THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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CONTENTS

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 40

SWITZERLAND

William Hold[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Switzerland does not immediately come to mind when considering shipping law. Nonetheless, it has been in contact with the shipping industry for many years. Swiss companies and individuals financed many voyages to the New World and a Swiss insurance company was one of the co-insurers of the *Titanic*.

Nowadays, there is a Swiss ship registry based in Basle and there are about 50 ships on the oceans under the Swiss flag. The registry came into being when the Swiss government acquired vessels during World War II to secure the supply of essential resources. In the aftermath of the war, the Swiss government wanted to ensure that a Swiss-flagged fleet would be available for that purpose in the event of emergencies and took measures to encourage the existence of a private merchant fleet.

Moreover, many goods are still shipped in and out of Switzerland along the Rhine, through the port of Basle, and to or from the port of Rotterdam.

A substantial number of trading companies are based in Switzerland, many of which regularly charter seagoing vessels; some of them own their own vessels. According to some estimates, more than 20 per cent of the global transportation of commodities such as petroleum products, grains, cotton, coffee and sugar is organised out of Switzerland.[2]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The main legislative act for navigation on the high seas is the Federal Law on Navigation under the Swiss Flag (Navigation Act), which is completed and implemented by numerous pieces of secondary legislation, including the Ordinance implementing the Federal Law on Navigation under the Swiss Flag (the Navigation Ordinance) and the Ordinance on Swiss Yachts Navigating on the High Seas.

Moreover, Switzerland is a signatory to numerous International Maritime Organization conventions, which are imported into Swiss law and, therefore, are directly applicable to vessels flying the Swiss flag.

There are also specific pieces of legislation that apply to navigation on Swiss lakes and on the Rhine.

1 William Hold is a partner at HFW. The information in this chapter was accurate as at May 2018.

2 Source: Swiss Shipping and Trading Association.

The Swiss Ship Registry is based in Basle, and the administrative body tasked with implementing the legislation on merchant ships is the Swiss Maritime Navigation Office (the Office), which is a department of the Federal Department of Foreign Affairs. The Office also maintains a separate registry for ocean-going yachts and small boats.

III FORUM AND JURISDICTION

i Courts

As a rule, Swiss courts will recognise choice-of-law and jurisdiction clauses in contractual matters.

In the absence of a jurisdiction clause, the Swiss courts will determine whether they have jurisdiction under the standard civil procedure rules as far as contractual matters are concerned. In general, this means that the home court of the defendant has jurisdiction.

The civil courts in Basle have mandatory jurisdiction for all actions *in rem* with respect to a vessel entered in the Swiss Ship Register, for all claims arising out of unauthorised acts carried out on board a Swiss seagoing vessel and for actions in connection with proceedings to limit the liability of the ship operator or for confirmation by the court of a general average adjustment.

The criminal courts in Basle have jurisdiction for offences committed under the Navigation Act or on board a seagoing vessel, unless different courts are specifically provided for in special provisions.

ii Arbitration and ADR

Switzerland does not have a specific maritime arbitration procedure. However, it does have a very long tradition of hosting arbitrations of all sorts. For example, the International Chamber of Commerce (ICC) usually administers more arbitrations seated in Switzerland than in any place outside France, where the ICC is based.[3]

Moreover, given the number of commodity traders based in Switzerland, there is a deep pool of arbitrators and experts with strong industry experience in the shipping and commodities fields. Accordingly, it is by no means unusual for commodity and shipping arbitrations to take place with a seat in Switzerland. The fact that the underlying contracts are not governed by Swiss law is no barrier at all.

These arbitrations can be administered on an ad hoc basis or may be administered according to institutional rules, such as the ICC Rules or the Swiss Rules of International Arbitration, which were established by the Chambers of Commerce and Industry of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

Arbitration proceedings with a seat in Switzerland are governed by the Private International Law Act, which grants arbitral tribunals a large degree of discretion and broad powers.

Appeals against arbitral awards must be brought directly to the highest court – the Federal Tribunal – within 30 days of receipt of the award or interim award. The grounds under which an appeal may be brought are the following:

a if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

3 See, for example, International Chamber of Commerce, *Dispute Resolution Bulletin 2017*.

b if the arbitral tribunal wrongly accepted or declined jurisdiction;
c if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
d if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
e if the award is incompatible with public policy.

Interim awards can only be annulled on the grounds stated in points (a) and (b).

The appeal is generally dealt with on paper and is usually decided within four to six months.

Effectively, the only way an appeal can be brought against the merits of an award is under point (e), by claiming that the award is against public policy. As a rule, the Federal Tribunal is extremely reluctant to allow appeals on grounds of public policy. Although no official statistics are available, the overall success rate of appeals against arbitral awards is understood to be lower than 10 per cent for all grounds combined.

