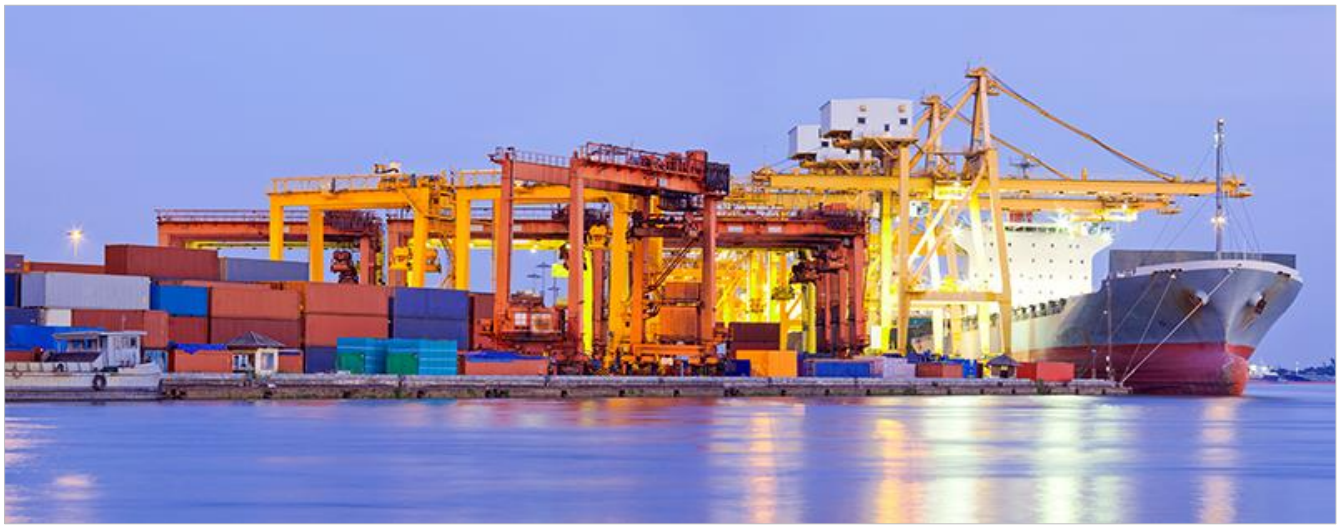
ONC The Voyager August 2017



Cover Story

Applicability of the Crossing Rule and the Narrow Channel Rule in Vessel Collision Disputes

Introduction

In the recent case of *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2017] EWHC 453 (Admlty), the Admiralty Court of the United Kingdom considered the applicability of both Rule 15 (the "**Crossing Rule**") and Rule 9 (the "**Narrow Channel Rule**") of the International Regulations for Preventing Collisions at Sea 1972 (the Collision Regulations) and had decided that the Crossing Rule would not apply in situations where one vessel was navigating within a channel and another vessel was approaching the entrance to that channel planning with a view to embarking a pilot before entering it.

The Facts

On 11 February 2015, a collision occurred between two vessels, "Alexandra 1" and "Ever Smart", outside the dredged channel by which vessels enter and exit the port of Jebel Ali in the United Arab Emirates. The collision took place when "Ever Smart" was exiting the channel after disembarking her pilot and when "Alexandra 1" was about to enter the channel intending to embark the same pilot. After "Ever Smart" had successfully disembarked the pilot, her master ordered her to increase its speed to full sea speed. Eventually, it collided with "Alexandra 1" when its port bow struck the starboard bow of "Alexandra 1" at an angle of around 40 degrees. At the time of collision, "Ever Smart" had a speed over the ground of 12.4 knots.

The damage suffered by "Alexandra 1" was around US$32 million and the damage suffered by "Ever Smart" amounted to some US$4 million.

The Dispute

There was no dispute that the dredged channel in question was "a narrow channel" for the purposes of the Narrow Channel Rule. The major dispute between the parties was whether the Crossing Rule or the Narrow Channel Rule shall apply on the facts of the case.

According to the Crossing Rule, "*when two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.*"

On the other hand, the Narrow Channel Rule provides that "*a vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable.*"

The position of "Ever Smart" was that given the two vessels were crossing at the time of the collision, the Crossing Rule applied and hence, "Alexandra 1" was under a duty to keep out of the way of "Ever Smart" as "Ever Smart" was on her starboard bow.

