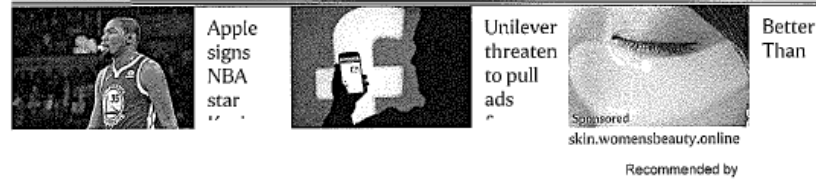


**Panel Discussion
Chaired by
Damien Laracy of Hill Dickinson**

**(IPBA Conference – Manila 2018)
M/T “Iron Monster”**



THE STRAITS TIMES



More piracy, robbery cases in Malacca and Singapore straits



MR MASAFUMI KUROKI

🕒 PUBLISHED JAN 17, 2018, 5:00 AM SGT

The nine incidents last year mirror the increase in such occurrences in the rest of Asia

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More piracy and armed robbery incidents took place in the straits of Malacca and Singapore last year, a situation that mirrors the increase in such cases in Asia.


There were nine such incidents in the straits last year, compared with two in 2016. For Asia as a whole, 101 piracy and armed robbery incidents against ships were reported last year - a 19 per cent increase over the 85 in 2016.

Of the nine in the straits, eight occurred in the Singapore Strait, and one in the Malacca Strait. Most of the cases were carried out after dark by four to six perpetrators in small boats.

"The possible reasons for the increase in the number of incidents (in the Singapore Strait) could be lower surveillance by littoral states, and complacency of ship crew," said an annual report by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCaap) Information Sharing Centre, which was released yesterday.

But the centre's executive director Masafumi Kuroki said the figures should not cause alarm, given that the situation has improved significantly since the late 1990s, when the area was a hotbed of piracy.

"The regional coordination (among the littoral states) is working well, particularly as the Malacca Strait was once considered a very dangerous area, but now, they have almost no incidents there," he said.



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"Singapore is playing an important role in terms of coordinated patrols with its neighbours, and has to play an important role for its own interest."

Mr Kuroki added that the patrols were a key factor for the long-term improvement in sea safety.

In 2004, Singapore, Malaysia and Indonesia embarked on trilateral coordinated patrols in the Malacca Strait aimed at stamping out piracy.

Research fellow at the Maritime Security Programme of the S. Rajaratnam School of International Studies Collin Koh said: "It is simply the persistent capacity shortfalls of many regional maritime forces, having to keep up with various challenges across multiple maritime areas such as illegal fishing and smuggling. This makes it difficult to keep such piracy incidents consistently low."

Mr Kuroki hosted a media briefing yesterday at the Pan Pacific Orchard Hotel, at which the results of the annual report were presented.



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REMINDER TO STAY VIGILANT

While the number of incidents in 2017 continues to be among the lowest in the past decade, the increase that occurred over the last year is a reminder that there is no room for complacency in the fight against piracy and armed robbery against ships, and underscores the need for enhanced vigilance among all stakeholders.

MR MASAFUMI KUROKI

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Almost half the world's total seaborne trade passes through the straits of Malacca and Singapore each year.

Of the 101 incidents in Asia last year, 84 per cent, or 85 cases, were armed robbery against ships, while the other 16 per cent were piracy cases.




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Areas of concern flagged by the report include the continued abduction of crew in the Sulu and Celebes seas, although the number of such incidents has fallen from 10 cases in 2016 to three last year. Hijacking of ships to steal oil cargo is also of concern, with three incidents last year.

Mr Kuroki said: "While the number of incidents in 2017 continues to be among the lowest in the past decade, the increase that occurred over the last year is a reminder that there is no room for complacency in the fight against piracy and armed robbery against ships, and underscores the need for enhanced vigilance among all stakeholders."

The incidents are collected from designated government agencies from ReCaap's 20 member states, which include 14 Asian countries such as Singapore, India and the Philippines. The Maritime and Port Authority is Singapore's designated agency.



