Value Chain for Maritime Jurisdiction

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I. Introduction

Developing the law for any nation is a challenge bigger than what may be apparent as a mechanical process of discussing bills drafted by groups of people interested, needful, or wary of the needs in the passing of any particular legislation. In the same way that experience matures a person and makes him or her better equipped to handle a similar challenge in the future, the same can be said for the courts. In this sense opportunities of a particular type to some extent cannot be chosen in order to fulfill a particular need to sharpen one's skill in handling any particular situation. Sometimes we undertake a task in order to prove our sense of capability in managing a situation, whether in a personal or professional capacity; sometimes we fall into circumstances.

It may be that this process can be taken as a passive and reactive behaviour in developing and maturing the mechanism. We can simply deal with opportunities as they come along. We do not need to find, invite or encourage new challenges, much less wrestle cases from other jurisdictions. What comes to mind would now of course be the issue of seising jurisdiction.

To a certain extent it matters most on the part of the parties to any dispute that the issue of which jurisdiction should hear and decide their case is given serious thought. The courts in the jurisdictions involved in the "wrestling" process are perhaps only concerned that the best interests of the parties to the dispute should be the priority in

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order to achieve justice for everyone involved. Would it be wrong for these courts to also have self-interest in capturing certain cases for the sake of the aforementioned need *ie* of adding and improving the track record of its experience in making decisions, in order to develop the law in the country? Of course, due process is followed, there is transparency, everything is legal, and no cheating is involved.

This kind of issue would naturally arise in cases having an international flavour. Maritime law is one of them. Parties invariably come from various jurisdictions, the shipowners, charterers, cargo-owners, masters and crews, harbours etc. Not to mention the place of departure and destination of the ship, the place where the contract was concluded, the place where the casualty took place and a whole lot of other places which may be relevant to the case.

II. Maritime Jurisdiction

For disputes concerning maritime law, jurisdictions such as London, Singapore and Hong Kong are popular for the shipping fraternity, just to name a few. China is also an emerging jurisdiction climbing up the shopping list. These nations are maritime giants and so it is not surprising that they manage to capture not only the sailing off of the commercial activity but also the berthing in of maritime disputes. Malaysia has seen some cases each year but some years there are none at all. Is there something that can be done about it? Do we want to do something about it? If we did do something about it, will we actually gain much benefit from the exertion?

There has been a number of occasions where the legal and shipping fraternity has come together to discuss and suggest ways in which to overcome this problem. There have been suggestions that forming an Admiralty Court for Malaysia may be the key to open the door to inviting more shipping cases to come to our shores. The objective of this paper is to explore further the recipe required to achieve this objective.

No doubt by the creation of an Admiralty Court, the signal that we are sending out to the world is that we have a mechanism that is fully equipped to handle any admiralty law dispute, whether it be the judges, the lawyers, the court staff, and even the marshal who will execute the arrest of the ships in the jurisdiction. Therefore training of all these characters in the substance of shipping law as well as procedure is of utmost importance and priority. In this aspect we are not on ground zero. There are a number of judges and lawyers in Malaysia who are already familiar and in fact specialised in shipping law matters, but of course the more the merrier, and this must be encouraged, if need be with incentives. We need more people, not just in terms of quantity but people who are professional, skilled, trained, and experienced.

From that last word we come to the issue raised earlier. To become experienced, one needs the opportunity. But how will we get the opportunity if it will not come to us unless we have the experience to handle the case? No right-minded person, no matter how generous will take a risk in losing the case on an incompetence, mistake, technical or whatever basis just for the sake of giving an opportunity to someone to use his case as a guinea pig in order to enhance his skill. And when we are talking about risks, in shipping, we are talking about millions of dollars involved. Not that we are in fact incompetent; I do not believe this is the case as I have indicated earlier. However the uncertainty or mistrust that is held by parties to the dispute and even people in the profession itself whether legal or judicial, if they have diffidence in their own capabilities, may contribute to the overall effect. We must take that brave step and forge ahead, well-prepared and supported, and not simply pass on the opportunity to the next door neighbour.

