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Arbitration in China

ICSHK Column -
Meeting Customer Expectations

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Law Column - Knowing Your Limitations – Hong Kong Implements 1996 Protocol

Harry Hirst / Max Cross / Rory Macfarlane / Su Yin Anand

With effect from 3 May 2015, the 1996 Protocol (the 'Protocol') to the Convention on Limitation of Liability for Maritime Claims, 1976 (the '1976 LLC') now applies in Hong Kong.

The Merchant Shipping (Limitation of Shipowners Liability)(Amendment) Ordinance 2005 (the 'Amendment Ordinance') contains provisions amending the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) (the 'Limitation Ordinance') so that the Protocol can apply in Hong Kong. The Amendment Ordinance specifies that these provisions are to come into force on a day to be appointed. They could not come into force immediately but only after the Central People's Government of Mainland China ('CPG'), as the sovereign State, arranged to deposit the appropriate accession instrument with the International Maritime Organisation ('IMO'). The CPG has now done so; and in Law Notice L.N. 81 of 2015 issued on 22 April 2015, the Secretary for Transport & Housing (as successor to the Secretary for Economic Development & Labour following the re-organisation of the Hong Kong Government Secretariat in 2007) appointed 3 May 2015 as the date for entry into force of these provisions.

Accordingly, the Protocol now applies in Hong Kong having force of law by reason of section 12 of the Limitation Ordinance; and the new limits of liability are set out in Schedule 2 thereof.

New Limits

As a result of these amendments to the Limitation Ordinance, a shipowner's limits of liability for both property damage claims, and for personal injury or loss of life claims in Hong Kong have been increased, and are now as follows:

Property Damage Claims

Personal Injury / Loss of Life Claims

Gross Tonnage	Old Limit (SDRs)	New Limit (SDRs)
<500	167,000	1,000,000
501 – 2,000	+167 per ton	1,000,000
2,001 – 30,000	+167 per ton	+400 per ton
30,001 – 70,000	+125 per ton	+300 per ton
>70,000	+83 per ton	+200 per ton

Personal Injury / Loss of Life Claims

Gross Tonnage	Old Limit (SDRs)	New Limit (SDRs)
<500	333,000	2,000,000
500 – 2,000	+500 per ton	2,000,000
2,001 – 30,000	+333 per ton	+800 per ton
30,001 – 70,000	+250 per ton	+600 per ton
>70,000	+167 per ton	+400 per ton

The daily conversion rate for Special Drawing Rights (SDRs) is available on the International Monetary Fund website.

How substantial are the increases?

As appears, the new limits of liability are substantially higher. The table below shows the old and new limits of a shipowner's liability for property damage claims, and for loss of life and personal injury claims, using gross tonnages which are representative of, respectively: a handy-size, panamax, and cape-sized bulk carrier; a 5,000 TEU container ship; and a VLCC; and using a conversion rate of US$1.4 = 1 SDR.

Property Damage Claims

Gross Tonnage	Old Limit (USD)	New Limit (USD)
Handy-size: 25,000	$5,961,900	$14,280,000
Panamax: 40,000	$8,880,900	$21,280,000
Cape-size: 85,000	$15,873,900	$38,080,000
5,000 TEU: 55,000	$11,505,900	$27,580,000
VLCC: 160,000	$24,588,900	$59,080,000

Personal Injury / Loss of Life Claims

Gross Tonnage	Old Limit (USD)	New Limit (USD)
Handy-size: 25,000	$12,472,600	$28,560,000
Panamax: 40,000	$18,303,600	$42,560,000
Cape-size: 85,000	$32,310,600	$76,160,000
5,000 TEU: 55,000	$23,553,600	$55,160,000
VLCC: 160,000	$49,845,600	$118,160,000

Are there any other changes?

The limit of liability for the owner of a passenger ship for claims for loss of life or personal injury to passengers has also been substantially increased to 175,000 SDRs (from 46,666 SDRs) multiplied by the number of passengers which the ship is certificated to carry; and the previous cap of 25,000,000 SDRs has been abolished. For the owner of a high-speed Hong Kong–Macau ferry, the limit has accordingly increased from some US$21,755,689 (old limit) to some US$81,585,000 (new limit), assuming the ferry is certificated to carry 333 passengers, and using a conversion rate of: US$1.4 = 1 SDR.

The Protocol makes clear that claims for special compensation under Article 14 of the International Salvage Convention 1989, and claims for contributions in general average, are both excepted from limitation.

Practical Implications

With Hong Kong now a party to the Protocol, regional shipping lawyers could see an increase in cases of forum shopping, and particularly because Singapore – another popular common law jurisdiction in Asia – is still currently a party to the 1976 LLC; and because China, whilst not a State Party to the 1976 LLC, applies the limitation provisions of the Chinese Maritime Code which are modelled on the 1976 LLC.

The Protocol contains a "tacit acceptance" procedure for updating (increasing) the limits of liability, and on 19 April 2012 the State Parties agreed to adopt higher limits with effect from 8 June 2015. Section 28 of the Limitation Ordinance provides that:

"The Chief Executive in Council may by order published in the Gazette amend Schedule… 2 in accordance with any revision to... the Convention on Limitation of Liability for Maritime Claims, 1976, or to any protocol [to the Convention] which may apply to Hong Kong."

It is to be expected therefore, that the new limits will be further increased next month for both property damage ('property') claims, and for loss of life and personal injury ('LOL/PI') claims, as follows (figures are in SDRs):

Gross Tonnage	New Limits (Property)	New Limits (LOL/PI)
< 2,000	1,510,000	3,020,000
2,001 – 30,000	+604 per ton	+1,028 per ton
30,001 – 70,000	+453 per ton	+906 per ton
> 70,000	+302 per ton	+604 per ton

(Mr. Harry Hirst: Regional Head of Admiralty, Partner, Hong Kong
Mr. Max Cross: Partner, Hong Kong
Mr. Rory Macfarlane: Partner, Hong Kong
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Crew Optimization Programme (船員優化計劃 Part II)

Peter Chu

In my previous letter entitled 船員優化計劃, I highlighted a missing link in maritime career development. Under the present legislation, there is a crew licensing system for local vessels (within Hong Kong waters), and a crew licensing system for oceangoing vessels (trading worldwide). There is no bridge between them.