The Facts – Scenario 1

Name:	M/V “Iron Monster”
Owners / Flag:	South Korean
Nationality of Crew:	Mixed – South Korean, Filipino
Type:	VLCC
Voyage:	West – East (Crude oil from the Middle East, via Straits of Malacca, to China or South East Asia)



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The Facts – Scenario 2

Name:	M/V “Handy Monster”
Owners / Flag:	South Korean
Nationality of Crew:	Mixed – South Korean, Filipino
Type:	Handysize Geared Dry Bulk Carrier
Voyage:	South–North (i.e. corn from Australia to Okinawa, Japan)



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Sea route & distance

Port of Darwin to Okinawa Port: 2520 nautical miles

find start port:

Port of Darwin

find destination port:

Okinawa Port

start typing to see the suggestions

calculate

Share route via SMS:

Login to be able to send

Port of Darwin, Australia

2. Timor Sea

3. Arafura Sea

4. Banda Sea

5. Ceram Sea

6. South Pacific Ocean

7. North Pacific Ocean

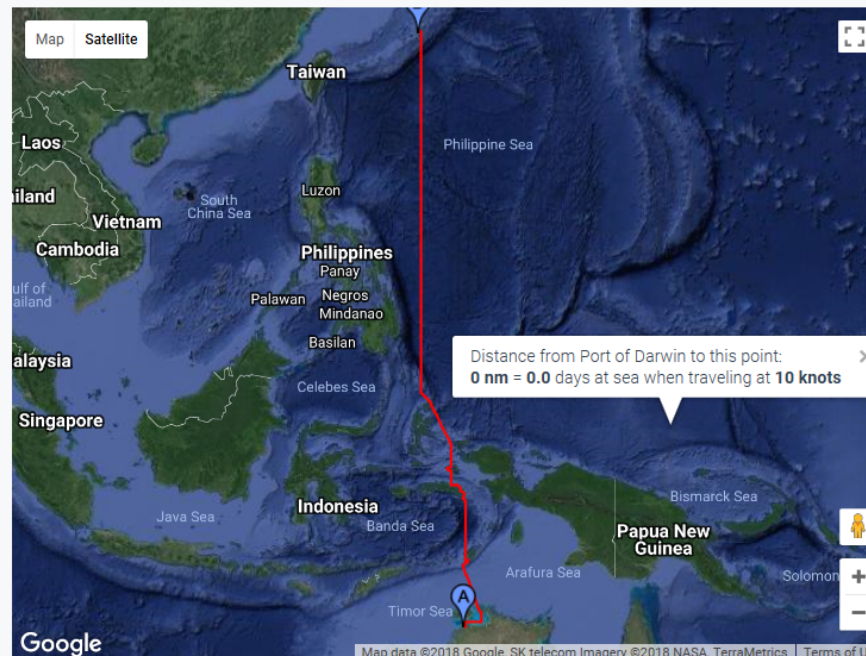
8. Philippine Sea

Okinawa Port, Japan

Distance: 2520 nautical miles

TIME AT SEA

DISTANCE: 2520 nm SPEED: 10 knots DAYS AT SEA: 10.5



Share

Paste link in email: <http://ports.com/sea-route/port-of-darwin,australia/okinawa-port,japa>

More Facts – Hijack / Piracy Incident

Straits of Malacca incident re “Iron Monster”?

Elsewhere re “Handy Monster”?

- Africa
- South East Asia

Resulting In.....

Damage to both Vessel and Cargo

Vessel limps in to a port (towage, salvage, GA issues)

Arrest by cargo interests (Japan focus): Tanaka-san to discuss

Owners and bankers?: Thian Seng to discuss.

Crew unpaid, refuse to leave the vessel: Val Del Rosario to discuss



FACV No. 26 of 2007

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 26 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 243 OF 2006)

Between:

PAQUITO LIMA BUTON

Appellant

- and -

RAINBOW JOY SHIPPING LIMITED INC

Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ,
Mr Justice Ribeiro PJ, Mr Justice Mortimer NPJ and
Mr Justice Gault NPJ

Date of Hearing: 15 April 2008

Date of Judgment: 28 April 2008

J U D G M E N T

Mr Justice Bokhary PJ :

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Chan PJ :

2. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

A. The accident and proceedings leading to this appeal

3. The appellant, a Philippine national, was employed as Second Engineer on board the “RAINBOW JOY”, a Hong Kong-registered general cargo vessel. On 3 September 2003, he was ordered by the Master to repair the starboard accommodation ladder together with the Chief Engineer. When the latter attempted to straighten a bent portion of the ladder using a sledge hammer, a fragment, described as “a piece of metal shrapnel”, flew out and struck the appellant, causing him the total loss of vision in his right eye. He was then 54 years of age.

