The Hong Kong Judicial Institute
A Talk entitled "The International Character of Maritime Law and the Importance of the Jurisprudence of Asia" by James Allsop
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1. Chief Justice, colleagues from the Court of Final Appeal, Mr Justice Ribeiro, Mr Justice Fok, and Mr Justice Lam, Mr Justice Zervos and all other judicial colleagues, Secretary for Justice, Deputy Consul-General for Australia, distinguished guests, including all the students here, ladies and gentlemen. Thank you all for coming. It is a great pleasure and an honour to speak to you all tonight.

2. Whilst it is important tonight to say something of maritime law in Asia, especially China, it is first necessary to explain why the international character of maritime law is so important. That requires a little time.

3. The internationality of maritime law as well as its marine subject matter must be appreciated for a number of reasons. These include at least the following: to understand the law itself, how it came to be what it is, the problems that it seeks to solve or regulate, and its sources and thus the inspirations for coherent development.

4. The internationality of maritime law can be seen at the practical level by appreciating that few maritime ventures are undertaken

[1] This is a settled and somewhat expanded form of that which was said on 24 February 2025.

without a complex inter-connection of international participants, whether or not they are bound to each other by contract. The conduct by each of its part in the venture will generally affect the safety or success of the venture for others: the flag state and its authorities, the port state authority where the vessel is or was, the crew, the officers, the company providing the crew and officers, the company managing the vessel, the company managing the commercial use and chartering of the vessel, the insurers and reinsurers of the vessel, the insurers and reinsurers of the cargo, the insurers (by mutual protection and indemnity clubs) of the liabilities of the ship owners, the classification society certifying the vessel, the variety of owners, hirers and controllers, and participants in the use, of the vessel, being the registered owner, beneficial owners, bareboat (or demise) charterers, time charterers, voyage charterers, slot charterers, shippers and consignees of the cargo, stevedores, banks financing the building of the vessel, or the cargo or purchasing of the cargo, salvors, *und so weiter*. They are likely to be of different nationalities converging variously from time to time or continuously in the operation or use of the ship.

5. It is also worth recognising the ever present practical reality of ventures at seas. They are full of risk, not least because at sea the ship, crew and cargo are surrounded by danger, the perils of the sea. It is a workplace (and a home) surrounded by the deadly risk of the sea.

6. But it is not just the likely variety of nationalities of the participants in the venture or the maritime environment and the danger that are important. If one steps back and seeks to obtain the appropriate focal distance from which to view maritime law, one is struck by the reality that frames it: It is the law of an activity and not of a place, or a

society or a community (unless community be conceptualised as the international community of those who engage in the activity).

7. Laws of societies grow from the roots of the group and of the place, with their important differences of culture, politics, history, environment and geography. Maritime law is different. It is the law of the seaborne activity and commerce, and of the humans who engage in it across the world.

8. John Wigmore in his beautiful work published in 1928 entitled "A Panorama of the World's Legal Systems"[2] placed maritime law as one of the 16 **legal systems** of the world. This was not antiquarian fancy, but legal reality. Underpinning this classification or characterisation was the recognition that maritime law was not the law of a place or of a people, but a general body of law drawn from shared common experience in facing the exigencies, risks and perils (human, commercial and physical) in the timeless activity of seaborne commerce.

9. The importance of all these considerations is that they lead, or should lead, to the development of common principle.

10. A number of considerations spring immediately to mind from this realisation that it is law for an international activity: the need

[2] St Paul: West Publishing Company 1928.

for principle to be understood by, and to be acceptable to, strangers from very different societies; within that consideration there is the need for simplicity in expression and structure of principle that is reflective of human experience, rather than of theoretical abstraction; the need for compromise of national interests and for comity in developing principle and applying it; and the need for principle to recognise the ever-present danger to life and property at sea: the surrounding of the venture, the ship and the people involved by the risk of failure or death, from the sea and its perils. All these considerations are both human and practical, on the one hand, and jurisprudential, on the other, but lacking any requirement of theoretical abstraction divorced from human experience and pragmatic reality.

11. Let me begin by referring to some English and American decisions. I will spend a little time on this because aspects of some recent approaches to maritime law risk a form of deracination by losing connection with the sources of maritime law that its international and maritime character provide. It is here that Asia's role is so important. To this I shall return.