III. The Value Chain

To some extent however, this is not the only issue in formulating the steps to achieve the objective of capturing the opportunities of hearing the cases. In order for us to capture the so-called customer, we have to be aware that no matter how good the product or service is, no one will want it if it carries no value to them. Therefore first, we have

to attach value to our legal products and services. Then, we measure, what is the value of our jurisdiction as compared to other jurisdictions.

The next step is of course to see what makes those top-ten jurisdictions valuable to the shipping industry and how we can increase our value in their reckoning. Thus, it is submitted that creating a specialised court is only one aspect of the analysis. There is a whole line or chain of activities which generates value to achieve the competitive advantage. In business knowledge, this is referred to as the value chain. It may not be too bad an idea to find some analogy between consumer products and services with legal products and services. Why not, if we can learn something from it and improve ourselves?

This being a law paper, I will not delve into the intricacies of business management models. For more information on value chain analysis, one can refer to the author of the value chain model.[1] What I am interested in is the idea of attaching value to our legal products and services to enhance our competitiveness in the market. Basically Porter's Generic Value Chain Model consists of a sequence of activities that are common to a wide range of firms. In the chain, there are primary as well as support activities, ranging from logistics, operations, marketing, services, infrastructure, human resource management, to technology development and more. All these activities have the objective of offering the customer a level of value that exceeds the cost of the activities.[2] To be competitive, we have to be efficient in as many activities in the chain as possible.

Perhaps we could say that in the structure of obtaining admiralty jurisdiction, there are also primary and support activities which could be identified. We may have to look at the British, American, Chinese or other popular models to see what are the primary and support activities required to have a strong admiralty jurisdiction.

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[1] Porter, M, *Competetive Advantage* (New York: Free Press, 1985).
[2] www.netmba.com – The Value Chain.

The primary value chain activities may include:

Business Management Value Chain	Maritime Jurisdiction Value Chain
Inbound Logistics	Receiving and registering applications of all kinds - determining jurisdiction, writ *in rem*, bail, arrest etc.
Operations	Processing the applications - service of writ, hearing, application of the law, advice from expert evidence adviser, evidence from the parties.
Outbound Logistics	Mechanism for appeal, limitation fund.
Marketing and Sales	Identifying what the parties need - laws and processes which benefit them.
Services	Enforcement of the judgements recognised internationally.

Support value chain activities may consist of:

Business Management Value Chain	Maritime Jurisdiction Value Chain
Infrastructure	The laws, the Admiralty Court, organisational structure of the officers of the Admiralty Court and procedure as well as location.
Human Resource Management	Recruiting and training lawyers, judges and court staff with skills in substantive and procedural admiralty laws.
Technology Development	Using more sophisticated machines and ICT to help in registering claims, keeping the law database, communication between stakeholders, information system for globalising the availability of our resources etc.
Procurement	Getting more parties to bring their cause of actions to our jurisdiction.

There are probably more items which could be identified that could fit into the primary or support activities and perhaps there are more links which could be added to the chain. In fact so far I have only looked at the structure within the court and legislative system. Perhaps there is a better chain that could be drawn up and I welcome any suggestions to help solve the equation. We should also look into industries related to the whole mechanism in those countries whose admiralty jurisdictions are preferred, for example, London is the home of Lloyd's, known and trusted worldwide for insurance and salvage, Singapore is a regional and international transshipment hub, whereas the US and China are the dominant players in ship building and international trade. In order for us to be more marketable perhaps we have to have a combination of legal as well as commercial resources in order for the whole process to run smoothly for parties in one place to make us a more attractive jurisdiction. For example logistic service providers for transport, distribution and freight logistics and specialist services in IT, communication, banking and finance.

The most important legal resource that we may be lacking is the admiralty law itself. A lot of our laws on admiralty are still unfortunately rather ancient relative to the leading maritime nations. This is a point which I will come back to later.

IV. Achieving A Competitive Advantage

One of the key elements in achieving a competitive advantage from the value chain above is by reconfiguring our position in the chain to provide a cost advantage or better differentiation. Where legal products and services are concerned, better differentiation is perhaps more relevant than the issue of costs, though it is not completely accurate to say that parties are not concerned with costs. Costs are extremely important to parties especially if they end up paying for them, not just for themselves but for the other party too.

