

RECENT ADMIRALTY DECISIONS IN HONG KONG – ARE THE COURTS READY TO DEVIATE FROM THEIR ENGLISH PREDECESSORS?

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1 Introduction

In Hong Kong, the jurisdiction of the courts in Admiralty matters is derived from the *High Court Ordinance (Cap. 4) (HK)*, in particular ss.12A-12E. These provisions are mostly identical to those contained in ss.20-24 of the *Senior Courts Act 1981 (UK)*. Hence, it is also similar to the *Admiralty Act 1973 (NZ)* and largely resembles *The Admiralty Act 1988 (Cth)*. Being a former colony of England, English case laws remain highly influential, if not directly binding in Hong Kong.¹ As one of the State Parties to the ‘International Convention Relating to the Arrest of Sea-going Ships, Brussels, May 10, 1952’ (Arrest Convention 1952), judicial authorities from other State Parties to this Convention have provided much food for thoughts for Admiralty judges in Hong Kong. The continued reliance on Hong Kong as a centre of dispute resolution by the international shipping sector suggests their strong trust in Hong Kong’s judicial procedures and its rules of law. Likewise, Hong Kong has legal practitioners – solicitors and barristers – who are well-equipped with sophisticated knowledge to handle shipping matters. These unique features of Hong Kong should of course be maintained, undisturbed by any political concerns.

Despite its historical root from that of the English law, the development of Admiralty law in Hong Kong must largely be credited to judges. As observed by one of the leading practitioners in Hong Kong, the Admiralty Division of the Court of First Instance in Hong Kong has in recent years been active in developing its own precedents.² Indeed, a review of recent cases seems to suggest that the courts in Hong Kong, where they deem appropriate, are more willing to depart from the English authorities. This is also a trend across the Asia-Pacific Region, as it can be seen in some cases in Australia and New Zealand. While there might be a benefit of uniformity, this has to be balanced against the need for the ‘best quality’ law – the law which most suits commercial reality. Two examples of such ‘best quality laws’ will be discussed in this work. The first example is the recent decision of the Hong Kong Court of Appeal in *The Alas*³ where the Court, in upholding the decision of Ng. J at first instance,⁴ refused an argument based upon the decision of the House of Lords in *The Indian Grace (No.2)*⁵ in the context of the right to raise an *in rem* action in light of a prior arbitration award. The second example is from an observation of the Hong Kong Court of Appeal in *The Almojil 61*,⁶ which gave an indication that it prepared to go beyond the ship registration to determine the ownership of a vessel. Once again, if this is developed further in subsequent cases, it will be a clear sign of departure from the English authority represented by *The Eppo Agnic*.⁷ This work will conclude with a supporting voice for the courts in Hong Kong as well as for those other countries in the Asia-Pacific Region, to be ready to depart from the English authorities, especially those which are deemed to be too static and wrong.

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¹ Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on 4th April 1990 by the Seventh National People’s Congress of the People’s Republic of China in its Third Session): ‘The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.’

² Mary Thomson, ‘Preface’ in Mary Thomson (ed.), *Maritime Law and Practice in Hong Kong* (2015) xv.

³ *Handytankers KS v The Owners and/or Demise Charterers of the Ship or Vessel M/V ‘Alas’ subsequently renamed as ‘Kombos’ and those other vessels named in Schedule ‘A’ Annexed Hereto HCMP 2315/2014*.

⁴ *The Alas* [2014] 4 HKLRD 160.

⁵ *Republic of India and The Government of the Republic of India (Ministry of Defence) v India Steamship Co. Ltd (The ‘Indian Grace (No.2)’)* [1998] 1 Lloyd’s Rep 1.

⁶ [2015] 3 HKLRD 598.

⁷ [1988] 2 Lloyd’s Rep 411.

As mentioned, this part deals with the case of *The Alas*. A fuller analysis of this case can be found in an article written by the author elsewhere.⁸ The fact of the case in short was that the plaintiff chartered its ship to the defendants for a period of five years.⁹ There were disputes between the parties on the alleged breach of the charterparty and the alleged non-payment or late payment of hire by the defendants.¹⁰ Their disputes were referred to the arbitration in London as per the dispute resolution clause in the charterparty stipulating the LMAA arbitration. The arbitrator made the award for the plaintiff.¹¹ The plaintiff came to invoke the *in rem* jurisdiction of the Admiralty Jurisdiction of the Court of First Instance in Hong Kong and sought to arrest the defendant's ship based on s.12A(2)(h) of the *High Court Ordinance (Cap. 4) (HK)*, namely 'any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship'.¹² The defendants in turn came to apply for the warrant of arrest to be set aside or struck out and additionally challenged the *in rem* jurisdiction of the Court of First Instance. Ng J, relying primarily on the decisions of the Admiralty Court in *The Rena K*¹³ and of the Court of Appeal in *The Tuyuti*,¹⁴ found that the plaintiff's claim was in the nature of the claim for breach of the charterparty and for unpaid hire as per s.12A(2)(h) and that there is nothing wrong for the plaintiff to invoke the *in rem* jurisdiction for the unsatisfied arbitration award.¹⁵

The Rena K involved the carriage of sugar from Port Louis, Mauritius, to Liverpool.¹⁶ The charterers and the cargo-owners commenced proceedings *in rem* against *Rena K* for losses and damages to cargo.¹⁷ The ship-owners sought a stay of the action based on the arbitration agreement.¹⁸ One of the questions was whether the stay of the action would necessitate the release of *Rena K*.¹⁹ Brandon J delineated two scenarios. Where the stay of the action is likely to be final; the ship should be released. Where, on the other hand, the stay is unlikely to be final and that there might be a judgment; the ship may be released upon the provision of alternative security.²⁰ He examined the facts before him and came to the conclusion that it was unlikely for the ship-owners to be able to satisfy the arbitration award. He concluded:²¹

It follows, on my view that a cause of action in rem does not, as a matter of law, become merged in an arbitration award, that is a case where the stay might well not be final and there might well therefore still be a judgment in the action to be satisfied.

It should be observed, however, that nowhere in his judgment did Brandon J suggest that the action *in rem* in this context can only be invoked where the claim is framed within one of the headings of claim listed in s.20(2) of the *Supreme Court Act 1981 (UK)*.

The Tuyuti involved the damage to cargo during the discharge operation.²² The relevant bills of lading contained a London arbitration clause.²³ Nevertheless, the cargo interests came to issue the writ *in rem* and issued a warrant of arrest.²⁴ The defendants contended the fact that the action *in rem* may be re-opened for the unsatisfied arbitration award means the action *in rem* is used to enforce the arbitration award.²⁵ In response to the defendants' challenge against *The Rena K*, Robert Goff LJ explained:²⁶

⁸ Poomintr Sooksripaisarnkit, 'Ship Arrest in Hong Kong Despite an Arbitration Award?' (2015) 21 *Journal of International Maritime Law* 94.

