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LIABILITY ISSUES IN COMMERCIAL MARITIME DISPUTES CONSOLIDATION OF SEPARATE ARBITRATIONS

LAWRENCE TEH

LIABILITY ISSUES IN COMMERCIAL MARITIME DISPUTES (INDONESIAN LAW PERSPECTIVE)

SAHAT A. M. SIAHAAN

DELAYS IN SHIPBUILDING CONTRACTS - IS PREVENTION PRINCIPLE AN ESCAPE?

ERNEST YANG

WIN-WIN SOLUTION

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Notes to contributors

If you are interested in contributing an article about Arbitration & Alternative Dispute Resolution, please sent by email to **bani-arb@indo.net.id**. The writer guidelines are as below :

1) Article can be written in Bahasa Indonesia or English 12 pages maximum
2) Provided by an abstract in one paragraph with Keywords (Bahasa Indonesia for English article & English for Bahasa Indonesia article)
3) The pages of article should be in A4 size with 25 mm/2,5 cm margin in all sides
4) The article used should be in Ms. Word format, Times New Roman font 12 pt
5) Reference / Footnote
6) Author Biography (100 words)
7) Recent Photograph

From the Editor

This edition of BANI Newsletter contains articles related to maritime issues such as: Delays in Ship Building Contracts, liability issues in commercial maritime disputes from the Indonesia Law Perspective, as well as the consolidation of separate arbitrations. The last two articles was presented in BANI-IArbI seminar 2018 under the topics of Enhancing Regional Arbitration cooperation – Emerging and current issues.

First article by Mr. Ernest Yang focusing on the prevention principles in construction contracts where prioritising the creation and logical storage of contemporaneous records that can establish the existence and cause of delays is imperative.

Mr. Sahat Siahaan, in his article focus on the need of involvement in Indonesian Shipping and Maritime Laws and Regulations to keep up with current trends in international shipping in maritime practice, especially on the limitation of liability and maritime liens.

Mr. Lawrence Teh, concentrate on the SIAC consolidation proposal that deal with two matters i.e. The decision consolidate and the administration of proceedings and the rules adopted. He suggested that with all its deficiencies, still the proposal for a protocol on cross-institutional consolidation of arbitration considered as bold solution to a long standing and unresolved challenge faced by arbitration users.

From the desk of the editor, we wish you all a happy and prosperous new year 2019.

December, 2018

LIABILITY ISSUES IN COMMERCIAL MARITIME DISPUTES CONSOLIDATION OF SEPARATE ARBITRATIONS

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Lawrence Teh is a Senior Partner in the Litigation and Dispute Resolution practice and Arbitration practice since January 1999. He advises clients in all areas of commercial law and appears regularly as lead counsel in the Singapore courts, in arbitration, mediation and other forms of dispute resolution. He is also considered and appointed regularly as an arbitrator in international disputes under the rules and auspices of many international arbitration institutions and also in ad hoc arbitrations. He is particularly noted for his work on jurisdictional issues in international arbitration and litigation.

He has particular experience in handling disputes in international trade and commodities, maritime and aviation, banking and financial services, onshore and offshore construction, mergers acquisitions and joint ventures and insurance.

He is named in numerous legal guides and directories including the *The Legal 500 Asia Pacific, Asialaw and Who's Who Legal*.

Headnote

This article seeks to provide some insight into the challenges which arbitration may face in the future and some thoughts on the proposals developed in response to such challenges.

I. INTRODUCTION

1. International trade is expected to continue to grow around the world despite recent developments in the trade policies and measures of some countries. Thus, the World Trade Organisation anticipates that merchandise trade alone will continue to grow by 4.4% in 2018, matching the growth rate of 4.7% in 2017.[2] Much of this growth may well occur in Asia. In 2013, the combined economies of the Association of South East Asian Nations alone achieved an annual growth of 5% while economic growth in the rest of the world remained at only 3%.[3]

2. This dynamism may present both opportunities and challenges to the international arbitration community. For, on the one hand, it may lead to a rise in the number of disputes and hence a heightened demand for mechanisms to resolve such disputes swiftly and efficiently.[4] Arbitration is one such mechanism which may accomplish this. Yet, on the other hand, many of these disputes are cross-border disputes. This may require arbitration to be able to come to grips with certain potentially limiting factors or aspects which are inherent to arbitration. The manner in which the international arbitration community responds to these challenges may thus be highly significant to the continued relevance of arbitration to users and hence its viability as a dispute resolution mechanism in the future.

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[1] This paper is an expansion on the presentation given by the writer at the BANI-IARBI Seminar on 29 November 2018. The writer is grateful for the assistance of Mr Sim Junhui, an associate at Dentons Rodyk & Davidson LLP, in preparing the presentation and this paper.

[2] See WTO Press Release on 12 April 2018 <www.wto.org/english/news_e/pres18_e/pr820_e.htm>.

[3] See Opening Speech by Minister for Law, K Shanmugam at the In-House Counsel World Summit 2014 <https://www.mlaw.gov.sg/content/minlaw/en/news/speeches> at para 9.

[4] See Chief Justice Sundaresh Menon, 'Response by Chief Justice Sundaresh Menon' (Opening of the Legal Year 2015, 5 January 2015) <www.supremecourt.gov.sg/news/speeches> at para 20(a).

II. PRESENT STATE OF AFFAIRS

1. A natural by-product of the rising numbers of disputes, whether cross-border or otherwise, is the growing complexity of the same. Increasingly, disputes may arise in the same chain of contracts or commercial transaction but which involve multiple and different contracts between different parties in different jurisdictions subject to different laws. Thus, in a maritime context, it is not difficult to imagine that the carriage of goods on a particular voyage may involve an owner, a bareboat charterer, a time charterer and a voyage charterer, all from different jurisdictions engaging in different contracts. As each set of parties in the chain may commence separate proceedings, disputes in such a context may result in a multiplicity of proceedings.

2. It is generally acknowledged that a multiplicity of proceedings is likely to have a negative effect on justice as well as on efficiency. First, it would not seem entirely just for the same event occurring in the same commercial transaction between the same set of parties to lead to vastly different outcomes simply because there are different contracts. Indeed, these different outcomes could be wholly mutually inconsistent. Second, a multiplicity of proceedings is detrimental to efficiency. The inconsistency between decisions could lead to challenges, and the contest which this may engender could negatively affect the finality of such decisions. Moreover, it may also lead to an inefficient apportionment of risk and liability between the parties. After all, where disputes arise in a transaction involving a chain of contracts, it may be inefficient for parties in the middle of the chain to have to defend proceedings when the facts are best known by the parties at the end of the chain who may also be in any event the most appropriate party to suffer the loss. There is therefore a need to avoid multiplicity of proceedings by either consolidating the same or having related proceedings heard together.

3. However, this involves exercising power over third parties to proceedings. The exercise of such power may prove problematic for a dispute resolution mechanism like arbitration, the legitimacy and efficacy of which is so based on the concept of party autonomy and the agreement to be bound by decisions. Where no such agreement exists, it may be challenging to conceptualise the exercise of power by an arbitral institution or a tribunal over a third party to the arbitration. Indeed, this was voted the 3rd worst feature of arbitration in 2018.[5] This is a significant development given the relative lack of importance accorded to this factor by voters in the 2015 survey.[6] As stated by the authors of the survey:[7]

   > "*This finding is indicative of the fact that, as cross-border commercial transactions are becoming increasingly complex, international arbitration as a system is expected to respond to what its users want; this also means developing new mechanisms to better deal with disputes involving multiple contracts, jurisdictions, parties and third parties*."