4. The respondent was the owner of the vessel and the appellant’s employer. It is a Panamanian company registered in Hong Kong as a foreign corporation under Part XI of the Companies Ordinance.¹

5. On 5 November 2003, the appellant sought compensation by commencing an arbitration under the auspices of the National Labour Relations Commission in the Philippines. However, on 15 January 2004, he withdrew from the arbitration which was dismissed without prejudice to his claim. He then brought an Admiralty action *in rem* against the vessel in Singapore. But the respondent successfully obtained a stay of those proceedings on the ground of *forum non conveniens*. The appellant’s appeals in Singapore from the Registrar to the High Court and then to the Court of Appeal were dismissed on 28 September 2004 and 27 April 2005 respectively.

6. It was not until 23 June 2005 that the respondent gave notice of the accident to the Commissioner for Labour in Hong Kong, although it had been

¹ Cap 32.

11. In any event, as was stated in *Mariner International Hotels Ltd v Atlas Ltd*,⁷ the Court cannot be bound by a concession or an agreement between the parties regarding a question of law which it holds to be erroneous. As Bokhary PJ pointed out,⁸ the principle is stated by Lord Diplock in *Bahamas International Trust Co Ltd v Threadgold*,⁹ in the following terms:

“In a case which turns, as this one does, upon the construction to be given to a written document, a court called upon to construe the document in the absence of any claim for rectification cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of that court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous.”

12. While it is true that this arbitration agreement point has not been considered by the Court of Appeal, it is a case-specific question which does not require discussion of any difficult or far-reaching doctrinal issue. It is therefore my view that the arbitration agreement point is open to the appellant. As it is logically anterior to the exclusive jurisdiction point, I will deal with it first.

D. The arbitration agreement point

D.1 The employment and arbitration agreements identified by the respondent

13. It was common ground below and continues to be the respondent’s case that the relevant contract of employment is constituted by three documents, namely:

⁷ (2007) 10 HKCFAR 1.

⁸ At §23.

⁹ [1974] 1 WLR 1514 at 1525.

- (a) a contract dated 9 August 2002 between the appellant and Cleene Maritime Corporation signing as sub-agent of the respondent (“the Philippine contract”);
- (b) a contract dated 27 August 2002 between the applicant and the respondent entitled “Agreement and Lists of the Crew” (“the Hong Kong agreement”); and
- (c) a collective bargaining agreement dated 2 October 2002 between Hang Woo Ship Management Limited on the one hand and three trade unions, namely, the Merchant Navy Officers’ Guild Hong Kong, the Amalgamated Union of Seafarers and the Hong Kong Seamen’s Union, on the other (“the Collective Agreement”).

14. The arbitration agreement which the respondent relies on as the basis of the stay of the ECO proceedings is found in Section 29 of the Philippine contract (“Section 29”) and provides as follows:

DISPUTE SETTLEMENT PROCEDURES

In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel arbitrators. If there is no provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

D.2 Problems with the concession

15. The concession made below faces a fundamental difficulty. There are irreconcilable inconsistencies between the Philippine contract on the one

disadvantaged in conducting an arbitration. And in a case like the present, where the arbitration agreement refers the dispute to a foreign arbitral tribunal, even if (which is not the case here) that tribunal should be amenable to applying the ECO, it would be ill-equipped to give effect to its provisions in the light of the relevant case-law. A foreign arbitral tribunal is in practice far more likely to apply the law of its own jurisdiction, which may or may not be as favourable to the employee.

55. It follows, in my view, that on its true construction, section 18A(1) confers exclusive jurisdiction on the District Court to deal with all ECO claims save in the cases expressly excepted. Arbitration is not such an exception and there is no power to stay ECO proceedings in favour of arbitration.

F. Conclusion

56. I am accordingly of the view that both the arbitration agreement and the exclusive jurisdiction points must be decided in the appellant's favour. I would therefore allow the appeal and make an order nisi for the respondent to pay the appellant's costs here and below. I would direct that such order should become absolute within 14 days of the date of this judgment unless submissions in writing on the question of costs are lodged by the respondent before that date. In such event, the appellant is to be at liberty to lodge reply submissions within 14 days thereafter.