Under the present system a coxswain of a local ferry, for example, is solely responsible for the safety of the passengers carried on board the ship. Sometimes this can be as many as few hundred people. Yet, with this qualification the coxswain is not allowed to keep a navigation watch of the lowest grade, such as a 4^{th} or 3^{rd} class watch keeping officer, on an oceangoing ship. You may draw a skeptical conclusion that the Coxswain actually may not be qualified, despite his local certificate. Of course, there are deficiencies in both training and academic requirements when compared with ocean going officers, but certainly these deficiencies can be remedied by further training and education. What we need is a bridge which clearly lists what should be fulfilled in order to move from local ships to oceangoing ships.

With this bridge, we should be able to draw more people into sea going careers which would hopefully lead to a professional qualification of Master Mariner or Chief Engineer. These qualifications are recognised worldwide due to their international characteristics. The training and examination syllabus are truly international (regulated by STCW).

We are also likely to attract those who do not fully understand seagoing career prospects because they can start a trial job on local ships. What other careers can offer you a trial job?

Compare with working a shore job

Unless for a very lucky few, you are compelled to waste time travelling to and from your work place in a very user unfriendly environment such as the MTR or other public transportation. You are forced to eat junk food, with plastic containers and disposable chopsticks at great health risk. You are probably overcrowded in your own house at home, with little space to breath. And worst of all, there is no clear career path or pay escalation expectations. You are probably compelled to work with a superior you do not like, and you and your office mates slave away in a congested office for many years. All these are caused by the high housing costs from which we all suffer now.

You need not actually go on an ocean going ship to find all the differences with a seagoing career; you can take a ride on a ferry to the islands to feel how life on the open sea can be.

For job security and pay

I have given the figures in my first letter "船員優化計劃" on the same topic. But I have been very conservative. For local vessels, an academic qualification of secondary school will be sufficient. Within 2-4 years, you will be qualified as a coxswain/engine operator. Not something you can be proud of, but at least a well recognised qualification. With a better education background, one can probably save 1 year. When the bridge is built, one can move to work as a junior watch officer on ocean going vessel and work one's self up the career ladder to the rank as Master or Chief Engineer. If you work hard, this is merely a period of 5-7 years. If you take a more leisurely way, may be 2-3 years more. But this is something feasible and virtually everyone is following this path. The present salary for senior officers on oceangoing vessels ranges from HK$80-90,000. For special ships this easily over HK$100,000. But the career does not stop there.

For example, a self employed surveyor can easily earn HK$7,000 per day. Of course, you may not work 30 days a month. But many are working close to 30 days per month. Nearly all surveyors are ex-Masters or Chief Engineers.

A superintendent or assistant superintendent will get HK$50-60,000 per month, this is usually the first shore job after reaching the most senior rank on a vessel. With work and management experience, you will be promoted to Manager Grade and a few can be promoted to Directors and CEO of listed companies.

Within the Marine Department, there are many posts now pending to be filled. And once you are appointed, you are on professional grade office pay scale. It is simply a matter of time to reach the post of Senior Officer, Principal officer, Assistant Director and Director. Though a very few may stay many years as base grade officer until retirement.

You may also switch your sea going career to the legal professional. Combining the two you will be a lawyer specializing in the shipping and marine business. The hourly charge for maritime lawyers ranges from HK$3500 to HK$4500 per hour (yes, per hour).

If you are less ambitious and decide to quit before reaching the top rank, you can still join the marine and shipping industry as a ship broker, ship operator, marine insurance and claim handler or as engineer or assistant engineer in another field.

The relatively high remuneration has something to do with the service you offer and the value you add or create. An ordinary bulk carrier will cost HK$80 Million, while expensive ships like LPG, passenger ships, off shore ships can easily cost HK$300 Million to HK$800

Million. While ordinary restaurants, retail shops, land transport vehicles cost only a hundredth of a ship, the value they generate is also very low as compared with the value generated by a ship. Thus, the pay difference.

I am eager to promote this career because of all the above reasons, it is a waste and pity that this industry is not well recognised and well promoted.

However, all this is not possible unless we have the bridge. In 2004, some draft ordinances were prepared under the Provisional Local Vessel Advisory Committee creating a new category of ship called a "coastal ship". This is exactly what we need and unfortunately they were shelved. It is time to revive these drafted ordinances.

This bridge is important to the development of our marine industry. Therefore, I appeal to all concerned parties to either re-activate the drafted ordinances, or alternatively to prepare a bridge mechanism for the local vessel certified staff to work as junior watch keeping officers on oceangoing ships. I think this is something within the power and obligation of the Marine Department.

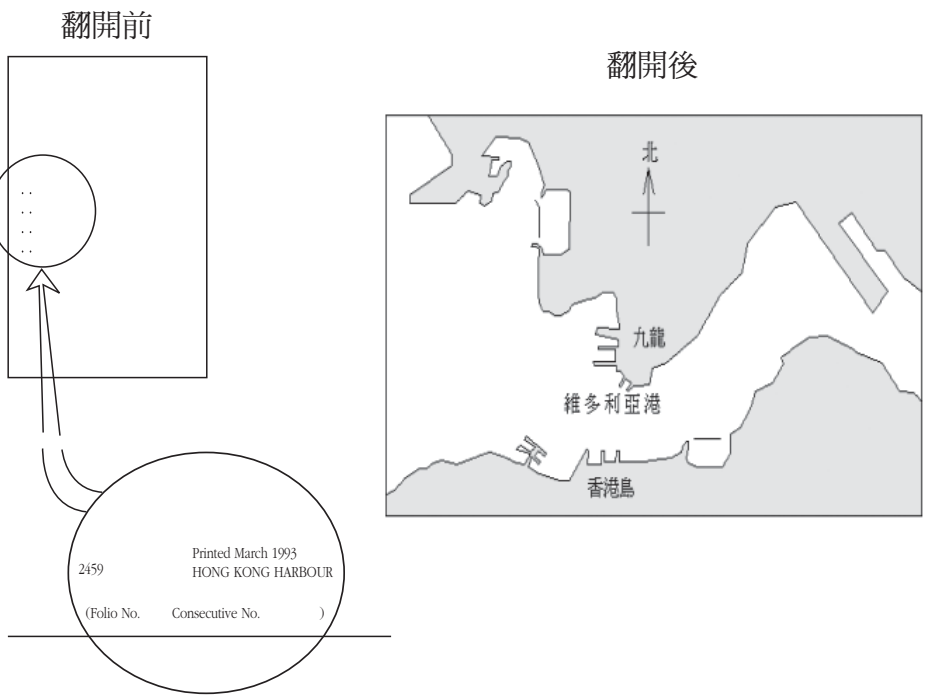
(Captain Peter Chu: South Express Ltd)