4. In order to overcome this challenge, arbitral institutions have sought to include clauses in their institutional rules which allow for related proceedings to be consolidated or heard together. Thus, for example, in the maritime context, paragraph 16(b) of the LMAA Terms 2017 provides:

   > "*Where two or more arbitrations appear to raise common issues of fact or law, the tribunals may direct that they shall be conducted and, where an oral hearing is directed, heard concurrently. Where such an order is made, the tribunals may give such directions as the interests of*

[5] See Queen Mary 2018 International Arbitration Survey by White & Case <www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> at page 2.

[6] See Queen May 2015 International Arbitration Survey by White & Case <www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf> at page 7.

[7] See Queen Mary 2018 International Arbitration Survey by White & Case <www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> at page 8.

fairness, economy and expedition require including:

…

(ii) that the documents disclosed by the parties in one arbitration shall be made available to the parties in the other arbitration upon such conditions as the tribunal may determine;

(iii) *that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunals may determine."*

5. This traces similar wording to be found in previous versions of the LMAA Terms[8] as well as in other institutional rules such as those of SCMA and BANI.[9]

6. In the non-maritime context, article 10 of the ICC Rules 2017 provides:

"*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:*

(a) The parties have agreed to consolidation; or
(b) All the claims in the arbitrations are made under the same arbitration agreement; or
(c) Where the claims in the arbitration are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitration are in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties."

7. Other institutional rules such as those of SIAC, may contain similar wording.[10]

8. The incorporation of such institutional rules into arbitration agreements between different parties is a solution to the challenges faced by arbitration in exercising

power of third parties to proceedings. In this way, parties may be taken to have agreed to have their respective proceedings consolidated or heard together. This overcomes any difficulty surrounding the concepts of party autonomy since the parties would have indirectly agreed to be bound by a decision in a consolidated set of proceedings. The arbitral institution would therefore be fully entitled to exercise power in consolidating related proceedings or having them heard together. Likewise, the tribunal of a consolidated set of proceedings would be fully empowered to make a decision binding on parties which were not initially parties to the first set of proceedings.

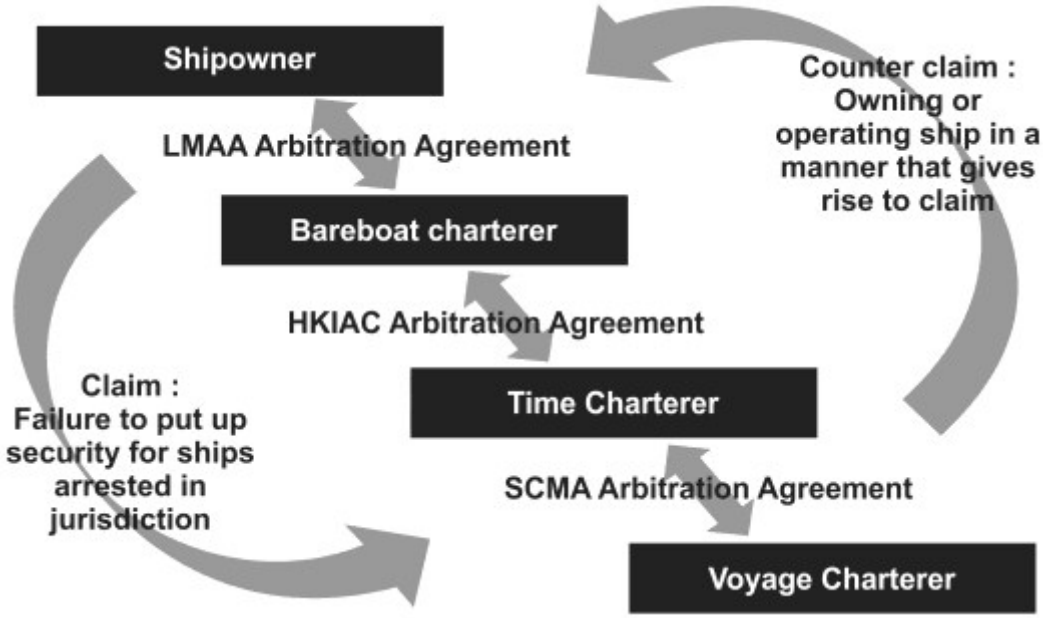
III. INTER-INSTITUTIONAL CONSOLIDATION

1. However, the solution suggested above may not always be feasible. The incorporation of institutional rules which provide for consolidation into arbitration agreements, may not always help to conceptualise the exercise of power over third parties as an instance of respecting party autonomy. Thus, for instance, a situation may arise where disputes in a commercial transaction involve not only different parties in different jurisdictions subject to different laws but also where the multiple and different contracts linking these parties contain different arbitration agreements incorporating different institutional rules. A pictorial demonstration of this is as follows:

[8] See para 14(b), LMAA Terms 2006; para 15(b), LMAA Terms 1997.

[9] See rule 33.3, SCMA Rules 2015; rule 32.3, SCMA Rules 2013; rule 32.3, SCMA Rules 2009; art 9, BANI Rules 2018.

[10] See rule 8.1, SIAC Rules 2016.



2. In the above scenario, a consolidation of all proceedings between the shipowner, bareboat charterer, time charterer and voyage charterer would not be possible under the existing provisions in the LMAA, HKIAC and SCMA institutional rules. It would not be possible to conceptualise a consolidation of these proceedings as being in keeping with any concept of party autonomy. After all, the parties may not be regarded to have agreed directly or even indirectly to be bound by any decision in the consolidated set of proceedings. And yet, the danger and risk posed by a multiplicity of proceedings in such cases is no less than if the different proceedings were commenced on the basis of a single set of institutional rules which permitted the consolidation of the same.

3. In an attempt to remedy this, the SIAC has come up with a consolidation proposal for different institutions to adopt and be incorporated as part of their respective rules.[11] In so doing, the SIAC hopes to ensure that proceedings may be consolidated notwithstanding the incorporation of different institutional rules, and thereby avoid a multiplicity of proceedings from arising.

4. The consolidation proposal deals with 2 matters:
   (1) The decision to consolidate; and
   (2) The administration of proceedings and the rules adopted.

A. THE DECISION TO CONSOLIDATE

1. Although the different arbitral institutions have rules with similar features, there remain significant differences to be bridged. Therefore, in order to overcome these differences so that proceedings under different institutional rules may be consolidated, the SIAC is proposing as follows:

   (1) **Option 1**: Arbitral institutions could adopt a consolidation protocol which sets out a new, standalone mechanism as a sort of consolidation rule common to all institutions. This could address issues such as the timing of consolidation applications, the appropriate decision-maker and the criteria to determine when proceedings are sufficiently related to warrant crossinstitution consolidation. A joint committee would be appointed consisting of representatives from the particular concerned institutions to decide particular applications.

[11] See Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol by SIAC <http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol>.

(2) **Option 2**: Arbitral institutions could adopt a consolidation protocol which provides for one institution to determine any cross -institution consolidation application in accordance with its own consolidation rules. This would require the institutions to agree on objective criteria beforehand to determine which institution would be authorised to make this decision.

2. Although Option 2 dispenses with the need for institutions to agree on new consolidations rules and therefore has the benefit of simplicity, SIAC suggests that Option 1 may be more attractive to arbitral institutions and users because it would prevent any one particular arbitral institution from having and exercising too substantial a degree of discretion.[12]

B. THE ADMINISTRATION OF PROCEEDINGS AND RULES ADOPTED

1. Making a decision on the consolidation of different proceedings is however not the end of the matter. It remains to be decided how the consolidated proceedings are to be administered and which rules should be adopted to govern them. In that regard, the SIAC is proposing as follows:

   (1) **Option 1**: Arbitral institutions could adopt a consolidation protocol which sets out new rules which will be applicable to consolidated proceedings and which can be jointly administered by the institutions.