Mr Justice Mortimer NPJ:

57. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Gault NPJ:

58. I agree with the judgment of Mr Justice Ribeiro PJ.

Cast of Potential Characters

Parties	Interests	Possible Issues and Arguments
Lawyer(s) representing cargo interests	<ul style="list-style-type: none">• Arrest the ship as a security• Apply for the sale of the arrested ship to recover clients' loss	
Cargo Underwriter	<ul style="list-style-type: none">• Protect the cargo owners from risks of cargo loss/ damage• In relation to a submitted claim, they ask the following questions:<ul style="list-style-type: none">▪ Did the assured have insurable interest? - assume YES here▪ Was the loss and/ or damage proximately caused by the insured peril? - if the cargo loss is due to piracy, assume piracy is an insured peril▪ Did the loss and/ or damage occur during the currency of the risk i.e. within period of policy? - assume YES here	<ul style="list-style-type: none">• The cargo on board is dangerous cargo requiring urgent discharge notwithstanding loss?<ul style="list-style-type: none">▪ Shipper has furnished information about the dangerous nature of the goods in a timely manner

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Parties	Interests	Possible Arguments
	<ul style="list-style-type: none">Once they have settled the claim under the cargo policy, they are subrogated to the rights of the assured including the right of the assured to bring a claim against the carrier under the bill of ladingEntitled to bring the claim against the carrier	
Other Cargo interests in different jurisdictions		<ul style="list-style-type: none">The carrier did not properly and carefully handle, stow, carry, keep, care for and discharge the goods carried under Art III (2) of the Hague-Visby Rules. So the carrier was in breach of the contract of carriageThe carrying ship is of unseaworthy nature
Lawyer representing bank interest or headowner (having been informed by IMB piracy reporting centre of the attempted hijack)	<ul style="list-style-type: none">The bank has financed the ship purchase	



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Parties	Interests	Possible Arguments
H&M underwriters	<ul style="list-style-type: none"> H&M insurance may cover physical damage to or the loss of the ship 	<ul style="list-style-type: none"> The loss resulting from piracy may / is not covered by the H&M insurance Current market practice is for this risk to be excluded from standard H&M insurances and for it to be covered by war risks insurers.
Representative of the shipowners	<ul style="list-style-type: none"> Following an amendment to the MLC which entered into force in January 2017, shipping companies must show that they have the necessary financial security arrangements in place to address unpaid wages in the event of bankruptcy 	
Charterer (T/C or voyage)	<ul style="list-style-type: none"> May be liable to the shipowners for the loss of or damage to the ship May be liable to cargo owners for cargo loss or damage if they are the carriers under the relevant contract of carriage 	<ul style="list-style-type: none"> Charterer may wish to claim an indemnity from the ship owner (if it is held liable to the cargo claimant) If the ship is of unseaworthy nature (i.e. perhaps given not well maintained), the shipowner, if he is the carrier under the bills of lading, will have no right to claim an indemnity from the charterers.

Parties	Interests	Possible Arguments
	<p><u>Indemnity Claims under charterparties</u></p> <ul style="list-style-type: none">• If the claims are bought under bills of lading which are issued pursuant to a charterparty then the carriers under the bills of lading may wish to claim an indemnity from the other party to the charterparty<ul style="list-style-type: none">▪ Merits depends on the terms of the charter and the cause of the cargo damage/ loss <p><u>Time Charterer</u></p> <ul style="list-style-type: none">• If the carrier is the time charterer, time charterer may wish to claim an indemnity inter se under the terms of the time charter. <p><u>Voyage Charterer</u></p> <ul style="list-style-type: none">• If the cargo receiver is the voyage charterer (e.g. where the cargo is brought FOB) the governing contract of carriage between the shipowners and the receivers would be the voyage charter.	



