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MARITIME DISPUTES POST 2020 AND LESSONS FROM MALAYSIAN COURTS

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Introduction

On 1 January 2020, shipowners were adapting to the onset of IMO 2020 with the low sulphur fuel regime for ships, and traders were adapting to the consequences of then US President Donald Trump's Trade War with China and the lingering effects of the crash in oil prices, each causing different effects.

Shortly thereafter, the COVID-19 pandemic of 2020 exploded worldwide, resulting in disruptions which brought much of the world to a standstill and causing loss of lives across the globe, closing borders, and closing businesses. The effect on shipping and trade was immediate.[1] Vessels were denied entry into ports. Even in 2021, there are still such cases including the case of the Evergreen Container Vessel *Ital Libera*, whose Master died of Covid, having to divert to Europe as no ports in Asia would accept the vessel.[2]

This article covers developments from around Asia, in particular Malaysia and Singapore, which arose during 2020 to 2021, and touches on some decisions of the Malaysian courts that are relevant to other common law jurisdiction. At the outset, it is worth pausing to consider the practices of the industry as maritime trade involves parties across borders, leading to interplay of different legal systems.

The Interplay of Law and the Practice of Shipping

Shipping, law and practice intersect as observed by Lord Mustill:[3]

> 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

There is much uniformity of the maritime law due to the adoption of various international rules and conventions, including the Hague Rules, Hague-Visby Rules and the York Antwerp Rules. These rules are incorporated in most bills of lading as well as Charterparties and other common forms of contracts used in international shipping.

As stated in *Stage Line Ltd v Foscolo Mango & Co Ltd*:[4]

> 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.

The need for uniformity in interpreting the Rules and has been endorsed by Justice Ramly in *Trengganu Forest Products Sdn Bhd v Cosco Container Lines & Anor*.[5]

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[1] See the Author's article 'The Impact of the Covid-19 Pandemic Effects on Shipping', *The Maritime Executive* (Online, 7 April 2020) <https://www.maritime-executive.com/editorials/the-impact-of-the-covid-19-pandemic-on-shipping>.

[2] See Marcus Hand, 'Asian ports refuse to accept containership whose Captain died of Covid', *Seatrade Maritime News* (Web Page, 8 June 2021) <https://www.seatrade-maritime.com/ship-operations/asian-ports-refuse-accept-containership-whose-captain-died-covid>.

[3] See London Shipping Law Centre, 'The Rt Hon the Lord Mustill' (Web Page, 2015) <https://www.shippinglbc.com/about/news/the-rt-hon-the-lord-mustill/>.

[4] [1931] All ER Rep 666, Lord Macmillan (at 677) on interpreting the *Carriage of Goods by Sea Act 1924* (UK).

[5] [2007] 5 MLJ 486.

The Impact of the Pandemic on the Maritime Industry

Many countries have responded to the pandemic by imposing lockdowns or restricting movement. Retailers and manufacturers failed to pick up their cargo and containers because their warehouses were full or closed. Some ports remained open but had a reduced workforce, which exacerbated cargo congestion. This caused disruption of the supply chain, including movement of essential goods and foodstuffs. The cargo lying uncollected at ports creates congestion and takes up space, reducing capacity for incoming cargo and containers. The closure of ports and port congestion has caused disruptions in the supply chain and import and exports. These disruptions have exposed the fragility of supply chains when manufacturing of critical components stopped, and movement was prevented.

The pandemic has inevitably raised the issue of 'force majeure', which relieves a party from contractual performance when an unexpected event beyond the parties' control occurs. Some ports have taken the precaution of declaring 'force majeure' to pre-empt claims and legal liability.[6] This is likely to have limited effect as 'force majeure' operates as a contractual provision to be invoked upon certain occurrence of certain events. Depending on the contractual provision, the 'force majeure' event will usually have suspensory effect only and the parties' obligations will resume after the event has ceased to operate. Thus, whether the disruption has the effect of excusing or suspending contractual performance is a matter of construction of the provision as a matter of contractual interpretation, and such unilateral government declarations will have no effect. Further, not all contracts have 'force majeure' provisions. Even the mention of 'pandemic' or 'epidemic' will not automatically excuse contractual obligations unless the operation of the clause is invoked as a matter of construction of the wordings.

Electronic Bills of Lading

There has been gradual progress towards replacing the physical bill of lading by an electronic one. If the original bill of lading were electronic, it could be transferred quickly enough to be presented at the port of discharge when the ship arrives, no matter how many hands it has passed through. An indemnity letter would no longer be necessary.[7]

The issuance of electronic bills of lading requires legislative action and this has taken place in some countries. For example, since 2013, Section 516(3) of the German Commercial Code has authorised the Federal Ministry of Justice and Consumer Protection to regulate the details of an electronic bill of lading by statutory order.[8]

The United Nations Commission on International Trade Law ('UNCITRAL') has issued an entire model law on the subject, the UNCITRAL Model Law on Electronic Transferable Records ('Model Law'). This law specifies when electronic transferable records are equivalent to traditional transferable documents or instruments (functional equivalence). Provisions of this Model Law have been integrated, with some changes, via amendments into the Singapore *Electronic Transactions Act* on 19 March 2021.[9] The amended *Electronic Transactions Act* enables the creation and use of electronic bills of lading ('eBLs') that are legally equivalent to paper-based bills of lading'.[10]

Port closures and free pratique

At the height of the pandemic, only factories producing essential cargo were allowed to operate. If the cargo was non-essential cargo, it could neither be produced nor moved to the ports during a national lockdown. In this circumstances, the vessel may arrive at the port and find no cargo to be shipped, incurring costly demurrage.