如何認識英版海圖

林傑

在翻開一張海圖前，應把海圖背面印有海圖編號的向上和向左，放在海圖檯面上 (圖一)。

圖一



用右手向右翻開海圖，一般翻開海圖後，你會發覺地理北方在海圖的上方，地理南方在海圖的下方；有些海圖需要在翻開後，向左方旋轉 90 度，便是北上南下（圖一）。英國海圖很有系統和規律，連翻開海圖的規律和步驟都顧及到。同時英國海圖的紙張尺碼，大部份都幾乎是相同的，在對摺海圖後，其尺碼是相同的，方便將海圖分地區性整理成圖集，容易收藏和查閱。

閱讀海圖翻開時，我們必須知道下列有關海圖的資料：

(1) 海圖編號

海圖編號印在海圖的右下角，同時在左上角也有倒轉了的相同編號。海圖背頁上標題旁邊也印有編號。

(2) 海圖標題

在海圖上不會妨礙航行的圖面上，印有海圖的地理範圍 (即海圖標題)。在標題下，詳載何時測量，根據什麼資料製圖，山高和水深等單位資料，比例尺，投影方式和一些重要通告等。

(3) 海圖測量日期

在海圖標題下。

(4) 印刷日期

顯示在海圖背頁標題 / 編號旁邊。

(5) 印刷方式

製版方式用字母顯示在右下角處，如 Z (即鋅製版)。

(6) 第一版日期

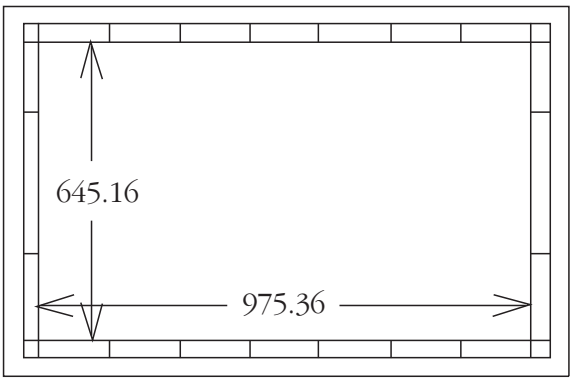
在下方中央處註有海圖何時第一次出版，例如 <Published, Taunton 12th April 2012>。

(7) 更新出版日期

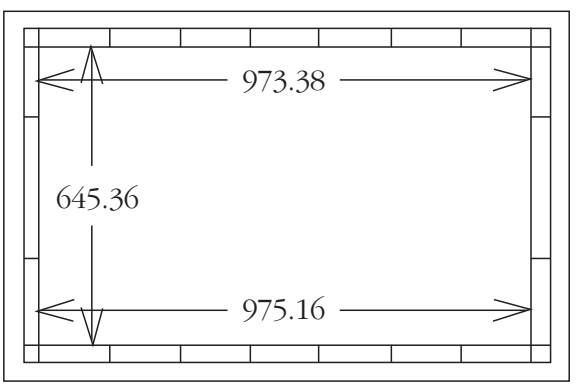
當一張海圖經過徹底修改，更新出版，在右下方海圖第一次出版日期右面註有更新出版日期。 更新出版意即是把以前的所有大小改正一次過納入新版處。

(8) 海圖圖幅

並不是說明印製海圖用紙張的尺碼 。是指經緯坐標週圍內的尺碼，註在右下方接近海圖編號處，其數目字以括號顯示，以毫米或吋為單位；如 (645.16 x 975.36) 在麥卡托投影的海圖上（圖二）；如在磐折形投影的海圖上，圖幅會以如 (x 645.36) 表示（圖三）。



圖二



圖三

(9) 小改正

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(10) 依據英國海圖 5011 號的標準符號和縮寫。

(11) 等深線。

(12) 經緯度坐標

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經度坐標，大都註有該圖的經度是在格林威治（即基本子午線）之東面或西面。緯度坐標除了測度緯度外，還可用以測度里程，因為緯度一分相等於一浬。經度坐標是不能用作測度里程的。

(13) 水深單位

海圖上的水深是在海圖基準面以下的，除另有說明外，一般都是天文低潮位為基準，即大潮低潮或低低潮位都很少有低過天文低潮的。有些海圖基準面可能不同，會註明在海圖標題內。水深數字散佈在海區上，數字的中心點是水深的位置，單位用米（公制）或潯（英制）。公制海圖在右下角和左上角處均印有棗紅色的「水深以米為單位」(DEPTH IN METRES) 等字。

(14) 距離比例尺

在海圖方便的地方，(祇在大比例圖)，如標題附近或緯度坐標旁邊，會印有一些比例尺，可測度不是以浬為單位的距離，如呎、米、鏈（即基保）或碼等。

(15) 觀測點的位置

在海圖一角的地方，有些放得更大比例的平面港口圖，可能沒有經緯度坐標印在四週，在這些圖上會註明某一點是觀測點的經緯度，從而可計算出其他位置的經緯度。

(16) 陸地高度

由平均大潮高潮位算起的高度，以呎或米為單位，在標題內註明。

(17) 淺灘上有底線的數字

表示淺灘在海圖基準面上的乾出的米數 (或英制英版海圖之呎數)。

(18) 潮流和潮汐資料

所有該海區的潮流資料除了印在海區上，有時也會用表列形式印在海圖一些方便的地方，包括潮流、潮汐水位等資料。凡是這些潮流資料，皆必須連同該海圖註明的潮汐港的潮汐表一起運用，以幫助航行。

(19) 燈質

燈塔、燈標、燈船和燈泡的燈質，例如 Fl(2) 10s。

(20) 橋樑通航高度

由最高天文潮位算至橋底的可通航高度。

(林傑船長 : Master Mariner, M.I.S., MH.)

Law Column -
Arbitration in "China" - does that mean the place of arbitration must be in Mainland China, or can it be in the Hong Kong SAR?