   (2) **Option 2**: Arbitral institutions could adopt a consolidation protocol which provides for one institution to administer any consolidated proceedings in accordance with its own institutional rules. This would require the institutions to agree on objective criteria beforehand to determine which institution would be entitled to administer the proceedings.

2. Option 1 has strategic benefits for arbitral institutions involved. However, there are likely to be significant practical consequences which militate against coming up with a new set of rules. As such, SIAC suggests that Option 2, being better able to avoid these practical difficulties, may be more workable.[13]

IV. CONCLUSION

1. The proposal by SIAC is not without its sceptics. Thus, there are those who point out the difficulties which lie ahead in getting various different arbitral institutions to cooperate and act consistently. Further, it is possible that the SIAC proposal will not reduce the potential areas of dispute, but rather increase them and thereby decrease the efficiency of arbitration as a dispute resolution mechanism.

2. The main concern however remains the issue of party autonomy. Parties quite clearly have chosen to incorporate the institutional rules of a particular arbitral institution. They are likely to have intended to arbitrate pursuant to those rules, and are unlikely to have intended to be bound by the rules of another institution. Yet, some have posited that that may well be the outcome of the SIAC proposal.[14] Indeed, taking it further, some have suggested that it would fly in the face of parties' intentions since they are likely to have chosen to adopt the rules of different arbitral institutions to keep their cases separate.[15] It is even said that parties may incorporate inconsistent arbitration agreements to have the settlement leverage

[12] See Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol by SIAC <http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol> at page 4-5.

[13] See Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol by SIAC <http://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol> at page 8.

[14] SIAC Issues Proposal for Consolidation of Arbitral Proceedings Between Institutions by Alastair Henderson, Chris Parker, Vanessa Naish and Caroline Le Moullec <https://hsfnotes.com/arbitration/2017/12/22/siac-issues-proposal-for-consolidation-of-arbitralproceedings-between-institutions/>.

[15] See Mourre Calls for Institutions to Join Forces by Tom Jones and Alison Ross <https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces>.

of the possibility of inconsistent awards as a form of protection when other problematic commercial terms must be accepted.[16] Further, if parties had only agreed to different arbitration agreements and institutions inadvertently, it is suggested, the parties would likely agree to consolidation after the dispute has arisen. This would render it wrong then to force consolidation on parties on an opt-out basis.[17]

3. Nevertheless, despite the force of these arguments, it should be acknowledged that the proposal by SIAC may be properly seen as a bold solution to a longstanding and unresolved challenge faced by arbitration users.[18] Indeed, it has also been suggested that it will be a step in reducing the complexity encountered by users as well as the time and cost to be incurred in arbitration proceedings.[19] It may also enhance the overall quality of decision-making.[20] Another reason for the international arbitration community to pay attention to the SIAC proposal is the fact that the courts are more proactive in consolidating disputes. The growing reach of international litigation through such courts as the Singapore International Commercial Court cannot but create an increasingly tempting alternative to arbitration. It is also worth recalling in that regard that growing numbers of users find that a major problem with arbitration is the lack of power over third parties in proceedings. In the circumstances, it would therefore be advisable for the international arbitration community to give serious consideration to the SIAC proposal.

[16] See SIAC's Proposal for a Protocol on Cross-Institutional Consolidation of Arbitrations: Too Much Complexity to be Beneficial? by Philippa Charles <https://www.stewartslaw.com/news/siacs-proposalfor-a-protocol-on-cross-institutional-consolidation-of-arbitrations-too-much-complexity-to-bebeneficial/>.

[17] See Mourre Calls for Institutions to Join Forces by Tom Jones and Alison Ross <https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces>.

[18] See Towards Reducing the Complexity, Cost and Time of Arbitral Proceedings: SIAC's Proposal on Cross-Institution Consolidation by Tan Wei Ming and Pradeep Nair <https://singaporeinternationalarbitration.com/2018/01/10/towards-reducing-the-complexity-cost-andtime-of-arbitral-proceedings-siacs-proposal-on-cross-institution-consolidation/>.

[19] See Towards Reducing the Complexity, Cost and Time of Arbitral Proceedings: SIAC's Proposal on Cross-Institution Consolidation by Tan Wei Ming and Pradeep Nair <https://singaporeinternationalarbitration.com/2018/01/10/towards-reducing-the-complexity-cost-andtime-of-arbitral-proceedings-siacs-proposal-on-cross-institution-consolidation/>; SIAC Issues Proposal for Consolidation of Arbitral Proceedings Between Institutions by Alastair Henderson, Chris Parker, Vanessa Naish and Caroline Le Moullec <https://hsfnotes.com/arbitration/2017/12/22/siac-issuesproposal-for-consolidation-of-arbitral-proceedings-between-institutions/>.

[20] See Towards Reducing the Complexity, Cost and Time of Arbitral Proceedings: SIAC's Proposal on Cross-Institution Consolidation by Tan Wei Ming and Pradeep Nair <https://singaporeinternationalarbitration.com/2018/01/10/towards-reducing-the-complexity-cost-andtime-of-arbitral-proceedings-siacs-proposal-on-cross-institution-consolidation/>.

Past Events

1. The 5th Asian Mediation Association Conference 2018

Time : 24-25 October
Venue : Le Meridien Hotel, Jlr HR Rasuna Said, Jakarta
Hosted by : Asian Mediation Association (AMA)

The theme of the conference was "Can Mediation Survice in a World of Trumpian Negotiators ? Thought Provoking – New Thinking"
https://asian-mediationassociation.org/ama/

2. Konstruksi Indonesia (KI) Tahun 2018

Time : Friday, 2 November 2018
Venue : JIEXPO Kemayoran, Jakarta, Indonesia
Hosted by : Construction Services Development Board of Indonesia (Lembaga Pengembangan Jasa Konstruksi Nasional, LPJKN) and Tarsus Indonesia

It was the 3-day national annual exhibition of Indonesia construction industry. The exhibition included a national workshop session, with the theme of "Construction Industry Communtiy Existence in Facing the of Goods and Services Trade Liberalisms". The resource-persons form BANI/IArbI arbitrators presented the "Construction Contracts" and "Construction Contract Dispute Resolution" topics.
lpjkn@lpjk.net

LIABILITY ISSUES IN COMMERCIAL MARITIME DISPUTES (INDONESIAN LAW PERSPECTIVE)

SAHAT A.M. SIAHAAN
PARTNER
ALI BUDIARDJO, NUGROHO, REKSODIPUTRO[1]

Sahat A.M. Siahaan is a Partner at ABNR specializing in shipping, including dispute resolution arising from charterparties, bills of lading, shipbuilding, collisions, groundings, salvage, limitation and total loss. His expertise encompasses both dry and admiralty matters, which is especially beneficial when handling major casualties with a multi-jurisdictional focus. He has acted for owners, charterers and cargo interests and their insurers in a wide variety of cases.

With respect to advisory matters, he has assisted clients on contract terms, including charter parties, bills of lading and sale and purchase agreements. He has also been involved in many ship financing transactions, representing, respectively, financiers and borrowers involving parties from multiple jurisdictions.

He has also acted for both foreign and domestic clients in a variety of arbitration proceedings under BANI, ICC and UNCITRAL rules.

Abstract

This article outlines the provisions of carriers' liability and some legal issues in Indonesian shipping law that result in Indonesian law and the jurisdiction of Indonesian courts or arbitration to be less attractive as a governing law and dispute resolution forum in the field of international shipping law.

Abstrak

Tulisan ini menguraikan ketentuan-ketentuan tanggung jawab pengangkut dan beberapa permasalahan-permasalahan hukum dalam hukum pengangkutan laut di Indonesia yang menyebabkan hukum Indonesia serta yurisdiksi pengadilan atau arbitrase menjadi kurang menarik untuk dijadikan pilihan hukum serta forum penyelesaian sengketa dalam bidang hukum pengangkutan laut internasional.