12. In the 18th century, well into the era of the nation state, Lord Mansfield described maritime law as "not the law of a particular country, but the general law of nations."[3] This way of expressing the matter calls immediately for caution: the need to be careful about confusing the municipally binding character of a supra-national law (that does not exist) with a body of *principle* (suitable to be called law) of an harmonious

[3] *Luke v Lyde* (1759) 2 Burr 882, 887; 97 ER 614, 617.

international and maritime character (that does exist) and from which binding municipal law is developed. The distinction will be appreciated most clearly in the United States jurisprudence.

13. The United States Constitution provides, in Article III Section 2, for the vesting in federal courts (not state courts) of "Admiralty and maritime jurisdiction." The nature of this jurisdiction was described by one of the great American jurists of the first half of the 19th Century, Joseph Story in 1815 as[4]:

> "[T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, … general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, … still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."

14. This expression reminds common lawyers that part of the sources of maritime law is civil law, to which may be added international agreements, Equity and a just solicitude for the vulnerability of seafarers, a sense of common policy for the shared venture of risk, and necessary comity among strangers.[5] It reflects that maritime law is or should be formed from shared, experiences and values, not parochial or nationalistic considerations.

[4] *De Lovio v Boit* 7 F Cas 418, 443; 1997 AMC 550, 602-603 (1815).

[5] Tetley *International Maritime and Admiralty Law* (Éditions Yvon Blais 2002) Chs 1 and 2.

15. The great architect of early American Constitutional principle, Chief Justice John Marshall, in an action *in rem* against cargo (to which action against the ship I will return) described the international source of the law governing admiralty and maritime jurisdiction in the following terms:[6]

> A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.

16. The modern eye, attuned to national sovereignty, immediately sees in these words the glimmer of a heresy of binding supra-national law hovering over sovereign jurisdictions. The possibility of this heresy, and his words being misunderstood, would hardly have been lost on Marshall who had, in his earlier years, participated in his nation's revolutionary liberation from the British Empire. Chief Justice Marshall had a more limited conception, but one that was nevertheless important to grasp: This was law, a body of principle, that was present, in existence, before the United States was formed. It existed and was recognised, not created, by the words of Article III Section 2. As such, it was to be adapted by national (federal) courts (and, in time, by Congress[7]) as the general maritime law of the United States.

17. The significance and jurisprudential character of these ideas were given more fully expressed content by Justice Bradley in the

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[6] *American Insurance Co v 356 Bales of Cotton* 26 US (1 Pet) 511, 545-546 (1828).

[7] *The Genesee Chief* 53 US 443 (1851).

Supreme Court over 50 years later in *The Lottawana*[8] in the description of the subtle relationship between the two bodies of *law* involved: *the general maritime law* as it exists and had existed for generations, as a body of coherent principles, and the *particular municipal maritime law* which springs from it (that came to be called the general maritime of the United States). The passages are too long to read out, but they contained at least five important propositions:

- The general maritime law as a body of principle existed outside and separate from municipal maritime law.
- This separate existence was owed to its internationality.
- The necessity for the general maritime law, to be adopted by a state (here by the Constitution recognising it).
- The content of the general maritime law is not fixed or uniform, but capable of local (municipal) adaption.
- The general maritime law was the source, groundwork or foundation for municipal maritime law.

18. Over the following century, these ideas were developed and worked out in the United States in many cases.[9] In two of these cases (*The Western Maid*[10] and *Southern Pacific Company v Jensen*[11]) the great Justice Oliver Wendell Holmes opposed these notions, saying in the *The*

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8 88 US (21 Wall) 558, 572-575 (1874).

9 Such as: *The Lexington* 47 US (6 How) 344, 385-392 (1848); *The Scotia 81 US* (14 Wall) 170, 187-188 (1871); *The Belgenland* 114 US 355, 362-363 (1885), *Panama Railroad Co v Johnson* 264 US 375, 385-386 (1924); *Detroit Trust Co v The Thomas Barlum* 293 US 21, 43 (1934); *United States v Webb Inc* 397 US 179, 191 (1970).

10 257 US 419, 432 (1922).

11 244 US 205, 220-222 (1917).

Western Maid: "There is no mystic over-law to which even the United States must bow", and in *Southern Pacific* using the metaphor of the "brooding omnipresence in the sky" to reject the characterisation of law or a corpus juris to what he saw as a "limited body of customs and ordinances of the sea."

