Actions in rem and contemporary problems in the Far East

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An examination of the implementation of the 1952 Convention on the Arrest of Sea-Going Ships by certain Far East Countries.

I. THE SOURCE

The preamble to the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships 1952[1] affirmed the desirability of the Contracting Parties determining "by agreement certain uniform rules of law relating to the arrest of sea-going ships". As a result of this Convention seemingly insurmountable problems relating to the arrest of ships and sister ships were resolved.

Eleven nations were signatories to the 1952 Convention. The United Kingdom was one of the signatories which subsequently ratified the Convention. The United Kingdom Administration of Justice Act 1956[2] was passed to give effect to the 1952 Convention.[3]

In 1962, the Singapore Parliament enacted the High Court (Admiralty Jurisdiction) Act,[4] which is *in pari materia* with the AJA.[5] In Malaysia, the same Act was applicable by virtue of section 24(b) of the Courts of Judicature Act 1972.[6] In Hong Kong, the same effect was achieved by virtue of the Admiralty Jurisdiction (Hong Kong) Order 1962.[7]

Together with other enactments relating to the Supreme Court in England and Wales and the administration of justice, the AJA was incorporated, with some amendments, into the Supreme Court Act 1981 (UK). In order to be consistent with English Law, sections 20 to 24 of this Act are extended to Hong Kong by virtue of the Admiralty Jurisdiction

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1 Hereafter referred to as the 1952 Convention.

2 Hereafter referred to as the AJA.

3 This Act was incorporated, with minor amendments, into the Supreme Court Act 1981 (UK). This Act will be referred to as the UK Act.

4 Hereafter referred to as the Singapore Act.

5 Cap 6 (1970 Revised Edition Vol. 1).

6 Act 91 of 1972.

7 1962 No. 1547.

(Hong Kong) Order 1985. No amendments have been made to the Singapore Act to give effect to sections 20 to 24 of the UK Act. In Malaysia, the AJA is still applicable.

II. ADMIRALTY JURISDICTION

An action in rem, which is an action against the res (the ship or her cargo or her freight), is a unique feature of admiralty jurisdiction. A characteristic of such an action is that the ship herself can be arrested, and, unless satisfactory security is provided by her owner to secure her release, she will be sold by way of a judicial sale. Such a purchase is free from encumbrances or liens.

A claimant can invoke the admiralty jurisdiction of the Singapore High Court arising out of one or more of the grounds listed in section 3(1)(a) to (r) of the Singapore Act.[8]

III. MODE OF EXERCISE

For disputes relating to the title to, or ownership of any ship, disputes between co-owners of any ship as to its ownership, possession, employment or earnings or the mortgage or hypothecation of any ship, Article 3(1) of the 1952 Convention stipulates that the arrest shall be confined strictly to "the particular ship in respect of which the claim arose". The position under the Singapore Act and the UK Act is the same apart from the following additional ground in the Singapore Act:

> any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of admiralty.[9]

As for a claim arising out of a maritime lien, the admiralty jurisdiction of the High Court may be invoked by an action in rem against that offending ship.[10] The offending ship can be arrested by the claimant arising from a maritime lien regardless of any change in her beneficial ownership.

The main mode of exercise, however, is for most of the grounds listed in the Singapore Act. The following criteria under section 4(4) of the Singapore Act must be satisfied:

> In the case of any such claim as is mentioned in paragraphs (d) to (q) of subsection (1) of section 3 of this Act being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship the

8 Section 3(1)(a) to (r) of the Singapore Act. Section 20(2)(a) to (s) of the UK Act (previously section 1(1)(a) to (s) of the AJA). Article 1(1)(a) to (q) of the 1952 Convention.

9 Section 3(1)(e) of the Singapore Act. Section 20(2)(s) of the UK Act (previously section 1(1)(s) of the AJA).

10 Section 4(3) Singapore Act. Section 21(3) UK Act (previously section 3(3) of the AJA).

admiralty jurisdiction of the Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against —

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) any other ship which, at the time when the action is brought is beneficially owned as aforesaid.

