APPLICATION OF ADMIRALTY JURISDICTION IN THE FACE OF ARBITRATION AGREEMENTS:

A COMPARATIVE ANALYSIS OF SRI LANKAN AND ENGLISH LAW

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Introduction

In any Admiralty Action, a claimant will institute the action in rem invoking admiralty jurisdiction claiming rights under the bill of lading, not against the other party to the arbitration agreement but against the Motor Vessel. It is a trite concept in Maritime Law that a vessel is considered a wrongdoer for purpose of a suit which is a concept peculiar only to Admiralty Law. This legal fiction was created by courts to allow an injured party to proceed in rem directly against the vessel. Thus, even if the owner of the vessel does not participate in the admiralty proceedings, the judgment entered in such proceedings is considered *interpartes*. One of the objectives of such an innovation is to guard the injured against the empty purse of the charterer by providing reparation in the form of a lien over the vessel. Thus, the legal fiction of the vessel's liability saves the humiliation of the injured party having to circle the globe in his efforts to sue and enjoy the berries of his triumph.

History & the Development of Law

When one studies the enduring expedition of the history and the development of the Maritime Law in Sri Lanka, it was the English Law that was originally applied through Section 2 of the Civil Law Ordinance of 1852.[1] The Ceylon Courts of Admiralty Ordinance was in force until it was repealed by the Administration of Justice Law in 1974, which was then repealed by the Judicature Act of 1978. Lastly, the "Admiralty Jurisdiction Act No 43 of 1983" ('AJ Act') was enacted which read together with the Section 13 (1) of the Judicature Act No 2 of 1978 confers admiralty jurisdiction on the High Court of

[1] The Law was later replaced by Statute. However, the Maritime Law as embodied in various Statutes from time to time was developed by case Law but the English Law never went into disuse but remained in the system. The Admiralty Law of Sri Lanka was first introduced through the Charter of 1833. In the year 1891 the Supreme Court of Ceylon was declared to be the Colonial Court Admiralty and exercised admiralty jurisdiction.

Sri Lanka sitting in the judicial Zone of Colombo.

At the very outset, in the backdrop of the differing areas involved in the extant discussion, it is to be understood that the 'AJ Act' enacted in 1983 entails specific and special Provisions relating to admiralty matters unlike the Arbitration Act enacted in 1995 which is of general nature which thus indicates that a special jurisdiction was conferred on an Admiralty Court long before the Arbitration Act No 11 of 1995 ("Arbitration Act") even came into life.

It would also be pertinent at this stage to refer to two most important sections of the two enactments around which the discussion revolves, where Section 2 (1) of the AJ Act states that:

> *"The admiralty jurisdiction of the High Court of the Republic of Sri Lanka shall, notwithstanding anything to the contrary in any other Law, be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims: (see (a) to (r))"*

and, Section 5 of the Arbitration Act states:

> *"Where a party to an arbitration agreement institutes legal proceedings in a Court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the Court exercising jurisdiction in respect of such matter."*

However, there appears to be a prevailing erroneousness/ misconstruction as to the endurance of an Admiralty action when confronted by an Arbitration clause in reference to the concept of 'party autonomy'. This was so seen in cases for example *Scarlet Shipping Company Ltd Vs Mettalloyed Ltd and another*[2], where it was held that the plaintiff in an admiralty claim is bound by an arbitration clause to resolve the dispute by resorting to arbitration. This led to much controversy as is evident from the High Court decision in *Colombo Commercial Fertiliser Limited V Motor Vessel "SCI Mumbai"*[3], which was finally settled at the appellate stage. It is the view of the Author that both in "Scarlet" and "SCI Mumbai"" the legal maxims "general does not detract from the specific" and "established jurisdictions are presumed not to have been ousted" were not adverted to.

To sum up what happened in "SCI Mumbai", the Plaintiff- Petitioner preferred a claim under Section 2 (1) (g) and (h) of the AJ Act against the Motor Vessel "SCI Mumbai", exercising admiralty jurisdiction.

[2] CA LA 69/2007
[3] CA PHC APN 47/2013

However, a significant turning point occurred with the Respondent raising a novel point of Law in the answer, touching upon a jurisdictional issue based on an arbitration clause incorporated in the Bill of Lading. It was the position of the learned High Court Judge that the Provisions of the Arbitration Act are applicable to the admiralty proceedings and that even though the Admiralty Act confers jurisdiction notwithstanding anything to the contrary in any written Law, when there is an agreement between the parties pointing to arbitration, it is the best practice to respect the party autonomy.

To resolve this ambiguity, as to the fortune of Admiralty proceedings between two parties when confronted by a protest under Section 5 of the Arbitration Act, it is important to resort to the aforesaid two legal maxims at this juncture.

Presumption against ouster

The first being the 'presumption against ousting established jurisdiction', it is trite law that a Statute should not be construed as ousting the jurisdiction of the Court once conferred in the absence of clear and unambiguous language to that effect.

