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Shipping Law Updates

The Shipping Law Updates is a publication by our Regional Shipping Group which marshals legal expertise, industry insight, and commercial acumen in the fields of maritime and trade from the diverse talent pool of specialist lawyers at the Rajah & Tann Asia offices. The publication provides a snapshot of the key legal, regulatory, case law and industry developments in the region that have an impact on the shipping industry and your operations.

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Introduction

In this issue, we report on the launch of the Fourth Edition Rules of the Singapore Chamber of Maritime Arbitration which will apply to maritime arbitrations commencing this year. We also spotlight the implementation of Protocols on Court-to-Court communication and cooperation in Admiralty, Shipping and Cross-Border Insolvency matters announced by the Supreme Court of Singapore and the Federal Court of Malaysia in October 2021. From a recent court decision in Brunei, with conjoined arbitrations launched in Singapore, we revisit the practical significance of the arbitral seat and the consequences of wrongly interpreting an arbitration agreement. Regarding the topical subject to main-line operators and logistics companies of abandoned containerised cargoes, we consider the options available to manage the same, as well as the factual and legal issues to be considered as a matter of English law and Singapore law.

Singapore: Streamlining of Maritime Arbitration Proceedings under Fourth Edition of SCMA Rules

Introduction

The Singapore Chamber of Maritime Arbitration ("**SCMA**") is a specialist arbitration institution that aims to promote maritime arbitration in Singapore. Since its formation, it has established a solid presence in the region, with the quantum of claims handled reaching approximately US$120 million in 2019.

Amidst a constantly evolving maritime arbitration landscape, SCMA continues to keep itself current by updating its rules with the launch of the Fourth Edition of the SCMA Rules on 1 December 2021. The Fourth Edition seeks to reflect current shipping arbitration practices, reduce costs, and streamline arbitral proceedings.

The Fourth Edition will apply to all arbitrations commencing on and after **1 January 2022**, and we examine the key changes below.

Key Changes

(1) Streamlining of Proceedings

Allowing two arbitrators to constitute the Tribunal prior to appointment of third arbitrator

Where parties have agreed that three arbitrators are to be appointed, there will be two changes to the period prior to the appointment of the third arbitrator.

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(a) The two arbitrators will be able to constitute the Tribunal, and will be able to make decisions, orders, and awards if they agree on any matter.

(b) The third arbitrator must be appointed only: (i) before any substantive hearing; or (ii) without delay if the two arbitrators cannot agree on any matter (Rule 8.4(c)). Accordingly, a third arbitrator need not be appointed for a documents-only arbitration.

Oral hearings no longer mandatory

Under the Third Edition of the SCMA Rules, an oral hearing was to be held unless the parties agreed otherwise. Per the new Rule 25.1, the Tribunal shall decide if a hearing should be held or if the arbitration will be a documents-only arbitration. However, a hearing must be held if any party so requests.

Default time limit for close of proceedings

Unless the parties agree or the Tribunal directs otherwise, proceedings will be deemed closed three months from the date of any final written submission or final hearing (Rule 27.1).

Tribunal's approval required for change of counsel

The new Rule 4.4 requires that once the Tribunal is constituted, its approval is required for any change of a party's authorised representative. Such approval can only be withheld if there is a substantial risk that the change might prejudice the conduct of proceedings or enforceability of the award. This is to prevent any abuse of process where a party changes their counsel to derail or delay proceedings.

(2) Adoption of Electronic Methods

The COVID-19 pandemic has greatly accelerated the adoption of virtual hearings in light of global travel restrictions. Accordingly, the Fourth Edition adopts the following changes:

(a) **Electronic service of documents will be effected** – Documents will be deemed as effectively served and received when sent to the addressee's designated electronic mailing address (Rule 3.1(c)).

(b) **Electronic signing of awards** – Arbitral awards may be signed electronically and/or in counterparts (Rule 34.4).

(c) **Virtual hearings and conferences** – Case management meetings and hearings may be conducted in person, by telephone, by video-conference, or in any other manner the Tribunal deems appropriate (Rules 17.3 and 25.3).

