a foreign jurisdiction.
- 4 Different from another 'venue', for example arguably, in this case California.
- 5 *Private* factors: (1) residence of parties and witnesses (are key witnesses in US); (2) availability of compulsory process for attendance of witnesses (can unwilling

witnesses be forced to testify in US); (3) cost of bringing willing witnesses to trial in US (based on defendant's resources); (4) access to physical evidence (where is key evidence located); (5) enforceability of judgment in US (where easier to enforce final judgment); and (6) other practical problems in holding trial in US (witness visas, logistics/communicating with foreign parties and

coordinating experts etc.). *Public* factors: (1) burden on local court and jury, court congestion (how much stress on local v alternative forum); (2) interest in matter decided locally (does one country have greater interest to have its court decide case); and (c) US court familiarity with governing law (does it have to apply foreign law).

The America's Cup in San Francisco

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The 34th America's Cup

The America's Cup, often referred to as the oldest trophy in international sport, one that is steeped in rich history and tradition, is about to take the Facebook generation head-on in its latest incarnation. If the recent America's Cup test sessions held in Auckland and San Francisco are any indication, the result is going to be fantastic. One might ask, 'What has changed since the last Cup?'. The short answer: Everything. What follows is a brief look at all of the different aspects which will comprise the 34th America's Cup.

The venue

After a hotly-contested selection process, San Francisco Bay was chosen to host the 34th America's Cup. Home to the Golden

Gate Yacht Club, the current Challenger of Record, as well as a geographically perfect natural amphitheatre, San Francisco Bay with its notoriously challenging winds and currents will be the perfect venue to push the boats and the teams to their limits. The America's Cup was last hosted in the US in 1995 in San Diego, and the pressure is on to keep it here!

Perhaps one of the Cup's most ambitious aspects is its promise to transform the local San Francisco waterfront into a world-class sports platform on a par with an Olympic or World Cup venue. Plans, which are in the review phase, include proposed improvements to many of San Francisco's currently underutilised and neglected piers to make room for race facilities. Those race facilities will include a race village to showcase the teams, as well as construction of new dockage for the multitude of superyachts which the event expects to attract. In addition, dredging and reconstruction of city docks and marinas will be undertaken and improvements will be made to shorelines where public viewing of the races is expected to take place. There will also be renovation of key viewing spots. The America's Cup is expected to attract upwards of 500,000 spectators for the finals races. While construction has yet to begin, it is anticipated that once the Environmental Review and Planning Process is complete (scheduled for the end of 2011), a flurry of activity will transform the city's waterfront in time for the 2012 Louis Vuitton Series.

The race format

The finals for the 34th America's Cup will be held in San Francisco in September 2013. This will be the culmination of this Cup's three main stages – the America's Cup World Series (ACWS), the Louis Vuitton Series and the America's Cup Finals. The first phase, the ACWS will be played out on

a worldwide stage with the first ACWS event to be held in Cascais, Portugal on 6 August 2011. This Series will take the teams to between eight and 16 international venues (yet to be finalised) where the teams will gain experience with the boats, and one another. The ACWS will be followed by the Louis Vuitton Series which will be contested on San Francisco Bay during the summer of 2012 (July–September). The Louis Vuitton Series is critical as it will also mark the debut of the AC72s, and its winner will determine who earns the right to race the defender in the 34th America's Cup. The America's Cup Finals, held in the AC72s will be contested right on San Francisco's waterfront. The close track, which varies significantly from previous Cups which were often contested in open water well offshore and away from spectators, will provide an unparalleled spectator experience as well as never-before-seen challenges to the teams which are seeking to pilot these vessels in such a close area. The dates for the finals have been set for 7–22 September 2013.

The boats

This Cup will be unique in large part because of the new and exciting boats that have been created exclusively for this purpose, the AC45 and the AC72. The AC45 is a 45-foot wing-sailed multihull, the AC72 is its as yet unseen big brother. The AC45s are a one-design boat developed by the Oracle Racing Design and Engineering Team and then mass-produced and sold to all the teams for the specific purpose of America's Cup racing. Each AC72 will be designed and constructed by its respective team and must conform to a rigorous series of design rules, restrictions and construction requirements.