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[6] See, e.g. the Indian Ports: Carina Li et al, 'India lockdown: Ports declare force majeure, ship operations go awry', *S & P Global Platts* (Web Page, 25 March 2020) <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/032520-india-lockdown-ports-declare-force-majeure-ship-operations-go-awry>.

[7] Norton Rose Fulbright, 'E-bills of lading' (Web Page, February 2018) < https://www.nortonrosefulbright.com/en-gr/knowledge/publications/b20094b6/e-bills-of-lading>.

[8] Article 1 no. 42 of the *Act on the Reform of Maritime Trade Law* of 20 April 2013 (Gesetz zur Reform des Seehandelsrechts vom 20. April 2013), Federal Law Gazette I, 831. See also section 443(3) of the German Commercial Code and article 1 no. 24(b) of the *Act on the Reform of Maritime Trade Law* of 20 April 2013 (Gesetz zur Reform des Seehandelsrechts vom 20. April 2013), Federal Law Gazette I, 831.

[9] *Electronic Transactions Amendment Act 2021* (Singapore).

[10] See Patrick Dahm, 'The New Electronic Transactions Law in Singapore: Paving the Way for Electronic Bills of Lading?', *dahm adr* (Online Article, 29 April 2021) <https://scma.org.sg/SiteFolders/scma/387/Articles/2021-04-29%20-%20Patrick%20Dahm%20-%20The%20New%20Electronic%20Transactions%20Law%20in%20Singapore.pdf>.

If the crew of the vessel are infected, this will create another problem with the health screening at the port of call. Before the vessel can take on cargo, it must be cleared by the health authorities of the port, a process known as obtaining 'free pratique'. In the pandemic-affected countries the process of vetting the crew may take time, and this delay will fall on the shipowner rather than on the charterer. If the crew are infected, then clearance will not be granted.

The solution in this circumstance would be to tender notice of readiness only after the health issues have been addressed. For a vessel with infected crew, this may take some time and the owners will not be able to start the laytime or loading until the infections have cleared.

Safe Ports

Where the ports are closed or quarantined due to infections, the question that arises is whether the port is a safe port as a port the chartered vessel is obliged to sail to. The cargo owner who charters vessels to ports to load or to discharge cargo is required to nominate port which they hold a reasonable belief will be a 'safe port' when the vessel arrives – i.e., a port which the vessel can safely call at, conduct cargo operations at, and leave. When the intended port is closed, the cargo owner or charterer would be obliged to nominate an alternative port. This is not always possible as there will not be any alternative destination the cargo can be discharged at.

The test of a safe port was established in the case of the *Eastern City*:[11]

> …a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it, and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship…

Safety relates not just to the risk of damage to the vessel or cargo due the physical characteristics of the port, but extends to other risks, including risk to the crew through the threat of infectious disease.

Owners may be able to decline nomination of ports in regions affected by the pandemic on the grounds that those ports are not safe. However, it may be difficult to predict whether there will be infections at a port or in close proximity to a port to the extent that closure is necessary or the port is made unsafe.

Insurance

Insurance implications may also arise from the disruption of shipping and logistics due to the pandemic. Cargo owners and importers facing losses may find that their insurance cover is inadequate due to various reasons, including:

- Delay – although many cargo owners and importers will want to keep their cargo moving, delay during the ordinary course of transit or while the goods are in storage could soon be inevitable. Most cargo and stock throughput policies exclude loss or damage solely caused by delay.

- Additional costs/charges – hold-ups or re-routing goods to an alternative destination due to government prohibition will incur an additional cost.

- Vulnerable goods – perishable items such as pharmaceutical products and produce operate on a stringent and well-monitored time schedule. The normal cover for marine insurance does not cater to the characteristics of these cargoes due to exclusions for inherent vice and delay. Both will operate when ports are congested, and cargo clearance is delayed in the current outbreak.

Trade Sanctions

The US-China Trade War escalated in 2020 with then US President Donald Trump imposing tariffs on Chinese imports and China retaliating in return. This caused the trade between the two countries to be prohibitively

[11] [1958] 2 Lloyd's Rep 127.

expensive.[12] Traders took to devising ways to overcoming the tariffs by disguising the origins of the cargo.[13] Some of the products diverted to third countries might actually be made in China or the US. For example, a recent news reports shows that Vietnamese exports to the US surged in 2019 and some of the products such as plywood were actually made in China but shipped to the US with 'Made in Vietnam' labels.[14] This was made possible by issuing so-called switch bills of lading.[15] The trader who wants to protect the identity or origin of the supplier / shipper may ask the carrier to switch bills of lading to another bill of lading which does not name the actual supplier or the actual origins. The original of bill of lading must be returned before a switch bill of lading will be issued. The carrier and/or freight forwarder must make sure that the original set of bills of lading are taken out of circulation and cancelled before the switch bill of lading can be released. This is important as it ensures that there is only one set of documents in force.[16] If the authorities in the importing countries suspect that the actual origins are fraudulently declared as a means to evade tariffs, these imports may be detained as well as confiscated.