(3) Other Amendments

Increase in monetary threshold for Expedited Procedure

Previously known as the Small Claims Procedure under the Third Edition, the Expedited Procedure allows for a quick and cost-effective resolution of a dispute by way of a sole arbitrator. The Expedited Procedure will now apply to disputes where the aggregate amount in dispute is US$300,000 and below (Rule 44), doubling from the previous US$150,000.

Default application of SCMA Standard Terms of Appointment for arbitrators ("Standard Terms")

Under Rule 40.2, the Standard Terms will now apply to all arbitrations by default unless otherwise agreed. This helps to ensure greater certainty and transparency in the appointment of arbitrators.

Concluding Words

Overall, the Fourth Edition is a welcome update to the SCMA Rules that streamlines arbitral proceedings, adapts to the new normal by encouraging electronic service and virtual hearings and enables a quicker resolution of disputes. Additionally, it improves the cost efficiency of SCMA arbitrations through changes such as allowing for arbitration to proceed with two arbitrators and removing the requirement for oral hearings.

Leong Kah Wah, Rajah & Tann Singapore's Head of Dispute Resolution, is a member of SCMA's Board of Directors and provided guidance on the formulation of the Rules.

For more information, click here to read the full article on *Arbitration Asia*, Rajah & Tann Asia's website covering insights from our thought leaders across Asia concerning arbitration and other alternative dispute resolution mechanisms, ranging from legal and case law developments to market updates and many more.

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Singapore & Malaysia: Singapore and Malaysia Announce Protocols for Court-to-Court Cooperation in Shipping and Cross-Border Insolvency

Commercial transactions and disputes are increasingly likely to contain a cross-border element. As such, the ability of Courts to cooperate on the management of proceedings that span their respective jurisdictions will facilitate the efficient resolution of cross-border issues. In this regard, the Singapore and Malaysia Courts have demonstrated a commitment to judicial cooperation between the two countries.

On 5 October 2021, the Supreme Court of Singapore and the Federal Court of Malaysia announced the implementation of Protocols on Court-to-Court communication and cooperation in Admiralty, Shipping and Cross-Border Insolvency matters ("**Protocols**"). The Protocols put in place a framework for cooperation and communication between the two Courts to facilitate the efficient and timely coordination and administration of prescribed types of cases.

The Protocol on related admiralty and shipping matters applies to the following types of proceedings commenced in Malaysia and Singapore:

(a) Proceedings involving claims coming within the admiralty jurisdiction of either Court;

(b) *In rem* proceedings that involve the arrest of the same vessel, including the release or judicial sale in Malaysia or Singapore; or

(c) Proceedings that arise out of the same casualty and which involve parties to an existing limitation action in Malaysia or Singapore.

The Protocol on cross-border corporate insolvency matters applies to the following types of proceedings commenced in Malaysia and Singapore (or other similar processes as are available in Malaysia and Singapore):

(a) Winding up;
(b) Judicial management;
(c) Schemes of arrangement for debt restructuring; or
(d) Receivership in the context of corporate insolvency.

The Protocols set out the procedures on how the Courts of Malaysia and Singapore may establish communication in the relevant areas. The key features are highlighted below.

Regional Shipping

(a) **Initiation of communication** – Under the Protocols, each Court may initiate a request for court-to-court communication with the foreign Court concerning the cases listed above. The foreign Court may respond directly to the request and engage in court-to-court communication, the method of which will depend on the agreement by the two Courts.

(b) **Disputant participation** – Parties before each Court will be notified of each request for court-to-court communication. However, the parties will not be permitted to participate in such communication unless the agreement of the Courts is obtained.

(c) **Confidentiality** – The confidentiality of any documents, information and other data exchanged in court-to-court communication will be maintained, unless already in the public domain. The documents, information, and other data exchanged will only be used for the purposes and objectives of the Protocol concerned.

The Protocols are a welcome development as they target matters in the pertinent areas of Admiralty and Shipping, as well as Cross-Border Insolvency. Disputes in these areas are likely to involve separate jurisdictions and are potentially complex. Different parties and stakeholders may be involved in the different jurisdictions and each jurisdiction may have its own unique considerations and circumstances. Court-to-court communication protocols provide a platform for each party to better understand and consider another party's position, and hopefully facilitate a holistic resolution of issues.