Kata Kunci : *Tanggung Jawab Pengangkut, Perselisihan Hukum Pengangkutan Laut.*

I. INTRODUCTION

Indonesia, comprising more than 13,000 islands, is known as the world's largest archipelagic state. Located at strategic crossing-points for international trade, several of the country's straits are heavily used for major international maritime transport. These factors make Indonesia an important maritime player at international level.

Unfortunately, Indonesia's strategic position and rich potential in the maritime world have not yet been properly backed up with updated and clear sets of regulations. As an example, many issues relating to the commercial aspect of Indonesia's maritime law, including carrier's liability, limitation of liability, charter parties, and the law of general average, are regulated in

[1] This paper is presented by the writer/speaker at the Joint Seminar of BANI and IArbI on 29 November 2018. The writer/speaker would like to thank Marintan Panjaitan, Priscilla R. Manurung and Adithya Lesmana, associates at Ali Budiardjo, Nugroho, Reksodiputro, for their assistance in preparing this paper.

Indonesian Commercial Code ("**Commercial Code**") and Indonesian Civil Code ("**Civil Code**"), both of which were enacted prior to Indonesia's independence; the majority of the legal provisions regarding the commercial aspect of maritime law set out above remains unchanged until now. Meanwhile, the latest piece of Indonesian shipping legislation, Law No. 17 of 2008 on Shipping ("**Shipping Law**") and its implementing regulations, which mainly cover the public and administrative domain of Indonesia's shipping industry, still have shortcomings.

In addition to the above, Indonesia is not a party to many international conventions on maritime law, especially commercial aspects. The several international shipping conventions to which Indonesia is a party, such as the CLC Convention and Bunkers Convention, have not been incorporated into Indonesian law or a regulation, and therefore have not effectively been applied. Anachronistic regulations and an absence of formal participation in international instruments have resulted in Indonesia's shipping law being out of date for international maritime players as it does not accommodate current maritime trends and needs. For example, the concept of maritime lien is not recognized under Indonesian shipping law. Moreover, the regulation of events such as ship collision, carriage of goods, and cargo claim also require many improvements.

As a result, many international shipping stakeholders decry Indonesian laws' inability to keep up with global trends in the shipping industry, especially its inability to provide a swift resolution to a simple shipping dispute. Moreover, based on the writer's observation, the majority of Indonesian commercial maritime disputes (especially carriage of goods) were settled in court. Based on the writer's interview with the chairman of BANI, only a few maritime disputes have ever been brought to BANI. Some of these were related to ship construction disputes. Many of the judgements made by courts were far from satisfying. Through this paper, the writer would like to provide a quick summary on carriage of goods by sea under Indonesian law and elaborate further on some of the issues that we face currently.

II. CARRIAGE OF GOODS BY SEA UNDER INDONESIAN LAW

Unlike most international instruments such as the Hague Rules or Hague Visby Rules, none of Indonesia's shipping-related regulations expressly set out a definition of "contract of carriage". Chapter V of the Commercial Code, which sets out provisions related to carriage of goods, simply defines a "carrier" under Article 466 of the Commercial Code as a person (or party) that has bound itself, either by time or voyage charter, or another agreement, to carry goods either wholly or partially by sea.

Furthermore, under Article 468 (1) of the Commercial Code, "contract of carriage" is only explained as having to fulfill a promise by the carrier to take proper care of the carried goods from the moment of their receipt to that of their delivery.

Prof. Soebekti, an Indonesian scholar, defines a contract of carriage as a contract where a party agrees to transport a person or goods safely from a place to another while the other party agrees to pay the freight costs[2].

Another Indonesian scholar, Purwosutjipto, defines carriage of goods as "a reciprocal agreement between a carrier and a shipper, where the carrier binds itself to carry goods and/or people from one place to a specified destination safely; meanwhile, the shipper binds itself to pay the carriage expense".[3]

When carrying goods, a variety of problems or disputes might arise. These may bring the parties concerned to the question of where liability lies. For example, in the event of ship collision, it is a regular question from the

[2] Soebekti, *Anka Perjanjian* (8th edn. Citra Aditya Bakti, 1989), 69.

[3] H.M.N. Purwosutjipto, *Pengertian Hukum Dagang Indonesia 3: Hukum Pengangkutan* (3rd edn, Djambatan 1987), 2.

ship owners as to how Indonesian shipping laws and regulations determine the party liable to pay for the damage incurred, or the apportioning of liabilities between both ships involved in a collision.

In order to have a more detailed understanding of this liability issue, we elaborate as follows:

1. Liability in Cargo Claims
   As a carrier is under an obligation to undertake the carriage of goods and to take proper care of the carried goods, the carrier may be held liable for goods that are damaged while under its care.

   Article 468 (2) of the Commercial Code sets out the general rule on a carrier's liability, whereby the carrier must compensate all losses caused by: (a) the carrier's inability to deliver the goods, partially or entirely; or (b) any damage to such goods, unless the carrier can prove that its inability to deliver the goods or the damage was caused by (a) force majeure; (b) defect in the goods; or (c) the shipper's fault.

   Article 40 (2) of the Shipping Law also emphasizes that the carrier will be held liable for the cargo it carries in accordance with the type and amount as stated in the cargo documents and/or the agreed contract of carriage.

2. Liability in Ship Collision Claims
   From the perspective of Indonesian laws and regulations, a ship's fault that causes damage to other vessels in a ship collision can be considered an unlawful act or tort. Article 1365 of the Civil Code provides that:

   > *"a party that commits an unlawful act that causes damage to another party shall be obliged to compensate therefor."*

   In relation to liability for damage caused by a ship collision, Article 536 of the Commercial Code provides that if one of the ships in a collision with another is to blame for the collision, the owners of the ship to which blame attaches shall be liable for the entire loss or damage. If both ships are at fault, according to Article 537, the liability should be borne by both parties in proportion to their respective fault. Moreover, if the cause of collision is either (i) inadvertent; (ii) a product of force majeure; or (iii) uncertain, then pursuant to Article 535, each party shall become respectively liable for the damage it suffers. The Commercial Code also covers collision liability that occurs during towage, whereby both the owner or operator of the towed ship and the tugboat will be jointly and severally liable.

   As an effort to apply Article 536 of the Commercial Code, it is normal in a ship collision case for the ship owners of a vessel involved to blame the other ship for the collision. However, it is difficult to prove that the other ship is liable in the collision without the support of solid evidence. Based on our experience, the most crucial issue that must be proven is the element of fault in order to establish liability of the opponent ship.

   Indonesian courts have different views as to whether there is jurisdiction to adjudicate a collision case prior to a preliminary examination by the maritime tribunal (locally known as *Mahkamah Pelayaran*). For example, in case No. 417/Pdt.G/Bth/2010/PN.Jkt.Ut, between PT. Trans Pacific Jaya v. Capt Widi Soedadio and PT. Samudera Sukses Makmur, a panel of judges from North Jakarta District Court held that a preliminary examination by a maritime tribunal was essential in determining the fault in the collision. Since the preliminary examination had not been made, the panel of judges had difficulty in determining the fault, and therefore the defendants could not be held liable without any preliminary examination from the maritime tribunal (*Mahkamah Pelayaran*).

   However, in the Supreme Court Decision case No. 3450 K/Pdt/2016, the Supreme Court held that the preliminary examination by the maritime tribunal

(*Mahkamah Pelayaran*) is only necessary to upheld the ethical code for the Master and/or vessel crew. The decision of fault/ negligence and recommendation from the maritime tribunal (*Mahkamah Pelayaran*) is not a prerequisite before submitting a tort lawsuit.

