

Frank Stuart Dethridge Memorial Address

CHARTING OUR OWN COURSES: THE AUSTRALIA, NEW ZEALAND, AND SINGAPORE JOURNEYS IN MARITIME LAW

I. My own voyage begins

1 I am deeply honoured to be invited to deliver this address. When the late Mr Frank Dethridge first conceived the idea of establishing a maritime law association in the early 1970s, I dare say that he would not have dreamt that, more than 40 years on, it would grow to be as successful as it now is. It is a measure of the respect and esteem with which he is held that, since 1977, an annual lecture has been delivered each year in his memory by such luminaries as Sir Anthony Mason, Justice Michael Kirby, Justice Steven Rares, and Lord Cooke of Thorndon, just to name a few. Like Justice Waung in 2008, I approached this task with no small measure of trepidation, conscious that I follow in the wake of the giants who have preceded me.

2 The process of preparing for this speech has been an opportunity for reflection and introspection. In a sense, my career in shipping law can be traced back to 1977, the year the first memorial address was delivered. By then, I had secured a place in law school and was serving as a young midshipman in the Singapore Navy. As part of my training, I served onboard the RSS Endurance which sailed for Darwin in 1977. The grand ol' dame — an LST-542 Class tank landing ship — was then the pride of the Republic of Singapore Navy, having recently been purchased in 1975. In its previous incarnation, it was the USS Holmes County, which first saw service in Okinawa in the closing years of World War II before being

deployed in Korea and, later, in Vietnam. By the time it was sold to Singapore, it was the proud owner of four battle stars (one earned for service in World War II, three in the Korean War) and 11 campaign stars garnered during the Vietnam War. The battle stars, however, ceased after she was acquired by Singapore.

3 As you might imagine, the old lady did not like to be hurried. Her RSN motto was “slowly, but *eventually*” — when you consider that she moved at the stately pace of 8 knots an hour (with currents assisting), you can well understand why. Given that almost 3,500 km lies between Singapore and Darwin, you will appreciate that it was a painfully slow and long voyage. I spent my days practising the ancient craft of seamanship: I got up before the break of dawn to shoot the stars with my sextant (which has since been “decommissioned” and now sits in my chambers as a conversation piece), I chipped away the rust which covered the deck — a daily ritual — and I spent endless hours interpreting Morse code in order to earn my much coveted shore leave. (The passing mark was initially 90% but it had to be reduced to 80% to ensure that at least *some* midshipmen could board the liberty boat!) In between, time was *gainfully* spent staring at the ocean, serenaded by the cries of seagulls and the dull steady throb of the ship’s engines. Somehow, in the midst of all that — lurching between bouts of frenzied activities interspersed with periods of intolerable monotony — I fell in love with the sea. And that love for the sea, combined with my interest in shipping law (which is essentially contract and tort together with private international law) confirmed my future vocation as a shipping lawyer.

4 It was hardly surprising that on leaving law school, there was only one destination for me: M/s Drew & Napier. It was, at that time, the pre-eminent shipping law firm in Singapore. In 1983, when I joined the firm, it was still located at Clifford Centre at the banks of the Singapore River. My pupil master was Mr Joseph Grimberg, the then doyen of the Bar while my supervising partner was Mr G P Selvam, both of whom were subsequently elevated to the Bench. I recall, with some embarrassment, my first day of pupillage. I was asked to join in a discussion. Mr Selvam enquired whether I was familiar with the UCP to which I said that I had some idea of the subject given that I took banking law in law school. I was then invited to comment on the case. I gave a most forgettable response. Mr Selvam then paused and grinned at me and, in his inimitable manner, uttered — “that’s rubbish”. The moral of the story is simply this. Even with the worst start in one’s career, with some self-belief, drive and good fortune, you can still have a decent career in the law and end up as the firm’s managing partner!

5 Through my years in practice, and later, as a Judge, one aspect of shipping practice that has always stood out for me is its dynamism and its international character. Like the sea which gives it life, maritime law never stands still. Perhaps uniquely of all parts of the legal corpus (save, perhaps, for public international law) the ocean of maritime jurisprudence is fed by streams of diverse and multifarious origin, with the decisions of each court drawing from and building on the decisions of courts many thousands of kilometres away. However, just as there is convergence, there will also be divergence. Occasionally, the courts of one country will decide that

a decision which was appropriate for another country in another time might not be suitable for their own.

