

2<sup>nd</sup> & 3<sup>rd</sup> December 2014  
Sheraton Imperial Kuala Lumpur

# CONTRACT LAW ESSENTIALS

For Ports and Terminals  
Masterclass 2014



**JOSEPH & PARTNERS**  
ADVOCATES & SOLICITORS

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ▶ Ports represent very specialized business enterprises. While they vary in size, methods of operations, facilities, and in many other areas, certain loss exposures are common to almost all ports. Additionally, many port loss exposures are of a type that are common with many other organizations.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ▶ Risks of loss can be categorized under 3 general categories –
  1. Property Loss;
  2. Liability Loss;
  3. Personnel Loss.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

► Types of risks included in these 3 categories:

## 1. Bailment

- ✓ In the case of a port, it is mainly reflected by the warehousemen's liability for damage to goods left in the port's care, custody and control.
- ✓ Since ports typically have substantial warehousing and storage facilities, they should recognize that a very large potential for liability exists should property be damaged because of their negligence. For example, a fire that originates from a negligent cause.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 2. Contractual Liability

- ✓ Contractual risk assumption or transfer can occur under a wide variety of agreement including, construction contracts, lease agreements, purchase orders, rental agreements, maintenance contracts, service agreements, warranties, vendors, mutual aid agreements, verbal agreements, contract of sale and charters.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 3. Pollution Liability

- ✓ Exposures may vary depending largely on whether or not a port handles or stores petroleum, flammable or hazardous materials, the volume of such goods handled, and the potential they pose for pollution and contamination.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Pollution liability can be a gradual occurrence over a period of time such as leakage from a storage tank or sudden or accidental, such as a fire, explosion or tank collapse. Required clean-up costs can make up a significant portion of pollution liability claims. Exposures may exist from old or prior uses of a port's property. Remediation costs can be substantial.
- ✓ Pollution liability can be based on the Waters Act 1920, Environmental Quality Act 1974 and Merchant Shipping (Oil Pollution) Act 1994.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 4. Joint Ventures

- ✓ Ports can become exposed to risk arising out of activities of others when they participate in joint ventures.
- ✓ To the extent the written joint venture agreements establish liabilities through hold harmless and indemnity agreements or insurance provisions, these must be reviewed to determine a port liability's exposures.
- ✓ Also, a port can find itself exposed to significant unknown risk when a joint venture agreement does not address these important subjects.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 5. Terminal Operators Liability

- ✓ Like any other business enterprise, a port is exposed to losses from the existence of its premises and the operations conducted at and from the premises.
- ✓ Exposures exist from bodily injury and property damage to the general public, visitors, contractors and others working at port facilities, vessels and their cargo and surrounding property.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Insurance normally covers:
  - a. Liability from the premises hazard and operations necessary or incidental thereto;
  - b. Vicarious liability from the operations of contractor or sub-contractors; and
  - c. Liability assumed under contract, products, completed operations, personal injury and the ownership, operation, maintenance, loading or unloading of watercraft.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 6. Stevedores Liability

- ✓ Covers a port's liability arising out of loading or unloading a vessel and moving goods. The liability for injury to stevedores, which attaches through a contract between the ship and a port, berth or terminal facility, is usually governed by the terms of the contract.
- ✓ A shipowner may enter into such a contract on a formal basis or on a more informal basis, for example where the use of a facility is regulated by well-publicised standard terms and conditions.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ A landlord port will have, at worst, a vicarious liability as the owner of the port facilities. Defence coverage is the most important aspect of coverage in this situation.
- ✓ An operating port may or may not provide stevedore services directly. Stevedores may be employees of a port or hired under contract with a stevedoring company.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ In either case, liability for losses caused by “unseaworthiness” of a vessel should be contractually imposed on the vessel owner and not accepted by a port. For stevedore subcontractors liability should be contractually transferred to the subcontractor via hold harmless wording.
- ✓ Also if a stevedore is injured, compensation may be granted if the claimant can prove that the injury, or death, was caused or contributed to by the shipowner’s negligence or by any person for whose acts, neglect or default the shipowner may be legally liable.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 7. Wreck Removal Operations