What makes these boats so special is that they are high-tech catamarans with fixed wing sails capable of reaching speeds previously unimagined, and providing a physical and mental challenge never before experienced, in sailboat racing. The Cup organisers have been working hard to meet the challenges posed by racing with these new boats, including developing all new technology for staging the races, monitoring and judging them, and presenting the fast-paced action to the world.

San Francisco got an early taste of the excitement to come when Oracle Racing brought its two AC45 catamarans to the bay for an early testing session in June and July

of this year. The Oracle boats, piloted by Cup legends Jimmy Spithall and Russell Coutts, spent every weekday afternoon for almost a month pushing their teams, their boats and themselves to the limits in San Francisco's challenging conditions. On one occasion the challenge proved perhaps too much for Russell Coutts as a botched attempt at bearing away (steering his boat downwind) resulted in the boat cartwheeling, or in sailing terms 'pitch poling', in what was soon to become known in sailing circles as 'The crash heard round the world'. Thankfully no one was injured, the boat was quickly repaired and Oracle was back on the water continuing its two-boat testing sessions.

The teams

The Challenger of Record, Oracle Racing, is well-known perhaps less for its sailors than its leader and local bay area resident, Mr Larry Ellison. Mr Ellison and team Oracle have been integral in bringing this magnificent event to San Francisco and with funding and experience on their side promise to be a formidable defender.

The Challenger of Record, Artemis Racing, is perhaps the greatest potential threat to Oracle Racing with a wealth of sailing experience and talent amongst its ranks. Led by bay area resident Paul Cayard, and skippered by the legendary Terry Hutchinson, Artemis will without a doubt prove to be one of the most serious contenders for the 34th America's Cup.

The other challengers: Aleph, China Team, Emirates Team, New Zealand, Energy Team, GreenComm Racing, Team Korea and Venezia Challenge represent a whole range of talent, experience and resourcefulness. While it remains to be seen who amongst them will rise to the ultimate challenge, one thing is clear, it will be an unprecedented and exciting process to watch.

With less than a month before the first starting gun goes off in Portugal for the Cascais ACWS event, the teams and the event organisers are working feverishly to provide what they have promised, and to ensure that the new format and the new events are a success: the world's best sailors sailing the world's fastest boats. I can't wait, and Cox, Wootton, Griffin, Hansen & Poulos will be looking forward to welcoming you to San Francisco if you decide to visit and view the America's Cup challenge.

Ship recycling on the Indian subcontinent: today and beyond

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Comeback kids!

Like Ninjas from the dark the ship recycling yards in the Indian subcontinent have emerged more focused, updated, energetic and stronger.

Until the recent Indian Supreme Court judgment in 2007 hardly any companies were investing funds in having their recycling yards upgraded to the internationally recognised ISO levels. Times, however, have now changed and of the 170 functional yards at Alang at least 100 have the ISO 9001, 14001 and 18001 with as many as 50 yards holding the fourth additional certification, the ISO 30000. Therefore the myth that Alang is an unlicensed and uncertified industry locked in the rudimentary methods of 25 years ago is debunked and replaced with hard and deserving facts.

Today Alang is considered to be the largest ship recycling market in the world. More than 8,000 ships (250 ships from 1 – 31 July 2011) have been recycled at Alang so far generating steel output of more than 75 million tons. In an average year Alang recycles about 500 ships with annual sales turnover from this activity hitting a whopping US\$1,300m. At full operating capacity this industry both directly and indirectly employs over 200,000 workers. By arming themselves with ISO the Indian yards are fully capable of green ship-recycling. The Gujarat Maritime Board (GMB) has invested millions of rupees in creating facilities for the safe disposal of hazardous wastes generated from recycling activities. Separate landfills have been created for glass wool, asbestos, sludge, oil wastes and other hazardous materials. An independent environmental agency has been contracted by GMB to oversee and regulate the handling and disposal of hazardous wastes. This agency strictly follows both in spirit and form the guidelines laid down by the Supreme Court. In the event of any non-compliance the agency makes a formal report to GMB which initiates appropriate action against the erring recycler or contractor.