19. But, for the United States, Holmes J was a lone voice. There is no doubt that there was recognised to be and is a general United States maritime law drawn from an international general maritime law, the former being rooted in the US Constitution's recognition and adoption of the latter. It was described most eloquently by Justice Robert Jackson for a powerful Supreme Court in 1953, containing Justice Felix Frankfurter, in *Lauritzen v Larsen*[12]. He was dealing with the proper construction of the United States seafarers worker's compensation legislation (the Jones Act), and whether or not it applied to a foreign seafarer, on board a foreign ship, injured while the ship was in New York Harbour. The seafarer's relationship with the ship and ship owner was entirely framed by articles of employment, the proper law of which was the same nationality of the flag of the ship and of his citizenship. Justice Jackson, having referred to "a non-national or international maritime law of impressive maturity and universality", said:

> International maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own.

12 345 US 571, 581-582 (1953).

20. He also said that it had:

> the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

21. Thus, we can see international maritime law as a body of accepted principles capable and worthy of meaningful description as law, from which municipal maritime law is derived by adoption and adaption. The importance of these matters arises at many points, most importantly for the recognition of maritime law as having a separateness as *a branch of the law* so important for its coherent development. This was recognised by the US Supreme Court in 1970 in *Moragne v States Marine Lines Inc*[13] where the Court said:

> Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. ... These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common law rule, criticised as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.

22. This does not reflect a super-imposed external force on a domestic legal system. It recognises the international and maritime

[13] 398 US 375 at 386-387 (1970).

character and sources of maritime law shaping and influencing the law and its distinctiveness, when necessary, through the history of maritime law and through the contemporary necessities and exigencies of maritime life and commerce.

23. The reality of the separateness of the general maritime law of the United States from the common law and Equity can be seen in its survival, as a form of federal general law, recognized by the Constitution, administered by federal courts, in comparison to the position of the common law and Equity as non-federal, but State general law, after the overturning of Justice Story's vision of federal common law, enunciated in 1842 in *Swift v Tyson*,[14] by *Erie Railroad Co v Tompkins*[15] in 1938.

24. Until the 1970s, one could see the same ideas and conceptions accepted in English law. The judges of the English Admiralty Court before the *Judicature Acts* in 1873, who were trained as civilian lawyers, routinely referred to the law merchant and the general maritime law. But the recognition of the general maritime law as a conception did not die with the passing of the *Judicature Act* in 1873. Lord Justice Scott was a fine maritime lawyer and *Le Président d'Honneur du Comité Maritime International* in 1947 and a delegate of the British Government to important maritime conventions on collision, salvage, carriage of goods, and maritime mortgages and liens from 1909 to 1926. In 1946, in *The Tolten*[16], in dealing with the phrase "damage

[14] 41 US (16 Pet) 1, 19 (1842).

[15] 304 US 64, 79-80 (1938); see also *RMS Titanic, Inc v Haver* 171 F.3d 943, 960-964 (4th Circuit 1999).

[16] [1946] P 135 at 139.

done by a ship" in the context of whether the **Mozambique Rule** [17] applied to an allision case (a ship striking a wharf), and whether only the foreign court where the wharf was located could deal with the matter (the ownership of the wharf having been put in issue), Lord Justice Scott recognised the need to resort to, and not depart unduly from, what he described as the "general law of the sea" in developing legal principle. In doing so, he concluded that the court (here the English Court) dealing with the *in rem* action could decide the issue. The expressions he used comport in substance, elegance, and spirit with the words of Justice Jackson in *Lauritzen v Larsen* which I earlier read out.

25. Lord Justice Scott was also echoing the views of Lord Justice Brett (later Lord Esher MR) in *The Gaetano and Maria*[18]

> … [W]hat is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. *It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law*; and about that I cannot conceive that there is any doubt. … [T]his case must be determined by the *general maritime law* as administered in England—that is in other words by the English maritime law. [Emphasis added.]

[17] [1893] AC 602: The general rule of private international law that the jurisdiction to decide title to land was reserved to the courts of the situs of the land.

[18] (1882) 7 PD 137 at 143.

26. That this maritime law has a separateness can be seen in the rules and principles that have often differed in maritime law compared to terrene law. Examples only are: the existence of the right of salvage[19], the capacity to vary a contract of salvage on the ground of unfairness[20], the right of a seaman to maintenance and cure despite the terms of any contract[21], the rejection of the defence of contributory negligence in a claim by a seaman for medical expenses for injury during the voyage[22], a refusal to apply the common law rule that saw the end of a cause of action with the death of the plaintiff[23], the inapplicability of the common law rules of occupier's liability to coming aboard a ship[24]; the choice of law to govern the sale of a ship[25], the duty to rescue human life at sea.