Section 3(4) of the AJA is the same as section 4(4) of the Singapore Act. However, under section 21(4) of the UK Act, the criteria are almost the same. It provides that:

In the case of any such claim as is mentioned in section 20(2)(e) to (r), where —
(a) the claim arises in connection with a ship; and
(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

IV. THE MEANING OF "CHARTERER"

Under section 4(4) of the Singapore Act, the claimant must be the owner, charterer of, or person in possession or in control of, the offending ship. A ship may be chartered out under a charter by time, voyage or demise. There is no definition given to the word "charterer" although the words "in possession or in control of" immediately after the words "charterer of or" may convey the impression that it is limited to a demise charterers.

As the AJA was passed to give effect to the 1952 Convention, it is permissible to look at that Convention. In *Salomon* v *Commissioners of Customs and Excise,*[11] the House of Lords held that where an Act was passed to give effect to obligations in international law, the Court must not refer to the specific treaty unless the terms of the legislation were not clear or were reasonably capable of more than one meaning. Lord Diplock in *The Eschersheim*[12] summarised the law as follows:[13]

If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning.

11 [1966] 2 Lloyd's Rep 460, 468.
12 [1970] 2 Lloyd's Rep 1.
13 Ibid 6.

However, the Singapore Court of Appeal decided in *The Permina 108*[14] that the word "charterer" would be given an ordinary and literal definition. In delivering the appellate Court's decision, Jim CJ said:[15]

> In our opinion if the legislature had intended to limit the operation of the sub-section to, among others, the charterer by demise only and not other types of charterers it would have expressly added the words "by demise" after the word "charterer".

The learned Chief Justice also remarked in the same case that it would be unnecessary and wrong to look at the 1952 Convention for a proper construction of section 4(4) of the Singapore Act. He said:[16]

> Furthermore, Singapore, even when it was a colony of the United Kingdom, was not one of the colonies to which the United Kingdom had under art. 18 extended the Convention and since independence Singapore has not acceded under art. 15 to the Convention.

The Singapore Court of Appeal's definition of the word "charterer" in *The Permina 108* was rejected by Mr Justice Li (as he then was) in the Hong Kong case of *Ledesco Uno.*[17] He explained:[18]

> In construing the word "charterer", I find that the charterer was put in as a group of persons who would be in possession and in control, that is, namely to a demised charterer only. This will be in accord with the English authorities in the sense that the other ship wholly owned by a demised charterer may be described as a sister ship or a ship in the like or the same ownership as a ship in connection of a claim of an action in personam.

In 1982, the English Court of Appeal decided the other way. In *The Span Terza,*[19] the Court of Appeal decided that words of section 3(4) of the AJA had to be given their natural meaning and thus "charterer" would include a time charterer as there was no sufficient reason to limit the words to charterer by demise. Sir David Cairns said:[20]

> If it is to be supposed that Parliament meant to be included as the "person" mentioned in the sub-section only a person who, like the owner or one of the types of person mentioned after "charterers", was at the time in question a person in possession or control of the ship, then that interpretation would give effect to that contention.
>
> For my part, as a matter of construction I find it impossible to construe the words in that way. If only a demise charterer were meant, one would of course have expected the word "demise" to have been inserted before the word "charterer". Alternatively the word "charterer" could have been omitted altogether, because a demise charterer would be included in the words "the person in possession or control".

14 [1978] 1 Lloyd's Rep 311.
15 Ibid 314.
16 Ibid 313.
17 [1978] 2 Lloyd's Rep 99.
18 Ibid 104.
19 [1982] 1 Lloyd's Rep 225.
20 Ibid 227.

In the same year, Mr Justice Power in another Hong Kong case, *The Djatisasi,*[21] disagreed with the narrow definition given by Mr Justice Li in *Ledesco Uno* and followed the Singapore Court of Appeal's decision in *The Permina 108.*

The Singapore Court of Appeal's definition was undoubtedly correct. Section 4(4) of the Singapore Act or section 21(4) of the UK Act is not reasonably capable of more than one meaning when the terms are given their literal or natural meaning. The fundamental rule of statutory construction as laid down in *Salomon* v *Customs and Excise Commissioners* should be adhered to. Secondly, the words "in possession or in control of" can embrace a demise charterer as well. Lastly, Article 3(4) of the 1952 Convention has no direct relevance or assistance to the definition of "charterer" under the sub-section.