Western surveyors visiting Indian recycling yards are often amazed to find how different things are from what they had assumed.

Indian yards are fully capable of recycling ships as per the Hong Kong Convention of 2009 since the Supreme Court judgment mirrors the requirements of the Convention and Indian yards are completely geared to embrace and adopt the Convention.

Vessels are sold today for scrap often at twice the price at which the ship may have been bought by the current owners ten years ago. The average price of a Suezmax tanker in the Indian subcontinent is about US\$12m.

Ship recycling is effective in India because, as a developing economy, India urgently requires various grades of steel. The use of ship steel is much more cost-effective and environmentally friendly than turning iron ore into steel which process has a greater impact on carbon footprints. Ships' generators are used in industry and agriculture and virtually every nut, bolt and sink is resold into the markets to fixed buyers.

Companies like WIRANA are known as cash buyers since they pay in cash. They are not brokers but traders. They buy the ships on their account and resell them to ship recyclers. Like wholesalers or distributors of goods in other industries cash buyer companies are specialists in the ship-recycling markets and help in the effective distribution of vessels in the various buying markets.

Additionally, cash buyers often buy ships on the basis 'as is where is' on simple terms. They later reflag their ship, appoint their own crew and steam the vessel to the recycling yards. Therefore a prompt sale is facilitated for the owners and their risks are fully underwritten in delivering a vessel to a recycling yard in the subcontinent.

Any allegations that portray the sale of a vessel through a cash buyer as a means of circumventing the legal responsibilities of the shipowner are erroneous.

Bangladesh has approximately 45 functional yards of which 12 have ISO 9001, 14001, 18001 and 30000. From 1 April

2011 to 8 July 2011 approximately 96 ships have beached while a few more are at outer anchorage awaiting permission to land.

Unfortunately, Pakistan does not have even one of the 50 operating yards ISO certified, so Pakistan remains on the sidelines watching the world go by. Since 1 January 2011, approximately 40 ships have been beached so perhaps the incentive to upgrade to ISO is lacking because so few ships are arriving in Pakistan as compared with India and Bangladesh.

Based on information from Greenpeace and other similar agencies several believe that ship recycling requires a European solution. However real life examples of *Sandrien*, *Otapan* and *Le Clemenceau* are cases

that have cost their respective governments millions of dollars and yet the problems have remain unresolved.

The current business paradigm and dynamics demonstrate that it is easier to practise effective ship recycling in countries that have already created a ship-recycling industry and value the asset to be recycled rather than creating a new industry in a country which *prima facie* treats the asset as a liability.

Unfortunately the gap between perception and reality is perhaps the widest in the ship-recycling industry and we need to step up to the plate to bridge this divide and undertake initiatives to work together and find practical solutions.

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The BASEL Convention: an update

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is the most comprehensive global environmental agreement on hazardous and other wastes. The Convention has 175 Parties and aims to protect human health and the environment against the adverse effects resulting from the generation, management, transboundary movements of and disposal of hazardous and other wastes. The Basel Convention came into force in 1992.

During its seventh session, the Working Group adopted Decision OEWG-VII/13¹ concerning cooperation between the International Maritime Organization and the Basel Convention. The decision requests the Secretariat, within available resources, to provide a legal analysis of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships and to publish such analysis on the website of the Basel Convention. The decision also invites the Secretariat of the International Maritime Organization to submit to the Basel Convention Secretariat any further comments, views or information that it may have on the following:

- the respective competencies of the Basel Convention and the 1978 Protocol to the 1973 International Convention for the Prevention of Pollution from Ships in respect of hazardous wastes and other wastes and harmful substances;
- any gaps between those instruments;
- any options for addressing those gaps, if any, such as may exist under other legal instruments of the International Maritime Organization;
- any other relevant information.

The Hong Kong Convention on the Safe and Sound Recycling of Ships 2009 has been signed though not ratified by France, Italy, the Netherlands, Saint Kitts and Turkey and ratifications are soon expected from France, Norway and China. Due to various reasons this is a lengthy process. The Hong Kong Convention 2009 will focus on the Safe and Sound Recycling of Ships and is perhaps the most comprehensive piece of legislation drawn up to date and is expected to completely regulate the environmentally safe disposal of vessels for recycling.