- ✓ In many cases, wrecks must be removed if they pose a threat to safe navigation or obstruct access to a port or port facilities.
- ✓ The International Convention on the Removal of Wrecks, adopted at a Diplomatic Conference organised by the International Maritime Organisation (IMO) in Nairobi in 2007, will enter into force on 14th April 2015, 12 months after ten states have ratified it. Those 10 States are: Bulgaria, Denmark, Germany, India, Iran, Malaysia, Morocco, Nigeria, Palau and the United Kingdom.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ The Convention applies only to wrecks located in the Member States' Exclusive Economic Zone (EEZ). However a Member State may choose to extend the scope of the Convention to its own territory, including its territorial sea.
- ✓ Ships of 300 GT or more which fly the flag of a Member State or use a port or offshore facility in the territory of a Member State will be required to have insurance or other financial security in place to meet the liabilities arising under the Convention.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ The registered owner is liable for the costs of locating, marking and removing a wreck which constitutes a hazard posing a danger to navigation or may reasonably be expected to have major harmful consequences for the marine environment or damage to the coastline or related interests.
- ✓ Liability is strict and subject only to three limited defences applicable, namely that the casualty:

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- a. resulted from act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
- b. was wholly caused by an act or omission done with intent to cause damage by a third party; or
- c. was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Wreck includes any object which is or has been on board the ship.
- ✓ The Convention does not affect the shipowner's right to limit liability under any applicable national or international regime. The regime which commonly applies is the Limitation Convention 1976, either in its original form or as amended by the 1996 Protocol. In either case, States are entitled to make a reservation excluding wreck removal from the category of claims subject to limitation.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## 8. Towage

- ✓ Although it is normal for ships to manoeuvre under their own power they often need the assistance of tugs when berthing in port. They may need assistance to be available at other critical stages of a ship's entry or departure from a port in case of steering gear failure or engine breakdown.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ There are also other circumstances that may warrant the assistance of tugs at some stage. This can arise when a ship is in danger and, in order to save it and the crew or its cargo from loss or damage, the master enters into a salvage contract.
- ✓ If a ship is temporarily disabled and the services of a tug are required to tow the ship to a place for repairs then it may be possible, if the ship is not in imminent danger, for a shipowner to make arrangements for the service to be provided under a towage agreement.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Examples of the liabilities that a shipowner may be exposed to while a ship is being towed include –
  - a. damage to the tug by contract or breakage of the tow line;
  - b. injury to a crew member on the tug;
  - c. contract with another ship or berth.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

✓ There are 2 types of towage:

## a. Normal towage

The normal situation when a ship is entering or leaving port and requires the use of tugs is for the ship to enter into a harbour towage contract with a local tug company. The contract is usually on standard terms and in many cases is not seen by the master or shipowner before the services are rendered. It is common practice for courts, in the event of a dispute, to assume that the owners have constructive knowledge of the terms of the contract on the basis that the terms are standard for a particular port. For example, harbour towage in the UK is performed under the UK Standard Conditions for Towage and Other Service.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

## **b. Habitual towage**

- ✓ It is very unusual for ships to be habitually towed from port to port or from place to place. An example of where it may take place is in the USA where it can be normal for some operators to tow barges from port to port.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Towage and salvage agreements:  
Whereas it is quite customary for a ship to enter into a harbour towage contract there are sometimes occasions when a ship may enter into non-customary towage contracts, such as in the salvage situation mentioned previously
- ✓ A large proportion of salvage services throughout the world are rendered under Lloyd's Standard Form of Salvage Agreement, the Lloyd's Open Form (LOF).

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ In the case of a temporarily disabled ship when the services of a tug are required, but the ship is not in imminent danger, a shipowner may make arrangements for the service to be provided under a towage agreement such as the TOWCON and TOWHIRE. These are international ocean towage agreements prepared by BIMCO and the International Salvage Union. Under a TOWCON towage contract the shipowner agrees to pay the tug owner a fixed sum, usually paid in instalments, in return for rendering an agreed service. Under the TOWHIRE towage contract payment is on a daily-rate-of-hire basis. Both agreements set out the respective contractual obligations and

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Liabilities of the tug owner and shipowner and cover such matters as details of the tow; price and conditions of payment; additional charges, and place of departure / destination; use of riding crew; towing gear; tow-worthiness of the tow and seaworthiness of the tug substitution of tugs; salvage; cancellation and withdrawal and a number of other points.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ The costs of towage to a place of repair arising as a result of damage to the ship would normally be covered by the hull underwriters.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