V. "BENEFICIALLY OWNED"

To invoke the admiralty jurisdiction of the Singapore High Court, the claimant must establish that at the time when the action is brought, that ship or any other ship must be beneficially owned "as respects all the shares therein by that person".[22]

A difficult issue which baffles both the judiciary in England and the Far East and academic writers is whether a demise charterer can be considered as a beneficial owner for the purposes of this proviso. English writers have often described a demise charterer as the owner *pro hac vice* or the temporary owner.[23] On the other side of the Atlantic, Gilmore & Black on *The Law of Admiralty* concurred:[24]

> The most important consequences of the distinction between the demise and the other forms of charters flow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice.*
>
> In consequence, he qualifies as the "owner" for purposes of the statutes relating to limitation of liability; he can thus limit under those statutes where the voyage and time charterers clearly cannot.
>
> Far less palatable are some of the other consequences of standing in the owner's position. In general, all in personam liabilities arising out of the ship's operation are brought home to the demise charterer.

In England, it was held in *The Andrea Ursula*[25] that a demise charterer was in the same position as that of the owner. In this case, Mr Justice Brandon (as he then was), referred to the term of the 1952 Convention as a

21 [1982] HKLR 427.

22 Section 4(4)(a) Singapore Act.

23 See *The Hopper No. 66* [1908] AC 126, 136 per Lord Atkinson; *The Tasmania* (1888) 13 PD 110, 113 per Sir J Hannen.

24 Page 242, 2nd ed. Foundation Press, New York, 1975.

25 [1971] 1 Lloyd's Rep 145.

guide for the "beneficially owned" and came to the conclusion that a beneficial owner would include a demise charterer. His reasons were as follows:[26]

> . . . a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have.
>
> A ship which is demise chartered is an example of a ship which is possessed and controlled by a person not the legal or equitable owner in the way that I have described.

On the other hand, Mr Justice Goff (as he then was) refused to follow *The Andrea Ursula* in *I Congreso de Partido.*[27] Instead, he held that the meaning of "beneficially owned" would refer to cases of equitable ownership, whether or not accompanied by legal ownership and should not be wide to include cases of possession and control without ownership.[28] In short, a demise charterer would be ruled out.

In Singapore, the Court of Appeal's decision in *The Pangkalan Susu/ Permina 3001*[29] decided that a demise charterer might have the beneficial use of a ship but not the beneficial ownership. Therefore, a demise charterer would not come within the meaning of a "beneficial owner" under section 4(4)(a) of the Singapore Act. In delivering the judgment of the Court, Wee Chong Jin CJ said[30]

> Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship.

In 1978, the Malaysian High Court in *The Loon Sheng*[31] followed the decision of *The Pangakalan Susu/Permina 3001.* In the same year, Mr Justice Li in the Hong Kong High Court in *The Ledesco Uno* seemed to prefer Mr Justice Brandon's construction of beneficial ownership which would embrace a demise charterer.[32]

In England and in Hong Kong, the present position is clear as a result of section 21(4)(b) of the UK Act which states that the relevant person can be either "the beneficial owner of that ship as respects all the shares in it" or "the charterer of it under a charter by demise".

26 Ibid 147.
27 [1978] 1 QB 500.
28 Ibid 538.
29 [1979] 2 MLJ 129.
30 Ibid 130.
31 [1979] 2 MLJ 179.
32 Supra n 17, 105.

VI. ANY OTHER SHIP

Another issue, which continuously divides the judiciary in England and the Far East, is the meaning of "any other ship" under section 4(4)(b) of the Singapore Act or section 21(4)(b) of the UK Act (previously section 3(4)(b) of the AJA). According to Article 3(1) of the 1952 Convention, it would appear that for a sister ship to be referred to as "any other ship" it must be owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship.