Ernest Yang / Sharon Leung

Z v A and others [2015] HKCFI 228; [2015] 2 HKC 272; HCCT 8/2013 (30 January 2015)

Introduction

The seat or place of an arbitration is significant and has wide ranging consequences. It dictates, amongst others:-

1. the applicable procedural law of the arbitration;

2. the national court that may assist to provide interim relief and/or to supervise the arbitral tribunal;

3. the national court that has jurisdiction to determine any challenge or appeal of the arbitral award (if such challenge or appeal is permitted); and

4. the nationality of the award for the purposes of recognition and enforcement of the arbitral award (for example the parties may wish to choose a state that is a signatory to the New York Convention).

There may be strategic advantages involved in a choosing a particular seat or place of arbitration, which may be selected for various practical and/or tactical reasons. It is therefore important that when parties agree on the seat or place of arbitration that it is set out in the arbitration agreement in clear and precise terms in order to avoid any ambiguity or future dispute. It is also important for the parties to expressly state the governing law of the arbitration agreement itself.[1]

So when parties decide that the seat or place of arbitration is "China", what does that mean? Does it mean that the parties have decided that the place of arbitration can only take place within the borders of Mainland China only or can it include Hong Kong SAR ("Hong Kong") or Macau SAR ("Macau")? There may be a cross section of individuals in Hong Kong whose first reaction may be that *"arbitration in China"* means Mainland China and not Hong Kong or Macau. However, in the recent decision of *Z v A*, the Hong Kong Court of First Instance held that where parties agreed the place of arbitration to be "China", under the circumstances of the case, i.e. where the arbitration was subject to the ICC Rules, this could include Hong Kong as the seat of arbitration.

In light of this decision, parties need to be aware that even if the agreed arbitration clause states "China" to be the place of arbitration, the arbitration may still be seated in Hong Kong (or Macau) with the laws of Hong Kong (or the laws of Macau as the case may be) applying as the procedural law of the arbitration.[2]

Background

Z, a Chinese company and the Applicant in the case, entered into two agreements with A and others, an Egyptian company and its affiliated companies or subsidiaries, together the Respondents. The first agreement is referred to as the CKD and Agency Agreement (the "CKD Agreement") and the second agreement is referred to as the Technical Cooperation Agreement (the "TC Agreement") (collectively the "Agreements"). The Agreements were made for the manufacture, sale and purchase of goods in Mainland China. The arbitration clause in the CKD Agreement provided that *"arbitration as per the International Chamber of Commerce and held in CHINA [sic]"*; and the arbitration clause in the TC Agreement provided that any dispute was to be *"finally settled in CHINA by arbitration pursuant to the Rules of the International Chamber of Commerce"*. There was no dispute that the governing law of both Agreements was the law of the People's Republic of China ("PRC").

Disputes arose between the parties and the Respondents commenced arbitration. A Request for Arbitration was filed by the Respondents with the International Court of Arbitration ("ICC Court") of the International Chamber of Commerce ("ICC") seeking relief in respect of the Applicant's alleged breach of the two Agreements. The Respondents submitted that the place of arbitration shall be Hong Kong, on the basis that Hong Kong is part of and within China, an arbitration award made in Hong Kong by the ICC Court can be enforced in Mainland China, and further, that the Arbitration should be government by the laws of the PRC. The Applicant's position was that the place of arbitration was agreed to be Mainland China under the two Agreements and that there was no need to fix another place of arbitration to be determined by the ICC Court.

The ICC Secretariat fixed Hong Kong as the place of arbitration pursuant to Article 14(1) of the ICC Rules (the 1998 ICC Rules in force at the time the arbitration was commenced) which provides that: *"The place of arbitration shall be fixed by the (ICC Court) unless agreed upon by the parties."*. A sole arbitrator was subsequently appointed by the ICC Court. One of the issues to be determined by the arbitrator was whether the tribunal had jurisdiction to deal with the issues in dispute. In a partial award, the tribunal upheld the place of arbitration to be Hong Kong stating that *"As the Parties could not agree on a city in China as the place of arbitration, on 15 December 2011 (in accordance with Article 14(1) of the ICC Rules), the ICC Court fixed the place of arbitration as Hong Kong, PR China..."*, and that *"the ICC Court validly determined Hong Kong SAR, PR China as the seat of arbitration, the applicable arbitration law to be applied in determining whether or not the tribunal has jurisdiction to hear this matter is Hong Kong law."* (the "Award").

The Applicant applied to the Hong Kong Court to set aside the Award under section 34 of the Arbitration Ordinance (Cap. 609) (which incorporates Article 16 of the UNCITRAL Model Law) for a declaration that the arbitrator had no jurisdiction to hear and deal with the issues

in dispute. The Applicant's position was that it was not open to the ICC Court to rule on Hong Kong as the place of the arbitration when the place of arbitration had already been agreed upon by the parties as China, and "China" meaning Mainland China. The questions considered by the Court included: (i) whether the ICC Court was entitled to determine the place of arbitration; and (ii) whether "Chinese law" referred to the law of the Mainland or Hong Kong law, and whether "China" means Mainland China or Hong Kong. The application was heard by Justice Mimmie Chan on 6 January 2015 and the decision was handed down on 30 January 2015.

The Court's Decision

The Hong Kong Court of First Instance dismissed the application and declined to set aside the Award. The Court's conclusion was that the Tribunal was properly constituted and the arbitrator had jurisdiction over the dispute submitted by the parties. Costs were ordered against the Applicant on an indemnity basis.[3]

The Court held that in view of the very dispute before it as to the meaning of "China" in the arbitration clauses of the Agreements, it could not be said that the parties had agreed upon the place of arbitration as provided for in the Agreements. The ICC Court was entitled and bound to determine the place of the arbitration under Article 14 of the ICC Rules which the parties had expressly agreed to submit to and be bound by. Also, there was no evidence that the appointment of the arbitrator and the constitution of the tribunal in this case was invalid or defective in any way.

In the context of construction of the arbitration clauses, the Court held that the judge should put himself in the place of rational businessmen and to consider what would have been the intention of ordinary, reasonable and sensible businessmen in the position of the actual parties to the contract and considered in light of the surrounding circumstances and the object of the contract. The Court was of the opinion that as reasonable, rational businessmen, the parties must have been aware at the time the Agreements were made that China had resumed sovereignty over Hong Kong, and that legally, as well as geographically, Hong Kong is a part of China. It could not be incorrect for the ICC Court to decide on a plain reading of the arbitration clauses that the arbitration should be held in Hong Kong.