27. A striking example of maritime law as a branch of the law with international character and sources is the world-wide existence of a maritime security regime[26] built upon the *in rem* action against the ship (in common law countries) and the remedy of attachment (in civil law countries) regulated in its operation in a coherent way by two

[19] *The Five Steel Barges* (1890) 15 PD 142 at 146; *The Meandros* [1925] P 61 at 68; *The Unique Mariner* (No 2) [1979] 1 Lloyd's Rep 37 at 49-53.

[20] *The British Empire* (1842) 6 Jur 608; *The Medina* (1876) 2 PD 5 at 7; *The Strathgarry* [1895] P 264 at 270; *The Unique Mariner (No 1)* [1978] 1 Lloyd's Rep 438 at 454; McGuffle *Kennedy's CivilSalvage* (London 4th Ed) at 314 ff.

[21] *Harden v Gordon* 11 F Cas 480; 2000 AMC 893 (1823).

[22] *Reed v Canfield* 20 F Cas 426 (1832).

[23] *The Sea Gull* 21 F Cas 909 (1865).

[24] *Kermarec v Compagnie Generale Transatlantique* 358 US 625 at 630-632 (1959); *CSL Australia Pty Ltd v Formosa* [2009] NSWCA 363 at [64].

[25] *The Cape Moreton* (2005) 143 FCR 43 at 79-80.

[26] Attard (Ed) *The IMLI Manual on International Maritime Law* (Oxford University Press) Vol 2 Ch 6.

international conventions (of 1952 and 1999[27]). Any sea-going ship within the territorial waters of a jurisdiction can be arrested for *maritime* claims, including unsecured maritime claims, and can be sued in rem or be the subject of attachment, and then be detained until full monetary security for the claim is put up by the shipowner. The water of an unsecured claim can be transformed into the wine of a secured claim. If no security is put up by the owner, the ship can be sold and the proceeds used to satisfy *maritime* claims of not just the party that arrested the ship, but all maritime claimants in an order of priorities by reference to the status of different maritime creditors out of *maritime property* – the ship. After the ship is sold by judicial sale, its hull is "cleaned" of all claims, just like a bankrupt who is discharged from bankruptcy[28].

28. The intersection of this system with insolvency law is not straightforward. However, it operates as the foundation of international seaborne commerce ensuring payment of legitimate claims.

29. Within that system exists the maritime lien which is unique to maritime law[29]. It is not possessory in nature. It arises in respect of a variety of claims (the range of these claims varying from country to country: crew's wages, collision and salvage being the best known). The occurrence or arising of the circumstances that give rise to the claim (the

[27] *International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships* done at Brussels 10 May 1952; *International Convention on the Arrest of Ships 1999* done at Geneva 12 March 1999; see Derrington and Turner *The Law and Practice of Admiralty Matters* (Oxford University Press 2nd Ed); *Berlingieri on Arrest of Ships* (Informa London 4th ed).

[28] *United Nations Convention on the International Effects of Judicial Sales of Ships* done at New York 7 December 2022.

[29] *The Ship 'Sam Hawke' v Reiter Petroleum Inc* [2016] FCAFC 26 at [48]-[92].

seafarer owed wages, the collision causing damage, the successful salvage) give a security interest in the ship that defeats the claims even of secured creditors and runs against a new owner, even without notice.

30. Within that system for common law countries where the writ of attachment of property for claims is rare[30], the *in rem* action against the ship is crucial. For the action to proceed against the ship that is within the waters of the jurisdiction there must be either a maritime lien (which makes unnecessary any ownership connection) or an unsecured maritime claim against the ship owner (or demise or bareboat charterer). The action against the ship and its arrest under the writ forces the owner to choose between abandoning its ship or appearing and submitting to the jurisdiction, *personally*. If the owner appears and submits to the jurisdiction of the court, there is the foundation for a personal judgment to its full amount, not limited by the value of the ship. If the owner does not appear, the claim can be proven against the ship, but only up to its value. Whether or not the claimant obtains any money from the ship's value depends not just on the success of its action, but on the value of the ship when sold *and* the sum of the claims of all worldwide maritime claimants who come in to justify their claims against the ship and share in the proceeds of sale of the ship. This shows the operation of a worldwide security and recovery system for maritime claims out of maritime property. The successful claimant might receive nothing. Ahead of it may be lien holders such as the crew or salvors, secured creditors, and any number of claimants of higher priority (priorities being worked out by maritime principle), though its costs of the action and of the arrest are prioritised as a first charge on the fund. Importantly, the claimant still

[30] See Attard Ed *op cit* note 26 above ch 6.

has its personal claim against the owner, who has not appeared. The action against the ship has been worth the try.