6 It is in that spirit that I have chosen, as the topic for my address, “Charting Our Own Courses: the Australia, New Zealand, and Singapore Voyages in Maritime Law.” What I hope to do, in the remainder of my speech, is to illustrate the ways in which our three nations, drawing from our common English heritage, have nevertheless proceeded to diverge in ways both great and small from the position in England to forge our own paths and, in so doing, contributed to this great enterprise of maritime law.

II. From colony to autonomy: the search for autochthony

7 The development of admiralty law from the time of the Rhodian law of the 9th century BC to the 12th century Laws of Oleron is a topic which has been well-traversed in academic literature and I do not propose to cover the same material today. For present purposes, my focus will be on the historical development of admiralty jurisdiction in our three nations which can be traced to the High Court of Admiralty in England.

8 The precise origin of the High Court of Admiralty jurisdiction in England is a matter of academic dispute but there is broad consensus that it reaches back at least as far as the reign of Edward III who, after the Battle of Sluys, proclaimed himself the sovereign of the seas and set up a Court of Admiralty to assert his dominion. Soon

after its promising beginnings, however, the Court of Admiralty found itself mired in a series of bitter jurisdictional conflicts. The court's bold assertion of jurisdiction over civil claims brought it into a collision course with the common law courts which did not take kindly to the competition. The common law courts retaliated with the issuance of writs of prohibition in the 16th century, effectively restricting admiralty jurisdiction to prize, droits, restraint and possession suits, bottomry and seamen's wages, and torts committed and contracts entered into on the high seas. There it lay, moribund and neglected, until its revival in the 19th century.

A. *The umbilical cord of English law: the Colonial Courts of Admiralty Act 1890*

9 Of particular interest for us is the year 1890, for that was when the most common recent ancestor of our respective admiralty jurisdiction statutes — the Colonial Courts of Admiralty Act 1890 — was passed. The 1890 Act, which came into force on 1 July 1891, enacted major changes in the administration of maritime law in the colonies. Under the Act, every “Colonial Court of Admiralty” was vested with jurisdiction over

... like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England ...

10 The rather elliptical words of this enactment was the subject of an important decision delivered by the Privy Council in 1927 — *The Yuri Maru*. The issue in that case was whether a Colonial Court of Admiralty (the District Court of British Columbia) had the jurisdiction to order the arrest of a vessel pursuant to a claim

arising out of a charterparty. The problem was this: when the 1890 Act was passed, the admiralty jurisdiction of the High Court of England did not extend to claims arising out of charterparties. Jurisdiction over such claims was only conferred much later, when the Administration of Justice Act 1920 was passed. In the lower court, the two warrants of arrest had been set aside for want of jurisdiction. Before the Privy Council, it was argued that the jurisdiction of the Colonial Courts of Admiralty mirrored that of the High Court of England in all respects and for all time. Thus, any later enactments expanding the remit of the admiralty jurisdiction on the English High Court would also apply to the Colonial Courts of Admiralty.

11 Unsurprisingly, the Privy Council disagreed. It held that the purport of the 1890 Act was to limit the jurisdictional competence of the Colonial Courts of Admiralty to that which was exercised by the High Court of England *in 1890*, when the Act was passed. Thus, subsequent statutes passed in England amending the admiralty jurisdiction of the English High Court would not apply to Colonial Courts of Admiralty unless there were express words to that effect.

12 This effectively meant that admiralty practice in the Colonial courts was frozen at 1890. This proved to be a tremendous impediment to the development of a robust admiralty practice because litigants were deprived of the benefit of the many vital improvements to admiralty jurisdiction and procedure passed after 1890. Many claims which presently form the bread and butter of admiralty practice today (eg, claims arising out of the use and hire of a ship or for torts committed in connection

with the carriage of goods) would not have fallen within the ambit of the jurisdiction of the Colonial Courts of Admiralty.

13 With that being said, however, it seems to me that the decision of the Privy Council was in fact the lesser of two evils. Lord Merrivale, delivering the joint opinion of the Board, made two important points. The first is the extension of admiralty jurisdiction was by no means an uncontroversial decision. Even within England, considerable divergence of opinion existed as to the proper limits of its exercise. Thus, s 3 of the 1890 Act empowered the colonial legislatures with the competence to set limits on the jurisdiction of their courts of admiralty. However, it must be pointed out that this power was subject to two important provisos: (a) the colonial legislatures were only empowered to cut back on the jurisdiction of their courts but could not confer jurisdiction beyond that which was granted by the 1890 Act; (b) that any reservation passed under s 3 was subject to approval by Royal Assent. The second point is that the appellant's argument would have the effect of making the colonies the recipients of legislation that they had neither input in drafting nor any say in its passage. It would mean that the Imperial Parliament could, without the self-governing states having any say in the matter, enlarge the jurisdiction of the courts in admiralty by decree. As Lord Merrivale put it, the appellant's construction would have

... the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self-governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction in rem, but no power to undo an unwelcome abatement

...