Note

- 1 www.basel.int/meetings/oewg/oewg7/docs/21e-report.pdf#vii13

Hague Appeal Court establishes duty of care on stevedore for vessel damage

The little-known decision of The Hague Court of Appeal in *The Noordkaap*, which is due to be published shortly, is likely to be welcomed by shipowners generally as it sheds new light on the duty of care which the courts in the Netherlands may deem to be required of stevedores in the course of cargo handling operations.

As a result of the decisions in, among other cases, the *Allegonda* in 2009 and the *Pretoria* in 2010, there has existed a perception that claims by shipowners against stevedores for damage caused to vessels during cargo operations will not be viewed favourably by the Dutch courts. In both those cases, the Court of Rotterdam found in favour of stevedores.

But the Appeal Court judgment in the *Noordkaap* overturns the decision of the court of First Instance, the Court of Rotterdam, which had found that it had not been proven that the stevedore had failed to exercise reasonable care in a lifting operation which caused damage to the vessel.

The damage occurred during unloading in the Port of Rotterdam in May 2000. The containers on board were being offloaded by a mobile crane operated by the stevedoring company, Hanno. Due to unequal loading, one of the containers was seen to be leaning to one side, giving the appearance that it was somehow fixed to another container.

The crane handler stopped the lifting operation and lowered the container. Subsequently, he tried once more to lift the container, but the lifting operation remained unequally balanced. Still the crane handler continued lifting, causing the container to swing and to damage the bridge house of the *Noordkaap*, with which it came into contact. None of the parties was aware that the containers were unequally loaded.

In the Court of First Instance it was found that the onus was on the vessel to prove that the damage to the bridge house could have been prevented if the stevedore had exercised reasonable care in offloading the containers. The court ruled that it had not

been proven that the stevedore had failed to exercise such reasonable care. Judgment was accordingly entered for the stevedore against the *Noordkaap* and its insurance underwriters, who appealed the decision.

When the dispute came before the Appeal Court in the Hague, it was noted that the basic assumption had to be that the offloading of the containers by the stevedore should be carried out with due care in order not to cause damage to the ship. The Appeal Court found that the damage had resulted from an error by the stevedore's crane handler. It noted that the crane handler had continued to lift the container even after noticing, for the second time, that it was not lifting in a balanced way. It was the continued lifting of the swinging container which subsequently caused damage to the bridge house.

The Appeal Court observed that the stevedore had maintained that the imbalance of the container itself could not – or could not sufficiently – be corrected, even by shifting the spreader, because of the unequal loading of the containers. But the Court considered tantamount to negligence the decision of the crane handler to continue lifting the container, even after discontinuing the lifting operations and noticing that the container was not lifting in balance, but hoping that it would clear the bridge house.

The Appeal Court said it was not proven that there had been no possibility of stopping the lifting operation, and found that the stevedore was liable for the damage to the vessel.

The decision of the Court of First Instance in *Noordkaap* is not the only occasion on which the Dutch courts have found for a stevedore in a dispute over damage to a vessel caused during cargo operations. Most recently – in September 2010 – the Court of Rotterdam ruled that the fact that a stevedore damaged a vessel during loading operations did not necessarily constitute an illegal act which obliged the stevedore to compensate the shipowner for any damage caused. In that case (*The Pretoria*) the court held that the mere fact that the damage was caused to

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the vessel during loading operations did not justify the conclusion that an unlawful act had been committed.

In the *Allegonda* (August 2009), the Court of Rotterdam held that a stevedore was not liable for damage sustained by a non-purpose-built container vessel during the loading of containers on board by means of a spreader.

The decision of the Appeal Court in *Noordkaap*, which is expected to be published

shortly in *Schip & Schade*, establishes a clear duty of care on the part of the stevedore. Although the decision is based on the same facts and arguments as those presented to the Court of First Instance, it arrives at a very different conclusion to the Court of Rotterdam. Furthermore, the decision does not appear to have been debated in the proceedings in *Pretoria* and *Allegonda*.