⁹ [2014] 4 HKLRD 160 [3].

¹⁰ *Ibid* [4].

¹¹ *Ibid* [5].

¹² *Ibid* [6].

¹³ [1979] QB 377.

¹⁴ [1984] QB 838.

¹⁵ [2014] 4 HKLRD 160 [25]–[26].

¹⁶ [1979] QB 377, 385.

¹⁷ *Ibid*.

¹⁸ *Ibid* 386.

¹⁹ *Ibid*.

²⁰ *Ibid* 404–405.

²¹ *Ibid* 406.

²² [1984] QB 838, 840.

²³ *Ibid* 841.

²⁴ *Ibid*.

²⁵ *Ibid* 849.

²⁶ *Ibid*.

The action is not an action on the award, but the action founded on the original cause of action identified in the writ. The result may be that the judgment will be obtained in a sum equal to the sum awarded in the arbitration, and in respect of the same cause of action, but it does not follow that the award itself is being enforced in the action.

It was only in the judgment of Robert Goff LJ that the writ containing the original cause of action was emphasised. However, his judgment must be construed with the context of the case. In neither *The Rena K* nor *The Tuyuti* that the arbitration award had been obtained when the warrant of arrest was sought. Hence, *The Alas* was original in this respect.

In the course of arguments in *The Alas*, the counsel for the defendants maintained convincingly that the authority in *The Rena K* could not be reconciled with that of the House of Lords in *The Indian Grace (No.2)*. As one could be recalled, the situation in *The Indian Grace (No.2)* was that the fire broke out from the cargo hold while the vessel was on its way from Sweden to India.²⁷ The cargoes were subsequently discharged at destination. However, claims for loss of cargoes and short of delivery were raised against the ship-owners by the Indian government.²⁸ The judgment in India was delivered in favour of the Indian government.²⁹ Subsequently, the Indian government initiated a claim *in rem* in London against the sister ship of *Indian Grace*.³⁰ The issue arose as to whether the action *in rem* was brought in contravention of s.34 of the Civil Jurisdiction and Judgments Act 1982, which basically bars an action between the same parties on the same cause of action.³¹ At first instance, the judge held that the action *in rem* was against the ship so one of the parties was different from that of the action in India.³² When the matter came to the House of Lords, Lord Steyn rejected the reasoning that the action *in rem* was an action against the ship. In his classic passage:³³

The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building. Fortunately, the scaffolding can usually be removed with ease...The idea that the ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts the fiction helps to defend and enlarge Admiralty jurisdiction in the form of an action in rem. With the passing of the Judicature Acts that purpose was effectively spent...

...It is now possible to say that...an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgment of the issue of the writ by the defendant before the service...From that moment the owners are parties to the proceeding in rem...

However, Ng J rejected *The Indian Grace (No.2)* as irrelevant since the issue in that case did not concern the arbitration award.³⁴ The Court of Appeal agreed with the reasoning of Ng J '*The Rena K* was cited in argument before the House of Lords, and it would be surprising for it not to be explicitly addressed by Lord Steyn in his judgment if he were intending to express disapproval of it'.³⁵ It is submitted that this seems to be a correct reading as nowhere in *The Indian Grace (No.2)* was *The Rena K* decision considered. The issue in relation to the arbitration award was also not considered in that case.

Indeed, a similar conclusion was reached by the New Zealand High Court in *The Irina Zharkikh*.³⁶ This case involved a hire of two vessels for the purpose of fishing in violation of the quota granted to the charterer.³⁷ Subsequent to the termination of this charter, the charterer was investigated by the Ministry of Fisheries for breaching laws relating to fisheries.³⁸ There was a clause in the charterparties to the effect that the ship-owners were to provide indemnity to the charterer in the event of 'losses, fines, penalties or costs, seizures and forfeitures' due to excessive catching of fish over the quota. Also, the ship-owners were to provide indemnity to the charterer for violation of laws regarding fishing.³⁹ The charterer commenced the action *in rem* against the ship on the basis

²⁷ [1998] 1 Lloyd's Rep 1, 4.

²⁸ Ibid.

²⁹ Ibid 5.

³⁰ Ibid.

³¹ Section 34 of the *Civil Jurisdiction and Judgments Act 1982*: 'No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless the judgment is not enforceable or entitled to recognition in England or Wales or, as the case may be, in Northern Ireland.'

³² [1998] 1 Lloyd's Rep 1, 5.

³³ Ibid 10.

³⁴ [2014] 4 HKLRD 160, [21].

³⁵ HCMP 2315/2014, [11].

³⁶ [2001] 2 NZLR 801.

³⁷ Ibid [6]-[7].

³⁸ Ibid [9]-[11].

³⁹ See ibid [15].

of s.4(h) of the *Admiralty Act 1973 (NZ)*, which governs 'any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship'.⁴⁰ The ship-owners provided the security.⁴¹ Subsequently, the charterer was held liable by the Ministry of Fisheries. The charterer amended its claim *in rem* and sought to arrest the vessels.⁴² The ship-owners sought to stay the concerned action, relying on the arbitration agreement contained in the charterparties. They argued, among other things, that '[i]f arbitral awards are made, this would result in the underlying causes of action merging in the awards'.⁴³ In the course of considering this issue, Young J considered the exact same line of arguments raised in Hong Kong in *The Alas*, which is that the authority in *The Rena K* was overruled by the judgment in *The Indian Grace (No.2)*.⁴⁴ This prompted Young J to analyse Lord Steyn's reasoning in detail in his judgment.⁴⁵ However, before Young J's reasoning is discussed in this work, it is appropriate to pause at this point to mention as well the more recent decision of the Full Court of Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,⁴⁶ where *The Irina Zharkikh* and relevant authorities were also discussed in the judgment. These cases will then be discussed together below.

In the *Comandate* case, the issues revolved around time charterparty disputes. The time charterparty was agreed on the basis of the 1999 version of the New York Produce Exchange (NYPE) form, with amendments to subject disputes to the London arbitration.⁴⁷ Subsequently, disputes arose between the parties which had prompted the charterer to effect the arrest of *Comandate* in Australia albeit she was released upon security.⁴⁸ The owners of the *Comandate* sought an anti-suit injunction in London. In anticipation of that, the judge in Australia granted an anti-suit injunction forbidding the owners of *Comandate* 'from taking any step in the High Court of Justice or in any other court to restrain the continuation of the proceeding in the Court...'.⁴⁹ The owners of *Comandate* commenced arbitration in London and arrested *Boomerang I*, another ship owned by another company, which was on demise charter to the charterer.⁵⁰ The main issue was: in arresting the *Boomerang I*, were the owners of the *Comandate* taken to waive or abandon the arbitration?⁵¹ In the course of discussing an argument that the action against *Boomerang I* 'can be taken the full equivalent of an action [between the parties]',⁵² Allsop J considered implications of *The Indian Grace No.2*.