✓ The leading cases:

a. *The “Bramley Moore”* [1963] 1 Lloyd’s Rep. 304:

Collision between a motor vessel and dumb barge in tow of tug Bramley Moore. The tug and tows were in different ownership. The motor vessel and Bramley Moore were decided equally to blame. The claim by Bramley Moore was to limit her liability to sum based on her tonnage alone i.e. whether the sum should be based on combined tonnage of tug and one or both barges, or on tonnage of Bramley Moore alone. Held, that limits of liability should be governed by the tonnage of Bramley Moore alone.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

***b. London Dredging Co. Ltd. V Greater London Council (The “Sir Joseph Rawlinson”)*** [1972] 2 Lloyd’s Rep 437:

The tug, Daunbe VIII and her tow, the dumb barge Black Deep, collided with a sludge carrier, Sir Joseph Rawlinson which capsized and sank with loss of life of 9 lives. The value of the Sir Joseph Rawlinson was put at over £400,000. As a result, the Sir Joseph Rawlinson, although subsequently raised, was a constructive total loss. The demise charterers of both Daunbe VIII and Black Deep, applied to limit their liability in respect of the collision damage.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

**Held**, where a tug and its tow are under common ownership, those owners may limit their liability for collision damage to an amount calculated by reference to the tonnage of the tug alone where there is negligence for which they are liable on the part of the person in charge of the tug but no negligence on the part of anyone on the tow.

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Ports and terminals Liability Insurance
  - Types of Coverage
    - Liability
    - Property Damage
    - Business Interruption
    - Hull and P&I

# UNDERSTANDING THE LIABILITY OF PORT OPERATORS FOR DIFFERENT TYPES OF SCENARIOS

---

- ✓ Ports and terminals Liability Insurance
  - Liability to who / from where
    - Imposed by law
    - Assumed under contract
      - ❖ with vessel owner
      - ❖ with cargo owner
      - ❖ with stevedores
      - ❖ With Port Authority / Terminal

# CARGO DAMAGES / LOSSES

---

- ▶ Insurance for liability for physical loss/damage to cargo and consequential loss arising therefrom
- ▶ Loss/Damage to Cargo
  - Fire
  - Impact damage
    - ✓ Operation of handling equipment
    - ✓ Failure of equipment

# CARGO DAMAGES / LOSSES

---

- Wet damage
- Contamination
- Theft (outsiders and insiders – or both)
- Temperature controlled cargo
- CFS Problems
  - ✓ Handling accidents
  - ✓ Method of stuffing containers
  - ✓ Method of securing cargo
  - ✓ Minor theft
  - ✓ misdirection

# CARGO DAMAGES / LOSSES

---

- ▶ Liability for cargo limited by weight or per container or per incident
- ▶ Also reliance on ship operator's ability to limit

# COLLISION AND ACCIDENTS

---

- ▶ Tenants, freight operators and other outside contractors may be active on a port's premises, increasing the likelihood of ports being recipients of a compensation claim.
- ▶ A range of claim scenarios include, damage to third-party vehicles during container unloading, collisions between vehicles and handling equipment, 'slip and trip' claims as well as flood damage to a tenant's property and goods in store.

# COLLISION AND ACCIDENTS

---

- ▶ Liability for Loss/Damage to Ships and consequential loss arising therefrom
  - ✓ dropping of cargo
  - ✓ operation or toppling of gantry crane
  - ✓ condition of berth
  - ✓ pilotage / towage
  - ✓ stuffing of container

# COLLISION AND ACCIDENTS

---

► Recent local update:

KLANG, Oct 29 — Two container ships collided at Malaysia's Port Klang last night, resulting in a fire on both vessels. The collision took place at about 7.30pm at Wharf 20 of Port Klang, the *Star* reported. A fire started in the forward sections of both vessels after the collision, the Maritime Executive reported. The two ships involved were UASC's container ship Al Riffa and San Felipe owned by Bernhard Schulte Ship Management. The Al Riffa had to be towed away to prevent the fire from spreading to other ships while the fire on San Felipe was contained, the Maritime Executive said. — Reuters

---

# **P&I INSURANCE FROM THE PORT OPERATORS' PERSPECTIVE**

An aerial, high-angle view of a port area. In the foreground, there are numerous stacks of shipping containers in various colors (brown, blue, grey) arranged in neat rows. The containers extend towards the water. In the background, several large cargo ships are visible on the dark blue sea under a cloudy, overcast sky. The overall lighting is dim, suggesting dusk or dawn.