At the end of the day, the choice was an invidious one: it lay between a construction of the statute which provided for sclerosis and ossification and one which exposed

the colonies to the risk of manifestly unsuitable legislation. It was clearly an untenable situation.

14 To me, the decision in *The Yuri Maru* was a watershed moment. It laid bare that the only way forward was for independent legislative intervention by the Parliaments of the respective territories in question. The door was theoretically opened (at least for Australia and New Zealand) with the passage of the Statute of Westminster 1931. Section 2(2) of the Statute of Westminster 1931 provided that no law made by the Parliament of a Dominion would be void or inoperative merely by reason of it being contrary to an English enactment. This meant that the previous restriction placed by s 3 of the 1890 Act, which prevented the enlargement of the admiralty jurisdiction of the Colonial Courts of Admiralty beyond the bounds set by the 1890 Act, would no longer pose an obstacle to legislative reform.

B. Legislative reform

15 Understandably (given that *The Yuri Maru* was a case on appeal from the Exchequer Court of Canada), Canada was the first one to seize the opportunity for law reform. In 1934, it passed the Admiralty Act 1934, which repealed the Colonial Admiralty Act of 1890 insofar as it applied to Canada, and granted their courts the same admiralty jurisdiction which the English High Court had enjoyed since 1925. However, reform in other parts of the Commonwealth was not immediately forthcoming. This, however, changed when the UK Parliament passed the Administration of Justice Act 1956 (UK). The Administration of Justice Act, which

implemented the 1952 Arrest Convention, provided, for the first time, for “sister-ship arrests”. I will return to the subject of sister-ship arrests shortly but the point to be made for now is that the Administration of Justice Act appears to have provided the impetus for legislative reform in many commonwealth countries, including our own.

(a) In Singapore, the Courts (Admiralty Jurisdiction) Ordinance 1961 was passed in the closing days of the British Empire. In the explanatory statement to the bill, it was specifically stated that its purpose was two-fold: first, it was intended to bring the law of Singapore in line with that in the UK following the passage of the Administration of Justice Act 1956; second, it was intended to enlarge the admiralty jurisdiction of the High Court which had hitherto been restricted under the 1890 Act.

(b) In New Zealand, the Admiralty Act 1973 was passed on 23 November 1973 pursuant to the Special Law Reform Committee’s Report on Admiralty Jurisdiction. Section 14(1) of the Act provided for the repeal of the Colonial Courts of Admiralty Act of 1890 and expanded the admiralty jurisdiction of its courts along the lines set out in the Administration of Justice Act 1956.

(c) In Australia, the Admiralty Act 1988 (Cth) came into force on 1 January 1989. It was based largely on recommendations set out in the magisterial work of the Australian Law Reform Commission on Civil Admiralty Jurisdiction and it codified and clarified Australian admiralty jurisdiction.

16 Each of these acts provided for the repeal of the Colonial Courts of Admiralty Act of 1890. With that, the umbilical cord of English law was, if not severed, then severely constricted. In a way, this development was long-overdue. The age of empire had long past and, with it, the time when it sufficed merely to look to the English courts and Parliament for guidance on maritime law. Today, differences of geography (the UK is literally half the world away); politics (the increasing influence of European jurisprudence in the UK), and economics stand in the way of automatic reception. It was no longer sufficient to assume that an English transplant could always be successfully grafted onto Singaporean or Antipodean stock without difficulty.

17 While English cases continued to be cited regularly, the presence of a domestic statute stimulated the development of an autochthonous jurisprudence informed by local conditions and policy considerations. This is perhaps best exemplified in the case of Australia where the Law Commission, in making the case for reform, argued that that “Australia’s ‘basic maritime transport policy orientation’ is dictated by its ‘status as a shipper rather than as a maritime nation...[and] as a user rather than supplier of shipping services.” This, it was argued, gave rise to a “strong interest in providing effective local remedies for persons dealing with ships, whether as importers, ship suppliers, crew members, or otherwise. Even in Singapore and New Zealand, whose acts are largely “transplants” of the Administration of Justice Act 1956, the development of the law has acquired a decidedly local flavour. As the scholar Alan Watson opined, “[a] successful legal transplant — like that of a human organ — will grow in its new body and become part of that body just as the rule or

institution would have continued to develop in its parent system.” From that point onwards, the maritime jurisprudence of our three nations have branched out from their English roots and developed in their own unique ways in response to local needs and circumstances.