Allsop J, in his analysis, was much influenced by the *Admiralty Act 1988 (Cth)* and the report of the Australian Law Reform Commission (ALRC 33) on *Civil Admiralty Jurisdiction* published in 1982 which he alluded to.⁵³ He arrived at the conclusion:⁵⁴

Until the High Court of Australia says otherwise, the law of Australia is that the action *in rem*, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship...After the appearance, it continues as an action *in rem* and also as if it were an action *in personam* against the relevant person who appears.

Of note is Allsop J joined Young J in *The Irina Zharkikh* on the thought that Lord Steyn arrived at the conclusion he reached in total disregard of *The Rena K*.⁵⁵ This basically was a reference to his part of reasoning where Lord Steyn set out the judgment of the Court of Appeal:⁵⁶

It is well established since the time of Dr. Lushington that a plaintiff who has an unsatisfied judgment in personam can proceed by an action in rem. (Presumably there would be no advantage in doing so unless there had been a change in ownership of the vessel; otherwise the plaintiff could employ ordinary methods of execution...). Similarly a plaintiff who has proceeded in rem, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action in personam. Those two propositions emerge from *The John and Mary*, (1859) Swab. 471, *Nelson v Couch*, (1863) 15 C.B.N.S. 100, *The Cella*, (1888) 13 P.D. 82, *The Joannis Vatis (No.2)*, [1922] P. 213, *The Rena K*, [1978] 1 Lloyd's Rep. 545; [1979] Q.B. 377...

⁴⁰ Ibid [17].

⁴¹ Ibid [22]–[23].

⁴² Ibid [27]–[29].

⁴³ Ibid [32].

⁴⁴ Ibid [76].

⁴⁵ See ibid [77]–[94].

⁴⁶ [2006] FCAFC 192.

⁴⁷ Ibid [15].

⁴⁸ Ibid [16].

⁴⁹ Ibid [18].

⁵⁰ Ibid [14] and [20].

⁵¹ Ibid [32].

⁵² Ibid [99].

⁵³ See ibid [105]–[127].

⁵⁴ Ibid [128].

⁵⁵ Ibid [117].

⁵⁶ [1998] 1 Lloyd's Rep 1, 9.

Can it be that by s.34 [of the Civil Jurisdiction and Judgments Act 1982] Parliament has, in a case where the first of two actions is brought in a foreign Court (but not if it was brought in England and Wales or Northern Ireland), abolished the well-established rule that a judgment in personal is no bar to an action in rem and vice versa? If so, it is hard to see the rhyme or reason of it.

Lord Steyn in the same page of the judgment was of the view that the authorities so referred to by the Court of Appeal are in the context of maritime liens and he would not be willing to extend it beyond the ambit of maritime liens.⁵⁷ However, as Young J pointed out in his judgment, the rule was not limited to cases on maritime liens. *The Cella* and *The Rena K* set out in the passage of the Court of Appeal which Lord Steyn should have been aware of were indeed *not* maritime lien cases.⁵⁸ The factual circumstances of *The Rena K* were briefly mentioned above. In *The Cella*, the case involved a claim by the plaintiff who was a repairer.⁵⁹ The plaintiff invoked an action *in rem* under the then s.4 of the *Admiralty Court Act, 1861 (UK)*.⁶⁰ The mortgagee intervened and provided undertaking. The payment was made into court. The plaintiff applied to receive such payment. The liquidator for the ship-owning company opposed and maintained his entitlement to payment.⁶¹ The Court of Appeal found for the plaintiff. In the passage of Lord Esher, M.R.: '...in the Admiralty Division, in an action in rem, the effect of the judgment is greater than it can be in another Division of the High Court, where money has been paid into Court. In the one case it is only a judgment between the parties, in the other it is a judgment between the parties and against all the world...'⁶² To this end, it is submitted that Young J's criticism of *The Indian Grace (No.2)* was correct. Therefore, he proceeded to confirm the continuing effect of the principle in *The Rena K*.⁶³

Although it is possible to read some of the cases establishing the rule that an unsatisfied in personam judgment does not exclude a later in rem claim as at least referable to the view that a claim in rem is against the ship, there is also the view, which also run through the cases, that a claimant who has an in rem claim should be regarded as having a "two-fold security" and when the first, a claim in personam, fails to produce any tangible result, is entitled to resort to the second (namely the in rem claim)...

This 'two-fold security' is in line with what Allsop J explained in the *Comandate*, which is that the action continued with both characteristics of the action *in rem* and the action *in personam* once the ship-owners enter appearance.

Allsop J noted also in his judgment that *The Indian Grace No.2* was distinguished by the Court of Appeal in Singapore in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte. Ltd.*⁶⁴ In this case, the judgment *in rem* had been handed down in favour of a company which provided materials and services to the ship. The ship-owners entered an appearance and the ship was released with the guarantee by the bank.⁶⁵ The ship-owners were subsequently dissolved.⁶⁶ Regardless of the dissolution, the trial judge proceeded to enter the judgment *in rem*.⁶⁷ On appeal, it was alleged that the trial judge was wrong in coming to the view that 'judgments in rem could be entered notwithstanding the fact that the defendant company had been dissolved'.⁶⁸ Relying primarily on earlier cases in Singapore,⁶⁹ the Court of Appeal affirmed the opinion of the trial judge that 'the action in rem continues to proceed against the res even though the real party to the action is the shipowner...'⁷⁰ To this end, it is respectfully submitted that the Singapore Court of Appeal was not clear on how it sought to distinguish from *The Indian Grace (No.2)*. It explained:⁷¹

If one were to follow the reasoning of the House of Lords in *The Indian Grace*, the result would be that the defendant to an action in rem is not the ship but the ship-owners, whether or not the ship-owners had entered an appearance in the in rem action as the owner is in fact directly impleaded as a defendant once the ship had been served with the writ. However, the factual situation in *The Indian Grace* must be recalled. There, the plaintiffs were in fact seeking to institute two actions, one in personam action in India and the action in rem in England. The decision to strike out

⁵⁷ [1998] 1 Lloyd's Rep 1, 9.

⁵⁸ [2001] 2 NZLR 801 [30].

⁵⁹ (1888) 13 P.D. 82.

⁶⁰ (1888) 13 P.D. 82, 83. Section 4 of the *Admiralty Court Act 1861 (UK)* provided: 'The High Court of Admiralty shall have Jurisdiction over any claim for the building, equipping, or repairing of any Ship, if at the Time of the Institution of the Cause the Ship or the Proceeds thereof are under Arrest of the Court. [As to Claims for building, equipping, and c. ships.]'

⁶¹ *Ibid* 83.

⁶² *Ibid* 87.

⁶³ [2001] 2 NZLR 801 [94].