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The UAE Maritime Code

Introduction

The United Arab Emirates (UAE) is a federation of seven Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Fujairah and Ras Al Khaimah) and is essentially a civil law jurisdiction.

The Constitution of the UAE enshrines the principle that the State religion is Islam and Islamic Sharia and practice is the basic foundation for all laws in the UAE. On this basis various federal laws (applicable throughout the UAE federation) and local laws (applicable solely in each Emirate) have been enacted governing, *inter alia*, civil and commercial transactions, contracts and legal proceedings in each Emirate. Generally, when a court is determining a commercial issue, it gives initial consideration to any applicable federal and local laws and if such laws do not address the issue, the applicable provisions of the Sharia may be applied.

Although the civil courts of the UAE may apply Sharia principles, they also act in accordance with the provisions of international usage and custom. Accordingly, the courts have regard to customary practice in international trade and commerce and financial markets. This can be of particular importance, especially in matters related to shipping, which (given its international nature) has always strived to obtain a degree of uniformity (not always successfully).

The Maritime Code

Maritime Law in the Gulf Cooperation Council (GCC) states is dominated by a sequence of Maritime Codes starting with

the 1980 Kuwait Code and followed by all the other Gulf States in more or less identical terms. In the UAE, the Maritime Code, Federal Law No 26 of 1981 as amended ('Maritime Code') provides the overriding framework for most of the relevant maritime, transport and marine insurance law provisions in the UAE. There are of course other laws and regulations which are also relevant, but it is probably fair to say that the Maritime Code is the primary statutory enactment in the UAE dealing with maritime matters generally.

The Maritime Code has adopted, or contains, many of the general principles adopted by the international community in the Hague and the Hague Visby Rules. It is not however a direct statutory enactment of the Hague and/or the Hague-Visby Rules.

Time for change: a new maritime code?

The existing Maritime Code is a comprehensive statutory regime, but has been around – virtually unamended – for the last 30 years. It is therefore probably fair to say that the law has not kept pace with containerisation and other rapid developments in the maritime sector and the Maritime Code is therefore in desperate need of an overhaul.

It has been reported in the local press that The Federal National Council (FNC) in late January 2011 approved a draft of a new federal maritime law (the 'New Maritime Code') which promises a comprehensive overhaul of the current system.

It is hoped that the New Maritime Code will deal with some of the more archaic provisions of the (current) Maritime Code, as set out below:-

Vessel ownership

Article 18 of the Maritime Code established the UAE ship register. Under the Maritime Code, any vessel which is more than 10 tons and intends to fly the UAE flag must be registered in the UAE. The UAE vessel register is currently maintained by the Marine Affairs Department of the National Transport Authority (NTA) which maintains a so-called 'national' or 'closed' register which requires the vessel-owning entity to be either UAE national(s) or a UAE corporate entity with majority UAE shareholders.

Unlike some other jurisdictions (for example, Panama), the UAE flag does not currently allow foreign owners and foreign companies to register their vessels on the UAE flag (although it is possible for foreign registered vessels to obtain UAE navigation licences in some instances). This limits the number of vessels which can be registered in the UAE. There is speculation that the New Maritime Code will allow for foreign vessel registration, although this has not yet been confirmed.

Mortgage registration

The Maritime Code sets out the law and procedure for the registration of mortgages on vessels registered with the NTA. A number of steps need to be taken to record and perfect security created through a mortgage instrument on a UAE-flagged vessel. It is important that the correct steps are taken before the registration of the mortgage to avoid any problems on the day of registration, especially if the registration has to be achieved by a pre-defined date. The main points to bear in mind are as follows:

1. the mortgage must be effected through an 'official instrument' otherwise it will be void. In practice, this means that the mortgage must be in Arabic and properly notarised. Although there is no statutory short form mortgage or prescribed form for drafting the mortgage, it should contain all the essential details that are relevant to a mortgage as set out in the Maritime Code;
2. the loan amount set out in the mortgage should have a specific maturity date, the maximum mortgage amount should be fixed, interest (if any) should be stipulated, and the mortgage should cover a particular vessel or vessels. It is unlikely that the NTA will accept a mortgage instrument which does not