III. Singapore — the “sister ship” arrest broadened

18 Let me begin with Singapore. At the risk of stating the obvious, maritime law is chiefly about ships. And the problem, as Lord Simon of Glaisdale pointed out in *The Atlantic Star*, is that “ships are elusive”. By their very nature, they are mobile and can easily sail in and out of port, evading the claimant’s attempt to pursue his claims. (Speaking of evasion, in my early years of my practice, I used to enjoy boarding vessels to effect warrants of arrest. On one such occasion, as my harbour launch was approaching the vessel to be arrested, the “MV Seatra Express”, I observed to my horror, the crew painting a new name “MV Sea Leopard” over her existing name! It did not stop the arrest. The crew could not have used a worse replacement name. They overlooked the old adage — “A leopard can’t change its spots”.)

19 For this reason, the core of admiralty practice is the action *in rem*, which is typically accompanied by the arrest of the ship owned by the person who would be liable *in personam* in respect of the claim relating to that ship. The importance of the right of arrest was recognised more than 150 years ago by Dr Lushington when he said that “an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment.” However, there was one

significant limitation to this doctrine. Under the common law, the right of arrest was limited only to the “offending ship” which was directly implicated in the cause of action. There was no right to arrest or even to effect service upon a ship which was not directly connected with the cause of action. The emasculation of the arrest jurisdiction of the admiralty courts was, as explained by Lord Denning MR in *The Banco*, another casualty of the jurisdictional wars of earlier years.

20 What this meant was that it was altogether too easy for shipowners to evade arrest by keeping the offending ship out of port. This loophole provided the impetus for the development of the doctrine of the “sister ship” arrest (or the “surrogate ship” arrest, as it is known in Australia) which was first introduced in the 1952 Arrest Convention before being given effect to in Administration of Justice Act 1956, albeit in a different form. The difference between the two provisions is critical and I will return to it soon. For now, I will focus on s 3(4) of the Administration of Justice Act 1956, which reads:

In the case of any [non-proprietary maritime claim] ... being a claim arising in connection with a ship, where the **person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship**, the Admiralty jurisdiction of the High Court... may... be invoked by an action in rem against —

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or

(b) **any other ship which, at the time when the action is brought, is beneficially owned as aforesaid**

[emphasis added]

21 This provision, which was eventually incorporated into the Singapore and New Zealand Admiralty statutes, is not the most felicitously drafted. On the face of it, there are two categories of ships which may be arrested:

(a) The offending ship, provided the relevant person (*ie*, the person who would be liable *in personam*) was, *when the cause of action arose*, the owner or charterer or in possession or in control of the offending ship and was, *when the action was brought*, her beneficial owner; or

(b) Any other ship which (though not connected at all to the cause of action) was beneficially owned by the relevant person, *at the time when the action was brought*.

22 However, in the 1977 decision of the House of Lords in *The Eschersheim*, Lord Diplock, in an *obiter dictum*, arrived at a different construction of the same provision. He opined that in order for a ship to be liable to arrest, it must either be (a) the offending ship itself; or (b) a “sister ship” of the offending ship, by which he meant that the offending ship *and* the arrested ship had to be owned by the same person. Now, it is important to appreciate that Lord Diplock’s gloss — the addition of a requirement of “common ownership” — severely attenuated the scope of the doctrine of the “sister ship” arrest. It meant, for example, that if the “relevant person” were merely the *charterer* of the offending vessel (instead of its owner) then the “sister ship arrest” doctrine would not apply because in such a situation, there would be no “sister” to speak of. This was the case in *The Maritime Trader* where Sheen J,

despite expressing misgivings about the construction placed by Lord Diplock, felt constrained to follow it. If the narrow construction favoured in *The Eschersheim* were followed, the policy rationale for the introduction of sister ship arrests would be greatly undermined since it would effectively restrict “the sister ship arrest” to owner-operated vessels.

23 It appears that Lord Diplock felt compelled to reach this conclusion because Art 3(2) of the 1952 Arrest Convention, upon which s 3(4) of the Administration of Justice Act 1956 was based, was worded quite differently. It read:

... a claimant may arrest either [A] the particular ship in respect of which the maritime claim arose [ie, the offending ship], or [B] **any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship** ... [emphasis added; interpolations in square brackets]

Under the 1952 Arrest Convention, a ship is only liable to arrest if it is either: (a) the offending ship itself; or (b) if the arrested ship and the offending ship are owned by the same person. This stands in contrast with the position under the Administration of Justice Act, where the right of arrest was extended also to situations where the relevant person is the charterer or in possession and control of the vessel. Notwithstanding the clear difference in the wording of the two provisions, Lord Diplock felt constrained to read down s 3(4) of the Administration of Justice Act in order to interpret it consistently with the 1952 Arrest Convention, which it was enacted to give effect to.