In *Lee Vs Showmen's Guild of Great Britain*[4], Romer LJ stated that the proper tribunal for the determination of legal disputes are the Courts and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates are fitted for the task. In *Smith Vs East Elloe* [5] Viscount Simonds, J emphasizing the principle of "presumption against ousting established jurisdiction" authoritatively states that;

> *"Anyone bred in the tradition of the Law is likely to regard with little sympathy Legislative Provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal".*

The Judges, particularly in England, have shown notable reluctance to sanction any departure from the fundamental rule that the conferment of jurisdiction on a Court is not to be construed as having whittled down the subject's recourse to Court for determination in the absence of express provisions to the contrary. This view was upheld, among many other cases, in *Earl Vs Shaftesbury Vs Russell*[6] and *Pyx Granite Co*

[4] [1952] QB [329], [354]
[5] [1956] AC [736], [750]
[6] [1823] 1B & C 666

Ltd Vs Minister of Housing and Local Government.[7]

This position was given much deliberation in the celebrated case of *Thilanga Sumathipala Vs Inspector General of Police and Others*[8] which made reference to the Indian case of *Prosunno Coomar Vs Koylash Chunder Paul*[9]where Peacock J. held that,

> *"thejurisdiction of the ordinary courts of judicature is not to be taken away by putting a construction upon an act of the legislature which does not clearly say that it was the intention of the legislature to deprive such courts of their jurisdiction..."*

Undoubtedly, Section 2 of the AJ Act, shouts out for the application of the presumption against ousting the established jurisdiction as the Arbitration Act has not made any impact on the admiralty court, ousting its jurisdiction by reason of Section 5. In the backdrop of above, it has to be understood that the provisions of the Arbitration Act do not supersede the specific jurisdiction conferred on the Admiralty Court, and thus the learned trial Judge is bound in terms of Section 2 (1) of the AJ Act, to exercise his admiralty jurisdiction, in overall disregard of any other Law (Arbitration Act in this background) that may oppose the specific power granted to him under Section 2(1) of the AJ Act.

A similar approach was seen to had been taken in *Aitken Spence and Co Ltd Vs The Garment Services Group Ltd*[10], a case dealing with the special jurisdiction under the Companies Act, where it was held by the High Court that, where the jurisdiction given to the court by a Statute was an extraordinary summary jurisdiction and the arbitral tribunal was not capable of exercising the same jurisdiction, the existence of the arbitration clause would not oust the jurisdiction of the Court. Even though the legality of the same was sought to be challenged in the Supreme Court[11] it was held to be of no basis to grant leave to appeal against the impugned judgment.

Presumption against Implied Repeal & *sui generis* nature of Admiralty Actions

It is common knowledge that an admiralty action substantially differs from a civil suit. Even the substantive Law applicable to a claim in an admiralty action considerably varies from an ordinary civil action. The procedure to be followed, the Court in which the action has to be instituted and the *rem* in respect of which the action is permitted to be brought are not the same or identical as in a civil suit. Therefore, not only the type of jurisdiction vested in the High Court to resolve claims under Section

[7] [1960] AC 260
[8] [2004] 1 SLR 210
[9] BLR Sup. Vol. 759; SC 8 WR 428

[10] CHC 2/2003 (2)
[11] SC LA (CHC) 23/2003

2 of the AJ Act but also the powers of Court, procedure as laid down in the relevant regulations and the mode of execution of the judgment are unique and therefore can easily be classified as an action of its own kind or genus and hence '*sui generis'* in its character.[12]

The principle '*generalia specialibus non derogant'* sums up the 'presumption against implied repeal'. It means that a subsequent General Act does not affect a prior Special Act by implication. This maxim requires that the General Provision should yield to a Special Provision. Accordingly, if a later Law and an earlier Law are potentially but not necessarily in conflict, courts will implement the reading that does not result in an implied repeal of the earlier Statute.

Lord Hatherley in *Garnet v. Bradbury*[13], authoritatively stated the rule as follows:

> *"An Act directed towards a special class of objects will not be repealed by a subsequent General Act embracing in its generality these particular objects unless same reference be made, directly or by necessary inference, to the preceding special Act."*

In *Seward v. The Vera Cruz*[14] Lord Selbourne stated that:

> *"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to a subject specially dealt with by earlier Legislation, you are not to hold that earlier and special Legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."*

In *Fitzgerald Vs Champneys*[15] Wood V C held that:

> *"In passing the special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be considered by general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special Act, they had thus carefully supervised and regulated".*

Bindra[16] speaks of the significance of a special Act where it holds:

[12] As opposed to an action *in personam* a claim under Section 2 of the AJ Act necessarily relates to a thing (the res) or an object, a subject matter, or a status against which legal proceedings are instituted. For example, in a suit involving a captured ship, the seized vessel is the res which provides a pre-judgment security for the claim and confirms the admiralty Court's jurisdiction in rem, and proceedings of this nature are said to be in rem.

[13] [1878] 3 App. Cases 944

[14] [1884] 10 AC [59], [68]

[15] 2 J & H [31], [54]

"if the Legislature makes a special Act dealing with a particular case and later makes a general Act, which by its term would include the subject of a special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act, the Legislature has had the special Act in mind and has intended to abrogate it, the provisions of the General Act do not override the special Act".

