# RESOLVING MARITIME DISPUTES :

# THE REGIONAL INITIATIVES*

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I thank the Malaysian Institute of Arbitrators for inviting me to address this distinguished audience from numerous countries of the Asia-Pacific, on the maritime developments in this region. Whilst there is no shortage of arbitration working-groups that have mushroomed over the last decade with the increased popularity of alternative dispute resolution, I must congratulate the Malaysian Institute of Arbitrators for their wisdom in organizing very aptly a regional gathering on arbitration, just as Asia is coming into her own.

I was drawn by Anthony D Smith's observation on arbitration of maritime disputes in the February 2007 edition of the publication of the Chartered Institute of Arbitrators[1], and since I have the pleasure of discussing here the regional initiatives on maritime dispute resolution, let me begin with a quote from his article:

> *"... in my opinion, it is likely that London will have an auspicious future, notwithstanding the expensive costs involved, mainly because the shipping industry has, over the years, built up confidence in London's highly qualified and experienced arbitrators, lawyers and others available to handle arbitrations.*
>
> *On the other hand, other jurisdictions, such as New York, Singapore, Hong Kong and Vancouver also offer arbitration services by people with similar expertise. They are fully capable of reaching reasoned and fair decisions, but at a cost lower than that which would be charged in London. This might prompt the Defence Clubs to encourage their members, by offering premium reductions, to negotiate into their shipping contracts an arbitration clause which names a jurisdiction other than London."*

Certainly, Singapore and Hong Kong have made great strides towards establishing themselves as significant maritime dispute resolution centers. Singapore has had the SIAC, Singapore International Arbitration Centre since 1991, and under its umbrella since November 2004; the SCMA, Singapore Chamber of Maritime Arbitration focused wholly on maritime dispute resolution. Hong Kong in turn has its HKMAG, Hong Kong Maritime Arbitration Group set-up within the HKIAC, Hong Kong International Arbitration Centre. I like to think that Malaysia can soon join Singapore and Hong Kong

[1] (2007) 73 Arbitration 1

in this ranking. Is this wishful thinking though, one might well ask? I believe not, if Malaysia keeps at her current initiatives.

## A. Maritime Growth

Incidents of maritime arbitration relate to the extent of maritime activity, and in terms of maritime activity, it is undeniable that Malaysia has progressed tremendously in her evolution as a maritime nation. Her maritime development must be viewed especially in the context of the direction the entire Asian shipping industry is taking.

Asia has the world's biggest share of ship building activity, with South Korea and Japan in the lead, and China intending to clinch the status of largest ship builder in the world by 2015[2]. As recently as 12th June 2007, it was reported that shipyards in Southeast and East Asia continue to receive abundant orders for off-shore drilling rigs, floating production units, and support vessels to compliment the phenomenal demands of the oil and gas industry.[3] More than 40% of the world's vessel tonnage is owned or controlled by Asian interest.[4] Against this background, I return to Malaysia.

Where better to begin with her initiatives than with a summary of facts and maritime figures confirmed by the Deputy Prime Minister of Malaysia on 8th March 2007[5] including that:

- 60,000 vessels ply the Malacca Straits; 30% of the world trade and 50% of the world's energy pass through the Malacca Straits, within and adjunct to Malaysian waters;

[2] Scandinavian Oil Gas Magazine Online
[3] Oil Online – http://www.oilonline.com/news/features/aog/20070612.Asian_ya.23799.asp
[4] http://www.scma.org.sg/abo/abo01.asp
[5] Keynote Address by the Deputy Prime Minister of Malaysia, YAB Dato' Sri Mohd Najib bin Tun Hj Abdul Razak at the inaugural National Maritime Conference held in Kuala Lumpur, Malaysia; jointly organized by the Malaysian Bar and the Attorney General's Chambers

- Malaysia has 7 international ports, with Port Klang and Port of Tanjong Pelepas ranking amongst the top ten best seaports and container terminal operators in the world;

- the tonnage of Malaysian owned ships places Malaysia as the 20th most important maritime nation;

- with a fleet of 23 LNG tankers, MISC Berhad, Malaysia's national carrier is the largest single owner-operator of LNG tankers in the world;

- PETRONAS, Malaysia's national oil and gas major, is a world leader in its field entering into major joint ventures for the exploration and exploitation and retailing of oil and gas in Myanmar, Vietnam, Philippines, Indonesia, China, India, Pakistan, Algeria, South Africa, Gabon, Morocco, Mozambique, Turkmenistan, Sudan, Egypt, Ethiopia, Iran, United Kingdom and Switzerland, to name a few;

- 95% of Malaysia's trade, valued at RM1 trillion in 2006, moves through her sea ports.