24 One year after *The Eschersheim* was decided, this exact issue arose for determination halfway round the world in Singapore in the case of *The Permina 108*. In that case, the plaintiffs were the owners of a vessel, the “*Ibnu*”, which they let out to the defendants under a time charterparty. Following the non-payment of charter hire, the plaintiffs commenced an *in rem* action against the defendants’ vessel, the “*Permina 108*” and arrested it. The defendants argued that the warrant of arrest should be set aside for two reasons: (a) first, relying on *The Eschersheim*, they argued that the “offending ship” — the *Ibnu* — and the arrested ship — *The Permina 108* — were not “sister ships” as they were not in common ownership; (b) second, they argued that the expression “charterer” must be read to mean “demise charterer” so only vessels owned by demise charterers were liable to arrest.

25 The Singapore Court of Appeal rejected both contentions. As a starting point, the court held that it was unnecessary to look to the words of the 1952 Arrest Convention in interpreting the provisions of its own domestic statute since Singapore was neither a party to the 1952 Arrest Convention nor had it ever, even while a British Colony, been subject to it (it was not one of the colonies to which the United Kingdom had extended the Convention). On that premise, the court held that on a plain reading of the provisions in question, it was clear that if the relevant person were the charterer of the offending vessel at the time when the action of action arose, then other ships beneficially owned by him when the action is commenced would also be liable to arrest. In so doing, it widened the scope of the “sister ship” arrest rule considerably and freed it from the constraints which had been imposed by *the Eschersheim*. This decision was soon followed in the UK (in *The Span Terza*),

Hong Kong (in *The Sextum*), and in New Zealand (in *The Fua Kavenga*), all of which cited *The Permina 108* in arriving at this interpretation.

IV. New Zealand — release of a vessel against the security of a P&I Club letter

26 From Singapore I turn to New Zealand and to a decision whose brevity belies its considerable practical importance. This is the case of *The Pacific Charger*, a decision handed down by the New Zealand Court of Appeal in 1981. In that case, the plaintiff had commenced an action *in rem* against the ship, “Pacific Charger”, for, *inter alia*, damage to the cargo carried on board the vessel. After arrest, the shipowners offered a letter of guarantee provided by the Britannia Steam Ship Insurance Association Ltd., a significant Protection and Indemnity Club in London, for the sum of NZ\$7,500,000. At first instance, Savage J held that the court had the discretion under r 17(4) of the New Zealand Admiralty Rules 1975 (NZ) to determine the adequacy of security and also to specify the form that the security would take. The Court of Appeal, presided over by Cooke J (later Lord Cooke of Thorndon), affirmed his decision, holding that the court indeed had the power to decide on the form of security.

27 In 1988, the High Court of Singapore followed New Zealand’s lead in *The Arcadia Spirit*. In the course of his judgment, Grimberg JC cited *The Pacific Charger* with approval and held that O 70 r 12(4) of Singapore’s Rules of Court likewise reposed the court with the discretion to order the release of the vessel against the provision of a letter of undertaking from a P&I Club. On that occasion, it was the

Japan P&I Club, another member of the International Group of P&I Clubs. In so doing, the Singapore High Court departed from English decisions which have long held that such letters of undertaking are purely private arrangements in respect of which the court will not enforce acceptance.

28 This decision is of particular interest to me for reasons both personal and professional. On the personal front, Grimberg JC was my pupil master before he was elevated to the bench and although I did not handle this particular application, I eventually acted as counsel for the shipowner at the trial of the action. On the professional front, it was a decision of immense importance to the shipping industry. At that time, the bulk of my practice consisted of briefs from shipowners who always lamented the difficulties they faced when attempting to secure an appropriate form of security for the release of their vessels. Back in the day, banks were typically reluctant to issue guarantees without a specific expiry date. By contrast, P&I Clubs whose interests are usually aligned with that of shipowners, were far more forthcoming with the provision of letters of undertaking containing automatic renewal clauses which specified that the undertakings would be valid until the final disposal of the action. Thus, the possibility of securing release against a P&I Club letter allowed shipowners to secure the expeditious release of their vessels and, in so doing, prevent further losses from accumulating while their vessels lay idle in harbour. The significance of this facility to secure a quick release cannot be overstated not just because time is money to shipowners but, more significantly, because any losses arising from the delay in arranging security will not be recoverable even if the underlying claim is ultimately defeated. The only exception,

of course, is when one is able to make out a case of wrongful arrest, which I shall touch on when I discuss the Australian voyage.