3. meet these basic requirements;
4. the mortgage can only be granted by the owner of the vessel over any commercial debt, provided it is not against the public policy of the UAE and, as we mentioned above, the mortgagor can only be a UAE (sometimes GCC) national(s) or UAE-based company with majority UAE shareholders;
4. as the mortgage will be created over an asset registered in the UAE, the mortgage document must be drafted in Arabic. Although in practice dual English/Arabic mortgages are accepted, it is important to bear in mind that the Arabic version will generally prevail if there is a dispute as to the language;
5. any substantive document which alters the scope and application of the original mortgage instrument must also be filed with the NTA; and
6. the relevant fees should be paid. The process of notarisation with the Dubai court notary and mortgage registration with the NTA currently incurs a charge of approximately UAED12,500 per vessel (but fees are subject to change).

It is hoped that the New Maritime Code will streamline the process for mortgage registration, especially in relation to the registration of mortgages over non-commercial (but high value) vessels, such as yachts and pleasure boats. Also, the law and practice of provisional mortgage registration and for vessels under construction would benefit from an overhaul.

Arrest

The Maritime Code also regulates the law and procedure for filing an arrest application over vessels (both UAE-flagged vessels and foreign vessels). An arrest application in the UAE is carried out *ex parte*. A ship may only be arrested to secure payment of a 'maritime debt' as defined in Article 115 of the Maritime Code.

A ship cannot be arrested if the claim does not fall within Article 115 of the Maritime Code and is not classified as a maritime debt. Where a claim relates to a maritime debt, the claimant may apply to arrest the vessel or any other sister vessel owned by the same debtor. Evidence to show that the same person owns the sister vessel must be provided to the court before the order is granted. The law and procedure for filing an arrest in the UAE is reasonably clear but there is speculation that the New Maritime Code will

expand the existing categories of 'maritime debts'. In particular, it would be useful to have a more streamlined (and expedited) procedure for the judicial sale of vessels under arrest. The current system does allow for judicial sale, but it can be a long and cumbersome process.

Priority and ranking

Vessel mortgages generally rank below the debts referred to in the list below:

- judicial costs incurred by the court;
- debts arising out of employment contracts of the crew and master;
- monies due for assistance and salvage and the share of the vessel in a general average;
- compensation due for collisions and other navigational accidents, bodily injuries to crew and compensation for loss or damage to goods and possessions of crew; and
- debts arising out of contracts made by the master of the vessel and operations carried out by him for the maintenance of the vessel or continuation of a voyage. This

includes any debt due to the master or lenders or persons undertaking to supply or persons who have repaired the vessel or other contractors.

Time will tell whether the New Maritime Code will change or improve the mortgagee's current ranking, or will introduce new categories and rankings.

Conclusion

The UAE has a proud maritime tradition, and remains an important shipping and trading hub, especially in the GCC region. The New Maritime Code has not yet been formally enacted, and it remains to be seen to what extent it deals with some of the more archaic provisions of the (current) Maritime Code. It is encouraging however to see that the authorities place great emphasis on developing the legal framework surrounding the shipping industry, and the New Maritime Code is hopefully not just a small step in the right direction, but a giant leap forward.

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An update on UK law

The Commercial Court has allowed a disponent owner's appeal against the striking out of its demurrage claim by an arbitrator. The grounds for striking out were that there was no contract between the disponent owner and Voyage Charterer, and as such there was no arbitration agreement between them.

TTMI Sarl v Statoil ASA [2011] EWHC 1150 (Comm)

The claimant disponent owner, who had time-chartered the vessel in question, instructed shipbrokers to sub-charter the vessel to the defendant Voyage Charterers. In the fixture recap, the shipbrokers mistakenly named the claimant's parent company, rather than the claimant itself, as disponent owners of the vessel.

The voyage under the charterparty between the claimant and defendant was fully performed. All notices of readiness were correctly tendered and accepted. The notices referred to the terms and conditions of the charterparty and identified the claimant as disponent owner. The freight invoices

specifically stated that an amount was due to the claimant, as opposed to its parent company, and specified the claimant's bank account details for payment. The defendant did not query this invoice, and paid the amount stated to the claimant.