Further, on the issue of construction, the Court held that the parties would have intended to produce a result that is legal, rather than illegal when agreeing to the terms of a contract. The Courts will lean in favour of and prefer a construction which renders the contract enforceable and legal. Expert evidence on PRC law was submitted by the parties as to the validity of arbitrations seated in Mainland China which are administered by foreign arbitral institutions. The expert for the Applicant took the view that an arbitration held on the Mainland and administered by ICC is not a domestic award and may not be enforced by the courts on the Mainland, since ICC is not an arbitration institution which is registered with the authorities on the Mainland under the PRC Civil Procedure Law. The Respondents' expert referred to the *Longlide*[4] case decided by the

Supreme People's Court in 2013, in which it ruled that an arbitration clause providing for ICC arbitration on the Mainland was valid. Nonetheless, the Court held that on the face of the expert evidence, there was a *risk* that an ICC award made in Mainland China may not be enforceable in Mainland China. On the other hand, the experts agreed that an ICC award made in arbitration proceedings conducted in Hong Kong would be enforceable in Hong Kong, on the Mainland and in other countries which are parties to the New York Convention. On this basis, and that the object of an arbitration agreement must be to have the dispute resolved by a process which would result in a final, binding and enforceable award, the Court agreed with the arbitrator that the arbitration between the parties should be conducted in Hong Kong as opposed to the Mainland China.

The Court also commented that it was regrettable the arbitration clauses in the Agreement were not drafted in more precise terms, but on the facts and evidence, the Court preferred the construction that the arbitration is to take place in Hong Kong, instead of Mainland China.

Comment

The Court's decision clearly illustrates the importance of the seat or place of arbitration to be clearly and precisely stated in the arbitration clause with absolutely no room for uncertainty. Any ambiguity as to the place of arbitration may lead to disputes regarding the validity of the arbitration agreement and/ or the jurisdiction of an arbitration tribunal, which will require time and costs to be resolved by a tribunal and/ or by the supervising court. This is exactly what happened in the case of *Z v A*. The arbitration was commenced by the Respondents on 11 October 2011 and the determination of the tribunal's jurisdiction by the Court was not handed down until 30 January 2015, more than three years after the commencement of arbitration.

It is clear from the outcome of *Z v A* that providing the place of arbitration simply as "China" is not sufficiently clear to mean Mainland China and will in certain circumstances such as in the present case, mean arbitration in Hong Kong instead of Mainland China. A similar argument could be made that the reference to "China" as the place of arbitration would include Macau.[5] Parties who intend to choose Mainland China as the place of arbitration should, amongst other things, specifically state the city in Mainland China and the Chinese arbitral institution recognized under PRC law, in order to eliminate the possibility of any uncertainty. The arbitration clause should be drafted in the clearest and most precise terms.[6]

Further, from the judgment handed down in *Z v A*, it appears the Hong Kong Courts continue to be doubtful of the enforceability of ICC awards made in Mainland China despite the case of *Longlide*[7], where the Supreme People's Court considered valid an arbitration agreement referring disputes to arbitration seated in Shanghai and administered

by the ICC. Although the Supreme People's Court upheld the validity of the arbitration agreement, concerns remain as to whether such awards made pursuant to these clauses (i.e. arbitration in Mainland China administered by a foreign arbitral institution) will be enforceable in Mainland China. Given that the Hong Kong Court considered there to be such a risk, i.e. that an ICC award made in Mainland China might not be enforceable, it preferred the construction that the arbitration is to take place in Hong Kong and that the reference to the place of arbitration being "China" included Hong Kong.

To ensure the enforceability of arbitral awards in Mainland China, parties should either opt for arbitration in Mainland China administered by a Chinese arbitral institution recognised under PRC law or for the place of arbitration to be other states which are signatories to the New York Convention, for example Hong Kong, if a foreign arbitral institution, such as the ICC, is to be chosen.

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1 *The importance of expressly stating the governing law of the arbitration agreement itself is illustrated by the case of Klöckner Pentaplast GMBH & Co KG v Advance Technology (HK) Company Limited [2011] HKCU 1340, where DLA Piper Hong Kong acted for one of the parties. Because the governing law of the arbitration agreement was not specified, disputes arose and the Hong Kong Court of First Instance had to determine the governing law of the arbitration agreement. It took approximately nine months from the commencement of the action to the decision of the Court for the parties to resolve whether the substantive dispute was to proceed by way of arbitration or by Court proceedings. If the parties had specified the governing law of the arbitration agreement, time and costs would have been saved. In light of the Klöckner decision and other English, Indian and Singapore decisions on the same issue, in August 2014, the Hong Kong International Arbitration Centre (the "HKIAC") updated the HKIAC model clauses to include specific wording to prompt parties to consider designating an appropriate law to govern their arbitration agreement.*

2 *Although in practice, only a few decisions have been rendered by an arbitral tribunal in Macau.*

3 *The indemnity costs order is in line with the now usual costs order in an unsuccessful set aside application as recently confirmed by the Hong Kong Court of Final Appeal where it upheld the decision made by the Hong Kong Court of Appeal in the case of Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd, CACV No. 136/2011.*

4 *Anhui Longlide Packaging Co. Ltd. v. BP Agnati SRL (2013) Min Si Ta Zi No. 13 (Unreported)*

5 *See footnote 2.*

6 *Parties should always seek legal advice when drafting arbitration clauses/ agreements to ensure its validity and enforceability. DLA Piper are well placed to advise on the drafting of arbitration clauses.*

7 *See footnote 4.*

(Mr. Ernest Yang, Partner, DLA Piper Hong Kong and Ms. Sharon Leung, Senior Associate, DLA Piper Hong Kong)

AA TALK

General Average on vessels in ballast
• *under English law and practice*

Raymond T C Wong

In General Average cases it is necessary to establish the General Average community which is quite obvious with the presence of cargo on board the vessel at the time of General Average act. Where the vessel is proceeding in ballast under charter, the General Average community can be brought about by the presence of the charterer's bunkers on board and/or chartered freight at risk, as the case may be. Where the vessel is proceeding in ballast and not under charter, there is no General Average community but Hull Underwriters under Clause 11 of ITC - Hulls 1/10/83 agree to pay GA expenses:

> "When the vessel sails in ballast, not under charter, the provisions of York-Antwerp Rules, 1974 (excluding Rules XX and XXI) shall be applicable, and the voyage shall be deemed to continue from the port or place of departure until the arrival of the Vessel at the first port or place thereafter other than a port or place of refuge or port or place of call for bunkering only. If at any such intermediate port or place there is an abandonment of the adventure originally contemplated the voyage shall thereupon be deemed to be terminated."