⁶⁴ [1999] 3 SLR 721 referred to in [2006] FCAFC 192 [103].

⁶⁵ *Ibid* [1].

⁶⁶ *Ibid* [3].

⁶⁷ *Ibid* [6].

⁶⁸ *Ibid* [11].

⁶⁹ See *ibid* [16]–[18] referring in particular to *The Kusu Island* [1989] SLR 119; *The Fierbenti* [1994] 3 SLR 864.

⁷⁰ *Ibid* [24].

⁷¹ *Ibid* [23].

the proceedings in England was based on the doctrine of *res judicata* and s.34 of the Civil Jurisdictions and Judgments Act. For these reasons, *The Indian Grace* is clearly distinguishable from the appeal.

It is true that the factual circumstances in *The Indian Grace (No.2)* were different from that of the *Kuo Fen Ching* case. However, the author does not believe that the question of law is so distinguishable that the reasoning in *The Indian Grace (No.2)* was found by the Court of Appeal as not deserving closer analysis. Both cases shared the same question of law - the fact of an *in rem* action once the ship-owners enter appearance! The Court of Appeal in Singapore pointed out difficulties had the approach of *The Indian Grace (No.2)* been adopted, especially in the event of the subsequent insolvency of the ship-owners or the complication in getting the *in rem* judgment enforced.⁷² Nevertheless, it was not clear to the author's mind the scenario which the Court of Appeal had at the relevant time. On the other side of the same coin, Allsop J envisaged the difficulty had the approach of *The Indian Grace (No.2)* been adopted and the ship-owners did not care to enter the appearance. He put the matter in this way:⁷³

Further, to assimilate judgments resulting from the actions *in rem* and *in personam* is to debilitate the utility of the action *in rem*...If the claimant has to bring the action *in rem* knowing that this is its one action against the defendant owner, it may risk disaster in proceeding *in rem*. If the owner does not appear and if the claimant proceeds against the ship, it may gain little from the action (even if it has a strong case). Other claimants may come in - mortgagees, lienees, other statutory claimants. None of these, or at least the amount each is owed, would have been apparent to the claimant before judgment. Yet, having gone to judgment *in rem*, the claimant is precluded from proceeding again *in personam* because really it has, according to *The 'Indian Grace'*, already had its opportunity against [the] defendant owner *in personam* by the *in rem* action. There has been no personal submission by the relevant person and so it is difficult to see how the plaintiff can somehow enforce the *in rem* judgment against other assets of the relevant person. If this is the position, there is a clear opportunity for a party liable for a maritime claim to collude with others to undermine entirely the worth of the underlying cause of action.

While there appears at first sight much force in this analysis, it is submitted that even if there is no assimilation of the action *in rem* and the action *in personam*, the overall objective of protecting the claimant is pretty much forfeited by the practice of using a 'one ship' company as a shield. Even if the claimant can bring a suit *in personam* independently from that *in rem*, doing so only costs the claimant time and money for the ship-owning company had no other assets apart from the ship which is the very subject of the *in rem* action. The technicalities arising from the recognition of such one-ship company will be discussed in further details below in the next part of his work.

Suffice it to say that for the present purpose, the judgment in *The Indian Grace (No.2)* has been the subject of much criticism. The courts in Hong Kong, New Zealand, Australia, and Singapore analysed it but either did not follow it or sought to distinguish from it. Academic commentators joined in casting doubts on the theoretical foundation of *The Indian Grace (No.2)*.⁷⁴ Taking into account these relevant authorities from other jurisdictions, it is only appropriate to say that Ng J's reasoning in the Hong Kong case of *The Alas* (which was affirmed by the Court of Appeal in the same case) is solidly founded on authorities. One short note would be the unnecessary introduction of technicality - a distinction between an arbitration award and an underlying cause of action - depending on the very specific skills of the barrister on what to be put in a *writ*.

3 Piercing The Corporate Veil In Admiralty - Taking A Shield Out Of A Ship-Owning Company?

A doctrine of corporate personality is well-settled in English law in a celebrated case of *Salomon v Salomon & Co.*⁷⁵ Shipping industries have been using this doctrine to their own advantage - even to the extent of *abusing* the doctrine by way of creating a 'single ship company'. The single ship company has two significant features - being a 'one man' company and being a single asset company.⁷⁶ As a 'one man' company, the true owner of the ship - an individual or a company - changes its role to either a mere shareholder of a ship-owning company or becomes a shareholder in a company which in turn is a major shareholder of a ship-owning company.⁷⁷ In this way, such individual or company still gains ultimate control of the ship.⁷⁸ As a single asset company, the company is formed

⁷² Ibid [24].

⁷³ [2006] FCAFC 192 [118].

⁷⁴ See Sarah C. Derrington and James M. Turner, *The Law and Practice of Admiralty Matters* (2007) 2.26–2.57.

⁷⁵ '...once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself. *Aron Salomon (Pauper) v A. Salomon and Company, Limited; A. Salomon and Company Limited v Aron Salomon* [1897] AC 22, 30 (per Lord Halsbury L.C).

⁷⁶ Dimitrios Ph. Christodoulou, *The Single Ship Company: The legal consequences from its use and the protection of its creditors* (2000) 5.

⁷⁷ Ibid 6.

⁷⁸ Ibid.

with a specific purpose of owning a specific ship.⁷⁹ Such practice is facilitated by the use of the 'flag of convenience'⁸⁰ made available by countries which adopt the 'open registry system'.⁸¹ This is not an over-statement. As described by Coles and Watt, 'the phrase [flag of convenience] has come to signify the evils of rampant capitalism, and the disregard of labour rights, safety standards and environmental protection in the pursuit of profit'.⁸² Of course, *prima facie* the use of the single ship company and the registration of ship with the flag of convenience are separate matters as the ship can be owned by the single ship company even though it is not registered with one of the countries adopting the open registry system. However, to be able to register a ship in a country adopting the open registry system, often it is necessary for the ship-owning company to be incorporated in that country.