The US-China Trade War is not the only trade dispute affecting international trade. Trade relations between China and Australia have cooled[17] since Australia pushed for an international probe into the origin of the coronavirus. China has targeted Australian barley, beef, wine, lobsters, and coal over the past year, including by requesting that Chinese parties not import the products from Australia, imposing high duties,[18] and banning import of Australian coal.[19] Trade in such commodities is usually done by traders who may engage through a chain of contracts. Where such sanctions or bans take place, there will be effect along the chain of contracts and how these affect the parties depend on the contractual provisions.[20]

Developments in Malaysia and Singapore

Salvage and general average

In March 2021, the fragility of trade routes which had been sorely tested by disruptions caused by COVID-19 was once again exposed when the large container ship the *Ever Given* ran aground while transiting the Suez Canal on 23 March 2021, lodging herself against both banks of the Canal.[21]

Her large size covered the width of the Canal, holding up vessel traffic and the route across the Canal for days while efforts were made to dislodge her. This caused knock-on effects on the movement of cargoes globally, which is not unexpected given that 12% of global trade is carried on board ships using the Canal to move cargoes from Europe to Asia.[22]

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[12] See Freight Right, 'How Chinese Tariffs Affect Your Freight and Logistics' (Web Page, 13 June 2019) <https://www.freightright.com/news/how-chinese-tariffs-affect-your-freight-and-logistics>.
[13] See, e.g., Lucia Kassai, 'Doctored and Rebranded Oil Blacklisted by U.S. Winds Up in China', *Bloomberg* (Web Page, 22 January 2021) <https://www.bloomberg.com/news/articles/2021-01-22/china-imports-oil-doctored-to-skirt-u-s-sanctions-on-venezuela>.
[14] See Xuepeng Liu and Huimin Shi, '(Still) made in China: how tariff hikes may trigger re-routing circumvention', *CEPR* (Web Page, 11 July 2019) <https://voxeu.org/article/how-tariff-hikes-may-trigger-re-routing-circumvention>.
[15] See the author's article: 'Switch bill of lading: Risks and Instruments of Fraud?', *Daily Maritime News* (Web Page, 12 April 2021) <https://maritimecyprus.com/2021/04/12/switch-bill-of-lading-risks-and-instruments-of-fraud/>.
[16] Ibid.
[17] See Marc Busch, 'Barley, Covid and a Most Unusual Trade War', *The Hill* (Web Page, 2 May 2021) <https://thehill.com/opinion/international/537581-covid-barley-and-a-most-unusual-australia-china-trade-war>; Weizhen Tan, 'Australia's growth may 'never return' to its pre-virus path after trade trouble with China, says economist', *CNBC* (Web Page, 29 December 2020) <https://www.cnbc.com/2020/12/29/trade-war-with-china-australias-economy-after-covid-19-pandemic.html>; Stan Grant, Stephen Dziedzic and Bang Xiao, 'Everything you want to know about Australia-China trade war but were too afraid to ask', *ABC News* (Web Page, 10 December 2020) <https://www.abc.net.au/news/2020-12-10/china-australia-trade-war-your-questions-answered/12971434>.
[18] See Su-Lin Tan, 'China-Australia relations: what's happened over the past year, and what's the outlook?', *South China Morning Post* (Web Page, 20 April 2021) <https://www.scmp.com/economy/china-economy/article/3130109/china-australia-relations-whats-happened-over-past-year-and>.
[19] See Hellenic Shipping News, 'China is paying a high price for its ban on Australian coal' (Web Page, 12 April 2021) <https://www.hellenicshippingnews.com/china-is-paying-a-high-price-for-its-ban-on-australian-coal/>.
[20] The BIMCO Sanctions Clause for Time Charter Parties 2020 is intended to address two scenarios. The first scenario is where the owners or charterers (or the third parties they are responsible for under the clause) are listed by a sanctioning authority or government and become subject to sanctions restrictions. In this scenario the innocent party has the right to terminate the charter party and claim damages. The second scenario is where the trade or activity itself is or become subject to sanctions restrictions in which case the owners have the right to refuse to perform. See BIMCO, 'Sanctions Clause for Time Charter Parties 2020' (Web Page, undated) <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/sanctions_clause_for_time_charter_parties_2020>.
[21] See Njiraini Muchira, 'Suez Canal Traffic Snarled After Megamax Boxship Runs Aground', *The Maritime Executive* (Web Page, 24 March 2021) <https://www.maritime-executive.com/article/suez-canal-traffic-snarled-after-megamax-boxship-runs-aground>.
[22] See The Times of India, 'Stranded Suez Ship's owner, insurers face million in claims (Web Page, 25 March 2021) <http://timesofindia.indiatimes.com/articleshow/81681095.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst>.

The blockage of the Canal for about a week until it was freed caused vessels to back up in the Mediterranean to the north and the Red Sea to the south.[23] It was estimated that the costs to global trade was about US$400 million per hour. Lloyds values the canal's westbound traffic at roughly US$5.1 billion a day, and eastbound traffic at around US$4.5 billion a day.[24] The *Ever Given* was detained by the Suez Canal Authority and only freed after 3 months, once the Authority's claim was settled.[25]

Most cargo insurance policies adopt the Institute Cargo Clauses issued by the Institute of London Underwriters Wordings, which applies the terms of the *Marine Insurance Act 1906* (UK). Most of these policies are of the all-risks type, and delay is excluded, for example, see clause 4.5: *'loss damage or expense caused by delay, even though the delay be caused by a risk insured against'.*

Upon arrival at the destination, the cargo owners cannot retrieve their cargo unless they settle their contribution towards general average, or their insurers provide a general average bond.

The most often cited legal definition of 'general average' is 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo losses within general average and must be borne proportionately by all who are interested'.

Lessons can also be learned from the Malaysian Federal Court decision of *Fordeco Sdn Bhd v PK Fertilizers Sdn Bhd*.[26] In *Fordeco Sdn Bhd*, the vessel was on a voyage from Ain Sukhna, Egypt to Lahad Datu, Sabah, carrying a cargo of about 22,000 metric tonnes of rock phosphate in bulk. The vessel grounded on coral rocks, and both the vessel and the cargo were in peril. The cargo was owned by PK Fertilizers Sdn Bhd, who was the plaintiff in the High Court and the respondent in the Court of Appeal and before the Federal Court. The mode of rescuing the stranded vessel was to lighten it, so that it could be re-floated, and continue its journey. The lightening of the vessel in turn meant that cargo had to be offloaded. It could not simply be jettisoned because that would give rise to marine pollution. The cargo had to be offloaded onto other vessels in order to lighten the load on the vessel.