III. SEVERAL ISSUES IN INDONESIAN COMMERCIAL MARITIME DISPUTES

1. Substantive Law Issues

(I) Limitation of Liability

Indonesia currently does not have up-to-date provisions on carrier's limitation of liability. The current provisions on limitation of liability are considered to be obsolete as they were enacted during the Dutch colonial era in Indonesia. Consequently, the standard prices or values set out in the provisions were considered to be very low and totally unrealistic for use at present. Additionally, Indonesia is not a state party to the Convention on Limitation of Liability for Maritime Claims 1976. Hence, there are no provisions on carrier's limitation of liability

Under Indonesian law, matters related to limitation of liability are governed under the Commercial Code. As the Commercial Code itself was enacted during the Dutch colonial era in Indonesia, its provisions are not up to date since its provisions, especially those that relate to shipping matters, have never been amended.

With respect to the carrier's limitation of liability, the Commercial Code recognizes two types of limitation of liability:

a. Package Limitation of Liability as stipulated under Article 470 (2) of the Commercial Code, which allows the carrier to affix a limitation on liability as long as it is less than IDR 600 (read 600 Dutch Guilders); and

b. Tonnage Limitation of Liability as stipulated under Article 474 of the Commercial Code which restricts the liability of the carrier to a maximum IDR 50 (read 50 Dutch Guilders) per cubic meter of net tonnage of the ship, reduced, in the case of a mechanically propelled ship, by the notional gross tonnage of the space occupied by the means of propulsion.

As the Dutch Guilder is no longer a valid currency, the currency in the Commercial Code has been interpreted as Indonesian Rupiah and consequently the value would be very low, as the multiplier value of the limitation on liability is only IDR 50 (read 50 Dutch Guilders). As demonstrated in one case, the panel of judges from Surabaya District Court in case No. 586/Pdt.G/2014/PN.SBY between PT Asuransi AXA Indonesia v. PT Salam Pacific Indonesia Lines and Raetsasia P&I Services Pte. Ltd., concluded that since the value of the limitation on liability set out in Article 474 of the Commercial Code was very low, Article 474 was no longer relevant and could not realistically be applied at that time.

(II) Maritime lien (not recognized under Indonesian Law)

A lien is another legal concept usually recognized by shipping practitioners in securing their interest against a vessel or cargo. A maritime lien, in a nutshell, is a type of claim against a vessel or other maritime property that may be enforced by seizure of such property. This provisions on lien are usually included in the charterparty which gives a right to the ship owner to detain cargo if the freight charge is not paid by the charterer.

Indonesian law, on the other hand, does not recognize the right to detain the property of other party, especially when it comes to cargo liens. Article 493 of the Commercial Code specifies that a carrier/ship owner is prohibited from detaining cargo for the purpose

of securing freight or average contribution. Any clauses in the charter party that confer such a right on a carrier/ship owner will be deemed null and void. The carrier/ship owner is only permitted to request another security instrument before the commencement of cargo unloading in order to secure any outstanding freight or average contribution. If the consignee refuses to provide any security, the ship owner can keep the cargo in an appropriate place.

From the practicality standpoint, Article 493 does not provide any protection to shippers if the consignees have not made payment to them. Once the cargo is shipped, the carrier has an obligation to deliver the cargo to the consignee, despite the consignee's default in paying the purchase price. The ship owner can only keep the cargo if the consignee is bound by an obligation to pay for the freight. If the shipper is the party who pays for the freight, the carrier does not have any right to keep the cargo, even if the consignee refuses to provide security.

(III) Applicability of Foreign Law

Indonesian law recognizes the freedom of contract principle, and the provisions set out by the parties should be upheld as a contract that binds the parties to the contract. The only exception to this principle is when the provisions are contrary with the mandatory rules of Indonesian law. However, as many charterparties and bills of lading issued by local shipping companies are governed by English law, and recognizes Hague Rules or Hague-Visby Rules as paramount, it should be observed how these foreign laws are applied in Indonesia in recent years.

Indonesian courts were not consistent in applying English law in disputes governed English law. For example. in Supreme Court Case No.1935 K/ Pdt/2012 and Supreme Court Case No. 1027 K/Pdt/2015, the Supreme Court decided that the choice to use English law in the hull and machinery insurance contract rendered the Indonesian courts as lacking jurisdiction to examine the case. The Court considered that if the parties had already chosen English law, the correct forum would be the English court since Indonesia does not apply English law.

On the other hand, the panel of judges in Central Jakarta District Court Case No. 52/PDT.G/2010/PN.JKT.PST stated that an insurance contract that was governed by English law should be followed and thus the insurance company had to pay for damages against the insured. The District Court only considered that under English law, the insured had the obligation to pay the insured under the insurance contract. Although the insured also argued that the Indonesian court did not have the jurisdiction to examine the case; however, Central Jakarta District Court considered that the choice of law did not necessarily also imply a choice of jurisdiction, and thus Central Jakarta District Court still had the jurisdiction to examine the case.

Following these court decisions, it shows that variations in the application of English law in Indonesian court practices are still uncertain and inconsistent. The choice of English law may be interpreted as choice of foreign jurisdiction and thus it will be considered that Indonesian lacks jurisdiction to hear the case. On the other hand, although in a few examples, an Indonesian court recognized the choice of English law by the parties as valid and applicable, we consider that its application by Indonesian judges is not carried out in the same way as English judges would do.

2. Procedural law issues
   (I) Interim measures
      a. Arrest of Vessel

         Indonesian law does provide a measure for arrest of a vessel. Pursuant to Article 222 of the Law No. 17 of 2008 on Shipping ("**Shipping Law**"), a vessel can be arrested by a harbormaster based on a court order, and pursuant to Article 223 (1) of Shipping Law, a request to the court to arrest a vessel can be made without filing a lawsuit beforehand.

         However, Article 223 (2) of the Shipping Law stipulates that further provisions for the arrest of a vessel will be legislated in a Minister of Transportation Regulation. These provisions have not been legislated until now. As such, other important issues regarding arrest of vessel (e.g. provisions relating to the security to replace the arrest, counter-security, definition of wrongful arrest, the release of the vessel, etc.) cannot be determined since there is no legal basis for such action.

         Moreover, the Shipping Law is silent on several important issues, such as whether an arrest can be granted against a foreign-flagged vessel in a maritime claim, and whether an arrest can be requested in cases where an Indonesian party is not involved. This creates a legal gap and thus there is no legal certainty whether Indonesian courts would issue an arrest order if a party requested one.

         However, in the case No. 10/ PDT.G/2013/PN.JBI between PT. Asuransi Indrapura v. PT. Pelayaran Nasional Fajar Marindo Raya, the plaintiff requested the arrest of a vessel but it was rejected by the court. The panel of judges of Jambi District Court held that the arrest request, which was submitted along with a Statement of Claim, was not in accordance with Articles 222 and 223 of the Shipping Law, which state that a request for arrest of a vessel be made without a statement of claim; it would therefore defeat the intention of the Shipping Law itself if the request were submitted with a statement of claim. Additionally, the panel of judges held that the request should also include the location of the vessel and the details of the vessel whose arrest was being requested. Without the location and the details of the vessel, the court would have difficulty in identifying it. Based on the above example, we can conclude that there is a possibility that such a request might be granted if the requirements were fulfilled. However, at present, this opinion is not held uniformly by all courts in Indonesia.

      b. Enforcement of arbitration award

         Based on Article 32 of Law No. 30/1999 on Arbitration and Alternative Dispute Resolution **("Arbitration Law"),** the parties to an arbitration dispute may request a provisional or interlocutory award (to order conservatory attachment, so that the items be kept by a third party or to order perishable goods to be sold).