In Admiralty cases, the courts mostly have to consider liabilities of the entity behind the ship-owning company when the question involves a statutory action *in rem*.⁸³ In Hong Kong, the manner which the statutory action *in rem* may be invoked is provided for in s.12B(4) of the *High Court Ordinance (HK)* (similar in language to s.21(4) of the *Senior Courts Act 1981 (UK)*):

In the case of any such claim as is mentioned in section 12A(2)(e)-(q), where –

- (a) the claim arises in connection with a ship; and
- (b) the person who would be liable on the claim in an action in personam (the “relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought before the Court of First Instance against –
 - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
 - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Cases where the corporate personality were considered are mostly those concerning the determination of the 'beneficial owner' in the above provision. The leading English authority which explained this term pre-dated the *Senior Courts Act 1981 (UK)*. It was decided in the context of a similar provision under the *Administration of Justice Act 1956 (UK)*.⁸⁴ That is the judgment in *The I Congreso*.⁸⁵ The factual background of the case was relevant to the political situation in Chile. Before the change of the government, the contract was made for the sale and purchase of sugar from Cuba to Chile. Two ships were engaged for carriage of the sugar. The first ship was engaged by means of a voyage charter entered into between the seller, a Cuban state enterprise, and the ship-owner, another Cuban state enterprise ('Mambisa'). The second ship was under a demise charter to Mambisa who let the ship on a sub-charter to another Cuban state enterprise and finally she was let on a voyage charter to the seller.⁸⁶ Following the change of government in Chile, given the concern of safety to vessels, the first ship which had been under discharge operations in a port in Chile was ordered by the Cuban government to leave the port and the second ship was instructed to deviate.⁸⁷ Subsequently, Mambisa acquired *I Congreso*, which was then a newly-built ship. It was established that Mambisa engaged in the ship sale and purchase contract 'on behalf of the Republic of Cuba' and subsequent to that, the ship 'was entered in the Cuban Registry in the name of the Republic

⁷⁹ *Ibid* 8.

⁸⁰ 'A flag of convenience is a flag flown by a vessel registered in one state, with which the vessel has few or no connections, while in reality the vessel is owned in or operated from another state'. William Tetley Q.C., 'The Law of the Flag, "Flag Shopping", and Choice of Law', (1992–1993) 17(2) *Tulane Maritime Law Journal* 139, 173.

⁸¹ The 'open registry system' may be explained as 'signifying the ability of a shipowner to register a vessel in a particular flag State regardless of his own nationality as a determining factor in the grounds of his qualification or entitlement to do so. These flag States permit registration for reasons of commercial expediency rather than requiring patriotic or naturally domiciled allegiance'. Richard Coles and Edward Watt, *Ship registration: law and practice* (2nd ed, 2009) 3.1.

⁸² *Ibid*.

⁸³ A statutory action in rem is sometimes known as a 'statutory lien'. This is essentially an extension of the jurisdiction of the courts in Admiralty by statutes. See D.C. Jackson, *Enforcement of Maritime Claims* (4th ed, 2005) 2.102.

⁸⁴ Section 3(4) of the *Administration of Justice Act 1956 (UK)*: 'In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty Jurisdiction of the Liverpool Court of Passage or any county court may (whether the claim gives rise to a maritime lien on the ship or not be invoked by an action in rem against – (a) that ship, if, at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.'

⁸⁵ [1977] 1 Lloyd's Rep 536.

⁸⁶ *Ibid* 539.

⁸⁷ *Ibid* 540–541.

of Cuba as owners'.⁸⁸ The ship *I Congreso* was arrested by the cargo owners on board the two ships alleging that Mambisa was the beneficial owner.⁸⁹ This was rejected by Robert Goff J In interpreting the relevant provision of the statute, he explained:⁹⁰

...the words "beneficially owned as respects all the shares therein" refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be...

...I start with the statute, and the words...are "beneficially owned at respects all the shares therein". In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner...Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of the demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship may have.

This interpretation was followed by modern authorities which sought to construe the equivalent provision in the *Senior Courts Act 1981 (UK)*. An example of such authority is that of the Court of Appeal in *The Evpo Agnic*.⁹¹ The facts of the case were relatively simple. It followed the sinking of a ship *Skipper I*. The cargo owners on board then came to arrest *Evpo Agnic* alleging that the ship-owning company of *Skipper I* and that the ship-owning company of *Evpo Agnic* belonged to the same ship-owning group with the same company officers.⁹² Lord Donaldson M.R emphasised the significance of the ship registration. 'These registers are of fundamental importance as establishing the flag of the vessel, thereby making it for some purposes part of the floating territory of that country and subjecting it to the laws of that country. I would therefore regard the concept of a registered owner as being a nominal owner as a contradiction'.⁹³ With respect, the author is rather disturbed with what Lord Donaldson MR subsequently opined:⁹⁴

The plaintiff's real case is that Mr. Evangelos Pothitos, who describes himself as a Greek shipowner, or his company...is the real owner of both ships and indeed of all the ships in the Pothitos fleet. This involves the proposition that the registrations are shams. I am as realistic as most Judges who has served in the Commercial Court, but I really do not see the commercial advantage of the creation of sham registered ownerships. Mr. Pothitos no doubt has a legitimate interest in running these ships...but he can do this by running a series of genuine one-ship shipowning companies as a group. He does not need a structure involving a holding company and subsidiaries, and still less sham companies. As governing shareholder in each shipowning company, he can cause them to use their individual assets to the mutual advantage of the members of the group and of Mr. Pothitos.

What the judge opined here is somewhat lopsided in the sense that Mr. Pothitos could take advantage of the corporate structure while likewise he can evade legal liabilities by 'sitting comfortably behind the veil' in Greece. On the other hand, the cargo owners on board *Skipper I* could not avail themselves of raising a claim *in rem*. The ship in question, *Skipper I*, sank. It was owned by a one-ship company. Even in reality both *Skipper I* and *Evpo Agnic* were employed under the instruction of the same person, ie., Mr. Pothitos, there was no way the cargo owners could go beyond the ship registration and the corporate structure so to make Mr. Pothitos liable.

In Hong Kong, the Court of Final Appeal followed the English authorities closely in *Re Resource I*.⁹⁵ The case arose out of a claim by the cargo interests following a deviation of the ship, previously named *Tian Sheng No.8*.⁹⁶ At the relevant time, the registered owners of *Tian Sheng No.8* was 'Tiansheng Shipping Inc'.⁹⁷ However, the claim by the cargo interests was based on the bills of lading issued by the carrier, 'Tiansheng Ocean Shipping Co. Ltd'.⁹⁸ *Tian Sheng No.8* was sold to the present owners in the case after the issuance of the writ and had its name changed.⁹⁹ However, this should not affect the claim which had been raised. However, the present ship-owners argued that Tiansheng Ocean Shipping Co. Ltd had never been the ship-owners and hence the requirement under

⁸⁸ Ibid 544.

⁸⁹ Ibid 544 and 545.

⁹⁰ Ibid 560.

⁹¹ [1988] 2 Lloyd's Rep 411.

⁹² Ibid 412.

⁹³ Ibid 414.

⁹⁴ Ibid 415.

⁹⁵ [2000] 3 HKLRD 49.

⁹⁶ Ibid, 60.

⁹⁷ Ibid, 54.

⁹⁸ Ibid, 55.

⁹⁹ Ibid, 60.

s.12B(4) of the *High Court Ordinance (HK)* that the person who would be liable *in personam* had to be the owner at the relevant time was not met.¹⁰⁰ Bokhary NPJ explained:¹⁰¹

In the internal, linguistic context of s.12B(4)(b) "owners" means legal owner (as opposed to beneficial owner) where a registered ship is concerned. And in the wider, real world context of the subsection, the registered owner of a registered ship is her legal owner. Both way of putting it come to the same thing in the end where a ship is a registered ship...If a registration is fraudulent, there would be room for an argument that the fraudulent registration should be ignored and that the person registered as owner by fraud should not be regarded as the registered owner.