29 I note, however, that the scope for curial intervention in matters of security appears to be quite different in Australia. In the *MSC Samia*, a dispute arose over the terms of a security proffered for the release of a vessel arrested following a collision. The defendant had offered a letter of undertaking from “CIGNA Insurance Europe.” However, the plaintiff rejected this, demanding that the undertaking be furnished either by “Cigna (UK)”, a P&I Club of international standing, or by a “first class bank” which traded in Australia. Finding themselves deadlocked, the defendant applied to court for the release of the vessel under r 52 of the Admiralty Rules 1988 (Cth), which provided that “the court may order the release from arrest of the ship... on such terms as are just.”

30 In refusing the application, Tamberlin J held that the sufficiency of the security offered was a matter for the parties. Should they be unable to agree, the court could not step in to impose an agreement upon them. In the course of arriving at this conclusion, Tamberlin J appeared to have been persuaded by the argument that the provision of security was a purely private arrangement so the court had no power to interfere in this process. While this might be the correct decision in the context of the Australian statutory provisions, there is no denying that it has significant negative practical ramifications. As the authors of the Australian Maritime Law Update 1997 pointed out, parties only come to court if they are unable to agree. If the court does

not have the power to decide on the terms of security then the deadlock will continue to persist.

V. Australia — damages for wrongful arrest

31 Finally, I turn to the Australian voyage and the issue of damages for wrongful arrest. Few decisions have cast as long a shadow as the judgment of the Privy Council in *The Evangelismos*. The Rt Hon Pemberton Leigh, delivering the judgment of the Board, held that damages for wrongful arrest may only be had where there is “either *mala fides* or... *crassa negligentia*, which implies malice.” For nearly 150 years, this test has prevailed throughout the Commonwealth, having been applied consistently in Canada, New Zealand, Hong Kong, Singapore, and, of course, the United Kingdom. In plain English, the test envisages recovery for wrongful arrest in two limited situations: (a) first, where the arresting party has no honest belief in his entitlement to arrest the vessel; (b) second, where there is so little objective basis for the arrest that it may be inferred that the arresting party either did not believe in his entitlement to arrest or acted without any serious regard as to whether there were adequate grounds for arrest.

32 Thus framed, it is clear that the test is an extremely onerous one. The high threshold set has deterred many shipowners from pursuing claims for wrongful arrest, a fact which is perhaps best exemplified by the dearth of reported cases on wrongful arrest in England in the 20th century. After the 1896 decision of *The Schooner Village Belle*, there was no reported decision on the issue of damages for

wrongful arrest in the English courts until the decision of the Court of Appeal in *The Damianos* in 1971.

33 It has persuasively been argued that the test is now anachronistic. The reason why such a high threshold was set was because at that time, the arrest of a ship used to constitute the commencement of an *in rem* action. At the initiation of an action, a plaintiff might not be able to prove his claim on a balance of probabilities. Thus, he should not be held liable for the wrongful commencement of an action unless it could be shown that it was either malicious or initiated without reasonable or probable cause. In this regard, an analogy was drawn between recovery for wrongful arrest and the tort of malicious prosecution (where, likewise, either malice or an absence of reasonable or probable cause must be shown). Were this still the case, there might be an important policy rationale to maintain the high threshold set in *The Evangelismos* since allowing recovery for wrongful arrest too easily might have the unintended effect of stifling what would otherwise be legitimate *in rem* claims.

34 However, since the passage of the Supreme Court of Judicature Act 1873 in the UK, admiralty actions can now be commenced by way of the issuance of a writ without an accompanying arrest of the vessel. Thus, the historical rationale for the high threshold set in *The Evangelismos* no longer holds. It has been argued successfully in Singapore in *The Vasilij Golovnin* that “the law ought not to perpetuate the now false analogy between malicious prosecution and damages for wrongful arrest.” Given that historical backdrop, I think the test can justifiably be

criticised for being one-sided and excessively plaintiff-friendly. For shipowners, time is money. Even the loss of a few hours can cause huge financial losses. Should the arrest prove ill-founded, any legal costs awarded will be a manifestly inadequate recompense.