         However, based on several court practices, these interlocutory awards cannot be enforced without court assistance. Based on our research at Central Jakarta District Court, one of the court officials confirmed that enforcement for an arbitration award, either domestic or international, could only be made for a final award. This may derive from Article 60 of the Arbitration Law, which stipulates that an arbitration award is final,

enforceable and binding on the parties.

Additionally, enforcement of an arbitration award under Indonesian law is ridden with uncertain timeframes as there is provision in the current regulations that stipulates a specific timeframe for the issuance of a writ of execution (exequatur). Based on our experience, enforcing an arbitration award in Indonesia, especially a foreign arbitration award, is not a straightforward process. Before it can be enforced, the arbitration award needs to be registered and the court will need to issue a writ of execution before it can be fully enforced. It may take up to a fewmonths before the court issues the writ of execution. Even after issuance of the writ, enforcement of the award will require the additional, lengthy process of summoning the defendant. A recalcitrant party might use this opportunity to challenge the validity of the award.

(II) Interrupting time bar on maritime claims

In general, with regard to the statute of limitations for breach of contract and tort, Article 1967 of the Civil Code imposes a 30-year time limit. However, the Civil Code and Commercial Code also stipulate time limits for particular claims, including those related to maritime matters. For example, as stipulated in Article 487 of the Commercial Code, it is stipulated that a claim for damages related to carriage of goods must be submitted within one year of the delivery date, or the date on which the goods were supposed to be delivered. Moreover, according to Article 742 of the Commercial Code, a claim for damages due to ship collision must be submitted within two years of the collision.

Under Indonesian law, the only certain way to interrupt the above time bar is to file a claim before a court. However, this is impractical, as the plaintiff may not have intended to file a lawsuit yet. Article 1979 of Indonesian Civil Code does provide a way to interrupt the time bar by way of serving a demand letter via a court bailiff. However, this is no longer done by courts and therefore the service of a demand letter is carried out personally by the disputing parties. Unfortunately, no definitive statement yet exists on whether the personal service of a demand letter will definitely interrupt the time bar, as Article 1979 of the Indonesian Civil Code remains unamended.

IV. AUTHORIZED DISPUTE SETTLEMENT FORUM

Indonesian law recognizes the principles of freedom of contract and *pacta sunt servanda.* As a consequence, if both parties have chosen in the contract of carriage an authorized dispute settlement forum to resolve any dispute arising from or in connection with the contract of carriage, this choice of forum shall prevail. For example, if both parties have mutually agreed that any dispute will be brought to and resolved through arbitration, the arbitration agreement will prevail, and an Indonesian Court must honor it. Therefore, if any party submits to the Court a claim that is subject to an arbitration agreement, the Court will reject the claim and declare that it is not authorized to hear and examine it.

In practice, the writer often finds that contracts of carriage between Indonesian and foreign parties identify an international arbitration institution as the authorized dispute settlement forum for related disputes, e.g., Singapore International Arbitration Centre, or London Maritime Arbitrators Association, etc. However, compared with purely domestic shipping, the majority of dispute settlement clauses choose an Indonesian court rather than arbitration.

As, Indonesia may not be viewed as a preferable place to settle a maritime dispute due to the issues referred to above, arbitration may offer a better alternative

maritime dispute resolution, as it is well known for its ability to accommodate parties' needs in settling a dispute in a swift and practicable manner.

As arbitration is a creature of consent, some of the issues currently faced in an Indonesian commercial maritime dispute can be minimized by consent of the parties to a dispute. For example, the choice of foreign law, e.g., English law, as the governing law will definitely be adhered to by the arbitrators as the governing law of the dispute. Furthermore, the parties may choose experts who are familiar with English law or who understand the shipping industry in detail, to ensure precision in the framing of decisions.

V. CONCLUSION

In conclusion, Indonesian shipping and maritime laws and regulations still need to be improved to keep up with current trends in international shipping and maritime practice. Some of the issues elaborated above originate from the same issue: an inability of the Indonesian legal system to keep up and even adopt international, well-received legal concepts, for example, the limitation on liability, and maritime liens.

At the same time, the Indonesian legal system will need a complete overhaul to comprehensively accommodate the interests of international shipping and maritime players. The Arbitration Law will need to be amended accordingly so that it can accommodate martime dispute practicalities, e.g., the enforcement of a provisional award to arrest a vessel. Additionally, the Arbitration Law will need to ensure the enforceability of an arbitral award by establishing a clearer timeframe for reaching a decision on enforcement of awards, and also to ensure that the award itself can be enforced as quickly as possible. In this way, Indonesian law could become much more relevant and supportive of the development of shipping and maritime industry, both domestically and internationally.

In the meantime, shipping industry stakeholders may wish to choose arbitration as a better alternative avenue for an effective judicial process. Arbitration can offer a more economic, swift and professional dispute settlement rather than the courts. With the support of improved Indonesian shipping and maritime laws and regulations, Indonesian arbitration (e.g. BANI), will hopefully become the dispute mediator of choice for international shipping and maritime players in the near future.

Past Events

1. IPBA – THAC Arbitration Day

Time : 5-6 November 2018
Venue : Eastin Grand Hotel Sathorn, BTS Surasak Station, Bangkok, Thailand
Hosted by : Thailand Arbitration Centre (THAC)

Mr Husseyn Umar, Chairman of BANI, participated as the Moderator in the 1st session of "Emerging Arbitration Centres within ASEAN, - How can they attract and keep more of their domestic cases?""
http://thac.or.th/events/ipba-thac/

2. Indonesia & SE Asia: 6th Annual International Arbitration & Regulatory Summit

Time : 6 December 2018, 9.10 am – 4.30pm
Venue : Mandarin Oriental, Jakarta
Hosted by : Wolters Kluwer & Legal Plus

In this event, Mr Husseyn Umar, Chairman of BANI, was honored to brief the summit by an Opening Address.
legalpluseventsasia@legalplus-asia.com

3. CIArb International Arbitration Conference '18
Evolving Asia, New Frontiers in Dispute Resolution

Time : 6 & 7 December 2018
Venue : Shangri-La Rasa Sayang, Penang, Malaysia
Hosted by : International Group of Arbitrators (formerly, Chartered Institue of Arbitrator's , Malaysia Branch)

The conference is unique and exclusive event exploring a plethora of current and live issues from across the regions and emerging trends. It dealt with the relevance and emerging importance of Asia in the arbitration industry.
BANI Advisor, Prof Colin Ong QC, participated in the session of Investment Arbitrations in Asia – the impact of the Trans-Pacific Partnership Agreement on Dispute Resolution in Asia.
http://ciarb.org.my/upload/2018/ciarb-international-arbitration-2018-v3.pdf

DELAYS IN SHIPBUILDING CONTRACTS - IS PREVENTION PRINCIPLE AN ESCAPE ?*)

Ernest Yang*)

Ernest Yang is a partner based in Hong Kong. Ernest's main area of practice is in commercial litigation and arbitration, with a particular focus on shipping and international trade. He writes and speaks regularly in Hong Kong and the PRC. He is the author of ***Sale of Goods*** and has co-authored texts *on* ***International Arbitration***, ***Evidence*** and ***Performance of Contract, Waiver and Estoppel*** published in China. Ernest has contributed to leading English texts including ***Arbitration in Hong Kong: A Practical Guide*** and has written for publications such as the ***Journal of Business Law*** and ***Hong Kong Lawyer***.

Since 2011, Ernest has started to accept appointments as arbitrator and was appointed as arbitrators in various jurisdictions (including as a sole arbitrator) on many occasions.

Ernest was named by Chambers Asia Pacific from 2011 to 2018 as a leading individual in the area of Dispute Resolution: Arbitration in China. He has also been recognised in China Business Law Journal 2016 and 2017 as The A-List Top 100 Lawyers for China practice.