The master could not re-float the vessel without assistance. He notified the vessel owners. The owners declared general average and took steps to re-float the vessel. This was done by discharging a part of the cargo on board the vessel onto two other vessels one of which belonged to the defendant, until the vessel could be re-floated. In order to procure the lightening of the load on board the vessel, the owners' agents, sought the assistance of a tugboat operator. When the cargo was unloaded at a port in Sabah, a portion of the cargo was found to be wet and contaminated with debris. The plaintiff brought a claim in bailment and/or negligence. The Plaintiff contended that the defendant was a sub-bailee of the cargo and thus the defendant had a duty to deliver the cargo in the same condition as the defendant had received the cargo – rather than wet and contaminated with debris. The defendant, on the other hand, contended that the operation was one of salvage and not a contract of carriage of goods – thus, it was not in breach of any obligation to the plaintiff.

The questions of law before the Federal Court included:[27]

> Where a vessel had run aground on the high seas and the owners of the vessel had declared general average in respect of the cargo, whether the rescue operation to save so much of the cargo as possible by other vessels hired for that purpose would in maritime law be classified as a salvage operation

The Court held that there was no dispute that general average was declared, accepted and that the cargo owner voluntarily contributed towards general average. It follows therefore that the cargo owners agreed and accepted that there was a common jeopardy or misadventure that affected the common interest of the parties involved, warranting the incurring of expenditure beyond the agreed contractual duties.

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[23] See Salma el Wardany and Ann Koh, 'It could take weeks to reopen the Suez Canal, salvage experts say', *World Oil* (Web Page, 25 March 2021) <https://www.worldoil.com/news/2021/3/25/it-could-take-weeks-to-reopen-the-suez-canal-salvage-experts-say#.YFyBnfx_EuI.linkedin>.

[24] See Lori Ann LaRocco, 'Suez Canal blockage is delaying an estimated $400 million an hour in goods', *CNBC* (Web Page, 25 March 2021) <https://www.cnbc.com/2021/03/25/suez-canal-blockage-is-delaying-an-estimated-400-million-an-hour-in-goods.html?__source=sharebar|twitter&par=sharebar>.

[25] Ruth Michaelson, 'Ever Given released from Suez Canal after compensation agreed', *The Guardian* (Web Page, 8 July 2021) <https://www.theguardian.com/world/2021/jul/07/ever-given-released-from-suez-canal-after-compensation-agreed>.

[26] [2019] MLJU 596.

[27] Under Malaysian law, appeal from Court of Appeal to the Federal Court is not automatic. Leave must be obtained from the Federal Court on the criteria set under the *Courts of Judicature Act* s 96(a).

The next issue that required consideration was whether, general average having been declared, it would follow definitively that the contract for the rescue and re-floatation of the vessel through the discharge and transport of the cargo on the vessel carrying the cargo, was one of salvage, rather than towage or carriage of goods.

In this respect, the Court held that there are four elements that are essential to establish a contract of salvage (as opposed to a contract for the provision of towage, pilotage, or the carriage of goods): (i) there should be a recognised subject matter; (ii) the object of salvage should be in danger at sea; (iii) the salvors must be volunteers; and (iv) there must be success by either preserving or contributing to preserving the property in danger. Ultimately, the Court found that a salvage service had been rendered and that the adjustment of general average would proceed under the procedures set out in the York Antwerp Rules which applied through incorporation in the bills of lading of the Carrier.

Malaysia moves to the Hague Visby Rules Plus+

For cargoes loaded at the Port of Tanjung Pelepas, Johor Malaysia, the terms of the bill of lading will attract the application of the Hague Rules as applied by the Malaysian *Carriage of Goods by Sea Act*.

The Hague Rules provide several defences under Article IV Rule 2 which will make recovery against the Carrier difficult, including:

> (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
>
> …
>
> (c) perils, dangers and accidents of the sea or other navigable waters;
>
> (d) act of God.

Malaysia has moved from the Hague to the Hague Visby Rules with effect from 15 July 2021 via amendments to the *Carriage of Goods by Sea Act 1950*.[28] However, the adoption was not a mere adoption of the Hague Visby Rules of 1968 as amended by the SDR Protocol 1979 but rather extended the Rules to cover cover 'sea carriage' documents which are defined as:

i. a bill of lading;
ii. a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea;
iii. a bill of lading that, by law, is not negotiable; or
iv. a non-negotiable document including a consignment note and a document of the kind known as a sea waybill or as a ship's delivery order which either contains or evidences a contract of carriage of goods by sea.

The change only applies to the States of West Malaysia and not Sarawak and Sabah which continue to apply the Hague Rules.[29]

Dangerous goods

Carriage of dangerous goods require special care. This was highlighted with devastating effect by the Beirut Port explosion on 4 August 2020.[30] This tragedy highlights what happens when dangerous chemicals are not stored with care. The explosion tore through the city, registering a force as strong as a 3.3 magnitude earthquake. Residents claimed that the scene looked 'like an apocalypse' and that the port was 'totally destroyed'.

In the incident at the Port of Beirut, the blast was likely caused by the detonation of more than 2,700 tons of ammonium nitrate which had been stored at the dock since it was confiscated from the cargo ship *MV Rhosus* in 2014. Ammonium nitrate is used both in agricultural fertilizer and in high-grade explosives.