Further, if none of the parties has its domicile, habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive the right to appeal, or they may limit it to one or several of the grounds listed above. The insertion of a clause that disputes will be 'finally' heard by a given tribunal would most likely not be sufficiently explicit to achieve this result, so a more express renunciation of the right to appeal is necessary.

Mediation is also a well-accepted mechanism for alternative dispute resolution in Switzerland. The Swiss Civil Procedure Code provides that a judge or parties may suspend proceedings in favour of a mediation attempt, and the Chambers of Commerce of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich also offer their services in commercial mediation based on the Swiss Rules of Commercial Mediation.

iii Enforcement of foreign judgments and arbitral awards

Arbitral awards are readily enforceable in Switzerland pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Likewise, foreign commercial judgments issued in signatory states of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the Lugano Convention) are also readily recognised and enforced. The Lugano Convention binds the EU Member States, Switzerland, Iceland and Norway, and closely mirrors the Brussels I Regulation. Although the Lugano Convention does not require non-EU Member States to refer questions of interpretation to the European Court of Justice, it does require courts to take into account decisions made by courts in other signatory states in similar matters. The interpretation of the Lugano Convention, therefore, is very similar to the interpretation of the Brussels I Regulation.

Both arbitral awards and foreign commercial judgments issued in signatory countries to the Lugano Convention are usually registered at the same time as the application for enforcement is made. Assuming the formal requirements for recognition are met and the foreign judgment is executory, the Swiss courts will usually register the judgment and order whatever measures the creditor is entitled to under the relevant debt-enforcement provisions.

As regards civil judgments issued by courts in states that are not signatories of the Lugano Convention, the Swiss courts will recognise and register the judgment if the court

that issued the judgment had jurisdiction to do so, if the judgment cannot be appealed under ordinary proceedings and if the recognition of the judgment does not conflict with Swiss public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

No commercial seagoing vessels are built in Switzerland.

ii Contracts of carriage

Swiss-flagged vessels often perform contracts of carriage governed by the law of another country, usually England.

The main Swiss legislation that deals with contracts of carriage is the Navigation Act, as supplemented by the general contract law rules found in the Swiss Code of Obligations. Swiss contract law, including the law relating to contracts of carriage, is derived from German contract law. Accordingly, in the presence of *lacunae*, the courts may consider the relevant position according to German case law as well as international commercial practice.

The relevant provisions are to be interpreted according to the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) and its various protocols, which have been imported into Swiss law. The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) has been signed but has yet to be ratified.

During the time from reception of the cargo until its delivery, the freight carrier will be liable for the loss, complete or partial destruction of, or damage to, the goods and for any delay in the delivery unless it proves that neither the carrier nor the master, crew or other persons on duty on the vessel, or persons helping the carrier to effect the transportation, are responsible.

In the event that the loss, destruction or damage of goods or the delay has arisen from acts, omissions or negligence of the master, pilot or other persons working on the vessel in connection with navigating or technical operations, or if it is due to fire, the carrier will not be held liable, provided that there is no direct fault on its part. Measures that are principally taken in the interest of the cargo are not considered as falling within the scope of the technical operation of the ship.

In the event that claims for the loss, destruction or damage of the goods or delay are made against the master, crew or other persons working on the vessel, or persons helping the carrier to effect the transportation, they may rely on the exemptions from, and restrictions of, liability in the same way as the carrier, whatever the legal basis on which the claim relies, unless the damage was caused intentionally or through reckless carelessness.

The carrier will not be liable for the loss, destruction or damage of goods or delay if one of the following causes is proven:

a *force majeure*, accident, danger or incident on sea or other navigable waters;
b act of war, riot or public disturbance;
c an official measure such as sequestration, quarantine or other limitation;
d a strike, lock-out or other work impediment;
e the saving (successful or attempted) of life or property at sea or other justified deviation from the course of travel that does not constitute any violation of the contract of freight;

f an act or omission of the shipper, consignee or owner of the goods, their agents or representatives;
g the shrinkage of volume or weight or other damage as a result of concealed defects of the goods;
h the special nature or peculiar condition of the goods;
i unsuitability of the packaging, or unsuitability or inaccuracy of the markings; and
j concealed defect of the vessel impossible to discover by exercising normal due diligence.

The exemption from liability will not apply if it is proven that the damage was due to the carrier or its auxiliaries. 'Auxiliaries' in this sense means the master, crew or other persons working on the vessel or persons helping the carrier to effect transportation.

In the event that the charterer is responsible for the loss or complete destruction of the goods, it will be required to pay only the value of the goods at the place of destination on the day the vessel is or should be unloaded according to the freight contract. The value of the goods will be determined by the market price, or in the absence of such a value, according to the common value of goods of the same type or character.