Adding to the maritime dynamics of Malaysia is the recent announcement in May 2007[6] of oil pipeline facilities, valued at USD7 billion, to be built and managed by a consortium of Malaysian, Indonesian and Saudi Arabian business interests across the top end of the Malaysian Peninsular, that would potentially divert, by the year 2014, 20% of crude oil which would otherwise pass through the Malacca Straits. This coast to coast project is of much significance to this region. It would provide an alternative route for the passage of crude oil from the Middle East and Africa to North-East Asia, which would not only relieve congestion and reduce pollution in the Straits of Malacca, but would provide a ready supply, with comfortable reserves, of oil to consumers in East Asia.

[6] Business Times, 29th May 2007 by S. Jayasankaran in Kuala Lumpur

In tandem with this rather impressive economic maritime growth for a population of 26 million people, the dispute resolution infrastructure for maritime claims in Malaysia has seen much improvement. With effect from 1st July 2005, an Admiralty Court was designated within the Commercial Division of the High Court at Kuala Lumpur to provide specialized determination of maritime disputes. To complement the workings of the Admiralty Court, the first set of Admiralty Practice Directions were introduced with effect from 1st February 2007 to ensure greater speed, efficiency and uniformity in maritime legal practice and procedure.

The KLRCA, Kuala Lumpur Regional Centre of Arbitration in collaboration with IKMAL, Institut Kelautan Malaysia (Malaysia Maritime Institute) have drawn the Fast Track Arbitration Rules to govern resolution of maritime disputes by a documents only process, and small claims procedures for disputes below the sum of RM500,000.00. These rules are available for adoption by maritime litigants as of 1st March 2007. Continuous training efforts co-ordinated by the KLRCA and IKMAL ensure a readily available pool of maritime experts within Malaysia to resolve the smaller and less complex maritime disputes.

It needs particularly to be observed that IKMAL is a maritime professional body of 23 years standing. Its members comprise, amongst others, master mariners, engineers and experienced seafarers, who collectively have a vast understanding of technical maritime issues, and wield a large sphere of influence over the maritime commerce of Malaysia. Their initiatives at bringing home to Malaysia for resolution smaller claims, which by large maritime entities consider a nuisance to business development, will go a long way in slowly but surely changing the mind-set of litigants of this region, who commonly seek to prolong disputes for short-term cash-flow benefits, oblivious to its impact on long term profit margins. The KLRCA-IKMAL initiatives can be expected to result in greater number of domestic charterparties, bills of lading, and ship building contracts providing for resolution of maritime disputes through arbitration in Malaysia, and in time persuading an extension of this local practice into international transactions.

The laws applicable to maritime dispute resolution in Malaysia complement these recent efforts. In terms of substantive laws, many international conventions are applied in Malaysia through direct ratification, or indirect adoption by local laws, including SOLAS[7], MARPOL[8], STWC[9], COLREG[10], OPRC[11], Hague Rules[12], 1957 Limitation of Liability[13], and Malaysia remains supportive of the role of the IMO in heading the future direction of maritime international standards.

Malaysia is a contracting state of the New York Convention[14] and she now has *The Arbitration Act* 2005, which came into force on 15th March 2006[15]. This aligns us closely with the UNICITRAL Model Law on International Commercial Arbitration. With the introduction of this new *Arbitration Act* 2005, party autonomy is provided its rightful place in the Malaysian maritime dispute resolution arena, with minimal Court inference over international arbitration. Sections 11 and 19 of *The Arbitration Act* 2005 provide for useful support by Courts, and confirm the powers of the arbitrators, to make interim and interlocutory orders. Having said that, they are three issues in respect of which maritime litigants would be justified in seeking reassurance, despite *The Arbitration Act* 2005.