The incident left 135 dead, thousands injured and 300,000 homeless.

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[28] See the *Carriage of Goods by Sea (Amendment) Act 2020*, which came into force on 15 July 2021.
[29] I.e., under *Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 of Sarawak* and *Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 of Sabah*.
[30] See the author's article: 'Beirut Port Tragedy: Ports and Dangerous Chemicals', *Maritime Executive* (Web Page, 6 August 2020) <https://www.maritime-executive.com/editorials/beirut-port-tragedy-ports-and-dangerous-chemicals>.

The transport of dangerous goods, such as ammonium nitrate, is regulated through international standards. The International Maritime Dangerous Goods Code (or IMDG Code) first published in 1965 is an International Maritime Organisation code which prescribes guidelines for the safe preparation, storage, and handling of transportation and shipment of dangerous goods or hazardous materials. The IMDG Code divides dangerous goods into nine classes, with different attributes and labelling, and each will have their unique UN Number.

The issue transport of dangerous goods arose in *The Ing Hua Fu*,[31] in which the forwarder declared the classes and UN numbers of the dangerous chemicals to the load port authorities without any appreciation of their significance. He did not have a copy of the IMDG Code, and he simply forwarded the information given by the shipper. In the booking of the shipment with the shipping agent the forwarder declared the cargo as innocuous Agrochemicals instead of their true nature.

The facts as related by Admiralty Judge Datuk Nallini Pathmanathan are as follows:

> From the evidence of these various witnesses, it transpires if that is not in dispute that pursuant to Bill of Lading No PGM206 ('B/L'), the shipper shipped the following cargo of agrochemicals on board the vessel at Penang Port for delivery to their buyers in Miri …
>
> These chemical products bear different characteristics identified by the UN and IMO Class numbers. The B/L described the cargo as 'six pallets said to contain 185 packages (30 bags and 155 cartons) AgroChemicals'. The shipment was arranged by the forwarding agent, Heng with the carrier's Penang ship agents, Syarikat Perkapalan Soo Hup Seng Sdn Bhd ('Soo Hup Seng').
>
> Between about 4.20pm and 4.30pm on 18 October 2008, an explosion took place on the Ing Hua Fu No 9 ('the vessel'), while cargo was being loaded on the vessel at Wharf No 7, Southpoint, Port Klang. The explosion had been preceded by some sparks, which became thick smoke within seconds, then fire and subsequently an explosion within five to seven minutes. The explosion which resulted was so great that the crew abandoned ship. Shortly after the explosion the bow of the ship started to sink. Within a time period of ten minutes the entire vessel sank. No lives were lost, nor injuries sustained, but widespread damage was caused to the vessel and the cargo.
>
> The parties to the dispute are the plaintiff which is the owner of the vessel and the carrier of cargo under Bill of Lading No PGM206 ('B/L'). The first defendant, Vitachem (M) Sdn Bhd, the shipper is in the business of manufacturing and trading agricultural chemicals and is the shipper under the B/L of a consignment of dangerous goods comprising agrochemical products. The second defendant are the shipper's forwarding agents, appointed by the shipper to arrange for shipment of the cargo.
>
> The plaintiff ('the carrier') claims against both the first defendant, Vitachem (M) Sdn Bhd ('the shipper'), and the second defendant freight forwarders, Syarikat Penghantaran dan Pengangkutan Heng Sdn Bhd ('the forwarders'), all losses suffered as a result of the explosion and sinking of their vessel.

Essentially, the chemicals which were stowed on deck caught fire and exploded when the vessel arrived at the subsequent port, sinking the vessel within 20 minutes. The court held that the forwarders and shipper's failure to declare the dangerous nature of the cargo was a negligent act which contributed and caused the damage to the vessel.

The Court considered in detail the provisions of the IMDG Code and Material Safety Data Sheet pertaining to the cargoes carried. It also found that the epicentre of the explosion occurred on that part of the main deck where the pallets of agrochemicals were stowed. The fact that the Agrochemicals were directly related to the explosion was borne out by the eye-witness account, The cargo manifests which disclosed the nature of the rest of the cargo loaded at both Penang and Port Klang showed that such cargo was not susceptible to ignition and explosion in the event of a fire. The evidence showed that the sparks and the subsequent fire were directly related to or consequential upon some physical and chemical reaction relating to the shipper's cargo.

Given the clear provisions for incompatibility set out by the shippers themselves in the material safety data sheet ('MSDS') produced by them, they had contravened their own safety standards in relation to packing and segregation, by paying scant or no attention whatsoever to the safety information comprised there. There was a clear contravention of the segregation requirement. The packing of the chemicals in pallet no five also was essentially flawed as it contravened the IMDG code.[32]

[31] [2013] 9 MLJ 825. The Author acted for the plaintiff shipowner in this case.
[32] *The Ing Hua Fu* [2013] 9 MLJ 825 [74]-[75].

The Court found that there was no information given to the carrier about the nature and characteristics of these chemicals, albeit in the form of the MSDS or otherwise. No indication on the possible hazards of such a composition of chemicals, notwithstanding that the shippers and their agents were the primary persons in possession of such knowledge.

The forwarding agent that arranged the shipment for the shipper dealt with the shipping agent, completed the draft bill of lading that declared the DG chemicals as innocuous Agrochemicals yet at the same time declared the proper IMDG Code and Number to the Penang Port Commission. When cross-examined on the IMDG Code,the forwarding agent admitted that he did not have a copy of the Code. When asked about the particular Codes and Numbers of the chemicals declared, he couldn't explain. The forwarding agent was held liable for failing to fulfil a duty of care.[33]

Bunkers disputes

The supply and trading of bunkers like most trading of commodities relies on a chain of contracts from physical traders / suppliers of bunkers to the ultimate customer, the owner / operator / charterer of the vessel.