31. Let me say something of salvage. The principles of salvage developed as a distinct and coherent body of law, common to all seafaring countries, albeit with differences in approach to reward and assistance and of the place of the success of the assistance, which differences were settled by the 1910 Convention. Salvage is perhaps the epitome of the separate coherence of maritime law drawn from marine considerations and international principle. The differences between countries before 1910 involved, but were not limited by, the legal conception of the salvage bargain, the element of restitution for effort and the place or importance of a reward for success.

32. The right to a salvage award springs from ancient maritime principles of justice and public maritime policy. Story called it a mixture of private rights and public policy. It is not simply explained by common law principles of contract or quasi-contract, or restitution or unjust enrichment, or dictated by notions of payment for work done or services performed, although none of these notions is foreign to it. It was a *sui generis* right springing from maritime law as a reward, worked out holistically for work or success which encompasses many considerations, including risk, danger, skill, the value of any saving to the owner and the expenditure involved, and the public policy of encouraging the taking of risk in the assistance at sea to others in saving property. This history tells us that the modern sources of principle are not, and should not be taken as, only the law of contract or the law of unjust enrichment as applied

generally in non-maritime contexts. To do so would be to deny, as antiquarian, salvage's international and maritime sources and so risk a lack of coherence of modern maritime law with its origins, and likely to risk making salvage law dependent upon parochially national non-maritime jurisprudence in some taxonomy of abstraction forming the elements of a cause of action for unjust enrichment or the demands of general contract law.

33. The above, I hope, conveys the reality of at least two things. First, that to develop coherently the law in this field one must first understand the internationality and maritime sources of its developed principles; and, secondly, the tribunal must understand the reality of the commercial and maritime affairs being undertaken.

34. The first proposition was deeply undermined in the 1970s in England in two cases, one a salvage case: *The Tojo Maru*[31], the second a landlord and tenant case: *United Scientific Holdings v Burnley Borough Council*[32]. Both cases, especially the former, were influenced by the views of Lord Diplock. The House of Lords interpreted the *Judicature Act* of 1873 as not just unifying court procedure and court structures, but also fusing the substance of common law, Equity and maritime law into one body of common law[33].

[31] [1972] AC 242.

[32] [1978] AC 904.

[33] [1972] AC 242 at 290-291; and [1978] AC904 at 924-925; see Heydon JD, Leeming MJ and Turner PG *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths 5th ed) Ch 2.

35. It is too late, and might seem unproductive for this evening, to canvas the debate about the correctness of these decisions. That debate would become enveloped in jurisprudential questions wrapped in a mixture of unhelpful metaphor of streams or rivers mixing or remaining in separate channels, and theoretical distinctions that would rival the debates over the Trinity at the Council of Nicaea.

36. The practical reality of the results of Lord Diplock's and others' certainty of the one fused common law and the lack of any separateness of maritime law is that it risks tearing maritime law from its sources in the development of English maritime law. One now finds salvage as a chapter in major texts on unjust enrichment, as if it were explained merely as an example of restitution[34]. One finds the House of Lords in 1998 [35] declaring that the *in rem* claim against a ship (presumably also cargo), though without dealing, somehow, with the maritime lien, was based on a tired fiction without modern utility, and was in substance, only a personal action against the owner. Thereby, in one fell swoop, the foundation of (the common law version of) the international maritime security regime was abolished, without apparent realisation or analysis of its importance to other jurisdictions, and without apparent realisation that two international conventions on arrest assumed the existence and efficacy of the *in rem* action[36]. It has not been followed[37]. And one finds judges tending to interpret international

[34] Mitchell, Mitchell, Watterson *Goff & Jones: The Law of Unjust Enrichment* (Sweet and Maxwell 8th Ed) at Ch 18.

[35] *The Indian Grace* [1998] AC 878.

[36] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2008] Lloyd's Rep 119; and see Derrington and Turner *op cit* note 27 above at 18-38 [2.26]-[2.51].

[37] Barma and Merkin (Eds) *Maritime Law and Practice in Hong Kong* (Sweet and Maxwell 2nd Ed) at 618-620 [17.119]-[17,124].

carriage of goods conventions from parochial or nationalistic viewpoints[38].

37. Not all these things flow from *The Tojo Maru*, but they do all flow from a failure to grasp the importance of conceiving of maritime law as having a certain distinctive wholeness, with international and maritime considerations as part of its sources and shaping influences.