[7] *International Convention for the Safety of Life at Sea*, 1974
[8] *International Convention for the Prevention of Pollution from Ships*, 1973
[9] *International Convention on Standards of Training, Certification and Watchkeeping for Seafearers*, 1978
[10] *Convention on the International Regulations for Preventing Collision at Sea*, 1972
[11] *International Convention on Oil Pollution Preparedness, Response and Co-Operation*, 1990
[12] *The International Convention for the Unification of Certain Rules of Law relating to the Bills of Lading*, 1924
[13] *The Convention relating to the Limitation of the Liability of Owners of Seagoing Ships*, 1957
[14] *Convention on the Recognition & Enforcement of Foreign Arbitral Awards, New York*, 1958
[15] In place of the *Arbitration Act*, 1952 and the *Convention on the Recognition & Enforcement of Foreign Arbitral Awards Act*, 1985

## B. Primary Maritime Concerns

I would classify these three issues as primary legal concerns of maritime interests, when resolving their disputes by arbitration.

(a) Would their customary manner of incorporating arbitration clauses be recognized as an “arbitration agreement”;

(b) Would they be able to secure their maritime claim by an arrest of a ship, pending reference of the dispute to arbitration;

(c) Would Courts seize control over their dispute, or stay Court proceedings in favour of an agreed reference to arbitration.

Let me first deal with the incorporation of arbitration agreements.

### (i) The Incorporation of an Arbitration Agreement

It is common in the shipping industry for arbitration agreements to take the form of express stipulations in writing, contained in a charterparty, shipbuilding contract, ship sale and purchase agreement or a salvage agreement, whether by adopting standard form documents or otherwise. That situation would be quite free of an “incorporation” issue. Not uncommonly though, bills of lading issued by shipowners would provide for the incorporation of terms of another document, usually a charterparty, into the bills of lading contract. The charterparty, and not the bills of lading, would contain the arbitration agreement. For instance, the standard form CONGENBILL may provide either,

> *"All terms and conditions, liberties and exception of the charterparty, dated overleaf are herewith incorporated"*[16]

or

> *"All terms and conditions, liberties and exceptions of the charterparty, dated overleaf, including the Law & Arbitration Clause are herewith incorporated"*.[17]

These bills of lading would eventually come into the hands of some third party purchaser/receiver of cargo that was carried on board the ship, who was not the original party contracting for the services of the ship (although by operation of shipping law such third party can acquire the benefits and liability under the contract evidenced by such bills of lading). The third party may not have knowledge of the precise terms of the charterparty between the shipowner and charterer/hirer of the vessel. A dispute may arise on the condition of the cargo delivered by the ship to the third party. Is such dispute between the shipowner and third party receiver of cargo subject to an effective and binding arbitration agreement?

This question gave rise to much debate in England as to the sufficiency of the incorporating clause.[18] Then came the English *Arbitration Act* of 1996, which contained in Section 6(2) a definition of an "arbitration agreement" similar to Article 7(2) of the Model Law.

The Malaysian *Arbitration Act*, 2005 by Section 9(5) carries this Model Law definition of "arbitration agreement" which states that:

> *"(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement."*

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[16] "CONGENBILL" Edition 1978
[17] "CONGENBILL" Edition 1994
[18] See: *The Annefield* [1971] P 168; *The Merak* [1964] 2 Lloyd's Rep 527; *The Federal Bulker* [1989] 1 Lloyd's Rep 103;

With this model law definition of "arbitration agreement" and the decision of the English Court of Appeal in *The Epsilon Rosa*[19] this issue may finally have been put to rest. The position now is that an incorporating clause in the nature of the CONGENBILL 1994 version which expressly states that it incorporates all terms of the charterparty "including the law and arbitration clause", would succeed in properly incorporating an arbitration agreement contained in a charterparty, provided the charterparty is "reduced in writing" and is "readily ascertainable". There is no Malaysian determination on this point as yet. However, the approach taken by the Malaysian Court of Appeal in *Bauer (M) Sdn Bhd v Daewoo Corp*[20] suggests that Malaysia is likely to be persuaded by the current English position.

Singapore has in its International Arbitration Act particularly provided in Section 2(4) that:

> *"A reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading."*

Maritime litigants can take comfort that disputes surrounding this issue, at least in terms of the law, have largely been contained.