The collapse of the Singapore Oil Trader Hin Leong Group of companies, one of Asia's largest fuel trading houses, sent shockwaves through the commodity and international financiers.[34] The company is currently under judicial management in Singapore,[35] but the lawsuits arising from its collapse are still reverberating and developing, particular as Hin Leong purchased and traded bunkers which following its collapse it could not deliver.[36] The repercussions from Hin Leong have spawned legal suits from parties who purchased cargoes from Hin Leong who found that the same cargoes had been sold to third parties. This situation arose because parties trading in bunkers face risks when a part of the supply chain breaks down.

In 2020, claims were filed in the Malaysian Admiralty Court (with litigation still ongoing) relating to Hin Leong. Hin Leong had been provided with trade facilities from several banks to finance his purchase of oil and oil-related products, and documentary letters of credit were issued by to finance Hin Leong's purchase of bunkers. Terms and conditions under the documentary letters of credit were expressly provided to parties, one of them being that the banks were entitled to the immediate possession of the bunkers shipped on board the vessel as evidenced by the bill of lading. However, Hin Leong and other parties involved failed to confirm the amount of cargo as stipulated in the bill of lading, which led to the conclusion that they had impaired the plaintiff's interest towards the cargo as stipulated under the bill of ladings, and the cargoes were not delivered. In April 2020, Hin Leong made an application to be placed under judicial management and an interim judicial manager was appointed by the Singapore High Court in April 2020. This litigation in Singapore and Malaysia is ongoing

Hin Leong's case mirrors what happened when OW Bunkers collapsed in 2014. On November 7, 2014, OW Bunker A/S, the parent company of a global network of traders and physical suppliers of bunkers ("OW" or "the OW Bunker Group"), filed for bankruptcy protection in Denmark upon the discovery of a massive fraud and unsupervised trading which resulted in losses of about US$275 million.[37] At the time of its collapse, the OW Bunker Group maintained operations in 29 countries and possessed a market share of roughly seven percent of the worldwide bunker trade.

In many cases, vessel owners or charterers contracted with an OW entity for the supply of bunkers to the vessel. Thereafter, that OW entity would then further subcontract the order with either an independent physical supplier,

[33] The shipper appealed to the Court of Appeal, but the forwarding agent did not. The Court of Appeal overturned the Admiralty Court decision on the disputed basis that the labels on the pallet could be discerned by the crew when it was loaded on board. The author argued the case at both High Court and on appeal, and with respect takes the view that the Court of Appeal came to a wrong decision. In any event the parts of the judgement of the High Court touching on the IMDG Code were not disturbed and remain good law.

[34] See John Basquill, 'Analysis: Hin Leong's "vicious cycle" of trade finance fraud', *Global Trade Review* (Web Page, 19 August 2020) <https://www.gtreview.com/news/asia/analysis-hin-leongs-vicious-cycle-of-trade-finance-fraud/>.

[35] See Anita Gabriel, 'Hin Leong Trading's judicial managers given more time to restructure firm', *Business Times* (Web Page, 15 January 2021) <https://www.businesstimes.com.sg/government-economy/hin-leong-tradings-judicial-managers-given-more-time-to-restructure-firm>.

[36] See The Star, 'Legal tussles snarl millions in oil from Hin Leong deals' (Web Page, 25 June 2020) <https://www.thestar.com.my/business/business-news/2020/06/25/legal-tussles-snarl-millions-in-oil-from-hin-leong-deals>; Grace Leong, 'More legal woes ahead for Hin Leong founder', *The Straits Times* (Web Page, 22 December 2020) <https://www.straitstimes.com/business/companies-markets/more-legal-woes-ahead-for-hin-leong-founder>.

[37] See the narrative by the American Club, *The Collapse of OW Bunker Group* (Report, October 2015) <https://www.american-club.com/files/files/OW_bankruptcy.pdf>.

or, depending upon the location of the port of supply, another OW entity to perform the physical supply of the bunkers. In the ordinary course of business, the physical supplier of the bunkers invoiced and was subsequently paid by the OW entity that acted as its contractual counterparty with respect to the supply. Likewise, the vessel interests were invoiced by and would subsequently proceed to pay the OW entity that acted as its direct contractual party with respect to the supply.[38]

After the financial collapse of the OW Bunker Group, the physical bunker suppliers faced the risk of not being paid as their contractual counterparty was now in bankruptcy. Accordingly, countless physical suppliers have sought to obtain payment by arresting or threatening to arrest the vessels that were supplied. The claims were met in many cases by the customers having paid OW Bunker companies.[39]

The UK litigation raised issues of rights of claim which eventually landed in the highest Court for decision, in the case of *The Res Cogitans*[40]. The case before the UK Supreme Court was a test case, brought to resolve the question of 'who an owner should pay' in situations where both the contractual suppliers OW Bunkers and the physical supplier were out of pocket. In this case, the bunkers were supplied to Res Cognitans by OW Bunker Malta Ltd in Tuapse, Russia. OW Bunker Malta Ltd had obtained the bunkers from OW Bunker Trading A/S who had obtained them from Rosneft Marine (UK) Ltd and who, in turn, had obtained them from RN-Bunker Ltd (the physical supplier who made the actual delivery in Russia). At the time of OW Bunkers becoming insolvent the physical suppliers had not yet been paid.