For more information, click here to read our Legal Update.

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Brunei: Interpreting Arbitration Agreements: A Cautionary Tale for Commercial Parties

Introduction

To avoid commencing arbitration in the wrong jurisdiction, parties should pay special attention to the drafting of arbitration agreements. This was illustrated in a recent decision of the Court of Appeal of Brunei Darussalam ("**BCA**"), which considered an arbitration agreement contained in a charterparty that seemingly referenced both Brunei and Singapore as potential arbitral seats. Preferring a commonsensical approach, the BCA interpreted the arbitration agreement as having clearly established Brunei as the proper seat of the arbitration. As the Defendants had commenced arbitration in Singapore, this led to a significant waste of time and costs.

The BCA's decision goes beyond academic interest and serves as a cautionary tale for commercial parties. Below, we examine the practical significance of the arbitral seat and the consequences of wrongly interpreting an arbitration agreement.

Kendall Tan, Yip Li Ming, and Shaun Ou from Rajah & Tann Asia's Brunei Desk advised the successful Plaintiff shipowners.

Brief Facts

The Defendants entered into a charterparty with the Plaintiff to charter the Plaintiff's vessel from January 2014 to January 2017. As no payment was forthcoming from the Defendants, the Plaintiff commenced legal proceedings against the Defendants in the High Court of Brunei Darussalam (BHC).

Initially, the Defendants succeeded in having the court proceedings stayed pending the outcome of arbitral proceedings in Singapore. However, upon appeal by the Plaintiff, the stay was in turn set aside. The BCA dismissed the Defendants' appeal against the setting aside, and we examine the reasoning below.

Grounds of Decision of the BCA

Unlike the two decisions below which had focused on the existence of a real dispute, the BCA considered whether the arbitral seat was Brunei or Singapore.

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The arbitration agreement

The relevant provision in the charterparty provided that "*Any dispute arising out of this Charter Party shall be referred to arbitration at the place stated in Box 33 subject to the law and procedures applicable there*".

Box 33 stated: "*English law preferably in Negara Brunei Darussalam or otherwise in Singapore*".

Commonsensical interpretation of the arbitration agreement

Adopting a commonsensical interpretation, the BCA held that the arbitration agreement did not permit the Defendants to unilaterally select Singapore as the arbitral seat for two reasons.

(a) The plain wording of "preferably in Brunei" indicated that the parties "were stating a preference". This was distinct from, for example, the phrase "in Brunei or Singapore" where parties would have the unfettered right to elect between two equal options.

(b) The phrase "or otherwise" implied that the "displacement of that preference must come about for a reason other than the whim of one of the parties". Rather, the ability to select a second venue was "a fallback provision should a cogent reason arise to prevent an arbitration in Brunei", where such "cogent reason" must also be agreed by both parties.

Accordingly, the BCA held that the seat of the arbitration was Brunei.

Concluding Words

In the result, the Defendants' instigation of arbitration in the wrong seat led to them wasting significant time and costs. Such costs included the arbitral administration fees, their own legal costs, and the Plaintiffs' costs incurred due to the Defendants' stay application. Additionally, commencing arbitration in the wrong seat may also leave the misguided party open to being enjoined by anti-suit relief from the correct curial court.

The BCA's decision underscores the importance of clear drafting, proper interpretation of arbitration agreements and the weight placed on their plain and/or logical wording. When in doubt, it pays to fall back on their clear and commonsensical meaning.

For more information, click here to read the full article on *Arbitration Asia*.

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Singapore: How to Manage Abandoned Cargo

Introduction

Situations of abandoned cargo in containers are a perennial but increasingly pressing occurrence in light of the current COVID-19 pandemic and its economic repercussions on cargo interests. The knock-on effects of abandoned cargo at ports adversely impact the interests of numerous parties, including but not limited to other users of the port, the terminal, and the carrier. It is in all parties' interests for the abandoned cargo to be removed from the port expeditiously. From a carrier's point of view, the financial exposure because of accruing storage and handling costs at terminals coupled with the general international shortage of containers make it all the more important for situations of abandoned cargo to be dealt with promptly and effectively.