The claimant commenced arbitration, claiming demurrage from the defendant. The arbitrator found that there was no contract between the parties, and as a result there was no arbitration agreement, because the claimant's parent company did not contract as the claimant's agent. On that basis, he struck out the claim on the grounds that he had no jurisdiction to decide it.

Claimant's appeal

The claimant appealed to the High Court. It argued that the defendant had contracted with the claimant and/or its parent company, which had instructed shipbrokers to negotiate the sub-charter. The shipbrokers' mistake in recording the disponent owners' name in the fixture recap did not mean that there was no contract. The claimant also submitted that, in

any event, a contract had come into existence by conduct: the voyage had been performed by, and the freight paid to, the claimant, and not the entity named in the fixture recap.

The defendant, on the other hand, argued that it was not aware that the charterparty was being performed by the claimant as disponent owner, and that it believed that that role was being performed by the claimant's parent company.

Court's findings on appeal

The High Court allowed the claimant's appeal, set aside the arbitrator's award and remitted the matter to the arbitrator.

In doing so, the Court noted that it is common for charterparties to be concluded by an exchange of communications, with the terms being set out again in a fixture recap. Charterparties could also be concluded orally and recapitulated in this way. In this case, however, there was no evidence of an oral contract coming into existence prior to the recap. Indeed the charterparty had not been agreed, either fully or substantially, before the claimant's parent company was named as disponent owner in the fixture recap e-mail.

Even if a written fixture recap is preceded by an oral agreement, the terms of the fixture recap itself are still very important. In this case the Court was unable, on the evidence, to identify or infer a prior oral agreement. As such, the fixture recap did not confirm the making of an oral agreement. Instead it was the main, indeed possibly the only, expression of the agreement between the parties. It could, therefore, for all material purposes be regarded as the charterparty. The disponent owner of the vessel was specifically named in the recap, even if the name given was in fact incorrect. The claimant's argument that the defendant had contracted with the claimant and/or its parent company which had instructed the brokers was at odds with, and undermined by, the express terms of the fixture recap e-mail.

However, the Court ultimately found that a contract had been formed between the claimant and defendant by the parties' conduct. The claimant and defendant dealt with each other throughout: in instructing the vessel to take on cargo, in tendering and accepting notices of readiness, in performance of the voyage and in the demanding and payment of freight.

As to when the contract was formed, the Court held that this was when the freight was

paid. Other possible points of formation of the contract included when the first notice of readiness identifying the claimant as disponent owner was accepted, or when the cargo was loaded.

The contract was on the terms set out in the correspondence: both parties had proceeded on the basis that the terms recorded in the recap e-mails applied, and that they were performing the transaction reflected in those e-mails. The contract so created did contain an arbitration clause. The notices of readiness referred to the 'terms and conditions' of the recap e-mail, and those terms and conditions included an explicit reference to clause 43 of the Shellvoy 5 charterparty form, which contained an arbitration clause. That reference in the recap e-mail had the notation 'OK' against it.

Because a contract had been formed by performance, the Court held that it was not necessary to rectify the recap e-mail to name the correct disponent owner.

Comment

This case exemplifies two important points. The first is that a contract can be created between two parties by their conduct, regardless of what is contained in the documentation. All of the circumstances will need to be considered, although certain of the parties' actions may well have more relevance than others. In this case Mr Justice Beatson noted, and indeed the parties agreed, that in the past the courts have regarded the fact that services are rendered, work is undertaken or payment is made as very relevant factors in deciding whether a binding contract is made.

Parties to a commercial transaction should, therefore, always bear in mind that contractual relations may be created in this way, and that such relations bring with them certain rights and consequences. A party may find itself liable to a different counterparty to that which is identified in any written contract.

Secondly, this case highlights the importance of accurately identifying all relevant parties in contractual documentation, and ensuring that such references are consistent throughout a transaction. Had a contract not been created by conduct, the claimant's appeal may well not have been successful and it would have been unable to pursue its demurrage claim in arbitration.