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ▶ Mutual Insurance Associations, originally insured vessel operators for risks arising out of the loss or damage to their containers and chassis anywhere in the world, whether afloat or on land. The reason for this was that P&I Clubs had been reluctant to insure liability risks which were outside of ship operations on the high seas. Even though the initial coverage was exclusively directed to vessel operators, nowadays the insurance protection provided by the Club has expanded to stevedores and terminal operators, transport operators and port authorities.

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ▶ The TT Club is an organization operating as a collective self-insurance and working on a non-profit making basis. In this modality of insurance the premium is called “contribution” not being fixed but variable and to be paid in advance. Besides, the level of contribution for each member is rated individually all depending on the analysis of his claim record, his exposure under user contracts, his terms and conditions of business, etc.

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ▶ The TT Club policy is a “specified perils” policy in the sense that it is tailored specifically to the operators set out in the Rules. Details of the coverage terminal operators are entitled to, under the Club’s protection can be appreciated in the pertinent Club Rules. In general terms an UNCTAD report has described the policy coverage as follows:

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

1. Liabilities in relation to cargo; liabilities for :
  - a. Physical loss or damage to property
  - b. Death, bodily injury or illness
  - c. Consequential loss;
  - d. Claims in respect of removal of cargo, containers, trailers, handling equipment
  - e. Additional costs and expenses incurred by a member in complying with an order from any authority with regard to removal of cargo, container, trailer, handling equipment;

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- f. Claims by any authority in respect of quarantine and disinfecting;
- g. Fines and other financial penalties;
- h. Personal injury

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

## 2. Insurance of :

- a. containers / trailers
- b. handling equipment;
- c. cargo
- d. property

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

## 3. Costs and expenses :

- a. of investigation, defense and mitigation
- b. of disposing of damaged or worthless cargo
- c. as a result of loss consequent upon waiver of general average.
- d. of repossessing leased containers
- e. incurred upon interruption of business

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ▶ Standard covers include:
  - ✓ Liabilities for loss of or damage to cargo and customers' equipment and ships
  - ✓ Loss of or damage to equipment including loss due to strikes, riots and terrorist risks
  - ✓ Liabilities arising from errors and omissions including delay and unauthorized delivery
  - ✓ Third party liabilities including impact and sudden accidental pollution
  - ✓ Fines for regulatory breach including eg customs, pollution and safety at work

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ✓ Wreck removal costs
- ✓ Investigation, defence and mitigation costs
- ✓ Disposal costs following an accident
- ✓ Quarantine and disinfection costs

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ▶ Property covers include
  - ✓ Buildings
  - ✓ Docks and wharfs
  - ✓ Berths
  - ✓ Quays
  - ✓ Jetties
  - ✓ Dolphins
  - ✓ Machinery
  - ✓ Handling equipment
  - ✓ Straddle carriers
  - ✓ Cranes

# EFFECTIVE INCIDENTS AND CLAIMS MANAGEMENT

---

- ✓ Reach stackers
- ✓ Top lifters
- ✓ Fork lifts
- ✓ Ship-loaders
- ✓ Elevators
- ✓ Conveyors
- ✓ RoRo ramps
- ✓ Tractor units
- ✓ Locomotives and rolling stock
- ✓ Rail & road infrastructure
- ✓ Contents

# SHIP ARREST

---

- ▶ Enforcement must be considered from the outset before obtaining an award or judgment
- ▶ Enforcement against security is vital

# ISSUES TO CONSIDER BEFORE AN ARREST

---

- ▶ Locating the vessel – Intel
- ▶ Language
- ▶ Urgency, Speed & Efficiency

# ISSUES TO CONSIDER BEFORE AN ARREST

---

- ▶ Are you going to be playing “Santa Claus” for others?
- ▶ Maritime Claims Vs Maritime Lien
  - ▶ What is Maritime Lien ?
  - ▶ Ownership of Maritime Lien irrelevant
  - ▶ It can survive a change of ownership
  - ▶ It ranks in priority to many other claims, including mortgages