38. I should add at this point that although Lord Diplock's despatch of maritime law as a branch of the law with its own sources in *The Tojo Maru* was later adopted in approach in *United Scientific* dealing with Equity, his Lordship's distinguished colleague in *The Tojo Maru*, the great Lord Reid, accepted the existence of the maritime law of England, saying[39]: "The maritime law of England has a long history. It differed in many respects from the common law…"

39. The second proposition above: that the tribunal must understand the reality of the commercial and maritime affairs undertaken that are being decided upon, is related to the first as an illustration of understanding the practical contemporary roots of the law.

40. Both the first and second propositions have significance for the administration of justice and court systems, and the coherent development of maritime law. If it be the case, as it should be, that courts

[38] *Port Jackson Stevedoring Ltd v Salmond & Spraggon (Aust) Ltd* (1978) 139 CLR 231 at 258-259; *Great China Metal Industries Co v Malaysian International Shipping Corp Berhad* (1998) 196 CLR 161 at 228.

[39] [1972] AC 242 at 267.

and judges have a responsibility to interpret and develop maritime law with an international approach without parochial or nationalistic favouritisms, since that reflects the immanent fabric of maritime law, the courts and judges need to be organized and to be able to function in a way in which the sources of the law and the practical reality of maritime commerce are understood. This is very difficult to achieve without a degree of specialisation in judicial administration and maritime knowledge in judges at all levels in the hierarchy who deal with the cases.

41. True it is that much maritime dispute resolution takes place in arbitration, whether London, New York and elsewhere in the United States, Singapore, Hong Kong, Shanghai, Shenzhen, and many other places. In these venues, there are maritime and legal specialists available with great experience and knowledge of maritime disputes.

42. But it is vital for the law and its development that the public, and not just private, hearing of maritime disputes can take place before knowledgeable, experienced and reliable tribunals that can provide the stable and coherent application and development of doctrine.

43. In courts, this can be done without too much difficulty. It just needs an appreciation of the need for it. Many jurisdictions such as London, Hong Kong and Singapore have a designated maritime or Admiralty judge or judges. Formal titles are not, however, the point. What is necessary is a way of organising the shipping work to ensure that a cohort of judges, registrars and Marshals (the latter two groups for tasks that include the effecting of the ship arrests, custody and sale) who are familiar with and interested in maritime law do the work: for the judges,

both at trial and on appeal. Confidence in the court to deal with the task, at least deal with the task efficiently, requires it.

44. I will give two examples. I apologise that the first is a personal reflection and recollection. When I first went on to the Federal Court, the maritime work of arrests and cargo claims was not being done as well as the profession might have expected. It was spread among a relatively large group of judges for the small volume of work. This did not promote knowledge and skill from repetition and familiarity. The members of the profession in Sydney were not happy with us, and they told us so by moving their work to the Supreme Court. Some of us were upset. We decided to try to remedy things. We drafted a maritime admiralty arrangement. Under this arrangement *any* shipping or shipping related matter (including, for example, employment law, seafarer's compensation and judicial review proceedings) would be heard by the Chief Justice and a group of thirteen designated Admiralty and maritime Judges around the country, at first instance and on appeal. There were to be at least two Judges in each Registry so that an arrest anywhere around the country could always be managed by a local Judge. The Chief Justice and the Judges of the Court approved the arrangement. A shipping website was also set up, and intensive maritime and shipping education was undertaken by Judges, Registrars and Admiralty Marshals with the particular assistance of (then) Professor (now Justice) Sarah Derrington and Professor Edgar Gold (both from the University of Queensland's Shipping Law Unit, though Professor Gold was a former master mariner on the Zim Line and a Queen's Counsel in Canada), and retired master mariners, Captain Mike Bozier and Captain Ken Ross. Admiralty Marshals' workshops were reinvigorated and the Admiralty Marshals'

Handbook was brought up to the date and developed. Memoranda of understanding were entered into with port and maritime authorities around the country.

45. The work returned and the Court soon became a true National Shipping Court with developing skill, expertise and enthusiasm from Registrars, Marshals and Judges.

46. The second example of court organization of maritime work is the approach of China's court system to maritime law disputes. It has 11 Maritime Courts organised across the country, 10 located in coastal areas, one, Wuhan, inland to service the great river trade and traffic. They have the status of Intermediate People's Courts. Appeals proceed to the relevant High People's Court. From there, there is not an appeal strictly so-called, but a special review process to the Supreme People's Court (SPC), specifically to the Fourth Civil Division, which deals with maritime law, international arbitration and international commercial law. Thus, the structure of the Court system reflects a recognition of the importance and, to a degree, the separateness of maritime law. The court structure also reflects a recognition of the need for specialised knowledge and experience in a vitally important branch of the law.