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Germany: Article 4(5)(e) of the Hague-Visby Rules and the burden of proof

Introduction

The general procedural rule of *nemo tenetur edere contra se* ('no party is obliged to give evidence against itself') is modified by the German courts when considering whether a sea carrier has forfeited its right to limit liability according to Section 660(3) of the Commercial Code, which is the equivalent of Article 4(5)(e) of the Hague-Visby Rules.

Although it is settled law that in the event of loss or damage to cargo during sea transport, the burden of proof generally remains with the claimant, in Germany it is generally sufficient for the claimant to allege circumstances which indicate that the carrier personally caused the damage recklessly or with intent and in the knowledge that such loss would be likely to result. Such circumstances can also be inferred from the cause or the nature and extent of the damage; in cases of loss, it is also generally sufficient that the cause of loss itself is unknown to the claimant. In such cases the German courts presume that the loss or damage resulted from an act or omission of the sea carrier with intent to cause damage or with recklessness and in the knowledge that damage would be likely to result.

Accordingly, at this point the burden of proof shifts to the sea carrier, which must prove that it did not intentionally or recklessly cause the damage, by outlining the organisational measures that were taken to prevent the loss or damage. However, in a recently published decision by the Stuttgart Court of Appeal (3 U 120/09), the *nemo tenetur* rule was partly reinforced in connection with sea carriage in which a sub-carrier is engaged.

Facts

The claimant's insured entered into a multimodal transport contract with the defendant on a fixed-cost basis. The

defendant was responsible for the land and sea transport of various pallets of new silver wire from Germany to Hong Kong. A sub-carrier was engaged by the defendant for the sea transport. The cargo was stowed in a container. After the sea transport from Germany to Hong Kong it was discovered that three pallets of new silver wire were missing. The cause of the loss itself was alleged to be unknown to the claimant.

Decision

The Stuttgart Court of Appeal first held that German law applied, as both the claimant and the defendant had their main branches in Germany.

Second, it held that liability had to be determined by applying the law on sea carriage as the goods had been lost during sea transit. The court stressed that stowing of the goods into a container is to be treated as part of the subsequent sea carriage.

Third, the court pointed out that a defendant can forfeit its right to limit liability only by its own actions.

Finally, the court held that the defendant did not lose the right to limit its liability according to Section 660(3) of the Code, since the claimant had not alleged to a sufficient extent circumstances which would justify the conclusion that the loss resulted from an act or omission of the carrier with intent to cause the loss or with recklessness and in the knowledge that the loss would probably result. This finding was mainly based on the fact that in the court's opinion, the loss in the case at hand could likewise be attributable to an act or omission by the sub-carrier which was instructed by the defendant. The right to limit liability according to Section 660(3) of the Code would therefore become ineffective if, in cases in which a sub-carrier is engaged, the burden of proof as to the question of whether the loss was

attributable to the carrier's act or omission also shifted to the carrier only because the cause of loss was alleged to be unknown.

Comment

The decision is correct in partly reinstating the *nemo tenetur* rule in connection with sea carriage where a sub-carrier is engaged. It allows the carrier to limit its defence in relation to the question of whether it has the right to limit its liability according to Section 660(3) by alleging that it acted with due diligence when choosing the sub-carrier. This differs from the view taken by the Supreme Court in cases in which the loss occurs during road or air transport. In these cases the carrier is obliged to put forward in detail the measures that it took to prevent the loss, even when engaging a sub-carrier.

This is due to the fact that Article 25 of the Warsaw Convention and Article 29(2) of the Convention on the Contract for the International Carriage of Goods by Road also refer to acts or omissions of the servants or agents of the carrier. Accordingly, the responsibilities of the carrier are wider than those imposed by Section 660(3) of the Code and Article 4(5)(e) of the Hague-Visby Rules, whereby only personal acts and omissions of the sea-carrier are decisive. This distinction has been retained in Article 61(1) of the Rotterdam Rules and the same applies to the planned reform of German shipping law. It follows that the decision of the Stuttgart Court of Appeal as to the reinforcement of the *nemo tenetur* rule in connection with sea carriage when a sub-carrier is engaged is likely to be good law in future.