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In this comprehensive article, Mr Philip Teoh provides an overview of the many principles of conflict of laws that can arise in maritime cases and maritime arbitration. Mr Teoh is a partner in and heads the shipping, international trade and arbitration practice of the firm Azmi & Associates, Malaysia. Our members are always seeking to promote understanding of the issues covered in this article, as this assists the proper resolution of maritime disputes.

Mr Teoh is an arbitrator in a range of maritime arbitration centres including LMAA, SCMA, EMAC, ICC, LCIA, AIAC, KCAB, and AABD Brunei. He has been in legal practice in Singapore and Malaysia for over 30 years and has written practitioner texts on maritime law and other titles including "Halsbury's Laws of Malaysia on Equity" and "Conflict of Laws". His profile can be found on LinkedIn.

On July 23 this year Mr Teoh delivered a presentation hosted by our Western Australia Branch which reviewed the kinds of disputes now escalating in the region in the wake of the COVID-19 pandemic. We thank him for his interest in our association and for submitting this thorough contribution to Semaphore.

Conflict of Laws Aspects of Maritime Disputes and Maritime Arbitration

Shipping moves international trade and the global economy. It connects countries, economies and businesses. As maritime trade involves parties across borders, there will be interplay of different legal systems as the cargo moves across borders.

Maritime Law and Practice of Shipping

Maritime law may be defined as the corpus of rules, concepts and legal practices governing the business of carrying goods and passengers by sea[1].

Many maritime cases have contributed to the development of legal principles especially in the area of contract law. Just to name a few, the case of *The Moorcock*[2] introduced the concept of implied terms into English law and established the business efficacy test for implying a term in fact. The case from which the Himalaya Clause takes its name, *Adler v Dickson (The Himalaya)*[3], which is the case from which the Himalaya clause originates and takes its name, introduced the concept that a contracting party can stipulate an exemption from liability not only for himself, but also for third parties whom he engages to perform the contract or any part thereof. The English Court of Appeal in *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*[4] established the important distinction between conditions, warranties and innominate terms for the purpose of determining whether a repudiatory breach of contract has occurred to give rise to the right of termination.

Maritime law closely reflects practices of the industry. The sage advice of Lord Mustill should be borne in mind:

> *"The Law and practice of shipping law have always been closely entwined. There can surely be no other branch of commerce where the practical people know, and need to know, so much of the law; and where professionals know, and need to know, so much of the practice."*[5]

In the course of handling the maritime dispute, the courts or the tribunal may be called upon to interpret provisions of the common maritime conventions such as the Hague Rules, Hague-Visby Rules or the York Antwerp Rules. It would be important to bear in mind that these rules are incorporated in most bills of lading as well as charterparties and other common forms of contracts used in international shipping. The uniformity of interpretation across different jurisdictions is important to maintaining certainty of principle and industry norms.

As stated in *Stage Line Ltd v Foscolo Mango & Co Ltd*[6]:

> *"It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of the foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."*

Parties Choice

It is inevitable that the parties in the maritime adventure will as far as possible provide for the application of laws they are most familiar with. For instance, the Japanese shipping lines may provide for disputes to be tried at the Tokyo District Court and the application of Japanese Law[7]. In charterparties, the party with the dominant bargaining power will decide on the choice of the arbitration centre and choice of law to govern the contract[8]. Sometimes the provision left in the charterparty or contract of affreightment is provided by one party with the other party providing no input through either ignorance or failure to consider their significance.

Maritime arbitration is also the most common dispute resolution choice in resolving maritime disputes, with good reason. Parties of different nationalities may not be comfortable to submitting their disputes to the national courts of the counterparty. One of the consequences of the choice of national courts is that only lawyers of that country can act in litigation of those courts. However, the reality is that judgements of national courts are of limited recognition outside its borders[9].

Forum Selection

Most shipping lines will provide in their bill of lading terms for a specific dispute resolution forum to file claims[10]. If the clause provides for a specific court to have exclusive jurisdiction, the court will normally give effect to the clause and stay any proceedings brought in breach of the agreed jurisdiction unless strong cause is shown why stay should not be granted[11]. If the clause provides for a specific court to have non-exclusive jurisdiction, then stay of actions brought in other courts will be decided on grounds of *forum non conveniens*[12].

In *The Atlantic Star*[13], Lord Denning MR famously stated:

> *"You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."*

New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on June 10, 1958 and entered into force on June 7, 1959 created a system where state signatories gave effect to recognition of arbitration awards in countries which acceded to the New York Convention. As of June 2020, there are 165 state signatories[14].