What is better differentiation about? Being different means being unique. The advantage from differentiation may be achieved by reconfiguring the value chain structure or changing individual value

chain activities to make the final product unique. Some of the drivers of uniqueness that Porter had identified include policies and decisions, linkages among activities, timing, location, interrelationships, integration and institutional factors.[3] For example by offering a combination of the most speedy, efficient and cost-competitive judicial and legal admiralty services, up-to-date laws, skilled officers of the court providing high service levels, supporting commercial links and geographical proximity with shipping traffic, this will make our jurisdiction more attractive because it is one of the few which has all the right combination of the needs of the shipping fraternity. Differentiation also means that we should focus on those activities which we do best or where we have core competencies and perform them better than our competitors. Thus it is also important for us to identify what are our strengths and weaknesses.

The next step is to identify where our products and services can fit in with the value chain of our clients and other jurisdiction systems. We have to acknowledge that we are only part of a larger system and so we have to find our place in the system. To this effect we may need to forge agreements with other jurisdictions in order to get a share of the cases, for example, within Southeast Asia for a start. The Brussels and Lugano Convention[4] in Europe is an excellent example of how we can institutionalise a mechanism for allocating jurisdiction.

Forum selection is the first most critical issue in any international maritime litigation. In fact it sometimes may be the only point of engagement in a transnational situation. In many cases, there may already be International Conventions which dictate where the parties must litigate,[5] or parties may have used standard form contracts which

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[3] *Supra* n 1.

[4] Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 and the Lugano Convention with the same name in 1988. Countries which accede to the former are members of the European Union and the latter extends the rules of the former to states belonging to the European Free Trade Association.

[5] As provided by the Brussels and Lugano Convention.

again would have consolidated the jurisdiction for settling any dispute.[6] This means it is not in every case that we can assert ourselves as an available jurisdiction. However we can still work within the room allowed where choice is given to the parties.

One of the important reasons why anyone would choose or utilise our jurisdiction is where the laws available in our jurisdiction are more favourable to their case as opposed to other jurisdictions, hence the term forum shopping. Among the laws which parties may consider to be quite crucial to them are the availability of anti-suit injunctions, what limitation of liability regimes we offer, what laws we have where lost or damaged goods or ships are involved, recognition of foreign liens, laws, procedures and facilities for arrest, the order of priority of claims that we apply, *etc*. With that, it is pertinent to look at the law as the legal resource in the value chain. Due to constraints, I will only focus on some of the items mentioned above including anti-suit injunctions, limitation of liability and the active role of legislators.

A. *Anti-suit Injunctions*

Anti-suit injunctions restrain a contract-breaker from commencing proceedings in another jurisdiction from that which had been agreed or where there is no jurisdiction agreement, restrains a party from commencing unconscionable, vexatious or oppressive foreign proceedings. Most civil law systems have no such similar remedy. In the UK, the court can take into account any relevant factor in using their discretion to grant an anti-suit injunction including delay in asking for one, or existence of other proceedings and parties.[7] Nevertheless with their accession into the European Union the UK has found that this powerful weapon of theirs may have to be left behind.

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[6] The use of Lloyd's Standard Form of Salvage Agreements will cause parties to the contract to be governed by English law and remuneration and any other difference arising shall be determined by arbitration in London.

[7] Ambrose, C, "The Use and Abuse of English Anti-suit Injunctions", *The Maritime Advocate*, Issue 23 July 2003.

The Court of Justice of the European Communities in *Turner v Grovit*[8] held that the Brussels Convention precludes the grant of an anti-suit injunction to prohibit a party from commencing legal proceedings before a court of another Contracting State even where that party is acting in bad faith with a view to frustrate the existing proceedings pending before the court of the Contracting State which issued the injunction. As such in future where other Member States of the European Union are concerned, the English Court may be restricted from issuing anti-suit injunctions to prohibit proceedings in those courts.[9]

A similar decision was made in *Continental Bank Gasser GmBH v MISAT srl*[10] where the European Court of Justice held that even with an express jurisdiction clause, the court in which the proceedings commenced first would prevail. In the European Union, the Brussels Convention lays down the "first-seised rule" where the Member State court first seised of the proceedings should have the right to determine the dispute including the issue of jurisdiction[11] even where the case has got nothing to do with that jurisdiction, and that the only reason why that jurisdiction is chosen is because of some strategy of the party commencing proceedings to force settlement or gain some other legal advantage. Nevertheless anti-suit injunctions may still be issued where the competition is from non-European Union or European Free Trade Association countries. Also these decisions do not affect anti-suit injunctions to enforce arbitration clauses even within the European Union.[12]

B. *Limitation of Liability*

The issue of limitation of liability is of great concern to any party in a maritime law dispute, thinking about which jurisdiction to commence

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[8] [2004] 2 Lloyd's 169 (E C J), Case No C159/02.