As with *The Evpo Agnic*, the Court of Final Appeal left open the possibility of looking beyond the ship registration. However, as it can be observed, the exception is extremely narrow. Further, it is one which raises a difficult question of proof.

The judgment in *Re Resource I* was relied upon by Ng J in the recent consolidated judgment of *The Almojil 61*.¹⁰² The situation in this case originated in 2012 when the vessel was sold to Mohammed Al Mojil Group (MMG), a Saudi Arabian company.¹⁰³ For the purpose of purchasing, MMG sought help from Al Mojil Investments Ltd (AMI) to pay the final instalment.¹⁰⁴ As one can observe from the name, both MMG and AMI belong to 'the business interests of the Al Mojil family'.¹⁰⁵ For AMI to pay the final instalment, MMG and AMI entered into agreements, as summarised by Ng J:¹⁰⁶

- (1) AMI would pay the final instalment "on behalf of MMG to the vendor in consideration for [AMI] being part owner of the Vessel with it being understood that on payment of the [final instalment] the ownership of the Vessel is to be transferred in the name of MMG".
- (2) AMI "shall at all times be entitled to the proceeds of any sale of the Vessel, the proceeds of which will be used to repay [the final instalment]"
- (3) this Agreement shall be governed by the laws of the Kingdom of Saudi Arabia.

In both actions, the plaintiffs who chartered vessels to MMG sought to arrest *Almojil 61*. In both actions, AMI acknowledged service as a co-owner.¹⁰⁷ In both actions, AMI sought to challenge the jurisdiction of the court on the ground that s.12B(4)(b)(ii) of the *High Court Ordinance (HK)* was not met.¹⁰⁸ AMI argued that by paying the final instalment, AMI effectively held 22% of 'beneficial interest' in the ship by trust.¹⁰⁹ Ng J gave two reasons why he rejected AMI's arguments. First, relying on the terms of the agreement between MMG and AMI, he found that AMI had demonstrated its status as a lender, instead of a beneficial owner.¹¹⁰ Ng J found support from AMI's acts in claiming in full its final instalment amounts from the proceeds of sale following the judicial sale of the ship, instead of taking into account the actual value of the ship which had since depreciated.¹¹¹

Secondly, yet more importantly (for the purpose of this paper), Ng J echoed *Re Resource I* in denying to look beyond the ship registration.¹¹²

The view of the law [to not look beyond the ship registration] also has the advantage of striking a fine balance between the interests of a claimant in being able to invoke the *in rem* jurisdiction of this Court to arrest a ship by relying on the particulars of ownership shown in the register and the interests of a co-owner in being able to protect a co-owned ship from arrest in respect of a maritime claim for which it is not responsible – all it has to do is to register its part ownership of the ship.

Affirming Ng J's finding that AMI was acting as the lender,¹¹³ the Court of Appeal differed from Ng J on the relevance of the ship registration. Nevertheless, the Court of Appeal's comment on this point should be perceived as merely an *obiter*. Of interest was Kwan JA's suggestion: 'It is a question of looking at the facts and drawing proper conclusions. There is no rule of law that fraud or some similarly compelling circumstances must be proved

¹⁰⁰ Ibid, 61–62.

¹⁰¹ Ibid, 70.

¹⁰² [2014] 4 HKLRD 313.

¹⁰³ Ibid, [1].

¹⁰⁴ Ibid, [16].

¹⁰⁵ Ibid, [5].

¹⁰⁶ Ibid, [6].

¹⁰⁷ Ibid, [1] and [5].

¹⁰⁸ Ibid, [7].

¹⁰⁹ Ibid, [17].

¹¹⁰ Ibid, [22]–[24].

¹¹¹ Ibid, [25]–[26].

¹¹² Ibid, [48].

¹¹³ [2015] 3 HKLRD 598 [44]–[45].

in order to go behind the registration of the ship for the purpose of identifying the “beneficial owner” for the purpose of s.12B(4)(ii).¹¹⁴ Of course, the Court of Appeal cannot evade the binding effect of *Re Resource I*. The proposed ground of distinction was that the Court of Final Appeal in that case dealt neither with sub-section (i) nor sub-section (ii) of s.12B(4).¹¹⁵ This distinction is doubtful to the extent that *Re Resource I* followed *The Evpo Agnic* while *The Evpo Agnic* in turn referred with approval to the judgment in *The I Congreso*. It would be recalled that in *The I Congreso*, the Court construed the term ‘beneficially owned at respect all the shares therein’ – the exact language adopted in s.12B(4)(b)(i) and (ii). Did the Court of Appeal indicate its readiness to break free from the fictitious corporate veil?

Just slightly before the judgment of the Court of Appeal in *The Almojil 61* was handed down, Ng J insisted on his reasoning in *The Bo Shi Ji 393*.¹¹⁶ The case arose following the loss of *Bo Shi Ji 393* along with her cargo.¹¹⁷ This prompted the cargo interests to arrest *Bo Shi Ji 838* in Hong Kong.¹¹⁸ The arrest was made on the belief, based on the ‘Certificate of Vessel’s Nationality’, that both vessels were owned by the same company, ‘Bolu Water Transport Corporation (BWTC)’.¹¹⁹ Subsequent to the arrest, the solicitors for the defendants revealed that from the ‘Vessel Ownership Registration Certificate’, *Bo Shi Ji 393* was owned at the time of loss 51% by BWTC and 49% by an individual named Mr. Liang Ping. On the other hand, the ‘Vessel Registration Ownership Certificate’ of *Bo Shi Ji 838* revealed that it had been solely owned by BWTC. Nonetheless, at the time when the writ was issued, she was owned 51% by BWTC and 49% by an individual called Mr. Cheng Wanli.¹²⁰ It should be noted that the said ‘Vessel Registration Ownership Certificate’ was not regarded as the official document but the judge was prepared to accept it as the best evidence.¹²¹ The scheme of arrangements with respect to both vessels, as the judge gleaned from witness statements was that both vessels had originally been purchased by the relevant individuals. They entered into the management agreement for BWTC to deal with all papers and documents. To comply with certain requirements of the laws of the People’s Republic of China, they put BWTC in the Certificate as having 51% and each individual at 49%.¹²² The plaintiff amended the claim alleging that both BWTC and the said Mr. Liang Ping were relevant persons for the purpose of s.12B(4).¹²³ However, based on the scheme of the arrangements, the defendants argued that BWTC cannot be considered the ‘relevant person’.¹²⁴ Ng J rejected the point advanced by the defendants’ counsel on the basis that accepting such argument would amount to giving effect to the management agreement while ignoring the ‘Vessel Registration Ownership Certificate’.¹²⁵ It remains to be seen whether there will be an appeal from *The Bo Shi Ji 393* in light of the Court of Appeal’s indication in *The Almojil 61*.