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Parties	Interests	Possible Arguments
	<ul style="list-style-type: none"> As a result, the cargo claim would be brought under the voyage charter and no question of indemnity arises between shipowner and charterer If the cargo receiver is not the voyage charterer, the governing contract will be the bill of lading. It is likely that the cargo claim will be made in the first instance under the bills of lading. 	
Mortgagee bank (of the arrested ship)	<ul style="list-style-type: none"> Has Financed the ship purchase with the mortgage Shipping company has not repaid the mortgage Insolvency of shipping company in issue 	<ul style="list-style-type: none"> The vessel may be sold by public tender in order to obtain the best possible price for the vessel Then, the mortgagee can make claims against the proceeds of sale The mortgagee has a priority over the cargo interest
P&I Clubs	<ul style="list-style-type: none"> Normally the liability of the carrier will be covered by the standard P&I cover provided on a mutual basis by the P&I Clubs, subject to detailed exclusions P&I insurer provides cover for a wide range of legal liability that the assured may have to third parties, and for expenditure arising as a result of loss or damage to cargo 	<ul style="list-style-type: none"> The cover provided by the member clubs of the P&I Clubs is on a 'pay to be paid' basis i.e. the shipowner must pay the claim first and then seek indemnification from the club. The club is not obliged to offer security to release a ship from arrest

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Parties	Interests	Possible Arguments
	<ul style="list-style-type: none"> Under the MLC, the shipping companies must have financial guarantees in place via P&I Clubs to ensure seafarers repatriation costs will always be met 	<ul style="list-style-type: none"> Provision of financial security for potentially unpaid wages is a liability which is hard to quantify and thus complicated to insure
Bunker suppliers (OW bunkers)	<ul style="list-style-type: none"> Unpaid suppliers of bunkers to the arrested ship Entitled to arrest the ship/ claim to recover the price of the bunkers 	
Technical and Crewing Ship Manager	<ul style="list-style-type: none"> Unpaid wages owed by ship owner Entitled to terminate the contract with the shipowner? Position under Philippine law? 	<ul style="list-style-type: none"> The ship <u>may</u> be sold by public tender The proceeds of sale should be used to meet unpaid wages
Unpaid Crew	<ul style="list-style-type: none"> Wages during the arrest Wages are unpaid Stranded Cost of repatriation to their home countries May decide to stay with their ships until they are sure any unpaid wages will be recovered 	<ul style="list-style-type: none"> Following an amendment to the MLC which entered into force in January 2017, shipping companies must show that they have the necessary financial security arrangements in place to address unpaid wages in the event of bankruptcy

Parties	Interests	Possible Arguments
Local port authorities / Flag state	<ul style="list-style-type: none"> • Arrange repatriation of stranded crew? • Cost of repatriation 	<ul style="list-style-type: none"> • The cost of repatriation could be recovered from the P&I Clubs because the ILO Maritime Labour Convention (“MLC”) requires shipowners to show they have financial security in place to ensure repatriation will occur
Local Admiralty Bailiff	<ul style="list-style-type: none"> • From the moment the ship is arrested, bailiff is responsible for the custody of the ship • Bailiff’s costs of arrest on demand (HK: requires law firm’s undertaking to pay contained in the affidavit) • (HK) All offers to purchase the ship must be made to the admiralty bailiff, who must realize the highest possible price obtainable 	<ul style="list-style-type: none"> • The arrested ship can be sold in order to cover the expenses and costs of arrest with the proceeds of sale
International Chambers of Shipping (ICS)	<ul style="list-style-type: none"> • Ensures that the MLC is being properly implemented • Informs the International Labour Organization (“ILO”) of the stranded seafarers • In conjunction with ILO and IMO, ITF ensure that crews are repatriated as quickly as possible in liaison with the vessel’s flag state. 	<ul style="list-style-type: none"> • The flag state should repatriate the seafarers as quickly as possible • The flag state could recover the cost of repatriation later from the P&I Clubs

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Parties	Interests	Possible Arguments
Surveyor	<ul style="list-style-type: none">• Checks the hull & machinery• Checks the cargo	
Broker	<ul style="list-style-type: none">• An agent of the ship owner/ carrier in arranging marine insurance <u>and</u> communicating with adversarial parties	
Valuer	<ul style="list-style-type: none">• (HK) appointed by the court to appraise the vessel in order to prevent the property from being sold at too low a price• (HK) determines the value of the vessel;• (HK) advertises the ship for 2 consecutive days• (HK) sells the vessel through sealed bids	
Classification Society	<ul style="list-style-type: none">• Special hull strength / rigidity certifications for iron ore carriers, for example	