35 Recognising these concerns, Australia, acting on the recommendation of its Law Reform Commission and following the lead of South Africa, spearheaded the shift away from *The Evangelismos* in the Commonwealth. Under s 34 of the Admiralty Act 1988, a plaintiff in Australia may recover damages for wrongful arrest if it can be proven that the arrest was initiated “unreasonably and without good cause.” While there has yet, to the best of my knowledge, to be any decided cases on the precise ambit of this statutory test, I think the purport of the provision is clear: it is designed to strike an equitable balance between the interests of the claimant and the shipowner.

36 This timely development has certainly not gone unnoticed. The apex courts in Canada, New Zealand, and Singapore have, noting the problems with *The Evangelismos*, all cited Australia as a possible model for reform. At the end of the day, each of them decided, recognising the polycentric nature of the issues concerned and the need for international comity, that any change would be best left to the legislature. When that day comes, I think the position in Australia will prove to be a valuable guide.

VI. A transnational judicial dialogue — the termination of demise charters

37 I have spent much of this address talking about the ways in which each of our nations have developed a unique maritime jurisprudence as distinct from that we inherited from our colonial past. I think it is fitting, therefore, if I should end with a discussion of a topic on which our three courts have made unique contributions: the termination of a demise charter.

38 It has long been held that the quintessence of a demise charter is the complete transfer of possession and control from the shipowner to the charterer. It is therefore brought to an end only if there is, by the same token, a transfer back of possession and control which is achieved through the physical redelivery of the vessel to its owner. The first inroad into this rule was made in *The Turakina*, which was a decision of the Federal Court of Australia handed down in 1998. The ship, *Turakina*, was sub-demise chartered on the standard Barecon 89 form. She was arrested in Sydney by the plaintiff stevedoring company pursuant to a claim for services rendered. The owner then applied for a release of the vessel on the basis that the court's admiralty jurisdiction had been improperly invoked. The owner's case was that the court lacked jurisdiction because the vessel was no longer on demise charter at the time when the proceedings for arrest were instituted, the charter having been validly terminated by way of the issuance of a notice of termination sent the day before. The central question in *The Turakina*, therefore, was whether the notice of termination was adequate to terminate the demise charter.

39 Tamberlin J answered the question in the negative. After reviewing the authorities, he noted that the critical difference between time and demise charters was that the latter involved the complete transfer of possession and control of the vessel. Thus, demise charters could only be brought to an end when there was a reversion of possession and control from the charterer to the owner which the notice of termination, *per se*, could not achieve. He added that this seemed to be the contractual position as well since the provisions of the charterparty provided that hire itself would continue to be payable until redelivery of the vessel and made mention of the “mechanical steps necessary to effect delivery of actual possession”. Thus, the mere issuance of a notice of termination was insufficient to achieve the termination of the demise charter. I pause to observe that while Tamberlin J made reference to the *sui generis* nature of demise charters, he did not go so far as to say that the common law mandated that physical redelivery was required for the termination of a demise charter. Instead, he principally relied on the terms of the charterparty in reaching his conclusion that the notice was insufficient.

40 As in many things in maritime law, things did not stay still for long. In the “*Socofl Stream*”, which was decided a year later, Moore J took the position even further when he held that the question of whether a demise charter could be terminated without repossession fell to be decided on the terms of the charterparty. He went on to hold that “if a charterparty expressly provided for its termination and the power to terminate was exercised, then the charterer ceased to be a demise charterer from the time of termination.”

41 It did not take long for these decisions to travel across the Tasman Sea. While the two cases were making their journey through the Australian court system, three of the *Turakina's* sister ships, which were also on demise charter, were arrested in Auckland. Termination notices had also been issued in this case and the question, once again, was whether the court's *in rem* jurisdiction had been properly invoked. Giles J held that the mere issuance of termination notices were insufficient to terminate the demise charters in the absence of the physical redelivery of the vessels. After affirming the common law rule, however, Giles J then went on to remark in *obiter* that "the deficiency here lies in the drafting of the contract" and that "an experienced craftsman could cover 'redelivery' in an early termination context in a way which would be contractually effective." In other words, Giles J contemplated that parties could contract out of the requirement of physical redelivery as a requirement for the termination of a demise charter.

42 However, this position was not without its dissentients. In the later case of *ASP Holdings Ltd v Pan Australia Shipping Pty Ltd*, Finkelstein J, while constrained by comity to follow *The Socofl Stream*, nonetheless expressed serious reservations about the notion that one could contract out of the requirement of physical redelivery. He remarked at [14] – [15]:

14 If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying *The Socofl Stream*, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. There is also the possibility that the owner may decide to retake possession at the next port of call or at a convenient port or

place as contemplated by cl 29. The result of the application of *The Socofl Stream* is that the owner has control of the vessel during the voyage. The true position is probably different.