Judges in Hong Kong, like their English counterparts, indeed have shown conservative views in disregarding the corporate veil. At this point, a short note should be made to the case before Mr. Justice Reyes (as he then was) in *The Decurion*.¹²⁶ The facts concerned a company, Chimbusco, which invoked the Admiralty jurisdiction to arrest the vessel *Decurion* owned by an Argentine company, known shortly as Maruba SCA, for the supply of bunkers. However, Chimbusco further purported to put the claims it had for the supply of bunkers against the other ten vessels and brought them into this action.¹²⁷ They did so even at the relevant time each of these ten vessels was owned by a separate registered ownership company.¹²⁸ These ten vessels were on time charter to Clan, which as found by the judge, ‘Clan is related to Maruba SCA, but is a different legal entity’.¹²⁹ Chimbusco relied on various factual evidence in an attempt to establish a link between Maruba SCA and these ten other vessels. These included the presentation by the Maruba Group (which Maruba SCA formed part) that they traded with the name ‘Clan’,¹³⁰ the description of Maruba SCA in the ‘Sea-Web Ship Overviews’ as the operator of six out of these ten ships,¹³¹ the guarantee by Maruba SCA to pay charter hire for Clan,¹³² name cards of people from the Maruba Group

¹¹⁴ Ibid, [50].

¹¹⁵ Ibid, [52].

¹¹⁶ [2015] 3 HKLRD 424.

¹¹⁷ Ibid, [4].

¹¹⁸ Ibid, [1].

¹¹⁹ See *ibid* [6] and [8].

¹²⁰ Ibid, [10] and [11].

¹²¹ Ibid, [12].

¹²² Ibid, [13].

¹²³ Ibid, [14].

¹²⁴ Ibid, [23].

¹²⁵ Ibid, [23]–[26].

¹²⁶ [2012] HKCFI 630; [2012] 2 Lloyd’s Rep 309.

¹²⁷ Ibid, [1]–[3]. Chimbusco relied on s. 12A(2)(l) of the High Court Ordinance: ‘Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.’

¹²⁸ [2013] HCA 180; [2013] 2 Lloyd’s Rep 107, [77].

¹²⁹ [2012] HKCFI 630; [2012] 2 Lloyd’s Rep 309 [5].

¹³⁰ Ibid, [13].

¹³¹ Ibid, [15].

¹³² Ibid, [16].

containing the logos of both Clan and Maruba SCA,¹³³ the fact that both Maruba SCA and Clan were referred to in the press,¹³⁴ and the Maruba's guarantee of obligations of the company called South Atlantic, who was in agreement to supply bunkers to Clan.¹³⁵ Despite all these factual evidence, Reyes J declined to find that Maruba SCA was 'in possession or control' of the ten vessels such that it can be regarded as the 'relevant person' for the purpose of s.12B(4).¹³⁶

A natural person...can be in possession of a ship by being on board and in control of her navigation. A company can be in possession of the ship if it employs the master and crew in the navigation of the vessel. Something else must be involved when determining whether a person is in control, despite not being in possession...

The most obvious scope for that "something else" must be the ability to tell the person in possession of a vessel...what is to be done in relation to the vessel.

Relying in particular on the New York Produce Exchange Form (NYPE) 1946 that Clan entered into for the time charter of these ten vessels, the judge focused on Clause 8 which provided '[t]he Captain (although appointed by the owners), shall be under the orders and directions of the Charterers...as regards employment and agency'¹³⁷ and held therefore that the control of the vessel was vested in Clan.¹³⁸ He found documents which described Maruba SCA as the 'operator' of some of the vessels to be unhelpful as the term 'operator' has many meanings.¹³⁹

The Court of Appeal agreed with Reye J's interpretation as the Hon Fok JA explained:¹⁴⁰

In my view, it is giving the words "in control of" the ship their natural and ordinary meaning to look to see if the party said to be in control of the ship is in the position of a charterer...with a contractual power of control over that ship. Such a power of control would involve having the right to direct the master as to how the ship was to be employed and its existence would not be consistent with some other party having a superior contractual power of control. Thus, where a ship is on time charter under the NYPE form of contract, clause 8 of which gives the named charterer a contractual right to determine how the ship is to be controlled, there is no warrant, unless the charterparty is a sham or the corporate veil is lifted so that some other party is held to be the contracting charterer, to hold that another party is in control of the vessel. To do so would be to ignore the fact that there is already a party (the charterer) who is contractually in control by virtue of the charterparty.

The Full Court of the Federal Court of Australia endorsed with precision *The Decurion* judgment in determining the control by reference to the NYPE form.¹⁴¹

There is much to be said on the restricted view based on the English notion of corporate veil. The idea that one cannot look beyond those companies which can be bought 'off the shelf' to trace key personnel who are sitting in another part of the world is plainly unrealistic. As the author argued elsewhere,¹⁴² it is doubtful how the practice of ship registration interacts with the United Nations Convention on the Law of the Sea 1982 (UNCLOS), especially Article 91.1 which sets out the concept of 'genuine link':

Every State shall fix the condition for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Upon examining background materials of the UNCLOS, Churchill recorded the possibility of understanding the 'genuine link' as something more than a mere registration. 'It follows from the ordinary meaning of the words...that a "genuine link" is more than just a link. There must be a relationship between the ship and the flag state which makes the link of nationality *genuine*'.¹⁴³ Nevertheless, the International Tribunal on the Law of the Sea (ITLOS) in its decision in 1999 reached a different conclusion in *The M/V Saiga (No.2)*.¹⁴⁴ The case involved a ship *Saiga*

¹³³ Ibid, [17].

¹³⁴ Ibid, [18].

¹³⁵ Ibid, [19].

¹³⁶ Ibid, [29]–[30].

¹³⁷ Ibid, [11].

¹³⁸ Ibid, [30].

¹³⁹ Ibid, [35].

¹⁴⁰ [2013] HCA 180; [2013] 2 Lloyd's Rep 107, [61].

¹⁴¹ *The Bulk Peace* [2014] FCAFC 48, [16].

¹⁴² Poomintr Sooksripaisarnkit and Daryl YH Lee, 'Identifying choice of law in the context of maritime torts: yet still a challenge for courts in Hong Kong' (2014) 26(2) *University of San Francisco Maritime Law Journal* 185, 249.

¹⁴³ Robin R. Churchill, *The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships* (2000) International Centre For Advancing The Legal Protection of Seafarers

< http://seafarersrights.org/wp/wp-content/uploads/2014/11/INTERNATIONAL_ARTICLE_GENUINE-LINK-REQUIREMENT-IN-NATIONALITY-OF-SHIPS_2000_ENG.pdf> at 8th April 2016 (see in particular at page 69) (Italics adapted from the original text).