[9] Tetley, W, *Glossary of Maritime Law Terms* (2nd ed, 2004) - www.mcgill.ca/maritimelaw/glossories/maritime.

[10] [2003] All ER (D) 148 Case C – 116/02.

[11] Art 21 Brussels Convention.

[12] Mochrie, A, "Are Jurisdiction Clauses in European Reinsurance Contracts Worth the Paper They're Written on?" *Mondaq European Union and International Law*, August 2005.

proceedings. Limitation of liability may take the form of statutory or contractual regimes. Since this discussion is directed towards what Malaysia can do to create an environment that is shipping fraternity friendly, the statutory form is more pertinent. Currently there are two statutory forms of limitation of liability. The first is based on tonnage limitation, meaning, limitation is based on the tonnage of the ship and is considered a more global regime and the second type is based on package or weight limitation and is more specific for contracts for the carriage of goods by sea.

There are two main tonnage limitations of liability regimes currently in use around the world, the Limitation Convention 1957[13] and the Limitation Convention 1976.[14] An analysis of the provisions of limitation of liability in these two regimes could generate a separate and lengthy topic of discussion which is beyond the scope of this paper. The concept of limitation is basically that regardless of the total amount of claims made by various parties against the shipowner on any distinct occasion, the shipowner will be entitled to limit his liability for certain types of claims to a certain amount. This is a combination of public policy to encourage shipping activities and the need to get insurance cover at a reasonable level.

These two limitation of liability regimes differ not just in terms of the calculation of the amount which the shipowner[15] can limit, though obviously that may be the biggest concern of the party in choosing the jurisdiction, they also differ in terms of the basis of liability for which limitation may be obtained, the range of claims in respect of which the right to limit liability is available and the basis on which limitation can be broken. There have been many studies done to compare the two regimes and these studies have shown that the

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[13] The International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 instrumented by CMI.

[14] The IMO Convention on Limitation of Liability for Maritime Claims 1976.

[15] This facility is now also available for charterers, salvors, managers and insurers.

1976 Limitation Convention is arguably more favourable in terms of the matters stated above.[16] In fact the reason why the 1976 Limitation Convention came into being was because of the problems created by and deficiencies of the 1957 Limitation Convention. Where package limitation is concerned, there are three competing regimes; the Hague Rules,[17] Hague-Visby Rules,[18] and the Hamburg Rules.[19]

Malaysia applies the 1957 Limitation Convention[20] and the Hague Rules.[21] It may be worthwhile studying who else in the world is in the same boat as we are, and who are the players who implement the 1976 Limitation Convention, the Hague-Visby Rules and/or the Hamburg Rules as well as other countries who accede to neither. Then if we compare that list to the list of jurisdictions to which shipping cases frequent, we could see how significant or otherwise the limitation of liability regime is on the choice of jurisdiction for shipping law cases.

For example where tonnage limitation is concerned, UK accedes to the 1976 Limitation Convention[22] whereas for the package limitation it applies with the force of law the Hague-Visby Rules.[23] What about Singapore, China and the United States? Also, does it mean that just because there is a later Convention that has come into being, it is always advantageous to accede to it and follow suit without checking whether or not it suits our interests and national policy? Sometimes it may just be a matter of having the right combination of Conventions, old and new.

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[16] One of them is by Griggs & Williams, *Limitation of Liability for Maritime Claims* (London: LLP, 2nd ed, 1991).

[17] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924.

[18] The Hague Rules as Amended by the Brussels Protocol 1968.

[19] United Nations Convention on the Carriage of Goods by Sea 1978.

[20] By virtue of s 358(1) of the Merchant Shipping Ordinance 1952.