In the event of partial destruction, damage or delay, the charterer will be required to pay only the amount of the reduction in value of the goods without further damages, but under no circumstances more than in the event of total loss.

Subject to damage being caused intentionally or through recklessness, the carrier will in no case be liable, whatever the legal basis on which the claim relies, to pay damages in excess of those stipulated in the Navigation Ordinance. These amounts are calculated according to a rate determined either for every unit or other transporting unit, or for each kilogram of gross weight of the lost or damaged goods, whichever amount is higher.

The carrier may not rely on these maximum amounts in the event that the shipper has expressly stated the particular nature and the maximum value of the goods before the commencement of loading, and this value, which may be refuted by the charterer, has been entered in the bill of lading, or if maximum liability amounts have been agreed.

Any agreement in the bill of lading that has the direct or indirect purpose of excluding or of limiting the statutory liability of the carrier for the destruction or loss of, or damage to, the goods, or of shifting the burden of proof for such liability will be unenforceable unless the agreement refers to the carrier's liability for the period before the loading of the goods and after their unloading.

In the event that a container, a pallet or a similar device is used to collect goods, every piece or transport unit mentioned in the bill of lading contained in or that is on such a device shall be regarded as a separate piece or transport unit; in all other cases, the whole device will be regarded as a piece or a transport unit.

The carrier and its auxiliary staff taken together may not be held liable for an amount in excess of the maximum amount for which the carrier alone would be liable.

Neither the carrier nor its auxiliaries may rely on the exemptions from and restrictions of liability if it is proven that they caused the loss or damage through an act or omission perpetrated with the intention of causing loss or damage, or by acting carelessly in the knowledge that loss or damage was likely to occur.

The authorised holder of a bill of lading is entitled to receive the goods from the carrier that issued the bill of lading and, therefore, has title to sue the carrier if the goods are not delivered.

Whoever demands delivery of the goods will become the debtor for the freight and other debts attached to the goods, but the receiver will be liable only for demurrage and other debts that accrued at the loadport if these debts are recorded in the bill of lading, or if the receiver otherwise found out about the claims.

The provisions of the York Antwerp Rules 2016 apply to general average claims.

iii Cargo claims

See Section IV.ii for a general overview. It is possible to incorporate charter party terms into other agreements, provided that the parties to the agreement have had the opportunity to find out the terms of the charter party. If these terms are widely available to the general public, such as for standardised charter party forms, the standard will be somewhat lower, especially if the parties are commercially experienced. Under these conditions, there are suggestions that parties can be held to have incorporated an arbitration clause. Whether a demise clause is enforceable probably depends on the facts. If the parties to the bill issued are experienced commercial parties, there is a good chance that the clause would be upheld.

iv Limitation of liability

Under the Navigation Act, two limitations of liability are possible. First, Swiss federal law limits the liability of shipowners, and that of the shipper and carrier, by applying Articles 1 to 13 of the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976). Accordingly, liability may be limited for two types of claims: for loss of life or personal injury and for property claims. The limits under the LLMC Convention are based on the tonnage of the ship.

The second area of liability covered by the Navigation Act concerns 'loss or damage due to hydrocarbons'. This is governed, as stipulated in Article 49, by the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention).

In the case of the limitation of liability under both the LLMC Convention 1976 and the CLC Convention, the fault on the part of the shipowner, operator, charterer or carrier that justifies the exclusion of the limitation of liability must be proven by the party that asserts the existence of the fault.

In a case of limiting liability for loss, partial damage or complete destruction of goods, liability is limited to the total value of the goods lost or damaged. Inland operators (most generally in the case of barges on the Rhine) may limit their liability in accordance with the 1988 Strasbourg Convention on the Limitation of Liability in Inland Navigation, which is incorporated into Swiss federal law. The only *caveat* is that, in the case of push boats rigidly connected to pushed barges as a convoy set, liability will be calculated 'according to the engine output of the push boat and the carrying capacity of the pushed barges'.

V REMEDIES

i Ship arrest

It is possible to arrest a barge on the Rhine. A popular measure that is of more general interest is the arrest of bank accounts or other assets (including debts) that are located in Switzerland.

The holder of an unsecured debt may apply for an arrest of assets that are in Switzerland under certain conditions (the debt generally must be payable). An arrest may be granted, for example, if the debtor is preparing to flee or to conceal its assets, if the debtor is not domiciled

in Switzerland (provided that the debt has a sufficient connection with Switzerland), if the creditor has a valid recognition of debt from the debtor, or if the creditor has an enforceable judgment or arbitral award against the debtor.

The creditor will have to make a plausible case that the debt exists, that the conditions for an arrest to be granted are fulfilled, and that there are assets within the jurisdiction to be arrested.

ii Court orders for sale of a vessel

A court may order the sale of a vessel within the context of winding-up or insolvency proceedings against its owner.