On the contrary, "Alexandra 1" argued that on the basis of various case laws, the Crossing Rule has limited application to questions of navigation in and around a narrow channel. In particular, the Crossing Rule would not apply in circumstances where one vessel is in a narrow channel while another is navigating towards the channel in preparation for entering it (as in the present case).

The Decision

Applicability of the Crossing Rule

On the facts of the case, Justice Teare accepted "Alexandra 1"'s arguments and held that the Crossing Rule should not apply. In reaching such conclusion, Justice Teare took into account a number of relevant cases which considered the two rules, many of which are in support of the arguments raised by "Alexandra 1".

In particular, Justice Teare relied most heavily on a decision by the Hong Kong Court of Final Appeal ("**CFA**") in *Kulemesin v HKSAR* [2013] 16 HKCFA 195. The facts in that case were similar to the present case. The key difference is that the vessel in *Kulemesin* was not planning to embark a pilot before entering the channel, whereas in the present case, Alexandra 1 was planning to do so. In *Kulemesin*, the CFA held that the Crossing Rule would not apply when a vessel is approaching a narrow channel on a crossing course involving risk of collision with another vessel navigating in that channel. Justice Teare agreed with such ruling in *Kulemesin* and hence, he held that "Alexandra 1" was only bound by the Narrow Channel Rule which required her to keep to the starboard side of the dredged channel when entering it at the time of the collision. "Alexandra 1" was not under a duty to keep out of her way under the Crossing Rule as it did not apply.

Having reached such conclusion, the Court went on to deal with some other alternative submissions by "Alexandra 1" in arguing that the Narrow Channel Rule should apply instead of the Crossing Rule. In this regard, the Court accepted some of "Alexandra 1"'s arguments and held that "Alexandra 1" was not on "a sufficiently defined course" to trigger the duty under the Crossing Rule. That was because when "Alexandra 1" was picking up the pilot at the time of the collision, the course taken by her varied by nearly 30°, and it could not therefore be said that she had been on a sufficiently defined course. The Court then went on to assess the conduct of each vessel and to apportion liability.

Apportionment of Liability

On the question of apportionment of liability, the Court found that both parties were at fault. However, it was of the view that “Ever Smart” was more culpable than “Alexandra 1”.

The Court found that “Ever Smart” was in breach of the Narrow Channel Rule and had failed to keep a good lookout. As a result of her poor lookout, she proceeded at an unsafe speed and failed to take action to avoid the collision. The Judge described the faults on the part of “Ever Smart” as “very serious”. On the other hand, the Court also found “Alexandra 1” to have failed to keep an adequate lookout. This is because her Master had misunderstood VHF radio conversations between another vessel and the Port Control which had eventually hindered the vessel’s assessment of the situation.

Taking into account all evidence available, the Court concluded that “Ever Smart” was to bear 80% of the liability for the collision, whilst “Alexandra 1” was to bear the remaining 20%.

Conclusion

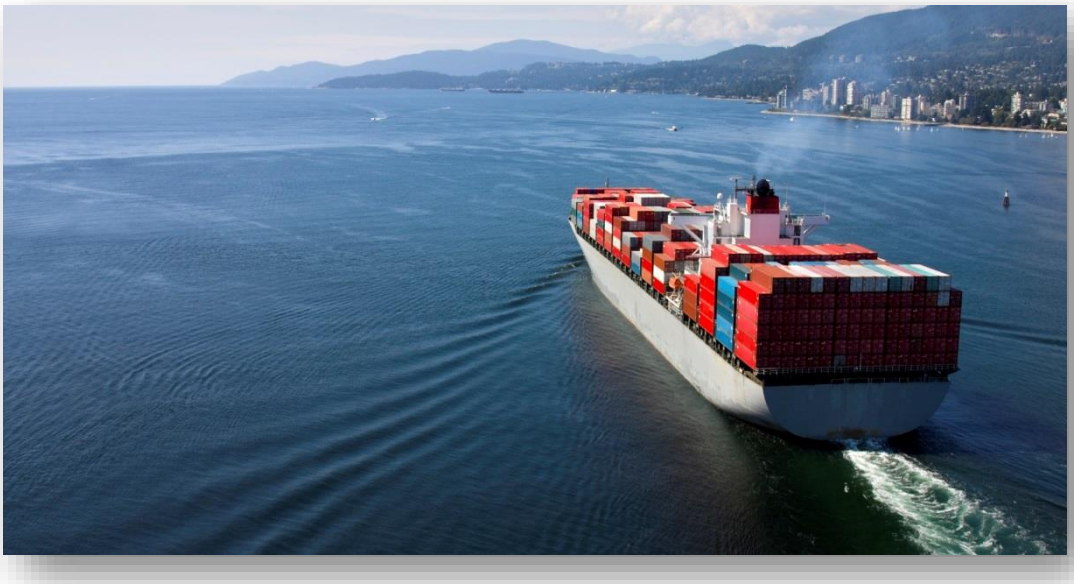
This decision provides clear guidance on how the Court looks at the inter-relation between the Narrow Channel Rule and the Crossing Rule under the Collision Regulations. It is now clear that in situation where one vessel is transiting a narrow channel and another vessel is waiting at the entrance of that channel to enter it, only the Narrow Channel Rule would apply. In other words, whilst two vessels may be crossing each other in or near a narrow channel, the Crossing Rule might not be applicable. This judgment also serves as a useful reminder to ship owners that in order to avoid collisions of similar kind, they must keep a good lookout.