47. Not long, about two years, after the resuscitation of the shipping work of the Federal Court to which I just referred, the maritime judges of the Federal Court were invited to participate in a standing judicial dialogue with the Fourth Civil Division of the SPC on maritime law. Maritime judges of both courts met regularly for scholarly

exchanges and seminars. I learnt then, and thereafter, in dealing with the Fourth Civil Division that the scholarship, erudition and practical experience of the Division's Judges was and is, if I may respectfully say, outstanding.

48. An appreciation of the internationality of maritime law in China is also reflected in the history of the development of relevant maritime laws. The Maritime Code was adopted in November 1992 and entered into force in July 1993. The drafting commenced in the 1950s, reflecting an early policy decision to develop the maritime transportation system, after large parts of the Chinese merchant fleet had moved to Taiwan after 1948.

49. Drafting began with use of the Russian Maritime Law. Over the years since the 1960s, but especially from the early 1980s, a drafting committee of professors from the maritime universities, lawyers and shipping practitioners from government agencies and shipping companies drafted the Code and other laws[40]. I taught international maritime law in Australia from 2005 to 2018 and we used, amongst other important national Codes and statutes, the Chinese Maritime Code and Maritime Procedure Law. Both the latter, in English translation, were the epitome of elegant balanced legal drafting reflecting careful selection from all relevant international conventions. They reflected the conception of maritime law expressed with the same beauty and elegance as did Justice Jackson in *Lauritzen v Larsen*, Justice Story in *De Lovio v Boit* and Lord Justice Scott in *The Tolten*. The Maritime Code was described by a

[40] Li and Ingram *Maritime Law and Policy in China* (Routledge-Cavendish Publishing 2002) at 2.

foreign scholar and practitioner at a conference in Shanghai, as follows:[41] "The Code has been some 40 years in the working but has done, at a stroke, what other leading maritime nations have been struggling to achieve in a piecemeal fashion over many decades. In adopting many international maritime conventions, the PRC puts a number of so-called leading maritime nations to shame."

50. What plainly lay behind the quality of the Maritime Code and related laws, behind the structural organization of the Maritime Courts, and behind the devotion of a Division of the nation's highest Court partly to shipping and maritime law was a policy to build a great international fleet and system. Yet it could not have happened without a realisation that maritime law and activity had its own character separate and distinct from terrene activity and law.

51. When the Federal Court and the Fourth Civil Division began their exchange in 2007, the judgments of Maritime Courts and the other important work of interpretation of maritime laws, and special review decisions of the Fourth Civil Division were not widely translated into English. They are now. It should be added that one of the first forces of impetus for this came from Hong Kong, through the work of the former Hong Kong Admiralty Judge William Waung.

52. In recognition of the importance of Chinese maritime law, Lloyd's of London Press now publishes annual volumes of Chinese

[41] Steven Hazelwood in his paper on the then new Maritime Code in Shanghai in 1994 at the Shanghai Maritime university quoted by Dr Li in his Preface to the work *op cit* note 40 above.

Maritime and Commercial Cases. Also, there are important exchanges between scholars at, and publications of, the Shanghai Maritime University and the Tulane Maritime Law Centre in New Orleans.

53. The depth of scholarship and practical knowledge of the great maritime universities of Shanghai and Dalian are of the highest possible quality in breadth and depth of teaching. Along with the many other maritime and technical colleges, they provide the foundation for a large maritime industry.

54. A review of the cases heard by the Maritime Courts and the Fourth Civil Division reflects the maturity, sophistication and quality of deeply experienced and skilled Judges administering a maritime law of balanced international focus without national partisanship. I will illustrate this by a recent Fourth Civil Division judgment on salvage.

55. In *Shanghai Salvage Co, Ministry of Transport v Provence Shipowner 2008-1 Ltd & Ors* [2020] 2 Lloyd's Chinese Maritime and Commercial Cases 14, the Supreme People's Court dealt with issues arising from a collision in March 2013, between two foreign flagged vessels, a bulk carrier (*Chou Shan*) and a container vessel (*CMA CGM Florida*) in China's exclusive economic zone off the Yangtze Estuary. Shanghai Salvage Co undertook various salvage measures and sought to claim salvage and pollution cleanup expenses against the owners and bareboat charterer of *CMA CGM Florida* and the owner of *Chou Shan*. The Ningbo Maritime Court awarded a sum for prevention of pollution expenses, to be a claim against the limitation fund that was established (such a claim for expenses, but *not* a claim for salvage fell under the

limitation of liability provision of the *Maritime Code*). The claim for salvage was dismissed. Shanghai Salvage appealed disputing the figure and claiming that it had rendered salvage services and was entitled to an award that was not subject to limitation. That appeal was dismissed. The appeal to the SPC was allowed. A salvage award was ordered in a significantly higher sum at SCOPIC rates. Also, a sum was given for pollution prevention and spill removal expenses.