VI REGULATION

i Safety

Pursuant to the Navigation Ordinance, the latest version of the following international conventions shall apply to Swiss seagoing vessels, their equipment and safety, to the protection of human life at sea and of the waters of the sea, and the training of seafarers:

a the International Convention on Load Lines 1966 (the Load Lines Convention);
b the International Convention for the Safety of Life at Sea 1974 (SOLAS);
c the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
d the Radio Regulations annexed to the International Communication Treaty of November 1982;
e the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) (with Annexes I to VI);
f the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention); and
g the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention).

These conventions are directly applicable under Swiss law, and the Office ensures that they are complied with.

ii Registration and classification

Seagoing vessels may be entered into the Swiss Ship Register if they are used, or intended to be used, for commercial activity. To be registered, the vessel's owner must first obtain a certificate from the Office to the effect that the legal conditions relating to the owners and the operators are fulfilled.

If the owner of the vessel is a corporate entity, its registered office and the actual centre of its business activities must be located in Switzerland. Broadly, the majority of the entity's management must be domiciled or resident in Switzerland, and must be Swiss citizens.

There are additional requirements with regard to the owner's financial resources and the origin of the funds: the requirements for operators who are not owners are similar. These restrictions reflect the strategic importance of the Swiss merchant fleet in times of crisis.

The idea is that the fleet remains firmly under Swiss control in times of need. Moreover, the name of the vessel must be approved by the Office. As a general rule, the vessel must hold the highest classification of a recognised classification society.[4]

The requirements are broadly similar for ocean-going yachts, except that the owner of the vessel must be a Swiss national or a Swiss foundation that encourages pleasure boating. The vessel's home port will be Basle.

Mortgages may be entered into the shipping register provided that certain requirements on the origin of the borrowed funds are satisfied. Moreover, the liens set out in the International Convention on the Unification of Rules relating to Maritime Liens and Mortgages on Seagoing Vessels 1926 rank ahead of any liens entered into the Swiss Ship Register.

Bareboat charters may also be entered into the register, so that in the event that the vessel is sold, the new owner must allow the charterer to use the vessel in accordance with the provisions of the charter party.

iii Environmental regulation

Switzerland is a signatory of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention), the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention), the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention) and the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention).

A party that acts in breach of these conventions or any of the provisions of the acts that deal with environmental protection would be liable to a term of imprisonment or a fine. If the act were carried out negligently, the party would be liable to a term of imprisonment for up to six months or a fine of up to 20,000 Swiss francs.

iv Collisions, salvage and wrecks

In the event of a collision between two or more vessels, the provisions of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Brussels Collision Convention) determine the rights and obligations of each party. Switzerland is also a signatory of the International Convention on Salvage 1989 (the 1989 Salvage Convention), which is directly applicable. The operator of the salvaged vessel will be required to pay the costs of salvage. It may have recourse in respect of the costs in proportion to its respective shares against the persons who hold rights to the other valuables salvaged.

v Passengers' rights

The provisions of Article 1 and Articles 3 to 21 of the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) apply to the liability of a carrier and its personnel in respect of passengers and their luggage.

4 There is no case law on the liability of classification societies, to our knowledge, but, under general contract law principles, it is possible that a classification society would be found liable if it were found to have caused harm through a breach of its obligations.

vi Seafarers' rights

Seafarers' rights are governed by Articles 68 to 86 of the Navigation Act. These provisions are supplemented by the general provisions that deal with employment contracts found in the Swiss Code of Obligations and numerous provisions of the Navigation Ordinance.

In addition, Switzerland is a signatory of the Maritime Labour Convention 2006, which entered into force in Switzerland on 20 August 2013.

VII OUTLOOK

The shipping and commodity trading sectors together amount to a substantial portion of Switzerland's annual gross domestic product. By some estimates, they contribute about as much as the tourism industry. Therefore, there is every chance that Switzerland will continue to have a discrete presence on the shipping scene in general for a long time to come.

Appendix 1

ABOUT THE AUTHORS

WILLIAM HOLD

HFW

William Hold is a solicitor in HFW's Geneva office. He regularly acts for trading companies in charter party disputes and trade disputes involving a range of physical commodities. He has acted in arbitrations governed by the Swiss Rules of International Arbitration, and the rules of the International Chamber of Commerce, the Singapore International Arbitration Centre, the RSA [Please define.] and the German Institution of Arbitration (DIS).

Mr Hold also has a non-contentious practice and he often advises lenders and borrowers on commodity finance matters, and other parties on general commercial issues, which usually concern commodities trading.

Before joining HFW, he practised for several years as an *avocat* in Geneva and spent several further years in Singapore practising as a foreign lawyer in the shipping and trade department of one of the largest firms in South East Asia.

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