Two-year postponement of Ballast Water Management Convention for existing vessels

The Ballast Water Management Convention ("**BWM Convention**") will come into force on 8 September 2017. However, on 7 July 2017, the International Maritime Organization's ("**IMO**") Marine Environment Protection Committee ("**MEPC**") has resolved at its 71st meeting to allow vessels already built to only install a ballast water management system ("**BWM system**") by their first International Oil Pollution Prevention ("**IOPP**") renewal survey after 8 September 2019.

Depending on the date of their previous IOPP renewal survey, existing vessels will have up to September 2024 to install a BWM system to comply with the BWM Convention, as IOPP renewal survey is conducted every five years. However, for vessels constructed on or after 8 September 2017, the postponement does not apply, and they are required to have a BWM system installed when delivered.

It was largely expected that the MEPC would postpone the implementation of the BWM Convention, as calls for the same have been overwhelming. In addition, Japan, one of the early adopters of the BWM regime with domestic legislation already in place, no longer insisted on the original timeline regarding existing vessels. Japan however warns that the postponement will damage IMO's credibility and negatively affect early adopters of the BWM regime. In fact, the postponement may render it necessary for Japan to amend its existing domestic legislation of the BWM regime.



Cosco Shipping replies to Shanghai Stock Exchange's inquiries on Orient Overseas takeover

COSCO Shipping Holdings (CSH), the containership and port unit of China Cosco Shipping Group which is currently listed in Shanghai and Hong Kong, has answered the inquiries of the Shanghai Stock Exchange regarding its offer to acquire the Hong Kong-listed Orient Overseas International Ltd, an offer which amounts to US$6.3 billion. Inquiries include antitrust risks and maintenance of listing status.

The trading of CSH's shares had been suspended in Shanghai since 17 May this year following the announcement of the takeover planning, and only resumed trading on 26 July. The takeover offer was made jointly with Shanghai International Port Group on 9 July to purchase up to 100% shares in Orient Overseas, for HK$78.67 per share. If 100% shares in Orient Overseas are purchased, the deal will amount to HK$49.2 billion or US$6.3 billion.

One uncertainty of the offer, as recognised by CSH, is antitrust risk. There are precedent takeovers in the market of which antitrust issues have been cleared with the EU and US regulatory authorities. However, details of the cases and the authorities' review have not been made public. CSH said it is at the current stage positive to clearance on antitrust with the EU and US authorities.

The US Committee on Foreign Investment will also examine the takeover, but its approval has not been made a prerequisite of making offer to the shareholders of Orient Overseas.

Lawyers involved in the takeover stated that the consent of Orient Overseas's overseas creditors is not needed for the deal, and the takeover will not amount to a debt default.

Other inquiries CSH has addressed include the level of synergy benefits expected from the takeover, and ways of maintenance of Orient Overseas's 25% public holding at the Hong Kong Stock Exchange for its listing status.

BW Group placing order with Daehan Shipbuilding for up to eight LR2 tankers

The BW Group has recently confirmed a deal for new Long Range Two (LR2) tankers with Daehan Shipbuilding, a South Korea ship construction company. There have been six firm orders from the BW Group for 115,000 dwt product tankers, and two further optional orders for the same. The schedule of construction is still being determined.