(ii) Arrest as Security

The international nature of shipping trade, with ships moving from country to country, utilizing services and creating obligations at short intervals of time, and departing ports without leaving any assets upon which unfulfilled obligations may attach, prompted the historical formulation of the right to arrest a ship as security for a maritime claim.

[19] [2003] 2 Lloyd's Rep 509
[20] [1999] 4 MLJ 545

The right of arrest in many countries is derived from provisions of International Convention; commonly known as *The Arrest Convention*.[21] The primary purpose of *The Arrest Convention* is to regulate the ability to arrest ships, whether or not the arresting country accepts jurisdiction to hear the dispute on its merits. The arrest is to lend efficacy to the legal system of recovery of maritime debts, and the enforcement of maritime claims, regardless of the forum in which the dispute is ultimately to be determined.

Following the decision of the Malaysian Supreme Court in *The Vinta* (1993 unreported)[22], however, the law in Malaysia is that a ship cannot be arrested in Malaysian waters as security for a maritime claim that is referred to arbitration, save for very limited circumstances, resulting from Malaysia's adoption of the English *Supreme Court Act* 1981 which prescribes the Admiralty jurisdiction of the High Court. The jurisdiction to arrest a ship, as applied in England under the *Supreme Court Act* 1981 and followed in Malaysia, is restricted to securing claims that are to be determined by Courts.[23]

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

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[21] *The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels*, 1952

[22] See also : *The Norma Splendour* [1999] 6 MLJ 652; *The Swallow* [2003] MLJU LEXIS 237

[23] *The Rena K* [1979] 1 All ER 397; *The Andria* (later known as *The Vasso*) [1984] 1 All ER 1126; *The Tuyuti* [1984] 1 QB 838; *The Cap Bon* [1967] 1 Lloyd's Rep 543; *The Golden Trader* [1975] 1 QB 348;

England cured this deficiency by bringing into effect on 1st November 1984, Sections 25 and 26 of *The Civil Jurisdiction and Judgment Act* 1982, and later Section 11 of the English *Arbitration Act* 1996. Singapore implemented a similar enabling provision through Section 7 of the International Arbitration Act. There is however, no corresponding provision under Malaysian law. *The Arbitration Act* 2005 in its current form does not alter the Malaysian status on arrest of ships as security for arbitration. More on the prospect of reform later.

(iii) Stay of Proceedings

*(a) In fact a dispute*

As maritime disputes are commonly referred to arbitration, it is vital to maritime claimants that Court proceedings are stayed, to give effect to the arbitration agreement, should one of the parties to the maritime contract take the dispute to Court.

Section 10 of *The Arbitration Act*, contains the Malaysian Court's power to stay proceedings in respect of disputes which are subject to an arbitration agreement. This provision, as currently worded departs from the Model Law in that one of the grounds to refuse a stay, as couched in Section 10(1)(b), *"that there is in fact no dispute between the parties with regard to the matters to be referred"* does not have a Model Law origin. It was also found in the (now repealed) Section 1 of the United Kingdom *Arbitration Act* 1975.

If remained unchanged, these words are potentially a source of controversy. Ordinarily, a Court faced with a stay application would enquire only whether there is a dispute falling within the ambit of the arbitration agreement. If there is, then the matter is remitted to arbitration. This was the approach in Malaysia under the *Arbitration Act* 1952, subject of course to other aspects of the Court's inquiry unrelated to the issue of *"in fact a dispute"*[24].

[24] *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309; *Accounting Publications Sdn Bhd v Hoo Soon Furniture Sdn Bhd* [1998] 4 MLJ 497

What Section 10(1)(b) requires of the Court is to now determine whether there is *"in fact a dispute"* between the parties. A number of English cases, for instance *Ellis Mechanical Services Ltd v Wates Construction Ltd*[25] and the cases applying it, have held that the equivalent words in the English Act of 1975 (and its predecessors) permit the Court to entertain a summary judgment application, and it is only cases or issues that are not likely to be decided by summary judgment procedure that would meet the test of *"in fact a dispute"*, and qualify for reference to arbitration.

It remains to be seen if the Malaysian Courts will take the same approach. Clearly, it would not help the cause of arbitration if they do for two reasons. First, there is potential for much delay if cases are prevented from going to arbitration whilst there is a protracted summary judgment enquiry. Secondly, it defeats the objective of the parties that any dispute, no matter how lacking in merit, should be resolved by arbitration.