In *The Banco,*[33] the UK Court of Appeal decided that the admiralty jurisdiction for an action in rem might be invoked either against the offending ship or against any other ship in the same ownership. In other words, an alternative action might be invoked only against a sister ship. Lord Denning MR, who traced the history of the admiralty jurisdiction of the Court, said that the effect of the 1952 Convention was to bring about uniformity in the law governing arrest of sea-going vessels. According to him, many continental countries permitted the arrest not only of the offending ship, but also of any other ship belonging to the same owner, whereas this was not the case under English law before the 1952 Convention. He continued[34]

> It was agreed that *one* ship might be arrested, but only *one*. It might *either* be the offending ship herself *or* any other ship belonging to the same owner: but not more....
>
> That Convention makes it clear that only one ship of the same owner may be arrested.

The interpretation of the words "any other ship" in *The Banco* was rejected by the Singapore Court of Appeal's decision in *The Permina 108.* A wider approach was adopted by the full Court in Singapore. Wee Chong Jin CJ said[35]

> ... s.4(4) enables the plaintiff to invoke the Admiralty jurisdiction against the ship in connection with which the claim arose if at the time when the action is brought, that other ship is beneficially owned by the person liable on the claim in personam and who was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship in connection with which the claim arose.

In 1981, the English Court of Appeal decided in *The Span Terza* to follow the Singapore formula regarding an action in rem against "any other ship" under section 3(4)(b) of the AJA.[36] However, there are two conflicting decisions in Hong Kong. Mr Justice Li in *The Ledesco Uno*[37] decided to follow *The Banco* but Mr Justice Power in *The Djatisasi*[38] decided otherwise.

33 [1971] 1 Lloyd's Rep 49.
34 Ibid 52.
35 Supra n 14, 314.
36 Supra n 19.
37 Supra n 17.
38 Supra n 21.

VII. CHARTER PARTIES BY DEMISE

An important characteristic of this type of charter party is that a charterer by demise is considered a "carrier" within the meaning of Article I(a) of the Hague or Hague-Visby Rules. Thus, the charterer and not the owner is liable for all legal consequences of the bill of lading signed by the master.[39]

For damage to cargo or for non-delivery, the claimant has to claim against the demise charterer as he is the "relevant person" who would be liable on the claim in an action in personam. As a result of the dichotomy in the development of the admiralty law in the Far East, the claimant may have to exercise one of two options:

1. To institute an action in rem against the offending ship in Hong Kong as long as at the time of the cause of action and at the time of the issue of the writ, she is still demise chartered to the "relevant person". This course of action is possible as a result of giving effect to section 21(4)(b) of the UK Act. Alternatively, the claimant may also invoke the admiralty jurisdiction of the High Court in Hong Kong with an action in rem against any other ship beneficially owned by the demise charterer; or
2. To institute an action in rem in Singapore against any other ship beneficially owned by the demise charterer. There is no legal recourse in rem against the offending ship in Singapore as a result of the decision in *The Pangkalan Susu/Permina 3001*.[40]

VIII. CONCLUSION

The Singapore Court of Appeal's landmark decision in *The Permina 108*, followed later by the English Court of Appeal's decision in *The Span Terza* and the Hong Kong Court's case in *The Djatisasi* gave a wide and flexible meaning to the words "charterer" and "any other ship" under section 4(4) of the Singapore Act or section 21(4) of the UK Act (previously section 3(4) of the AJA).

However, in *The Pangkalan Susu/Permina 3001*, the Singapore Court of Appeal held that a demise charterer would not come within the meaning of a "beneficial owner" under section 4(4)(a) of the Singapore Act. As a result of this decision, no action in rem can be instituted against the offending ship as long as she is under a charterparty by demise. A cargo claimant now has to instruct a lawyer in Hong Kong or London to issue a writ for an action in rem for such a ship. No action in rem is possible whatsoever in Singapore if the demise charterer does not own any ship under such circumstances.

The ultimate purpose of the 1952 Conference was to achieve "uniform rules of law relating to the arrest of sea-going ships". Perhaps it is in the interest of Singapore to bring about uniformity in the law by amending section 4(4)(b) of the Singapore Act by adding the words "or the charterer of it under a charter by demise".

39 *Scrutton on Charterparties* 19th Ed Sweet and Maxwell, London, 1984, 50.

40 Supra n 29.