Daehan refused to disclose the contract price. According to Clarksons, the newbuilding price of an 113,000 dwt to 115,000 dwt coated LR2 tankers is around US$45 million. Also, price of LR2 tankers in recent similar deals was around US$41 million. Estimation of price for eight LR2 tankers upon these price ranges would be around US$328 to 360 million.

These orders are another transaction which put the BW Group in spotlight again this year, adding to its earlier deal with DHT Holdings in March, which was a sale of its 11 crude carriers to DHT, and also made it become the largest single shareholder of DHT.

Indian consulate in Dubai lists companies complained by seafares for distress

The consulate general of India in Dubai has published a list titled "Advisory for Seafarers" on its website. Companies listed therein are those against whom complaints have been received by the consulate in recent months. The complaints are about incidents of breach of the Maritime Labour Convention, for instance, non-payment of salaries, poor working environment, and shortage of necessities and proper medical care. According to the list, the companies include Alco Shipping Services, Venus Ship Management and Shat Al Arab Marine Services.

The consulate said that they have been assisting seafarers who made the complaints. These seafarers were mostly recruited by unregistered and unauthorised agents in India. According to the consulate, cases have been and will continue to be referred to the United Arab Emirates authorities for further actions. Seafarers are also encouraged to conduct background check of their potential employers, and to accept job offers only from authorised agents.

Aline Tramp SA v Jordan International Insurance Company

[2016] EWHC 1317 (Comm)

* *

The Claimants in this case applied for anti-suit injunction against the Defendants, who brought legal proceedings against the Claimants in Jordan. The Claimants are the owners of a vessel (the "**Owners**") and their insurers (the "**Owners' Insurers**"). The Defendants are the insurers of cargo interests. The Jordanian proceedings were brought upon the alleged damage of cargoes on the Owners' vessel.

The Owners relied on the Bills of Lading ("**B/Ls**") of the relevant cargoes upon which the Jordanian proceedings were brought. The B/Ls contained jurisdiction clause and required arbitration in London to resolve disputes. The English High Court followed the ruling in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and granted anti-suit injunction in favour of the Owners, finding that any right of the Defendants to sue the Owner were derived from the B/Ls through subrogation, and the bringing of the Jordanian proceedings was a breach of the jurisdiction clause of the B/Ls. The Court also held that the jurisdiction granted to the Jordanian Courts by the Hamburg Rules does not constitute a good reason not to grant the anti-suit injunction in the instant case.

However, the Court dismissed the application of the Owners' Insurers, who found their case on the letter of undertaking ("**LOU**") signed by them in favour of the Defendants. Although the LOU contained a jurisdiction clause, the Court found that the clause was only a unilateral submission of jurisdiction by the Owners' Insurers rather than an exclusive jurisdiction agreement between the parties.

Mena Energy DMCC v Hascol Petroleum Ltd.

[2017] EWHC 262 (Comm)

* *

Two transactions were involved in the claims in the case. The first transaction (the "**1st Transaction**") was about shipments of fuel oil to Pakistan by the claimant to be delivered to the Defendant. However, the fuel oil was refused import on 15 November 2014 at port by the Pakistani authority for the reason of containing excessive centistokes. The parties reached an agreement on phone on 21 November 2014 for the oil to be further blended and reloaded on the vessel, and the vessel would return to the Pakistani port for importing the fuel oil into Pakistan again. On the second shipment, the vessel containing the further blended oil arrived at the Pakistani port on 30 November 2014.

However, there was a dispute over what was actually agreed on 21 November 2014. The Claimant argued that the parties have agreed that (1) the Claimant would use its best endeavours to ensure the vessel return to the Pakistani port by 26 November 2014 but gave no guarantee that this would be achieved; (2) the price would continue to be calculated according to the existing bills of lading; and (3) the defendant agrees to bear part of the cost of the second shipment. The Defendant's case was that (1) the parties had agreed that the vessel shall returned to the Pakistani port by 26 November 2014 for the existing bills of lading to be applied for calculating the price; and (2) there was no agreement that the Defendant shall bear the cost of the second shipment.

Further, the contract of the 1st Transaction provided for payment by a confirmed letter of credit, to be opened by the Defendant at the latest five working days before the first day of the laycan period, originally 23 to 25 November 2014. Given the refusal of oil import by the Pakistani authority on the first arrival of the vessel, the Claimant only requested opening of letter of credit on 26 November 2014. However, the Defendant refused to do so, and alleged short delivery by the Claimant.