# ISSUES TO CONSIDER BEFORE AN ARREST

---

- ▶ Types of Maritime Liens
  - ▶ Damage done by a ship
  - ▶ Salvage
  - ▶ Master and crews wages
  - ▶ Master's disbursements

# ISSUES TO CONSIDER BEFORE AN ARREST

---

- ▶ Size of Claim –Vs- Value of Vessel
- ▶ Element of Surprise is important
- ▶ Can you handle the maintenance costs ?
- ▶ Legal Costs
- ▶ Maritime Law Lawyers
- ▶ Do you have all the material facts and information ?
- ▶ Time bars

# ADMIRALTY COURT IN KUALA LUMPUR

---

- ▶ Set up on 1st Oct 2010
- ▶ Centralized Registry in Kuala Lumpur
- ▶ Hearing for warrant applications given top priority
- ▶ Parties not forced to file in KL but encouraged to use the Admiralty Court
- ▶ Not only restricted to pure Admiralty matters but “all maritime claims

# ADMIRALTY COURT IN KUALA LUMPUR

---

- ▶ Malaysia has one of the widest Admiralty Court jurisdictions
- ▶ Practice Direction 1/2012\*
- ▶ In principle, the Admiralty Court Kuala Lumpur hears all “maritime related” cases

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ Section 24 of the Courts of Judicature Act 1964 (Act 91)
- ▶ Section 20 (1) (a) of the UK Supreme Court Act 1981 sets out the admiralty jurisdiction of the High Court \*
- ▶ Section 20 (2) The questions and claims referred to in sub-s (1)(a) are : –
- ▶ any claim to the possession or ownership of a ship or to the ownership of any share therein
- ▶ any question arising between the co-owners of a ship as to possession, employment or earnings of that ship

*\* Refer to SCA 1981*

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ any claim in respect of a mortgage of or charge on a ship or any share therein
- ▶ any claim for damage received by a ship
- ▶ any claim for damage done by a ship
- ▶ any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of –
- ▶ the owners, charterers or persons in possession or control of a ship; or

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,
- ▶ being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- ▶ any claims for loss of or damage to goods carried in a ship
- ▶ 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

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ any claim in the nature of salvage (including any claim arising by virtue of the application, by or under [section 87 of the Civil Aviation Act 1982], of the law relating to salvage to aircraft and their apparel and cargo)
- ▶ any claim in the nature of towage in respect of a ship or an aircraft
- ▶ any claim in the nature of pilotage in respect of a ship or an aircraft
- ▶ any claim in respect of goods or materials supplied to a ship for her operation or maintenance
- ▶ any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages)
- ▶ any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship
- ▶ any claim arising out of an act which is or is claimed to be a general average act

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ any claim arising out of bottomry
- ▶ any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty
- ▶ the maritime claim must come within the subject matter of admiralty jurisdiction set out in s 20(2) (a)-(s) of the UK Supreme Court Act 1981.
- ▶ Claims that come under s 20(2) (a)-(c) and (s) of the UK Supreme Court Act 1981 generally concern proprietary or possessory interests in a ship.

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ The action in rem can only be brought against the “offending ship” and not a ‘sister ship”
- ▶ Claims that come under s 20(2) (e) - (r), a claimant can bring an action in rem against the offending ship or any sister ship

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ What is a sister ship?
- ▶ One ship companies are not sister ships
- ▶ Unless the Claimant can prove that the corporate structure is a sham or a façade, the Court will not lift the corporate veil of the one-ship company
- ▶ Are associated ship arrests permitted in Malaysia ? No.
- ▶ Only, in France, Belgium and South Africa

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ Section 21(4)(i) is also a condition to be satisfied.
- ▶ The relevant person could at the time the action was brought, be either the beneficial owner of the offending ship or a charterer of it under a charter by demise.
- ▶ The relevant person must be one who 'would be liable' rather than 'who is liable on the supposition that the action succeeds'