15 I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer's possession before delivery as that of "gratuitous bailment" is not to the point. *The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description.* I appreciate, however, that others take a different view.

43 Such was the state of the law when I had to consider the same issue in my recent judgment in *The Chem Orchid*. When I reviewed the authorities, Finkelstein J's concerns resonated with me. While the designation of the charterer as a "gratuitous bailee" under the terms of the revised 2001 Barecon form appeared to notionally re-vest possession and control in the owner, it did not change the *reality* that, until physical redelivery, the demise charterer continued to enjoy the full rights of control and possession of the vessel and, more importantly, that third parties would continue to deal with him on that basis. To my mind, to allow a shipowner to contract out of the general rule requiring physical redelivery works unfairness on third parties because, ultimately, in the absence of such redelivery, it is difficult to see how the change in legal status of the vessel *inter se* between the owner and the demise charterer can be made apparent to them.

44 For these reasons, it was my view that the question of the subsistence of a demise charter is not simply a matter of contract as it has crucial implications on the court's jurisdiction to order the arrest of demise chartered vessels. I therefore declined to follow the *Socofl Stream* and *The Rangiora* and instead preferred the

view of Finkelstein J, holding that parties cannot contract out of the requirement of physical redelivery of the vessel to bring about an end to a bareboat charter.

45 I have no doubt that my judgment will not be the last word on this subject. Just as I found my views being informed and sharpened by the exchange of ideas in Australia and New Zealand so, too, I hope that later courts will also benefit from my own modest contribution to the subject. Such is the dynamism in the practice of maritime law that even where we disagree, the general body of maritime jurisprudence is enriched by the continuing dialogue that takes place between our courts. This dialogue has always operated and will continue to operate as the catalyst for further evolution and refinement.

VII. Concluding reflections

46 I have spent much of my speech talking about the ways that our laws have diverged, but I want to conclude it with some reflections on the theme of universality. I started by observing that the ocean of maritime jurisprudence is fed by streams of diverse origin. That is true. However, it is equally true, as Homer observed, that the ocean is the source of all rivers.

47 Since antiquity, it has been acknowledged that the laws governing the affairs of men at sea are distinct from that which govern their affairs on land. In the 6th century Digest of Justinian the jurist Volusius Maecianus is recorded as having written that a sailor, one “Eudaimon of Nicomedia”, was shipwrecked off the Greek

island of Icaria whereupon he was robbed by farmers. Understandably aggrieved, Eudaimon petitioned the Emperor Antoninus who, with characteristic imperial *hauteur*, replied,

I am, indeed, the Lord of the World, but the Law is the Lord of the sea; and this affair must be decided by the Rhodian law adopted with reference to maritime questions, provided no enactment of ours is opposed to it.

48 What the Emperor was referring to was the unwritten body of Rhodian laws which has existed since the 8th or 9th century BC and which is now cited as one of the earliest sources of the *lex maritima* which is generally practised in much of the world today. Until today, strong statements of the existence of a “general maritime law” can be found in the law reports, albeit in somewhat humbler tones. It may be the case, as Lord Diplock remarked in *The Tojo Maru*, that, “outside the special field of ‘prize in times of hostilities there is no [such thing as a] ’maritime law of the world’ as distinct from the internal municipal laws of its constituent states that is capable of giving rise to rights or liabilities enforceable in domestic legal systems.” However, it does not change the fact that the substantive content of our maritime laws have a common root or anchor. Even as our laws continue to develop (and, possibly, diverge) in the future, there will always be much we can learn from each other and from the general maritime law of which we are all part.

49 It has been a tremendous privilege for me, in the past 30 years, to be associated with the practice of maritime law and to have contributed to its development. Because of my career in this area of the law, I have watched the sun set in far-flung corners of the globe; I have shared a drink or two with persons I

would otherwise never have met; and I have laughed, sung, and dined in a dozen time-zones. If someone should ask me: given all the varied choices available in the legal profession today, would you still have opted to practise maritime law? Without a moment's hesitation, my answer will be a resounding "yes". If I could, I would wind the clock back to 1977 and tell my 19 year old self, standing there on the bow of the RSS Endurance: "Stay the course. The voyage might be a slow one, but you will get there eventually. And what is more, you will love the ride." It has truly been a fascinating journey for me. Thank you.

Steven Chong
Judge
Supreme Court of Singapore
17 September 2015

Speech delivered by Justice Steven Chong at the 42nd Annual Maritime Law Association of Australia and New Zealand Conference in Perth