Where the vessel is proceeding under Charter

For the position under English law and practice, the leading guide is the Association of Average Adjusters Rules of Practice no.B26 which reads as follows:

"For the purpose of ascertaining the liability of Underwriters on British policies of Insurance, the following provisions shall apply:-

> *When a vessel is proceeding in ballast to load under a voyage charter entered into by the shipowner before the general average act, the interests contributing to the general average shall be the vessel, such items of stores and equipment as belong to parties other than the owners of the vessel (e.g. bunkers, wireless installation and navigational instruments) and the freight earned under voyage charter computed in the usual way after deduction of contingent expenses subsequent to the general average act. Failing a prior termination of the adventure, the place where the adventure shall be deemed to end and at which the values for contribution*

to general average shall be calculated is the final port of discharge of the cargo carried under the charter but in the event of the prior loss of the vessel and freight, or either of them, the general average shall attach to any surviving interest or interests including freight advanced at the loading port deducting therefrom contingent expenses subsequent to the general average act.

When a vessel is proceeding in ballast under a time charter alone or a time charter and a voyage charter entered into by the time charterer, the general average shall attach to the vessel and such items of stores and equipment as are indicated above. Failing a prior termination of the adventure, the adventure shall be deemed to end and the value for contribution to general average calculated at the first loading port upon the commencement of loading cargo.

Where the charter to which the shipowner is a party provides for York-Antwerp Rules, the general average shall be adjusted in accordance with those Rules and British law and practice and without regard to the law and practice of any foreign port at which the adventure may terminate; and in the interpretation of Rule XI it shall be immaterial whether the extra period of detention takes place at a port of loading, call or refuge, provided that the detention is in consequence of accident, sacrifice or other extraordinary circumstance occurring whilst the vessel is in ballast.

In practice neither time charter hire, as such, nor time charterer's voyage freight shall contribute to general average."

As will be noted, the Rule clearly defines the General Average voyage where the vessel is proceeding in ballast "to load" under voyage charter which shall be deemed to end at the final port of discharge of cargo carried under the (voyage) charter. It therefore provides a clear guide that cancellation or frustration of the original voyage under the charter forms a prior termination of the adventure. This is because the other interest at risk, chartered freight, will have disappeared as soon as the fixed voyage is cancelled, resulting in there being no further common adventure.

However, the Rule makes no reference to any specific cargo voyage where the vessel is proceeding in ballast (without the words "to load") under time charter. It provides for the termination of the adventure being at the first loading port upon the commencement of loading cargo, but without reference to any specific cargo voyage. The sub-voyage charter party has no relevance at all, noting

that any time charterer's voyage freight shall not be brought in to contribute to General Average. Furthermore, if it had been intended to give similar effect that cancellation or frustration of the original intended voyage under the sub-voyage charter would form a prior termination of the adventure, it would have been so easy to simply add the same words "carried under the charter" as in the preceding paragraph or even better, the words "originally contemplated" after "at the first loading port upon the commencement of loading cargo".

Having noted the construction of the Rule B26 in respect of the vessel proceeding in ballast under Time Charter being clearly different from that in respect of Voyage Charter, the Editor will consider further what constitutes "prior termination of the adventure" in cases where the vessel is proceeding in ballast under Time Charter.

The General Average community in the case of the vessel proceeding in ballast under time charter is established by the presence of the time charterer's bunkers on board the vessel, which are always on board for resuming the ballast passage. The common adventure would therefore continue until, as provided by the AAA Rules of Practice, upon commencement of loading of cargo at the first loading port (except where there is a prior termination of the adventure).

For vessels trading under time charter, the ship-owner has virtually no say on where the vessel is to proceed to load cargo as this is dictated by the time charterer. In real life it is not uncommon that time charterers make alterations of loading and/or discharging port(s). Indeed, in most cases involving considerable General Average detention, the originally intended voyage would almost certainly be cancelled as soon as it is apparent that the original cargo fixed by the time charterers can no longer wait and often the time charterers do not advise the ship-owners and merely instruct the Master to proceed to a new port/location until shortly before the completion of repairs. In the circumstances, whilst the voyage is altered the common adventure insofar as the General Average community, i.e. the vessel and the bunkers, continues and it is not right that when the General Average allowance will terminate will depend on when the time charterers bother to advise of the voyage cancellation or alteration during the detention whilst the vessel is under repairs.

It is worth noting the following submission on page 216 of the 3rd edition of "Marine Insurance And General Average In The United States - An Average Adjuster's Viewpoint" by Leslie J. Buglass:

> "... in practice it is sometimes difficult to determine if and when the voyage is terminated for general average purposes. A broad view is taken in

this regard and even if a charter under which the vessel was proceeding in ballast is cancelled while the vessel is in a port of refuge, assuming the vessel proceeds to the same geographical destination within a reasonable time, it is considered that there has been no termination of the adventure in a geographical sense. In such circumstances, the general average continues until the vessel is ready to proceed from the port of refuge..."

The Editor believes that most, if not all British fellow adjusters recognize and have been adopting this approach throughout since the publication of the first edition of this book in 1973 by an internationally recognized average adjuster.

The very first experience of the Editor in ballast General Average under time charter was in July 1973 in a vessel which was proceeding in ballast from Japan to the USA under a time charter and a voyage charter entered into by the time charterer. The original chartered voyage was cancelled shortly after the collision giving rise to a detention for repairs at a port of refuge for some 2 months. After completion of the necessary damage repairs, the vessel continued in ballast to the USA. The vessel was insured with Underwriters at Lloyd's and Institute of London Underwriters and both approved the Adjustment and settled the claim promptly without query. The Editor has since been adjusting similar claims on that basis throughout without yet encountering any adverse comments from underwriters.