Ernest was appointed a member of the Chinese People's Political Consultative Conference (CPPCC) in Shanghai in 2013, with a mandate to help Shanghai develop into an international arbitration center.

I. INTRODUCTION

The worldwide shipbuilding industry has experienced some dramatic changes over the last decade. The shifting of the economic power of shipbuilding from Europe to Asia continued and yet English law continues to represent the most commonly chosen law for large-scale export newbuilding contracts. Whilst the legal principles applicable to shipbuilding contracts are (in general terms) no different from those applicable to contracts generally, particular features of the shipbuilding business require extra care when applying land based contract principles. The last decade has seen a number of English judicial decisions of importance to shipbuilding industry particularly in relation to complex, commercially significant disputes relating to allegations of delay. There are two cases of particular interest to this paper where the English courts considered the application of the prevention principle in shipbuilding context. In both cases the shipyards tried to rely on the prevention principle to discharge their duty to pay liquidated damages and prevent the buyer from cancelling the shipbuilding contracts. It is apparent from the cases that the prevention principle is not an easy escape for the delayed shipyards.

II. PREVENTION PRINCIPLE IN CONSTRUCTION CONTRACTS

The prevention principle first arose in construction cases, and was formulated by Jackson J in *Multiplex Construction (UK) Limited v Honeywell Control Systems Limited* [1] in the following terms:

"(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.

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* This paper is an expansion on the presentation given by the writer at the BANI-IArbI Seminar on 29 November 2018

1 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] BLR 195

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor."

Hence, the argument goes, if the buyer has prevented the yard from tendering the vessel in time, the buyer cannot rely on that lateness to cancel; and the contractual deadline is replaced with an obligation to complete within a reasonable time. What is a "reasonable time" is a question of fact determined in light of all relevant circumstances[2].

In construction contracts, it is well established that the principle does not apply at all if there is a contractual machinery to permit the contractor an extension of time[3]. The reason is that the contractor does not need the prevention principle because his position is protected by the agreement. In this part, we will consider how this common principle is applied in the shipbuilding context by a closer study of two cases. The possible role of this principle in shipbuilding context was first considered in *Adyard Abu Dhabi v SD Marine Services*[4] in 2011.

III. THE ADYARD

Facts

In this case, Adyard contracted to build two vessels for SDMS. The shipbuilding contracts gave buyer a right to rescind in the event that the contractual delivery date, as extended by any permissible delay, was missed. In the event that the sea trials date was missed by seven days on one vessel and one day on the other vessel, the buyer exercised its right of rescission of both contracts. Subsequently, the builder commenced proceedings against the buyer. The builder did not dispute that the vessels were incomplete by the original sea trials date, but argued, *inter alia,* that the purchaser was not entitled to cancel on the ground that its acts had prevented their completion.

The contracts provided that each vessel should be built for registration under UK flag and included a detailed mechanism under which changes in the regulatory regime relevant to such flag would be addressed. In essence, if such change occurred during the construction period, the buyer could either (i) agree to "reasonable adjustment" required by the shipbuilder to the contract price, completion date and other terms of contract, in which case the relevant modifications would be implemented, or (ii) instruct the builder not to effect the modification. However, the buyer disagreed with the modification requested and did nothing else.

The builder argued that the buyer's failure to decide promptly whether or not to implement the modifications delayed the completion of the vessels and brought the "prevention principle" into play. On this basis, the builder contended that the purchaser's cancellation were premature and unlawful.[5]

The buyer on the other hand argued that the contract did in fact contain provisions entitling the builder to an extension of time and that the prevention principle could not apply. The buyer also emphasized that article VIII of the contract requested the builder to furnish notice for the delay, hence the builder was barred from claiming for extension due to the failure in giving notice.

Decision

Hamblen J found for the buyers and upheld their cancellation. He applied *Multiplex v Honeywell* case and held that the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Where such a mechanism exists, if the relevant act of prevention falls within the scope of the extension of time clause, the contract

[2] Shawton Engineering v DGP International [2005] EWCA Civ 1359.

[3] Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] BLR 195, [49]

[4] *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm)

[5] Ibid. [244-245]

completion dates are extended as appropriate and the builder must complete the work by the new date or pay liquidated damages[6]. He further held that any claim for extension for time under Clause VIII would fail due to lack of notice as prescribed in this Clause. In any event, even if no such notice is required, any extension of time will depend on proof actual delay[7]. The judge found that as a matter of fact the project was already in critical delay well before the design changes occurred and that Adyard was not entitled to additional time simply because the events did not actually cause delay. He said that concurrent delay is "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"[8].

In reach his decision, the judge was clearly worried that the wholesale importation of "prevention principle" into English shipbuilding contract law might upset a long established commercial balance between ship owners and shipbuilders – he referred in particular to concerns expressed by Colman J. in *Balfour Beatty Building ltd v Chestermount Properties ltd*[9] that the operation of the principle might mean that the existence of a "trivial variation" could cause the employer (or buyer) to forfeit a significant entitlement to liquidated damages for a long period of culpable delay.

Implications

It can be said that this case set out the tone that the application of the "prevention principle" to most shipbuilding cases is likely to be limited, unless for example the buyer was required to provide a significant element of the design or buyer changed instruction on a large scale. Even then, the principle cannot be invoked successfully if the contract itself includes express provisions dealing with the consequences of the relevant action or inaction as it is usually the case in form of shipbuilding contract.

This case is also significant in confirming in a shipbuilding context the determination of the builder's entitlement to extension of time. Given that the project in this case was in "irretrievable critical delay" long before any of the buyer's alleged delaying conduct had occurred, the shipbuilder was unable to reply on the prevention principle. Therefore, the builders can only seek protection from the prevention principle only if without such prevention by the buyer, in light of the builder's own delay, it is still possible to complete the project by the agreed deadline.

IV. GOLDEN EXQUISITE

The *Adyard* approach was followed in a more recent case, *Zhoushan Jinhaiwan Shipyard Co v. Golden Exquisite and others*[10], an appeal from an arbitration award in the buyers' favour. This decision analyzed in more detail the issues that are likely to arise under SAJ-type contracts.

Facts

The Chinese company Zhoushan Jinhaiwan Shipyard Co. Ltd. as builder entered into four separate shipbuilding contracts with four special purpose companies, together called the Golden Ocean Group, to build four vessels. In each case, the buyer purported to exercise the contractual right to cancel the shipbuilding contract for delay in delivery of the vessel, whilst the yard contended that the cancellations were wrongful on the ground that a relevant part of the delay that caused by the buyer's own breach.

Pursuant to Articles III.1(c) and VIII.3 of the shipbuilding contract, there were three types of delay:

i. Excluded Delays: delays excluded from consideration when determining whether the buyer was entitled to reduce the contract price or cancel the contract but may allow the yard an extension to the delivery date. Broadly speaking, delays

6 Ibid. [243]

7 Ibid. [299]

8 Ibid [277]

9 *Balfour Beatty v Chestermount Properties* (1993) 62 BLR 1, 27

10 *Zhoushan Jinhaiwan Shipyard Co Ltd v Colden Exquisite Inc and others* [2014] EWHC 4050 (Comm)

under this type are delays which are caused by the buyer.

ii. Permissible Delays: delays outside the control of the yard which are caused by force majeure events that allowed for an extension of time for delivery of the vessel. However, if the delay was for 225 days after the contractual delivery date, the buyer could cancel the contracts and recover the instalments (without interest). In order for this delay to count, the yard had to give notice to the buyer of the start date and the end date, and also give notice of the delay cause by it.

iii. Non-permissible Delays: delays that allow the yard no extension of time for delivery. If the delay was for 210 days after the contractual delivery date, the buyer could cancel the con-tracts and recover the instalments (with interest); and

Separately, the contract also provide a 270-day delay to the contractual delivery date resulting from a combination of permissible and non-permissible delays which also allowed the buyer to cancel.