The second transaction (the "**2nd Transaction**") was about shipment of gas oil by the Claimant to the Defendant. The Defendant refused to issue any letter of credit for this transaction. The Claimant argued that a contract for the 2nd Transaction has been concluded and such refusal constitutes a breach. The Defendant's case was that no contract has been concluded, and put emphasis on absence of agreement on time limit regarding such issue.

Upon examination of the evidence, the Court accepted the Claimant's account of facts, and found it according better with the contemporary documents. As such, the Court held that the Defendant, by refusing to open letter of credit as required under the contracts for each of the 1st and 2nd Transactions, has breached both contracts, with damages awarded to the Claimant to be assessed.

Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain

[2017] UKSC 43; [2017] 1 WLR 2581

The UK Supreme Court has clarified the principle of mitigation of loss in assessment of damages under breach of contract in this case which involves charterer's breach. The charterer repudiated a charterparty by informing its intention to redeliver the vessel to the owner two years before the expiry of the charter period. The vessel owner accepted the anticipatory repudiation, and shortly afterward entered into an agreement of sale to sell the vessel even before the vessel was actually redelivered, for the reason that there was no available chartering market.

It turned out that the actual sale price of the vessel was much higher than if it were sold after the expiry of the charter period without the charterer's repudiatory breach.

The issue before the Supreme Court was whether, in assessing damages payable by the charterer, credit should be given to the difference in value between the actual sale price of the vessel and the value of the vessel at the time of the expiry of the charter period. Overruling the decision of the Court of Appeal and affirming the High Court judge's view, the Supreme Court ruled that the charterer should not be entitled to such credit.

The Supreme Court held that as a matter of law, in order for the liable party to enjoy a credit for the benefit received by the claimant, the benefit must be caused by either the breach itself or by a successful act of mitigation of the claimant.

However, the premature termination of the charterparty did not make the sale of the vessel necessary. Therefore, the breach on part of the charterer did not cause the sale in the legal sense. It is the owner's own commercial judgment to sell the vessel and has nothing to do with the current assessment of damages. It was also erroneous to assume that the vessel would be sold had there been no breach. The Supreme Court thus refused to find the sale "an act of successful mitigation".

The Supreme Court found that the sale of the vessel by the owner was neither caused by the breach of the charterer nor caused by a successful act of mitigation, and thus the benefit obtained by the owner from the sale should not be taken into account in assessment of damages.

What Should I Be Aware of When Buying a Second Hand Vessel?

Introduction

In consideration of the substantive cost involved, buying a vessel is often an important decision for the buyer. One would want to ensure that the vessel purchased is not defective or without any problem. This is particularly the concern for buying a second hand vessel, which may have taken numerous voyages and incurred damage; buyers would like to have their position protected under their contract with the vessel sellers. This article gives a brief introduction to certain aspects of a second hand vessel sale and purchase contract to which a buyer should pay attention.

Vessel as personal property

Oral contract valid and binding

Perhaps surprisingly, ships and vessels are personal properties under the Hong Kong law, notwithstanding that they can be gigantic in size. In contrast to land properties of which sale and purchase must be reduced in writing with signature of the parties, personal properties can be sold under oral contracts without any agreement in writing. Thus, a person may become bound to buy a vessel by an exchange of letters, emails or facsimile, or a telephone conference with the seller, if by such exchange or conference they have agreed on the major terms of sale.

To prevent being bound before signing a written sale and purchase agreement, it is advisable that any communication with the seller before signing the written agreement should be expressly made "subject to contract".

Sales of Goods Ordinance applicable

To the advantage of buyers, vessels being personal properties mean that the Sales of Goods Ordinance (Cap.26) (the "**Ordinance**") applies to their sale and purchase. Among others, section 16 of the Ordinance operates to the effect that a vessel would be sold with implied conditions that she is of "merchantable quality" and fit for its purpose. These implied conditions may protect buyers regarding defects and damage of the vessels, as the sellers may be in breach of contract if the vessels sold are with such defects and damage that deprive the vessels of merchantable quality or renders them unfit for their purpose.

However, as to be discussed in the next part, the standard sale and purchase agreement generally used for transaction of vessels may exclude these implied conditions.