¹⁴⁴ *The M/V Saiga (No.2) (Saint Vincent and The Grenadines v Guinea)* (ITLOS Case No.2, 1 July 1999).

owned by a company in Cyprus and managed by a company in Scotland. She was chartered to a company in Switzerland. At the relevant time, all crew employed on board were Ukrainian with the exception of three Senegalese painters. She was registered in Saint Vincent and the Grenadines.¹⁴⁵ While she was 'south of the southern limit of the exclusive economic zone of Guinea', she was attacked by Guinean authorities for the alleged violation of the Guinean custom laws.¹⁴⁶ One of the grounds raised by Guinea before the ITLOS was that at the relevant time when the action was taken by Guinea, the ship was not legally registered with Saint Vincent and the Grenadines.¹⁴⁷ Guinea based its point on the ground that the provisional registration expired on 12 September 1997 while the permanent registration certificate was not issued until 28 November 1997. During the time gap, the ship had no nationality.¹⁴⁸ Despite *prima facie* no 'connecting factor' (to use the private international law parlance), the ITLOS, in considering Article 91 of the UNCLOS, accepted that this Article 'leaves to each State exclusive jurisdiction over the granting of its nationality to ships' and that 'it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag'.¹⁴⁹ As for the purpose of the genuine link requirement, the ITLOS concluded that 'the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag state is to secure more effective implementation of the duties of the flag state, and not to establish criteria by reference to which the validity of the registration...may be challenged by other States'.¹⁵⁰ This interpretation was reinforced by the European Court of Justice in *Peter Michael Poulsen v Diva Navigation Corp.*¹⁵¹ This case involved an alleged catching of salmon in breach of the relevant European Regulation.¹⁵² The ship involved was registered in Panama and was owned at the relevant time by a Panamanian company, which was in fact operated by a Danish national. The master and the crew were Danish.¹⁵³ In the course of answering the question on the applicability of the Regulation to non-Member State ship with crew being nationals of a Member State,¹⁵⁴ the European Court of Justice proclaimed that '[t]he fact that the sole link between a vessel and the State of which it holds the nationality is the administrative formality of registration cannot prevent the application of that rule [genuine link].'¹⁵⁵ Each State has 'discretion' in setting rules on granting nationality.¹⁵⁶ Acknowledging what the ITLOS maintained in *The Saiga (No.2)*, Churchill considered such conclusion to be 'untenable'.¹⁵⁷ He forcefully argued that Article 91 would be meaningless if a mere registration satisfies the genuine link requirement.¹⁵⁸ Coglati-Bantz traced developments of the concept of 'genuine link' both prior to and subsequent to *The Saiga (No.2)* decision in his work. He came to the conclusion that this was closely connected with the duties of a flag State.¹⁵⁹ The absence of a genuine link between the flag State and the ship would reflect in the ineffectiveness of the flag State to perform its functions.¹⁶⁰ He concluded that at one end of the spectrum the weakest link between the flag State and the ship is 'when the only territorial link is that established when the ship calls at home port' while at the other end of the spectrum the strongest link is 'when there are residence requirements for owners, operators and main crew members'.¹⁶¹ He came to the conclusion that the genuine link lies somewhere between that weakest link and the strongest link. 'The bottom line is that the flag State should establish such link both with those who are entitled to register the ship (owners) and those who will subsequently control it (owners and operators)'.¹⁶² Hence, it is submitted that the genuine link is more than a mere registration.

While the concept of genuine link exists in the UNCLOS to define the relation between the flag State, the ship, and the ship-owners, Admiralty courts should not be reluctant to borrow this concept to find that a 'one ship' company does not have sufficient links with the ship for the purpose of satisfying maritime claims. Of course, countries such as the United Kingdom and Hong Kong will be constrained somewhat by the language of Article 3 of the Arrest Convention 1952 which provides '...claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the

¹⁴⁵ Ibid, [31].

¹⁴⁶ Ibid, [33]–[34].

¹⁴⁷ Ibid, [55].

¹⁴⁸ Ibid, [57]–[58].

¹⁴⁹ Ibid, [63].

¹⁵⁰ Ibid, [83].

¹⁵¹ Case C–286/90.

¹⁵² Ibid, [1].

¹⁵³ Ibid, [3].

¹⁵⁴ Ibid, [6].

¹⁵⁵ Ibid, [15].

¹⁵⁶ Ibid.

¹⁵⁷ Churchill, above n 143, 69.

¹⁵⁸ Ibid.

¹⁵⁹ Vincent P. Coglati-Bantz, 'Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law' (2012) 79 *Nordic Journal of International Law* 383, 411. The duties of a flag State are provided in Article 94 of UNCLOS.

¹⁶⁰ Ibid.

¹⁶¹ Ibid, 415.

¹⁶² Ibid.

maritime claim arose, the owner of the particular ship...'¹⁶³ and '[s]hips shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons'.¹⁶⁴ However, the Arrest Convention 1952 left the term 'owner' undefined and there is nothing to restrict the interpretation of this term to the registered owner.¹⁶⁵ Therefore, it is submitted here that it is only commercially sensible for Admiralty courts to construe the terms 'owner' widely, taking into account the implicit *genuine link*. This can be done by judges taking bold steps to depart from the line of English authorities in *The I Congreso* and *The Evpo Agnic*.

4 Conclusion

To adopt Lord Steyn's scaffolding metaphor, the English concepts of Admiralty law have indeed taken the role of the scaffolding used in structuring Admiralty laws and solving maritime disputes in countries in the Asia-Pacific Region considered in this work - Hong Kong, Australia, New Zealand, and Singapore. English authorities will continue to provide fountain of knowledge in Admiralty matters for Admiralty lawyers around the world in the years to come viewing London as a popular place to solve maritime disputes. However, any part of the scaffolding which has become shaky over time should also be replaced by a newer material. Likewise, any English legal concepts which cannot keep pace with commercial reality should also be discarded and judges in the Asia-Pacific Region are encouraged to take the bold approach. Perhaps judges in New Zealand, Australia, Hong Kong, and Singapore already took the courageous attitude in denying to follow the authority from the House of Lords in *The Indian Grace (No.2)*. Similarly, the Court of Appeal in Hong Kong provided a hint of departing from the restricted view of the ship registration in its *obiter* in *The Almojil 61*. Judges in these countries are encouraged to not hesitate to depart from English legal authorities, where appropriate.

¹⁶³ International Convention relating to the arrest of sea-going ships, (Arrest Convention), 1952, 439 UNTS 6330 art 3(1).

¹⁶⁴ *Ibid*, art 3(2).

¹⁶⁵ Francesco Berlingieri, *Berlingieri on arrest of ships* (5th ed, 2011) 9.04.