[21] *Vide* s 2 of the Carriage of Goods by Sea Act 1950 (Act 527).

[22] By virtue of s 17 of the Merchant Shipping Act 1979, now consolidated in Schedule 6 of the Merchant Shipping Act 1995.

[23] By virtue of the Carriage of Goods by Sea Act 1971.

C. *Active Role of Legislators*

A lesson that we can learn from the United States of America (US) is that their Congress plays a very active role in maintaining their national policy on maritime development.[24] The national policy adopted by the US Congress was stated in *Marine Carriers Corporation v Fowler.*[25] Basically for them a strong merchant marine is required to protect not only the foreign trade but also to support the defence of the country. To this end what is required on our part is not only to own flag ships and trained Malaysian sailors, but also a modern shipbuilding industry.

The US also demonstrated that they can and will clamp down on anything that will threaten their merchant marine in order to uphold their national policy on shipping. For example when steamships came into the picture and the US clipper shipbuilding suffered, the First Congress enacted a law to tax foreign ships which were competing with their domestic ships operating in their domestic trade at a rate which virtually demolished the foreigners,[26] then later completely wiped them out by prohibiting foreign ships from operating in that trade at all.[27] Later still, when foreign ships stubbornly insisted on evading the law by transshipping in between US ports, Congress defiantly persisted by expanding the scope of the Act to prevent a foreign ship from loading the goods in a US port, then travel just outside the US and transship at that port, only to come back into the US to the port of destination.[28]

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[24] Ng, Jimmy & Sik, Kwan Tai, "The Different Approaches to Recent Developments in Chinese and US Ship Arrest Laws", *EJCL*, Vol 9.3 October 2005.

[25] 429 F 2d 702, 708 (2d Cir 1970), cert den'd 400 US 1020 (1971).

[26] Chapter 2, ss 5 of the Act of July 4, 1789, 1 Stat 27 (1848).

[27] Chapter 31, ss 4 of the Act of March 1, 1817, 1 Stat 351 (1850).

[28] Chapter 201, ss 20 of the Act of July 18, 1866, 22 Stat 641 (1883).

Even when their own courts disagreed and held in *United States v Two Hundred and Fifty Kegs of Nails*[29] that the legislation was only directed to one continuous voyage, Congress simply pressed on and amended the law again making it crystal clear that no foreign vessel can compete with domestic vessels in coastal trades, whether directly or indirectly via a foreign port.[30] This remains the position until today in the US.[31]

Malaysia has also made efforts to be self-sufficient in shipping services to reduce freight payments to foreign shipping lines. However Malaysia is still regarded as an infant in this perspective. The shipping fleet in Malaysia is still very small by global standards and may carry less than 20% of Malaysian cargo.[32] Where port development is concerned, the volume of cargo handled has increased alongside Malaysia's growth in trade and development of its ports.

V. Conclusion

Malaysia has a cabotage policy which restricts foreign flag vessels from trading between Malaysian ports for coastal trades. However Malaysia has allowed limited liberalisation of this policy on a case by case basis as part of the international leg of ocean transportation to promote transshipment aimed at fostering the load centering at Port Klang. The cabotage policy was introduced on the 1 January 1980. Under the policy the Merchant Shipping Ordinance 1952 was amended to introduce the Domestic Shipping Licencing Board (DSLB).[33] The DSLB can issue conditional, unconditional and temporary licences. Temporary Licenses can be issued to foreign registered vessels because of insufficient Malaysian-registered tankers. It is also facing the

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[29] 61 F 410 (9th Cir 1894).

[30] Ch 117 of the Act of February 15, 1893 (27 Stat 455).

[31] 46 USC ss 883 (1989).

[32] www.unescap.org – Current Status of Maritime Transport Industry in Malaysia.

[33] Part IIB of the Merchant Shipping Ordinance 1952.

problem of some local companies or applicants acting as fronts for foreign registered vessels.[34]

Thus, it is submitted that we need to take active steps to add value to our maritime laws and legal services so that we can join the value chain of the maritime jurisdiction of the world and the shipping fraternity will not hesitate in anchoring their cases in our jurisdiction.

[34] www.portsworld.com – Need to Tighten Cabotage Rules.