The Supreme Court held that the agreement to supply bunkers was not a 'contract of sale of goods' within the meaning of s 2(1) of the *Sale of Goods Act 1979* (UK) but a bailment. The supply was construed as a special one-off arrangement to permit to consumption of bunkers without transferring property (i.e. ownership) in the goods to the owners.

The effect of this was that although the ships which had consumed the fuel may have paid for them, after OWB's insolvency, such ships were then liable to pay a second time to the original supplier, since property in the goods had not passed to the "buyer"

The Hin Leong and OW Bunkers playbook exposed the risks in trading in bunkers and supply chain linkages. Payment to one part of the chain may not be passed on to parties higher in the chain. The other problem is that the contractual terms of each party along the chain will have different dispute resolution / forum clauses. For instance, a contamination claim may come from the vessel owner who will claim against the trader with whom he has a contract and the contract may provide for arbitration at a certain centre. However, the trader's contract with its seller/physical supplier may have an arbitration clause with a different centre or jurisdiction clause.

Virtual hearings

Before 2020, trying a dispute in court or before an arbitral tribunal largely required a physical hearing with the parties, witnesses, and counsel converging and attending a court or the arbitral venue to conduct a physical hearing. The most common exception to this would be a document only arbitration.

Physical hearings were no longer possible in the locked down world wrought by the pandemic, where parties and their counsel could not even travel outside their homes.

The arbitration centres adapted by allowing remote hearings to be conducted online.[41] The centres amended their rules to allow electronic communication, facilitation of electronic signature of awards by arbitrators, and generally refined and expanded the provisions on the use of online hearings. For example, the Seoul Protocol provides guidelines to safeguard confidentiality and integrity of online arbitral hearings.[42]

[38] Ibid.
[39] Ibid.
[40] There have been numerous commentaries on the case and implications for the industry, including from Norton Rose Fulbright, 'The fallout from Res Cogitans and expected changes to bunker supply contracts' (Web Page, November 2016) <https://nortonrosefulbright.com/en/knowledge/publications/1bbcb0c1/the-fallout-from-emres-cogitansem-and-expected-changes-to-bunker-supply-contracts>.
[41] See Maria Fanou and Kiran Nasir Gore, '2020 in Review: The Year of Virtual Hearings', *Kluwer Arbitration Blog* (Web Page, 2 February 2021) <http://arbitrationblog.kluwerarbitration.com/2021/02/02/2020-in-review-the-year-of-virtual-hearings/>.
[42] See Jiyoon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', *Kluwer Arbitration Blog* (Web Page, 6 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>.

Courts around the world (including in the United Kingdom,[43] Australia,[44] Singapore and Malaysia) also adapted by allowing hearings and trials to be conducted online. This allowed witnesses outside the jurisdiction who could not travel due to the closure of borders to give evidence. When the pandemic eased, most courts retained these protocols for online hearings while allowing physical hearings on strict protocols.

Case management is an integral process of trial preparation.[45] Court monitoring of the action is started after filing of the writ, and the court will call the case over at periodic intervals to check if the writ issued has been served. In the context of Admiralty actions, this is done by the Admiralty Registrar. Whilst previously lawyers had to attend court physically and wait in turn to see the Registrar for the periodic case management, now case management is conducted over email exchange allowing this to be conducted from the lawyer's office or home, in the context of work from home protocols.

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.[46]

Most arbitration statutes and institutional rules recognise the distinction between the seat of the arbitration and the venue in which hearings may be held.[47] A crucial issue given the challenges posed by COVID-19 is what happens to the seat of arbitration when all aspects of the arbitration are conducted virtually.[48] 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.

Admiralty and Ship Arrest

In line with the *in rem* nature of proceedings, it would be necessary to serve on board the vessel. This is done by the process server personnel (be it a lawyer or service clerk)[49] or the Court Sheriff or Bailiff,[50] who will attend onboard for this purpose.

Both Singapore and Malaysia allow the application for vessel arrests to be done virtually without the need of physically attending Court. With respect to Singapore, from 22 January 2021 until further notice, service of warrants of arrest or writs in an *in rem* action against a ship, freight or cargo may be effected by leaving or transmitting the same to the agent of the ship.[51] In the same vein, security guards are also not required to be deployed on board an arrested ship with effect from 15 January 2021 until further notice.

The new paragraph 124(5) of the Supreme Court Practice Direction further clarifies that solicitors representing arresting parties must make reasonable efforts to notify the following persons and entities in writing of the service as soon as practicable: the owner of the ship, the demise charterer (if any) of the ship, the Master of the ship, the manager of the ship, and, if the ship is in a shipyard, the shipyard.

These innovative changes are a welcome reaction to the effects of the pandemic.

Country wide lockdowns can also impact the process for arrest. When Malaysia underwent a lockdown from 1 June 2021 to 30 June 2021, the time periods for filing of court documents was suspended.[52] Additionally, service of court documents by electronic means in Malaysia is now allowed by the new Order 62 Rule 6(1)(cc) of the

[43] For a guide to remote hearings in UK see Jim Cormack and Katharine Davies, 'Remote Hearings in the UK', *Pinsent Masons* (Web Page, 6 April 2020) <https://www.pinsentmasons.com/out-law/guides/remote-hearings-uk-coronavirus>.
[44] In the federal jurisdiction, see the Federal Court of Australia website: <https://www.fedcourt.gov.au/online-services/ecourtroom> and <https://www.fedcourt.gov.au/online-services/online-hearings>.
[45] Under Order 34 of the Rules of Court 2012. The Singaporean Courts have a similar procedure.
[46] See *Arbitration Act 1996* (UK) s 3.
[47] E.g., Article 14 of the International Chamber of Commerce (ICC) Arbitration Rules and Article 16 of the London Court of International Arbitration (LCIA) Arbitration Rules.
[48] See Cemre Kadioglu and Sadaff Habib, 'Virtual Hearings to the Rescue: Let's Pause for the Seat?', Kluwer Arbitration Blog (Web Page, 13 July 2020) <http://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/> for a discussion of the challenges raised by online hearings and suggested approaches.
[49] In the case of Singapore.
[50] In Malaysia, only the Court Sheriff or Bailiff are authorized to effect service of both the writ in rem and warrant of rrrest.
[51] Order 70 rule 10A of the Singapore Rules of Court.
[52] See Practice Directions issued by the Malaysian Federal Court on 31 May 2021.