The obvious course of action of retrieving and disposing of cargo that has been abandoned can be more complicated than it seems. Often, the carrier's options need to be viewed through the lens of multiple systems of law, such as the governing law of the contract and the law of place where the cargo is situated. These options need to be balanced against the practicalities of actual recovery from a sale of the cargo (if possible) and cargo interests.

In this Update, we look at the avenues available to carriers regarding abandoned cargo, the factual and legal issues to be considered, and the procedural steps to be taken.

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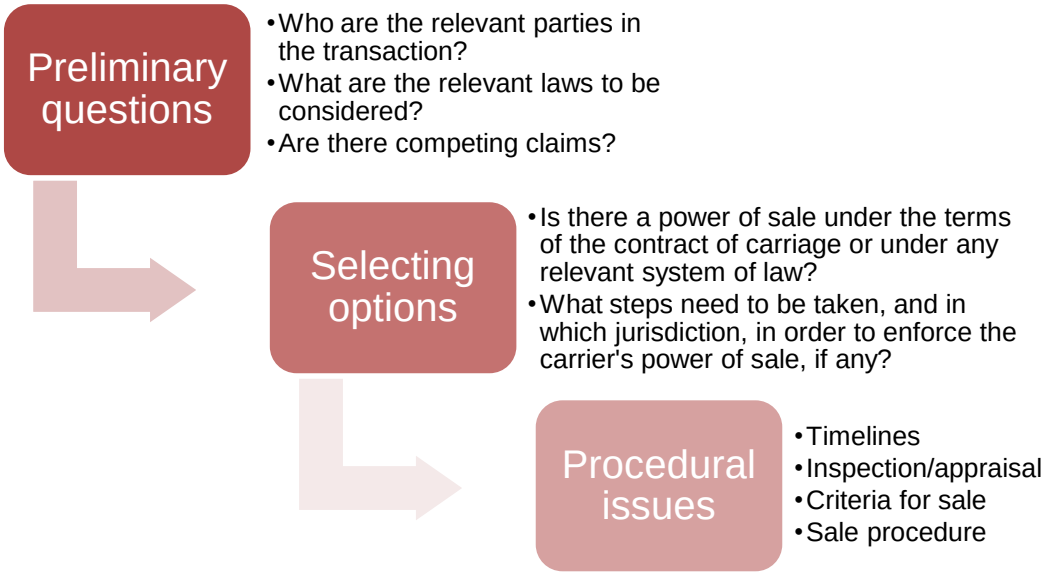
Overview



Preliminary Questions

Before choosing between the procedural options available, parties should first address their minds to a number of pertinent preliminary questions.

First, have you established the identities of the relevant parties (e.g. shipper, consignee or holder of the bills of lading), and are you in contact with any of these cargo interests? This factual enquiry will assist the consideration of the party whom the carrier should pursue for its claims, and specifically, the party whom the carrier should approach for an executed letter of abdonment for the cargo.

Second, what are the relevant laws? This would usually include the governing law of the contract of carriage and the law of the place where the stranded cargo is situated. This affects the legal rights and remedies available to the carrier.

Third, are there competing claims to the subject cargo? If more than one party claims an interest in the cargo, a carrier would be advised to proceed with caution as the cargo is clearly not abandoned by cargo interests. If the carrier were to proceed hastily to dispose of the cargo, the carrier may be exposed to claims from cargo interests. In such situations, it would be worthwhile to consider if the competing claims can be resolved in the short term, or if a multi-party commercial arrangement can be reached so

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as to minimise the carrier's financial exposure and risk. An application to court seeking inter-pleader type relief should also be an option.

Options to A Carrier

When considering options available to a carrier, the first consideration will invariably be the carrier's entitlement to rely on a contractual power to sell or dispose of the cargo. To supplement any rights which the carrier may have in contract, alternative options in the form of statutory and common law remedies are typically also considered.