The court found that in each case the cancellation of the contract followed a similar pattern:

1. The delivery of the vessel was delayed beyond the delivery date as agreed in the contract;
2. The buyer gave notice of cancellation of the contract on a date which was more than 270 days after the delivery date;
3. Before such notice of cancellation was given, the yard had not given notice to the buyer of any delay which the yard claimed had been caused by a breach of contract by the buyer (or any other cause for which the Yard was not responsible);
4. After notice of cancellation had been given, however, the yard alleged that breaches by the buyer had resulted in delays in the construction of each vessel totalling not less than 90 days. In each case, these were alleged breaches of Article IV, which made provision for inspection of the vessel by a supervisor appointed by the buyer throughout the period of construction. The yard alleged that the buyer's supervisor worked very short hours, imposed unreasonable requirements, and delayed unreasonably in returning procedures or drawings of the vessel.

The yard said that, on a proper interpretation of the contracts, delays caused by these alleged breaches of contract by the buyer could not be relied on in calculating any of the periods of delay which entitled the buyer to cancel the contract. When such delays were excluded, it followed that in each case the cancellation was wrongful and the buyer's actions amounted to a repudiatory breach of the contract. The disputes were referred to arbitration in London. There were four arbitrations but only two hearings.

The tribunal found that the builder was precluded from claiming any relief for failing to give notice to the buyer of delays caused by their purported default and, as the delay was not a 'permissible' delay under Article VIII. The yard then appealed the award.

Decision:

Mr Justice Leggatt, hearing the appeal in the Commercial Court in London dismissed the yard's appeal.

The Judge found that there was a tripartite classification of delays related to the delivery of the vessels where permissible and excluded delays could result in an extension of the time for delivery of the vessels without any reduction in the contract price, whereas non-permissible delays did not give rise to any extension of the time for delivery and, if they caused the delivery to be delayed by more than 30 days beyond the delivery date, they resulted first in a reduction in the price and then, after 210 days, in a right on the part of the buyer to cancel the contract and recover the instalments of the price paid with interest. Permissible delays resulted in an extension of the delivery date but nevertheless, if they accumulated beyond a certain point (either on their own or when

added to non-permissible delays), triggered a right to cancel the contract, though no interest was payable on the instalments of the contract price which became repayable on such a cancellation. Excluded delays were not counted as delays for the purpose of any right of cancellation.

The yard had argued that there was a fourth and separate category of "buyer's breach delays". This was rejected by the Judge for a number of reasons.

Firstly, Article IV on which the yard relied, did not contain any provision for an extension of time in the circumstances relied on by the yard.

Secondly, the Judge considered that it was intended that the abovementioned three categories of delay was a complete code that would "cover the whole field".

Thirdly, the delays in delivery of the vessels allegedly caused by the buyer's breaches of Article IV were not permissible delays. It had been argued on behalf of the yard that the long list of causes set out in Article VIII.1 conspicuously did not include breach of contract by the buyer but instead was made up solely of "supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility"[11]. In view of this and the fact that buyer's breaches were dealt with elsewhere in the contract, there was, in the Judge's view, no need to read Article VIII.1 as encompassing buyer's breach delays. Further, the buyer was entitled to cancel the contracts in circumstances where the delay had in each case continued for more than 210 days. Even if the delays could be characterised as permissible delays, this would not enable the Yard to avoid the conclusion that the buyer was entitled to cancel the contracts, since the delay in each case exceeded the length of time which gave rise to a right of cancellation under Article VIII.3.

Finally, the yard would not be entitled to rely on the delays alleged as it had failed to provide the relevant notices as required under the shipbuilding contracts.

Implications:

The case provides useful guidance to shipyards and buyers that cancellation provision will be applied clearly and strictly. It shows that the court was not prepared to look beyond the strict terms of the contract. Shipyards should be well advised to document delays, variation orders and the like in accordance with the contractual framework if they wish to reply on their contractual terms. When buyers grant yard extra time in relation to delivery, it is important they should not delete but only amend the provision which allows the yard extra time if buyers' actions cause delay. This is because it could potentially open up a strong argument for the yard that the prevention principle will come into play.

V. CONCLUSION

The two cases send clear message that though English courts have opened the door for the application of prevention principle, there is an apparent tendency toward restricted application of it in the shipbuilding context. Thus, the prevention principle is by no means an easy escape for shipyards. When establishing a delay claim it is crucial that parties have the records available to demonstrate that a delay has occurred and the documentation to show which party is responsible for that delay. It is imperative that parties to a shipbuilding contract prioritise the creation and logical storage of contemporaneous records that can establish the existence and cause of delays. Bad record keeping may directly affect how robustly a party is able to make or defend a delay claim.

[11] *The "Kriti Rex"* [1996] 2 Lloyd's Rep 171, 196.

News & Events

Past Events

1. Media Visit - TEMPO.CO

Time : 8 November 2018
Venue : Gedung TEMPO, Jl. Palmerah Barat 8, Jakarta Selatan


2. Media Visit - Jawa Pos TV

Time : 12 November 2018
Venue : Gedung Graha Pena, Fl.2, Jl. Kebayoran Lama no.12, Jakarta Selatan

3. Media Visit - Forbes Indonesia.

Time : 14 November 2018

Venue : Mayapada Tower Fl.8, Jl. Jend. Sudirman, Jakarta Selatan.

4. Media Visit - KOMPAS.COM

Time : 21 November 2018

Venue : Kompas Tower, Jl. Palmerah Selatan 22-26, Jakarta Selatan

5. Media Visit - Kumparan.com.

Time : 23 November 2018

Venue : Kantor Kumparan.Com. Jl. Jati Murni no.1A, Jati Padang, Pasar Minggu, Jakarta Selatan

6. Press Conference on 41 years BANI Anniversary

Time : 28 November 2018

Venue : BANI Arbitration Center, Wahana Graha Fl.2, Jl. Mampang Prapatan no.2, Jakarta Selatan

7. Regional Arbitral Institutes Forum Conference 2018

Time : 28 November 2018
Venue : Hotel Shangri-La, Jakarta, Indonesia
Host : Indonesian Arbitrators Institute (IArbI)

8. Joint Seminar of BANI and IArbI, Regional Arbitral Institutes Forum (RAIF) Enhancing Regional Arbitration Cooperation: Emerging and Current Issues.

Time : 29 November 2018
Venue : Hotel Shangri-La, Jakarta, Indonesia
Joint Host : BANI Arbitration Center and Indonesian Arbitrators Institute (IArbI)

9. MOU signing, BANI Arbitration Center and Arbitration Association of Brunei Darussalam (AABD)

Time : 29 November 2018
Venue : Hotel Shangri-La, Jakarta, Indonesia

10. GALA DINNER, BANI Arbitration Center 41 years anniversary

Time : 30 November 2018
Venue : Hotel Shangri-La, Jakarta, Indonesia

11. Media Visit - Kedaulatan Rakyat News Paper

Time : 17 December 2018
Venue : Kedulatan Rakyat, Jl. P.Mangkubumi, Yogyakarta

12. Meeting H.E. Sri Sultan Hamengkubuwono X (Governor of Yogyakarta)

Time : 17 December 2018
Venue : Governor Office, Kepatihan, Yogyakarta

13. MOU signing, BANI Arbitration Center and Gajahmada University, Yogyakarta

Time : 18 December 2018
Venue : University Club, Bulaksumur, Gajah Mada University, Yogyakarta

14. Training & Worshop Asian Law Students' Association National, Chapter Indonesia

Time : 22 December 2018
Venue : BANI Arbitration Center, Wahana Graha Fl.2, Jl. Mampang Prapatan no.2, Jakarta Selatan