Apparently some average adjusters following the Buglass approach are concerned about lengthy detention, which, with due respect, does not sound logical since the principle would be consistent whether the detention is 1 month, 3 months or longer. In this connection (regarding lengthy detention), the Editor experienced a vessel which was proceeding in ballast from Taiwan to load a cargo under a voyage charter at Richards Bay (for delivery in Taiwan). Her engine-room flooded in November 1989 and the vessel was towed to Singapore where she detained for necessary repairs for some 4.5 months. There was no cancellation date in the voyage charter party and whilst the original cargo intended to be loaded on this vessel was shipped by other vessel, the vessel did continue her ballast passage to Richards Bay to load another cargo under the same charter party, the chartered freight being earned by the ship-owner. The whole period of detention was allowed in General Average, which was queried by Underwriters who after discussions eventually settled the claim in full. This is not a ballast General Average under time charter but it demonstrates that the principle would not be affected by the detention period.

In view of the foregoing, the Editor would suggest as he has done so throughout that the circumstances under which there is a "prior termination of the adventure" for the purposes of General Average ballast under time charter would be either

(a) the complete diminishment of the bunkers on board, thus exiting the common adventure, or

(b) the frustration by agreement or otherwise of the contract between the ship-owner and the time charterer, i.e. the time charter party, whichever occurs first.

However, this approach was challenged by some average adjusters a couple of years ago, who would be against continuing to make allowance as soon as the time charterer makes the decision to change the voyage or communicates his decision to the ship-owner.

The subject was indeed discussed in the London market last year and apparently the market is in favour of an explicit rule of practice to achieve uniformity of practice amongst average adjusters. A sub-committee of the Association of Average Adjusters was therefore set up for this purpose. We shall in due course report on the outcome in this respect.

(Do you have a specific problem on a marine insurance claim? Then, write to "AA Talk" – email: info@seatransport.org)

(Mr. Raymond T C Wong: Average Adjuster)

ICSHK Column - Meeting Customer Expectations

Jagmeet Makkar

The views expressed here are solely those of the author, and do not necessarily reflect the views of the organization(s) he represents.

A ship-owner sells the cargo carrying capacity of his ship as his product. To service the customer, this ship is manned and managed by staff, both onboard and ashore, is maintained in sea worthy condition, being in full compliance with the rules and regulations. This product then goes on to strive to meet the contractual obligations, of a charterparty or a contract of carriage, as a "bare minimum".

In addition to above what sets a quality ship-owner apart are attributes such as attitude – "can do" approach; five dimensions of Servqual* - reliability, assurance, tangibles, empathy and responsiveness; flexibility; quality of operations etc.

Customer

Who is the customer of a ship-owner?

For a ship-owner, the customers could be the operators, charterers, industrial houses, shippers and traders. These customers are global and are the centre of a ship-owner's business orbit.

Attributes that a customer wants are similar to above with more emphasis on reliability and meeting schedules; flexibility; track record; quality of operations and finally, "No Problems"!

Now, let us define and understand the meaning of some of these attributes:

Reliability

Reliability is the ability to deliver what was promised, dependably and accurately.

To service contractual promises so as to satisfy charter-party obligations.

To tell if there is a problem because problems do happen and an early discovery and remedial action is far superior that cover ups!

To fix promises when they break and remedial actions.

Transportation of cargo is a derived demand and is not an end in itself. While a break down onboard a vessel may cause losses to her owners by way of loss of hire and cost of repairs, the losses to his

Customers could be many fold larger, e.g. by way of not meeting commitments down the line and in some cases – loss of an entire market which would be extremely difficult, if not impossible, to regain.

Assurance

It flows out of the knowledge and courtesy of employees.

The ability to convey trust and confidence by the employees, both afloat and ashore, will provide the desired "assurance".

A simple matter, usually taken for granted, such as compliance with Charterer's system of reporting, both in terms of the frequency and the format without reminders, is important. Experienced & knowledgeable operations personnel – "to know what one is talking about" can give the required assurance implicitly. Every message and response to the customer is important. Once the words are spoken or conveyed written, they are not retractable and leave an impression, favourable or adverse. In a subconscious mind, a trail starts to form. Hence, day to day communications must be relevant, clear and concise. Experienced & knowledgeable Masters, Chief Engineers and the staff onboard and ashore can deliver consistently good performance, leading to a high degree of assurance to the customer.

Tangibles

What the customer sees and perceives – from both hardware and software i.e. the ship and how the shipboard personnel come across.

Impression of the ship and equipment carried away by the customers or the agents of the customers during their ship visits. What they see is important than what the ship's personnel think they have seen!

Impression carried by the customers or agents of the customers – when they visit the Ships. Further how "they" see they are treated is extremely important.

Empathy

The degree of caring and individual attention provided to customers, summarized as "empathy" is an understanding of customer's needs.

Taking that extra time to learn/ understand customer's problems/ bottlenecks rather than a reactive "No" can go a long way. Having customer's best interest at heart and at times thinking out of the box – how we can help eliminate/ minimize problems or go that extra mile for the customer i.e. do more than what is required. This could be to accommodate requests that can be complied with without comprising the safety of the ship and ship-owner's interest.

Flexibility

An attribute that customers so much desire.

There are always some conflicting situations regarding "Ship-owners' interest" and say "Charterers' interest". Contractual

rights and obligations are discussed and finalized at the time of commercial negotiations while fixing the ship. At this point of time, customers want maximum flexibility mainly in terms of trading areas and cargoes.

The dilemma for ship-owners is to cooperate to maximum in order to retain a valuable customer, while at the same time, to mitigate the exposure based on the knowledge that accepting some trading areas and carrying some cargoes may result in damage to the ship and/or result in other financial losses including costs involved to restore the condition of the cargo holds.

Ship-owner must try to avoid medium to high risks at the time of negotiations by having a tight charterparty (CP). However, where the business and a relationship depends upon agreeing to taking some risks by way of accepting to trade in some areas and carrying some cargoes that a ship-owner would normally like to avoid, the ability of the ship-owner to mitigate the possible losses by close monitoring by the ship staff and office is an added edge that can differentiate one ship-owner from the other.

Responsiveness

Willingness to help customers and provide prompt service

React – Uncontrolled bouncing effect of an "act".

Respond - Comes from the word ponder – think and then carry out "an act of communication"

Responsibility – to keep promises to "get back" as committed, do "home work to find solution" as committed.