A carrier's contractual power of sale or disposal will usually derive contractually from the bill of lading terms and conditions, as incorporated into the relevant contract of carriage. As a contractual right, the carrier will be required to take care to ensure strict compliance with the conditions or criteria to be fulfilled under the relevant contractual provision, such as requirements relating to the giving of notice, or the period of time the cargo must remain unclaimed. In the event the carrier's right to sell or dispose of the cargo is disputed, the carrier will inevitably have to prove his contractual entitlement.

Each contractual provision will need to be assessed on its own terms and by reference to the factual circumstances of the case. The usual considerations include (but are not limited to) the following:

(a) Is it clear on the facts that the cargo has been abandoned?
(b) What rights do the contractual provisions confer upon the carrier?
(c) What are the criteria that the carrier is required to fulfil before the cargo may be sold or disposed, and has such criteria been fulfilled?
(d) Has the carrier attempted to contact the relevant cargo interest(s)?
(e) How are the proceeds of sale to be applied?
(f) If the carrier were to proceed with a disposal of the cargo, what are the risks to the carrier?

Depending on the specific facts of each case, it may also be worthwhile to consider options available locally where the cargo is situated. Certain jurisdictions have enacted statutory provisions which a carrier may rely on to dispose of abandoned cargo. Examples of such statutory provisions are the Singapore Merchant Shipping Act (Cap 179), and the English Torts (Interference with Goods) Act 1977.

At common law, a carrier may in some circumstances be able to rely on principles of bailment to dispose of cargo. Whether or not such a right is available depends on the specific facts of the case. The facts of the case must show an actual commercial necessity dictating the disposal, and the carrier must have acted prudently and *bona fide* in the interests of the owner and must have been, for practical purposes, unable to communicate with the owner of the cargo prior to the disposal. This may not be an easy threshold to meet. It would be well-advised for a holistic review of factual circumstances and potential

exposure to the carrier to be undertaken before a carrier invokes the principles of bailment to dispose of allegedly abandoned cargo, whether through a sale or other disposal means.

When assessing the options available to a carrier, the inquiry to be undertaken is a highly factual one. A delicate balance must be struck between the carrier's interests in minimising his exposure and the risk of liability in the event disposal of the cargo is unauthorised under the contractual arrangements and/or at law. Carriers are advised to proceed with caution before deciding to dispose of cargo through a sale or otherwise.

Procedural Issues

Having assessed the options available to the carrier in the circumstances, the next step would be to ensure strict compliance with the necessary conditions or requirements under the contract or at law before proceeding with a disposal of the cargo.

Additionally, it is prudent for a carrier to bear in mind issues of mitigation and recovery from cargo interests in the lead up to the actual disposal of the cargo. The following precautionary steps can be considered:

- Clear records should be maintained to reflect the carrier's efforts in locating a suitable buyer for the cargo. In particular, the carrier should approach a number of potential buyers instead of just a solitary bidder for the cargo.
- Where a buyer for the cargo cannot be found, it would be helpful if the carrier could find out the reason for the lack of interest in the cargo. To the extent the account provided can be supported by documents, such documents should be collated.
- The carrier should have good records of the condition and value of the cargo at the time of disposal. To the extent possible, it would be helpful to have surveyors inspect and appraise the cargo before any cargo sale is concluded.
- Where possible, the carrier should keep the cargo interests closely updated on the steps being taken to dispose of the cargo.
- Environmental risks are part of the equation and need to be scrupulously kept in mind.

Concluding Words

The handling of abandoned cargo can be fraught with risks, with an array of considerations influencing the viability of the options available to the aggrieved carrier. This is further complicated by the typically

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cross-border nature of the problem, as disputes are likely to span different jurisdictions and require a holistic understanding of the local laws and procedures.

Rajah & Tann Asia's Regional Shipping Group is well placed in this regard to advise on issues involving abandoned or unclaimed cargo, having managed numerous cases on abandoned goods and seeking recourse for resulting economic losses, and being able to support any local law issues that may arise through its regional network of practitioners.

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Find out more about our Regional Shipping Group here.

If you would like to find out how we may assist you, do touch base with us at shippinglaw@rajahtann.com or our team members below.

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