# INVOKING ADMIRALTY JURISDICTION

---

- ▶ Whether the action succeeds or not is a matter to be determined on the merits at trial, rather than at the earlier stage where jurisdictional disputes are resolved, so long as the plaintiff's claim is not so plain and obvious to be unarguable, frivolous or vexatious as to be dismissed
- ▶ The plaintiff need only show that he has an arguable case

# CLAIMS NOT INCLUDED

---

- ▶ Arrest of ship for unpaid insurance premiums and P&I calls
- ▶ Arrest of ship for unpaid ship management fees (as opposed to disbursements incurred by the manager on behalf of the owner)
- ▶ Arrest of ship for any commissions, brokerages or agency fees payable in respect of a ship
- ▶ Arrest of ship for any costs or expenses relating to wreck removal (sunk, stranded or grounded ship)
- ▶ Arrest of cargo
- ▶ Arrest of bunkers

# ARREST RULES & PROCEDURE

---

- ▶ Order 70 Rules of the High Court 2012
- ▶ Issue of Writ in Rem
- ▶ Service of Writ in Rem
- ▶ Warrant of Arrest
- ▶ Renewal of Writ
- ▶ Amendment of Writ

# ARREST RULES & PROCEDURE

---

- ▶ Caveat against arrest
- ▶ Caveat against arrest can be lodged by filing a praecipe signed by him or his solicitors (as their agents)
- ▶ Must furnish bail or pay into court an amount specified in the praecipe within three days after receiving notice that such an action has been begun.

# ARREST RULES & PROCEDURE

---

- ▶ The usual practice for the owners, their agents, or underwriters of a ship threatened with arrest, is to notify the plaintiff's solicitors the name of a solicitor or firm of solicitors who will accept service on their behalf and undertake to enter appearance and furnish bail.
- ▶ Whenever a caveat against the arrest of a ship has been entered, the name of the solicitors who had done so may be found by making a search on the caveat book maintained at the registry.

# ARREST RULES & PROCEDURE

---

- ▶ Every caveat entered into the caveat book is valid for six months with no extension.
- ▶ If a solicitor fails to perform an undertaking he has given to enter appearance, give bail or pay money into court in lieu of bail, he shall be liable for committal.
- ▶ The plaintiff who proceeds to arrest the ship or other property despite the caveat has to show a good and sufficient reason for doing so.

# ARREST RULES & PROCEDURE

---

## Entry of Appearance

- ▶ Is counter security required to be given to the ship owner if you arrest his vessel? No.

# STAY OF PROCEEDINGS

---

- ▶ In what circumstances can the action be stayed (or suspended)?
- ▶ Forum Non Conveniens
- ▶ The Spiliada (1987) test
- ▶ Foreign Jurisdiction Clauses
- ▶ ***The Eleftheria*** (1970) test

# ARBITRATION

---

## Arbitration Clauses

- ▶ Section 10 and 11 of the Arbitration Act 2005 (read together with Arbitration Amendment Act 2011) permits arrest as security for arbitration claims and ship to be retained as security or alternative security is provided for the release

# SECURITY

---

- ▶ Bail, Guarantee and P&I Club LOUs
- ▶ All P&I Clubs have their preferred wording
- ▶ Usually Clubs belonging to the International Group is accepted
- ▶ Claimant entitled to security in the amount sufficient to cover his reasonably arguable case together with interest and costs (*The Moscanthy* (1971))
- ▶ Intervention during arrest
- ▶ Release
- ▶ Wrongful Arrest

# ISSUES TO CONSIDER DURING AN ARREST

---

## Applications in respect of property under Arrest – Omnibus Orders

- ▶ When the property is arrested, it comes within the custody of the Sheriff and any unauthorized interference with the property amounts to contempt of court. In practice on matters of urgency, the arresting party or other persons (upon obtaining leave to intervene in the action) may make the application on behalf of the Sheriff.

# ISSUES TO CONSIDER DURING AN ARREST

---

## ▶ Common Omnibus Orders made:-

- ✓ take appropriate measure to preserve the ship, the machinery and equipment,
- ✓ to discharge the cargo
- ✓ repatriation of crew
- ✓ to move the ship within the limits of the port in which she is lying
- ✓ to supply or engage his agents to supply victuals, fuel and water to the vessel etc.