Competitive Rates

Unless the contacting parties can find common grounds by way of profit making in addition to other important and sometimes more crucial parameters such as reliability and flexibility, a business relationship cannot prosper. Customers want best service at a most competitive rate and this is possible only if the cost base is low, of course without compromising the safety and quality of operations and without asset deterioration. Only when some of the cost savings can be passed on to the customer, a ship-owner is able to offer competitive rates. The cost savings can be direct or indirect e.g. by way of nil or minimum off-hires, no losses due to breakdowns, meeting schedules to reduce risk of unreliable delivery.

Track Record

Commercial shipping is a very close knit industry with a very high degree of transparency. Word of mouth travels fast, especially the negative publicity. It takes many years, nay decades, to build the reputation of a company but it takes one or two incidents to seriously affect this hard earned reputation. This can only be done

by having very high degree of integrity, believing in "our word our bond"** and being responsive to the sensitivities of our customers.

Over Promise

The aim at all times should be to outperform the customer expectations. This should be done through careful evaluation of the capabilities, resources required to ensure that we can deliver what we promise.

Communication/day to day relationship

Positive, "can do approach" signals and "avoiding negative knee-jerk" replies in the first instance should form the basic technique. Thorough evaluation of the requirement at hand of the customer, understanding whether it can be done at all and if yes – what needs to be done to satisfactorily comply, open channel of communication with the head office and then final response to the customer is the way forward.

In every business environment, there may be an optimal mix of these attributes. In some businesses, one attribute may be denoted by a larger piece of the pie and others attributes as smaller fractions. In shipping, all of above are very important but the relative importance may vary depending upon the market conditions, type of business being negotiated (short, medium or long term), standing of the customer etc. One thing, however, does not change and that is –

Each member of the shipboard team is an "Ambassador" of the company and in the world. This simple but important realization and its awareness, while dealing with the customers can make or break an organization.

References:

**Zeithamel, Parasuraman, and Berry's List of the Dimensions of Service Quality (1988)*

1. *Tangibles – physical facilities, equipment, appearance*
2. *Reliability – ability to perform the promised service dependably and accurately*
3. *Responsiveness – willingness to help clients and provide prompt service*
4. *Assurance – knowledge, competence, courtesy of employees and their ability to convey trust and confidence (credibility and security)*
5. *Empathy – caring, individualized attention, access, communication, and understanding.*

Those who would like to learn more about Dimensions of Service Quality, please refer to http://www.kmfadvance.com/mind_the_gap.htm;

** "Our Word Our Bond" - Motto of the Baltic Exchange and Institute of Chartered Shipbrokers, www.ics.org.uk; http://www.ourwordourbond.net/2004/index.htm

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(Mr. Jagmeet Makkar, FICS FRINA FIMarE(I) MCIArb)

澳門海事博物館

劉銳業

在中環碼頭，香港成立了香港海事博物館。相信不少香港本土的居民及遊客親身參觀香港海事博物館，為我們展示了香港海事發展的珍貴史料。然而，當我們到達澳門，我們是否將澳門海事博物館也列為旅遊行程一站之一？

澳門，簡稱澳，古稱濠鏡澳，舊時或稱濠江、海鏡、鏡海、梳打埠。位於南海北岸，地處珠江口以西，北接廣東省珠海市，東面與香港相距 63 公里。澳門全境由澳門半島、氹仔、路環以及路氹城四個區域所組成：澳門半島是澳門發展的核心，其東北面一小部份陸地與中國大陸連接；氹仔和路環原本分別為兩座離島，後來連陸而成為路氹城。

澳門自秦朝起成為中國領土，從明朝 1557 年開始被葡萄牙人租借，澳門是歐洲國家在東亞的第一塊領地。直至 1887 年，葡萄牙與清朝簽訂有效期為 40 年的《中葡和好通商條約》（至 1928 年期滿失效）後，澳門成為葡萄牙殖民地。雖然澳門在地球上顯得微乎其微，但是，澳門在亞洲地區處於重要的地理位置；再加上沿海地區的海岸線，確定澳門在海事上的重要發展地位。

1986 年，當時的海事署（現改為“海事及水務局”）署長蘇勵治海軍中校提出建立海事博物館，並選擇了當時位於媽閣廟前地的一個古老而美麗的建築物作為展覽大樓。自 1987 年對外開放後，參觀人數不斷增加，加上各方的捐贈及新購得的藏品，使博物館迫切需要開設一座全新而寬敞的展覽大樓。因此，一座新的展覽大樓於 1990 年 6 月 24 日正式落成，展覽大樓的正面建築是按船的形式來設計，座落於河口旁，位於供奉漁民的女保護神（媽祖）的媽閣廟側面。

澳門海事博物館擁有 4 個展覽館，分別為海事民俗展覽廳、海事歷史展覽廳、海事技術展覽廳、水族館。海事民俗展覽廳集中展示有關南中國其它地區及澳門的漁民傳統及藝術，我們可以在不同的陳列點看到各類船隻，不同的捕魚藝術，服飾，船廠上使用的工具，及其它物品。有關漁民民俗的一些特別節日包括在海事民俗展覽廳。海事歷史展覽廳主要展示十五至十七世紀與中國及葡國有關的海事歷史，展覽廳內容包括地理大發現時期，葡國航海家使用的船隻模型，此外還有一些輔助航行的器具。透過電子路線圖，更可清楚看到當時航海家所開發的航線。海事技術展覽廳主要展出有關航海技術海上交通、疏濬及其它航海方面的展品。其中包括中國沿海的第一座燈塔 - 東望洋燈塔。水族館設有不同主題背景的水族箱，代表不同的水底環境：有代表河流的河床；反映海港的水域，以及模擬藏有沉船遺骸的深海水底。

澳門海事博物館標誌著澳門海事的歷史及重要發展，一批葡萄牙藉的航海家不斷發掘新的航線，澳門是其中一個重要貫穿東西交通的樞紐，為澳門海上發展打開新的一頁。與此同時，澳門渡輪的發展加速了珠江三角洲的連繫及融合。澳門海事博物館亦展示了澳門渡輪從前、現在及將來的發展。澳門海事博物館珍藏著澳門海事的史料，為澳門海事的研究及教育作出了重大的貢獻。

(劉銳業先生：
香港專上學院、香港理工大學助理講師)

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