This maxim is summarised in Halsbury's Laws of England[17] as follows:

"It is difficult to imply a repeal where the earlier enactment is particular, and the later general. In such a case the maxim generalia specialibus non derogant (general things do not derogate from special things) applies. If the Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general."

In applying the above maxim to the current context read together with the sui generis nature of an Admiralty Action, it appears clear that, where an earlier Statute deals expressly and precisely with a particular issue like in Section 2 of the AJ Act (Special law) a later Statute such as the Arbitration Act (general law) which is enacted in general terms will not repeal the Provisions in the earlier Act unless the contrary intention is indicated within the latter legislation. This maxim literally means that the general shall not derogate from the particular. The effect is to prevent the unintentional repeal or qualification of a specific Provision by a later one which is general in nature.

There have been several examples in our legal history where this maxim was used to answer analogous issues and to tag few amongst many, in *Abeykoon Vs. National Savings Bank*[18], the Court applied the maxim and ruled that Section 55 of the National Savings Bank Act contains express provisions for the passing of title in respect of immovable property on a Certificate of Sale signed by the Bank and the title

[16] Bindra, N S (Author), Dhanda, Amita (Editor) *Bindra on Interpretation of Statutes* (7th edn., Lexis Nexis) 149

[17] Halsbury's Laws of England (4th edn, (1989)) vol 44, para 1300

[18] [1999] 3 SLR 144

bestowed by such Certificate of Sale is valid by operation of Law. Consequently, in effect Section 55 of the relevant Act was held to be an exception to Section 2 of the Prevention of Frauds Ordinance which was the general law.

Further in *Ghouse Vs Ghouse*[19], the Respondent relied on section 6(3) of the Adoption of Children Ordinance No. 24 of 1941 as amended by No. 54 of 1943 which provides that "upon an adoption order being made a child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter", and on account of the adoption order made with reference to him, he should in law be regarded as 'a child born in lawful wedlock' of the deceased and is entitled to succeed to the intestate estate of the deceased. The Supreme Court however held that under the Muslim Law, an adopted child cannot succeed the intestate parent and that the Muslim Intestate Succession Ordinance of 1931 is a special Law applicable to the Muslims and that this special law of 1931 has not been abrogated by the latter General Law, viz: The Adoption of Children Ordinance of 1941.

The impact of Section 5 of the Arbitration Act on Section 2 of the AJ Act.

According to Section 5, when an action is instituted by a party in respect of a matter agreed to be submitted for arbitration under an agreement, the jurisdiction of the court is not affected unless and until the other party to the arbitration agreement elects to object to the court exercising jurisdiction in respect of such matter. Section 5 of the Arbitration Act applies where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement.

The situation becomes much thought-provoking in the backdrop of there being currently no distinction between a bare arbitration clause and a *Scott v Avery* clause which was drawn in the Hotel Galaxy judgement as been obliterated by Section 5 of the Arbitration Act of 1995. This is because Section 5 does not purport to maintain the said distinction, and on the contrary, seeks to extend the *Scott v Avery* refinement that a court would not exercise its jurisdiction to determine the case on its merits even to a mere arbitration clause which is not couched in the *Scott v Avery* format.

However it is clear from the prior paragraphs that when the literal meaning of general enactment covers a situation, for which specific Provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific Provision rather than the latter general one.

[19] [1988] 1 SLR 25

The AJ Act is not only of a specialized application to a legal dispute but an Act which is sui generis as to the type of action, procedure and the rem in respect of which the action is instituted and therefore the Arbitration Act cannot have any application, particularly in the absence of any express intention to that effect, to claims made under Section 2 of the former Act. This is very much so in the backdrop of the AJ Act which was enacted in the year 1983 (12 years prior to the enactment of the Arbitration Act) where the Legislature in its own wisdom had not addressed its mind to the Provisions of the former Act particularly Section 2 (1) in the latter (by contemplating either in express terms or by implication any repeal of the Provisions of section 2 of the AJ Act).

Conclusion

In the light of the preceding paragraphs it becomes evident that now the law is settled to the effect that an Arbitration clause could have no adverse impact on a claim brought by a party invoking the Admiralty jurisdiction under the AJ Act and thus the Admiralty action would survive. It is also to be noted with reference to the reasoning of the learned High Court Judge in *"SCI Mumbai"* case that, Section 5 of the Arbitration Act cannot have any adverse effects on the Section 2 (1) of the AJ Act which confers jurisdiction on the Admiralty Court to hear and determine claims "notwithstanding anything to the contrary in any other Law". The expression 'not withstanding anything to the contrary' when used in an enactment, refers to anything that may contradict the particular enactment as being ineffective. The cardinal rule of construction is to give effect to the words of the statute and it is only in situations where there is uncertainty or struggle as to the interpretation the Court may look to the object of the enactment or the purpose for which it was made. If the meaning is clear and quite unambiguous, that meaning must be accepted by the Court irrespective of other considerations [party autonomy in the present setting]. Dr. Justice A. R. B. Amerasinghe in his book titled "Judicial Conduct, Ethics and Responsibilities' at page 284 observes that:

> *"The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic processes must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years."*