Signatories to the New York Convention will recognise and enforce an international or foreign arbitral award under the convention if that arbitral award has been rendered by an arbitral tribunal sitting in a country which is also a signatory to the New York Convention.

This wide recognition allows, say an australian arbitration award to be recognised and enforceable by registration in Indonesia, China or USA whilst a judgement of the Australian Court will not be.

Conflict of Laws

When events or transactions involving civil and commercial matters are not confined within the borders of a single country, the indigenous legal systems of the different countries involved may have substantive laws that govern the subject matter of the legal dispute in very different ways. Conflict of laws rules allow for some necessary adjustment between these different substantive laws.

Conflict of laws (sometimes called private international law) concerns the process for determining the applicable law to resolve disputes. Another issue that arise is determining the forum to resolve the dispute.

The conflict of laws questions that can arise in a shipping dispute are:

(1) whether the court has jurisdiction to entertain the case

(2) if so, what system of law, local or foreign, it should apply

There may sometimes be a third question, namely, whether the court will recognise or enforce a foreign judgment purporting to determine the issue between the parties.

The Charactersation Question

Whereas matters of substantive law are governed by the *lex causae*, namely the law applicable under the local rules for the choice of law, all matters of procedure are governed by the *lex fori*, namely the law of the country in which the action is brought[15].

It is not always easy to classify rules of law into those which are substantive and those which are procedural, but, generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced[16].

Choice of Law

At common law, where the parties have expressly stipulated that a contract is to be governed by a particular law, that law applies so long as the selection is bona fide and legal and does not contradict public policy[17].

In the English House of Lords case of *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA*[18] the court considered what was the proper law of the contract in a situation where parties did not express a choice of governing law in their contract. The inquiry must always be to discover the law with which the contract has the closest and most real connection. The mere fact that arbitration was to be in London did not mean that what was in reality a French contract of affreightment had to be governed by English rather than French law. It did not matter at all that English arbitrators would have to apply French law. It is by no means uncommon for the proper law of the substantive contract to be different from the *lex fori*.

Arbitral Seat

The Seat of the Arbitral Tribunal is the judicial seat of the arbitration, rather than a geographical location or venue where the hearing is conducted. The seat designates the applicable law, procedure and international competence of a national court for the challenge of the award[19].

Most arbitration statutes and institutional rules recognise the distinction between the seat of the arbitration and the venue in which hearings may be held[20]. It is not necessary for the seat of arbitration and the venue of the arbitration to be the same location (though often they are) and even when

hearings take place during the course of the arbitration in several different countries, the chosen seat of arbitration will remain unaffected.

Emergency Arbitrator

Arbitration has very clear advantages in disputes between two parties of different nationalities. More often than not, the appointment of an arbitrator or constitution of an arbitral tribunal takes time. Urgent action may need to be taken prior to the constitution of the tribunal to preserve evidence, goods which may be perishable, indirect publishing of confidential information by commencing legal action, all of which will defeat intended arbitration. Either local or national court may provide interim urgent remedies but it is not confidential hence requiring local counsel.

An emergency arbitrator can be appointed expeditiously. The emergency arbitrator is not a part of the intended pending arbitral tribunal. Emergency arbitrators are not appointed by parties, the power to appoint must be accorded in institutional arbitration rules[21]. An emergency arbitrator will be accorded wide powers to grant necessary conservancy powers. He is empowered temporarily until intended arbitral tribunal is constituted. Once constituted, the arbitral tribunal is not bound by the emergency arbitrator's orders and has the option to confirm, vary, adopt or set aside orders made.

Generally both parties who are desirous of proceeding with the arbitration will comply with the orders of the emergency arbitrator. If the defaulting party does not comply, the order will need to be enforced in the jurisdiction of the defaulting party. The issue that arose is whether that jurisdiction recognises such orders? It is worth noting that emergency arbitrators' orders are not an arbitral award.

The arbitration laws of many key countries, however, expands the definition of arbitral tribunal to include emergency arbitrator would allow enforcement[22].

Cultural Aspects of International Arbitration

It is inevitable that international arbitration will involve arbitrators, counsel hailing from diverse legal backgrounds. A Russian lawyer may face an English lawyer in a maritime arbitration before a panel of three arbitrators with civil and common law backgrounds. Whilst the parties may have consensus on the governing law, they may have different approaches towards conduct of the hearing. The flexibility of arbitration and adaptability of the tribunal will accommodate these differences and often there will be problem.