BIMCO Saleform 2012

Contracts of sale and purchase of commercial vessels usually adopt the standard form provided by the Baltic and International Maritime Council (BIMCO). The latest version is the Saleform 2012 (the "**Saleform**"), which reflects the market practice. Recognising that parties may adopt different arrangements for a particular sale and purchase, the Saleform provides a number of alternative clauses for parties to decide which one to be adopted, failing which a default position will apply.

Rights of inspection

It should first be noted that there are alternative clauses for buyer's rights of inspection under the Saleform. Clause 4 provides for inspection of the vessel's classification records; the default position is that the buyer should have inspected and accepted these records before signing the agreement (Clause 4(a)); if not, the seller and buyer have to agree on the time and place for such inspection. The buyer should however notice that he should not cause undue delay in the inspection, or he would have to compensate the

losses incurred by the seller because of the delay.

With regard to the inspection of the vessel, the Saleform reflects the industry practice that most sales opt to divers inspection instead of drydocking. Each vessel is designated a class by a classification society based on its physical conditions. Under the Saleform, the default position is a divers inspection at the cost of the buyer, carried out in the presence of a surveyor of the vessel's classification society arranged for by the seller; the surveyor would check by divers inspection whether the vessel is found damaged so as to affect the class of the vessel. Alternatively, the parties may agree with drydock inspection by the vessel's classification society. If upon inspection in either manner the vessels have damage or defects which affect its class, the seller has to bear the cost of both the inspection and of making good such damage or defects.

Implied conditions

As aforementioned, the Ordinance applies to sale and purchase of vessels, and section 16 thereof imposes implied conditions as to merchantable quality and fitness for purpose. However, clause 18 of the Saleform may operate to exclude any implied term or condition, as it provides that "*[a]ny terms implied into this Agreement by any applicable statue or law are hereby excluded to the extent that such exclusion can legally be made*".

Normally, whether an implied condition can be validly excluded will depend on the circumstances of each case, in particular, whether such clause is "fair and reasonable" and the buyer is "dealing as consumer" under the Control of Exemption Clause Ordinance (Cap.71) ("**CECO**").

However, CECO does not necessarily apply to affect the validity of clause 18 of the Saleform. Section 16 of the CECO provides that the limits imposed by it on the extent to which contractual liability may be excluded or restricted do not apply to "exempted supply contract". Supply contract with cross-border or foreign elements may be regarded as such exempted supply contract. In the case of sale and purchase of vessels, if either party has its place of business outside Hong Kong, the sale and purchase agreement was made outside Hong Kong, or the vessels will be delivered outside Hong Kong, then the sale and purchase agreement will be regarded as an exempted supply contract, and the clauses for limitation or exclusion of liability therein will not be subject to CECO.

Title proof

At the closing of the transaction, it is the obligation of the seller to deliver title documents of the vessel to the buyer. They are listed in clause 8 of the Saleform. It is noteworthy that the certificate of registry issued by competent authorities evidencing free of registered encumbrances and mortgages over the vessel can be faxed or e-mailed by the authorities to the closing meeting, with the originals delivered later afterward. This arrangement is to address issues which can arise regarding mortgage deletion: if the original mortgage of the vessel is to be discharged by the seller through the proceeds of the sale, it would not be possible for the seller to deliver a free of encumbrances certificate prior to payment by the buyer. By allowing delivery of such certificate by faxing or emailing, the arrangement enables simultaneous delivery of certificate at the closing.

It should also be noted that in a cross-jurisdictional transaction, the bill of sale to be delivered by the seller should be witnessed by a notary public and legalized by the consulate of the country in which the buyer intends to register the vessel.

Governing law

Under the Saleform, there are alternative clauses for parties to choose the governing law of the sale and purchase agreement. If the parties do not make such a choice, the default position is that the agreement will be governed by English law, and dispute arising thereof shall be referred to arbitration in London conducted in accordance with the London Maritime Arbitrators Association Terms. In other words, if the parties using the Saleform for the sale and purchase of a vessel wish to adopt Hong Kong laws as the governing law, they have to make this specific.

Concluding remarks

The above are only some of the aspects of a sale and purchase of second hand vessel to which the buyer should pay attention. There are other terms in the Saleform and in a sale and purchase contract for vessel in general that may affect the buyer's rights and obligations which will be discussed in our next issue.

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