*(b) Seat in Malaysia*

The further aspect of Section 10 of *The Arbitration Act* 2005 that would be of concern to maritime claimants is that it appears only to apply to international arbitrations where the seat of arbitration is in Malaysia; by virtue of Section 3(3) of the Act and the omission of Article 1(2) of the Model Law. This raises some difficulty in the case of an international maritime arbitration with a non-Malaysian seat, for instance a London based LCIA arbitration involving say, a Malaysian and a non-Malaysian party. Assuming in such a case, Court proceedings are commenced in Malaysia, on the face of Section 10 there would be no statutory power in the High Court to grant a stay of the Malaysian Court proceedings, for the reason that Section 10 would not apply to such an arbitration that does not have its seat in Malaysia.

[25] [1978] 1 Lloyd's Rep 33

In the same vein, questions may legitimately be asked about the scope of the Section 11 interim relief. Does the section apply to international arbitrations with a seat outside Malaysia? Again, the reasoning which renders Section 10 inapplicable would seem to apply to Section 11. It would appear on the face of Section 11 not to be possible in the case of an international arbitration, with a non-Malaysian seat, to move the Court for interim protective measures available under this section.

Notwithstanding this temporary lacuna in the law, the Malaysian High Court in the recent decision of *Innotec Asia Pacific Sdn Bhd v Innotec GmbH*.[26] recognized the necessity to grant a stay of Malaysian Court proceedings in favour of arbitration in Germany, to honour Malaysia's treaty obligations under the New York Convention.

> *"… Being the court of the country it is the duty of this court to interpret our laws so as to comply with such Convention where Malaysia is a party, unless expressly prohibited by law.*
>
> *Be it under s 10 of the Arbitration Act 2005 or under the New York Convention 1958, a stay of proceedings is mandatory in order to refer the parties or the dispute to arbitration. This is also in line with the judiciary's efforts to refer disputes to arbitration or other mediation process before the matter is dealt with by the court."*

This is pro-active Court support of arbitration at its best.[27]

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[26] [2007] 3 AMR 67, decision delivered on 14th February 2007

[27] See also the Singapore High Court decision of *Front Carriers Ltd v Atlantics & Orient Shipping Corp* [2006] 3 SLR 832, to be contrasted with *Swift Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323

## C. The Regional Maritime Future

Whilst some concerns appear to have been effectively overcome, there are clearly issues that remain to be addressed. It is pertinent that recommendations for amendments to Sections 10 and 11 of *The Arbitration Act* 2005, that would resolve outstanding issues of arrest for security and stay of proceeding for reference to domestic and international maritime arbitration, have been formulated by the Malaysian Bar Council for consideration by the Attorney General of Malaysia. In keeping with the spirit of reform expressed on many occasions by the Attorney General, including in his address at the National Maritime Conference of March 2007 where the Attorney General emphatically called for the formulation of a consultative maritime working group comprising private and public sector maritime interests, amendments can confidently be expected to come to fruition very soon.

Ladies and Gentlemen, with the priority the Government of Malaysia and Attorney General's Chambers are seen to be affording to maritime affairs, a healthy environment of co-operation and consultation is nurtured not only to maintain, but indeed to inspire further maritime growth that will impact positively on maritime dispute resolution within Malaysia.

It is common ground that the predictability of outcome, without delay and at an affordable cost, are the practical factors that motivate litigants in their choice of forum for dispute resolution. Given that there are no restrictions to foreign arbitrators presiding over, or of foreign Counsel appearing in, arbitration proceedings conducted in Malaysia, Singapore or Hong Kong, this region offers essentially:

(i) the same expertise to resolve maritime disputes;
(ii) within supportive and familiar legal framework;
(iii) at lower costs.

The region further offers to many an element of neutrality. In an era where issues of bias and cultural differences are not only perceived but recognized as real matters of concern, this region has a significant role to play in ensuring an effective arbitration culture for all litigants, of any nationality, from whatever historical and cultural heritage.

With the emergence of dominant Asian trade markets and enhanced maritime activities, tremendous opportunities present themselves for dispute resolution within this region. I am confident that the region will rise to the challenge to provide the dispute resolution services expected of them. Defence Clubs that have offered premium discounts for the choice of arbitration in this region will not be sorry!