56. Three Judges, a Judge Assistant and a Court Clerk from the Fourth Civil Division sat. The judgment is detailed, but concisely written, over 27 pages of the Lloyd's report. As a full review, the Court meticulously set out the facts, the reasoning of the lower courts and their own reasoning. The judgment reveals, apart from anything else, the professionalism, efficiency and speed with which the aftermath of a serious collision was dealt with by the maritime authorities and the courts.

57. The reasons displayed a comprehensive and deep understanding of the inter-locking international conventions concerned with an attention to detail to, and evident knowledge of, the maritime activity described. The confident, clear and unambiguous prose reveals the quality of maritime skill and knowledge of the judges. The detail with which the Court dealt with the activity necessary to appraise the award of salvage was a lesson for the lower courts and anyone reading the judgment.

58. Importantly, the Court applied directly, the 1989 International Convention on Salvage and the 2001 International

Convention on Civil Liability for Bunker Oil Pollution Damage (both having been acceded to by the PRC) in accordance with the legal effect in Chinese law of accession to conventions. However, Chapter IX of the Maritime Code was applied also, but only to the extent that it was consistent with the two conventions, and if there were matters to which the conventions did not apply. Only then did the Maritime Code or the Tort Law of the PRC apply. This approach reflected a primacy of international conventions.

59. The same collision was dealt with by the Full Court of the Federal Court of Australia in July 2014 when CMA CGM interests arrested *Chou Shan* in Australia[42]. They sought to take advantage of a higher limitation amount in Australia. The Court dismissed an appeal from a decision of one of the Admiralty Judges who had stayed the action in favour of allowing the Chinese courts to deal with the matter. Two matters from the Full Court's reasons are of interest. First, we said that the *lex causae* in the EEZ was not Chinese law, but the general maritime law as reflected in the Collision Regulations. This was not entirely dissimilar to the approach of the Fourth Civil Division. Secondly, one of the reasons that we stayed the Australian proceedings was our view that the Ningbo Maritime Court was the natural forum because of a number of factors. These factors were: that with the matter already in hand by the Ningbo Maritime Court there was a risk of inconsistent findings in two courts, the proximity to China of the collision, the role of the Shanghai Maritime Safety Administration, the commencement of suit by a variety of parties in China, the ships having been repaired in China, and the control of the disputes by a "competent and skilled Chinese court". If I

[42] *CMA CGM SA v Ship 'Chou Shan'* [2014] FCAFC 90.

may respectfully say, given the quality of the despatch of the dispute by the three levels of courts of the Chinese court system, the view we took and expressed in respect of the last factor can only be criticised for its understatement.

60. None of this discussion of China diminishes the importance of the rest of Asia to the development of international maritime law. Hong Kong, Singapore, South Korea, Japan and Malaysia are important centres and places of maritime activity, maritime law and maritime dispute resolution in courts and arbitral tribunals. Anyone who has looked down from the window of a descending aeroplane on the waters off Singapore, or Hong Kong harbour, and seen the multitude of ships and the container ports of each will have been struck by the vastness of the maritime activity going on below them.

61. Each of these centres deserves its own lecture on its contribution to maritime law in the region. They are the places where the general maritime law of the world in the sense I earlier discussed will be developed.

62. I will finish with a thought about arbitration and its role in fostering this internationality of maritime law. Arbitrations are invariably conducted under an arbitration clause that will usually have a choice of law provision. That law will be almost always some national law. Where that is the case tolerably adherence, of course, should be shown to the governing law (and its case law) chosen by the parties. Error in applying that law will not, of course, invalidate the award; but a refusal to adhere

to the mandate of the parties, by not applying that law might well do so. However, notwithstanding that one is dealing with a maritime arbitration under the law of country X, if the dispute is not directly and wholly to be resolved by the direct application of existing statute, Code or caselaw of country X, it may be that international principles or foreign cases reflective of international principle could be drawn upon in applying the law of country X, whether directly, or in the process of the Tribunal attempting to decide what the Courts, on one view the highest Court, of country X would decide if called upon to decide the question.

63. Thank you for your patient attention.