Rules of Court. This avoids the traditional methods and recognises that many lawyers are not physically in their offices and work remotely.

In rem claims and the setting aside of an arrest

The Malaysian Court of Appeal in *Majorole Shipping Sdn Bhd v M & G Tankers (L) Pte Ltd* considered whether an in rem claim survived the setting aside of an arrest of the vessel.[53]

The *Courts of Judicature Act* (Malaysia) provides that the Malaysian High Court shall have the same Admiralty Jurisdiction as the English High Court under the *Senior Courts Act 1981* (UK).[54] In August 2021, the Malaysian Apex Federal Court considered an appeal from the Court of Appeal,[55] in a case which concerned the competing rights of a purchaser of an arrested vessel *vis-à-vis* the claim of a shipping agent which arrested the vessel and obtained an *in rem* judgment in default. After obtaining the judgment, the shipping agent did not proceed with the sale *pendente lite*. The vessel was under mortgage and if the sale had taken place the rights of the shipping agent would have fallen behind that of the mortgagee in priority. The arrest was not withdrawn. Some 18 months later, the subsequent buyer found that it could not sail the vessel outside of the port area due to the arrest which was still in place. The buyer could only sail the vessel after it had provided security of the shipping agent's claim. The buyer filed proceedings alleging that the continued arrest was an abuse of the Court process and also applied to set aside the arrest on the ground that the affidavit of service did not reveal the warrant was properly served on board. However, the buyer failed to conduct a search at the Admiralty Registry but still claimed that it was a bona fide purchaser without notice on the ground that the announced website was not set up and when it went on board there was no writ or warrant pasted on board. The shipping agent filed parallel proceedings contending that it had obtained an *in rem* judgement which attached to the vessel and the purchaser took subject to the crystallised *in rem* rights. The shipping agent also contended that the High Court Judge was *functus officio* and could not disturb the judgment or fail to give effect to those *in rem* rights. The High Court Judge gave judgment in favour of the purchaser and ordered the cancellation of the security.

The shipping agent appealed to the Court of Appeal and the Appeal was heard by a Panel of three Court of Appeal Judges over 2 sessions in November 2020 and February 2021.[56] The Court of Appeal overturned the decision of the High Court restoring the shipping agent's claim. In essence the Court of Appeal held that: '[t]he shipping agent's claim against the vessel has crystallised as a judgment *in rem* after the judgment in default of appearance had been granted and is an *in rem* claim which is protected and prioritized'.

The Court of Appeal also found on the facts that there was no abuse of process by the shipping agent in not proceeding with the sale application.[57]

The purchaser failed to obtained leave and the Federal Court noted that the questions of law posed revolved around issues of fact and the questions would not resolve or have the effect of overturning the Court of Appeal decision.

This case realigns Malaysian law with English Admiralty law to the effect that that in rem rights and judgements will bind the whole world.[58] The buyer who recklessly fails to conduct due diligence on the encumbrances of the vessel cannot claim to be a bona fide purchaser of the vessel without notice and takes the vessel subject to the crystallised in rem rights of the shipping agent.

[53] Civil Appeal No W-02(IM)(ADM)-1179-06/2019. The author acted for the Appellant in this case.
[54] *Senior Courts Act 1981* (UK) s 24(b).
[55] Federal Court Leave Application No: 08(i)-88-03/2020(W), appeal against Court of Appeal decision W-02(IM)-1179-06/2019 dated 23 February 2021. Leave will only be granted by the Federal Court on meeting the criteria under the *Courts of Judicature Act* s 96(a).
[56] The appeal was heard over the online platform 'Zoom' and the hearing took a total of 6 hours.
[57] The brief grounds were pronounced orally at the 2nd hearing session in February. The practice in appeals in Malaysia is that detailed grounds will only be written after leave is obtained from the Federal Court for the appeal to the Federal Court.
[58] The authorities accepted by the Malaysian Court of Appeal included the statement by the House of Lords in *The Cristina* [1938] AC 485 the House of Lords that 'A judgment in rem is a judgment against all the world' and in *The Ship 'Federal Huron' v OK Tedi Mining Ltd* [1987] LRC (Comm) 254 that 'Rights in rem arising out of a maritime lien travel with the vessel irrespective of ownership and come into existence automatically on the occurrence of the incident giving rise to the lien (per Scott, L.J., in *The Tolten* [1946) 2 All ER 379)'.

Conclusion

The practice of maritime law is one of the oldest areas of law. The events, challenges and disputes wrought by the cataclysmic events of 2020 and beyond has challenged both Industry and practitioners alike. Practitioners rose to the challenge and called upon established principles of maritime law to apply them in unprecedented situations and to difficult facts and situations.

There is great commonality in common law jurisdictions and the principles adopted by the Malaysian Court decisions covered in this article have application outside Malaysia. The past two years have certainly shone a spotlight on maritime law, an area of law which has sometimes been viewed as a niche specialization. For maritime lawyers this is surely a good thing.