Sometimes it is simply getting to know the tribunal members. A retired judge used to sitting in a formal court setting may be more familiar and comfortable with a setting not dissimilar with his former environs. Similarly, a lay arbitrator may not be comfortable with too much technicalities and the counsel should adapt his arguments accordingly.

The tribunal must understand and properly apply the governing law to the dispute in the reference. If principles are misapplied or ignored this may lead to the issues of arbitral misconduct.

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(footnotes commence overleaf)

Footnotes

1 Grant Gilmore and Charles L Black Jr, The Law of Admiralty (2nd edn, The Foundation Press Inc, 1975) p.1

2 (1889) 14 PD 64

3 [1954] 3 WLR 696

4 [1962] 2 QB 26

5 See https://www.shippinglbc.com/about/news/the-rt-hon-the-lord-mustill/

6 [1931] All ER Rep 666, Lord Macmillan (at p 677) on interpreting the UK Carriage of Goods by Sea Act 1924

7 Eg, Mitsui OSK: https://www.mol.co.jp/en/info/bl/img/bl-m.pdf

8 The BIMCO Charterparty Forms recently added Singapore as one of the stipulated Arbitration Venues in addition to London and New York: https://www.bimco.org/search-result?term=Arbitration

9 For instance the UK Courts recognise Judgements of Courts of other countries on a reciprocal basis as provided under the Foreign Judgments (Reciprocal Enforcement) Act 1933.This method of recognition is followed in many common law countries which follows English legacy. The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments is new and have not gained acceptance in many countries

10 See eg, Maersk: https://terms.maersk.com/carriage

11 See Brandon LJ in *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119; *The Pioneer Container; KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250 [1994] 2 All ER 250

12 See the *forum non conveniens* principles as set out in the House of Lords decision of *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL

13 [1973] QB 364 at 381–382

14 See https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards

15 *Chaplin v Boys* [1971] AC 356 at 378–379, [1969] 2 All ER 1085 at 1092–1093, HL, per Lord Hodson, at 380–383 and 1093–1096 per Lord Guest, at 392–393 and 1104–1105 per Lord Wilberforce, and at 393–395 and 1105–1107 per Lord Pearson; cf *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 606–607, [1970] 1 All ER 796 at 801, HL, per Lord Hodson, and at 616 and 809–810 per Lord Wilberforce (law governing arbitration procedure). See also *Re Fuld's Estate (No 3), Hartley v Fuld* [1968] P 675 at 695, [1965] 3 All ER 776 at 779 per Scarman J

16 See *Poyser v Minors* (1881) 7 QBD 329 at 333, CA (Eng), per Lush LJ; and see *Re Shoesmith* [1938] 2 KB 637, [1938] 3 All ER 186, CA (Eng)

17 See *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 [1939] 1 All ER 513, PC; *Lloyd v Guibert* (1865) LR 1 QB 115; *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL; *Tzortzis v Monark Line A/B* [1968] 1 All ER 949, [1968] 1 WLR 406, CA (Eng); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL

18 [1970] 3 All ER 71

19 Section 3 of the UK Arbitration Act 1996 provides:

> "In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated-
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> (a) By the parties to the arbitration agreement, or
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> (b) By any arbitral or other institution or person vested by the parties with powers in that regard, or
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> (c) By the arbitral tribunal if so authorised by the parties,
>
> or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

See also *Process & Industrial Developments Ltd v The Federal Republic of Nigeria* [2019] EWHC 2241 (Comm) where Butcher J discussed the concept of *Seat vs Venue* in Arbitration

20 Eg, Article 14 of the International Chamber of Commerce (ICC) Arbitration Rules and Article 16 of the London Court of International Arbitration (LCIA) Arbitration Rules

21 The Institutional Rules of many key Arbitral Centres have provisions for appointing Emergency Arbitrators eg, LMAA, EMAC, SIAC, SCMA, AIAC. Schedule 3 of the AIAC Arbitration Rules 2018 sets out emergency interim measures which the emergency arbitrators can exercise. Rule 1 of the Schedule states that a party may make an application on or after filing of Commencement Request but it must be done prior to constitution of arbitral tribunal. Rule 2 provides that the application must be made in a written form and send to Director and copied to all Parties simultaneously, with documents and details required

Rule 1 is similar with SIAC Rules 2016 where Rule 1 of the latter provides that a party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal

22 See also the author's Article in Volume 33 of the Young Arbitration Review July 2019, *The Emergency Arbitrator in Malaysia, Singapore, Hong Kong and Brunei*