# ISSUES TO CONSIDER DURING AN ARREST

---

- ▶ costs expenses incurred by the Sheriff in the maintenance and custody of the arrested ship rank as Sheriff's expenses which are either paid out of the proceeds of sale of the ship or borne by the arresting party either directly or by way of reimbursement to the Sheriff.

# ISSUES TO CONSIDER DURING AN ARREST

---

- ▶ a very wide discretion is vested in the court to make such orders.
- ▶ If the property on board, such as perishables, is adversely affecting a ship under arrest and the property is not under arrest, an order if granted, may include an order for the sale of that property.
- ▶ Insurance for port risks
- ▶ Security guards to prevent the vessel from “breaking arrest”
- ▶ Preliminary Acts for collision cases
- ▶ Judgment in Default & Summary Judgment

# JUDICIAL SALE

---

- ▶ Appraisalment and Sale of Property under Arrest
- ▶ Sale Pendente lite (Early sale or Sale pending litigation)
- ▶ What is the test to apply for an early sale?
- ▶ Effect of a Judicial Sale is that the vessel is sold free from all liens and encumbrances (Clean Title)
- ▶ Judicial Sale process subject to procedures and Sheriff's Terms & Conditions

# JUDICIAL SALE

---

- ▶ Determination of Priorities
- ▶ statutory claimants ie, through powers conferred by the port legislation of Malaysia on harbour and port authorities to detain and sell ships for unpaid dues;
- ▶ the Sheriff's costs, commission (unless sale is made by private contract, 5 per cent charged on the first RM1,000.00 and 2.5 per cent on the excess) and disbursement of the sale of a ship (if the ship is sold by order of the court as is the usual case); expenses incurred by plaintiff for preservation and maintenance not sanctioned by the Sheriff;

# JUDICIAL SALE

---

- ▶ the plaintiff's (costs of the producer of the fund) or its solicitor's costs in the action in which the order of sale is obtained;
- ▶ holder of possessory lien who has priority over subsequent liens;

# JUDICIAL SALE

---

- ▶ salvage claim, which takes priority over:
  - ✓ an earlier damage;
  - ✓ an earlier salvage which occurred on a different occasion;
  - ✓ earlier wages;
  - ✓ an earlier claim to forfeiture as instituted by the Crown;
  - ✓ any subsequent possessory liens;
  - ✓ mortgages;

# JUDICIAL SALE

---

- ▶ collision damage claim which has priority over:
  - ✓ an earlier salvage;
  - ✓ wages generally (unless employed by the Sheriff);
  - ✓ subsequent possessory liens;
  - ✓ mortgages;
  
- ▶ seamen's wages which rank ahead of mortgages and necessaries;
  - ✓ mortgage priorities;
  - ✓ necessaries;
  - ✓ contractual claims

# JUDICIAL SALE

---

- ▶ Payment of proceeds

# QUESTION & ANSWER

---

# Sources

## Sources:

International Maritime Organization (2014) Wreck-removal convention to enter into force: Shipowner liability on the horizon as Denmark ratifies international Instrument. IMO Press Briefing. [Online] Available from:

<http://www.imo.org/MediaCentre/PressBriefings/Pages/Wreck-removal-convention-to-enter-into-force.aspx#.VHWkazGUfNA> [Accessed on: 9.11.2014]

Malay Mail Online. (2014) Two container ships collide at Westport causing fire. Malay Mail News. [Online] Available from:

<http://www.themalaymailonline.com/malaysia/article/two-container-ships-collide-at-westport-causing-fire-video> [Accessed on: 9.11.2014]

# Sources

US Department of Transportation (1999) *Port Risk Management & Insurance Guidebook*. Maritime Administration (Revised). Washington

North of England P&I Association(2012) *An Introduction to P&I Insurance and Loss Prevention*. North of England P&I Association Limited : Newcastle

TT Club Press Release. Ports and Terminals. TT Club Mutual Insurance Limited [Online] Available from: <http://www.ttclub.com/us/who-we-insure/ports-and-terminals/> Accessed on: 9.11.2014

# THANK YOU



JOSEPH & PARTNERS  
ADVOCATES & SOLICITORS

[www.jnplaw.my](http://www.jnplaw.my)  
Email : [jeremy@jnplaw.my](mailto:jeremy@jnplaw.my)