THE ARREST news

Issued by the industry network devoted to ship arrests, www.shiparrested.com

Issue 5

December 2011

IN THIS QUARTERLY ISSUE

Piercing the Corporate Veil in Cyprus

The aim of this article is to outline the approach of the Cyprus Courts in connection with the enforcement of a foreign judgment when a defendant has not submitted itself to the jurisdiction of the foreign Court which would mean that in all likelihood the defendant may not comply with the Court's money judgment against it.

Generally speaking, if the claimant applies to the Cyprus Court for recognition of the foreign Court judgment and provided all the formalities have been complied with, the foreign judgment will be declared enforceable immediately. It is then placed on the same footing as judgments of the Cypriot Courts and takes effect as such. Accordingly, the defendant has the right to appeal against the order of the District Court to the Supreme Court of Cyprus, within a month of the service of the notice of enforcement. This period expands to two months if the defendant is domiciled in a Member State other than Cyprus.

A) Recognition and enforcement of judgments and arbitral awards

Cyprus is a member of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The recognition and enforcement of foreign arbitral awards in Cyprus is governed by Law 121 (1)/2000 and Law 84/79 which ratifies the New York Convention. In Cyprus, the New York Convention is not applied as a national law, but as an international treaty and as result, Cyprus Courts take into account not only Cypriot but also foreign decisions interpreting the New York Convention in order to ensure an internationally uniform application of the New York Convention.

Once the summons is served on the debtor, he is given the opportunity to appear at the first hearing of the application and can oppose the registration of the award. If the debtor opposes the registration, the Court will direct him to file his written opposition stating the grounds for refusing the registration of the award.

A judgment creditor can apply for an injunction freezing the assets of the debtor, which are within the jurisdiction of the Cypriot Courts, pending the final determination of the application for registration of the arbitration award. This is an important point and the greatest area of risk for the Cypriot companies if the claimant manages to pierce the corporate veil in another state and commences Arbitration proceedings against the Cypriot companies in another state.

It should also be noted that the power of the Cyprus Courts is not limited to freezing orders. Where justice requires, they may issue interim specific performance orders or mandatory injunctions to the effect of instructing a person to take active steps or they may even appoint a receiver or take any steps that justice may require.

B) What procedures / conditions (if any) in Cyprus allow "veil piercing"? What are the requirements/conditions that the claimant should follow in order to be successful in "veil piercing" in Cyprus?

The fundamental provision under Cyprus law is that in the case of companies limited by shares the liability of each member is limited to the nominal value of the shares they agreed to take up. Once the member has paid for his shares, his liability toward the debts and liabilities of the company is fully discharged, although fraud may render a member liable for the debts of the company in accordance with the provisions of Companies Law, section 311.

This covers responsibility for fraudulent trading. If in the course of the winding up of the company it appears that any business of the company

has been carried on with the intent to defraud creditors of the company or any other person or for any other fraudulent purpose, the Court, on the application of the official receiver, or the liquidator or any creditor or contributor in the company, may, if it thinks proper to do so, declare that any persons who are knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under the said section 311.

The expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interests created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on which the ground of which the declarations is to be made.

It should be noted that the power of the Cyprus Courts is not limited to freezing orders. Where justice requires, they may issue interim specific performance orders or mandatory injunctions to the effect of instructing a person to take active steps or they may even appoint a receiver or take any steps that justice may require.

C) In case the claimant following the foreign Court judgment will come to Cyprus Court and applies for freezing the assets of allegedly related to the debtor company is it possible that the Court would order the injunction and after that proceed to veil piercing?

We set out below the relevant conditions that would need to be satisfied for the claimant to "theoretically" obtain interlocutory/injunctive relief against the Cypriot company.

Interlocutory Relief:
An application for Interlocutory Relief is generally made by summons, and all parties are afforded the opportunity to make submissions. Only in urgent situations, can an application for Interlocutory Relief be made ex-parte.

The application should be made after the writ is issued and supported by an affidavit establishing:

- That the applicant has a prima facie case
- There is a possibility that a judgment will be issued in favour of the applicant on the merits
- If the order is not made, there is a great risk that any judgment issued in favour of the applicant will not be satisfied
- On the balance of convenience, the Court should issue the requested order in favour of the applicant.

Procedure:
Injunctive relief will be granted only on the condition that the applicant lodged a counter-security to indemnify the respondent against all losses sustained due to the injunction in case the Court finds that the injunction issued was unreasonable.
In ex-parte applications, the applicant must disclose to the Court all material facts including those which are adverse to the applicant's case. Failure to do this will result in the automatic discharge of the injunction.

The affidavit must contain:

- The facts giving rise to the cause of action
- The facts giving rise to the claim for injunctive relief
- The precise relief claimed.
- The facts relied on to justify the application being made ex-parte
- Details of any notice given to the respondent.

A right to grant an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the respondent. The Court will not, and ought not to, make an order which it cannot enforce.

As stated above and injunction cannot stand alone; any order for an injunction can only be issued on the back of a claim against the Cypriot company. Accordingly, the claimant will need to issue a claim against the Cypriot company before the Court will be in a position to issue an injunctive order against this company. In order to issue such claim the claimant will first need to pierce the corporate veil. Accordingly, veil piercing will need to precede any freezing order.

George Zambartas
L. G. Zambartas LLC, Law Offices
gz.law@cytanet.com.cy
www.zambartaslawoffices.com
Gregoriou Building, 95 Griva Dighenis Street, Limassol 3101
PO Box number 56145, Post code 3304
Tel: 00357 25373734
Fax: 00357 25725502

Mr. George Zambartas holds a Bachelor of Arts degree in Law and Politics from the University of London's Queen Mary College and has over 20 years experience as a lawyer in England and in Cyprus.
He has extensive experience in shipping encompassing ship financing, maritime claims (including ship arrest), ship management and purchase/sales of ships, including new builds. He has been instructed by leading international law firms and banks to provide legal opinions on high value shipping transactions on matters of Cyprus Law. He has undertaken ship registration, re-flagging, re-naming and parallel registration in all major registries around the world. He has also given presentations on numerous shipping topics at various seminars. He moved to Cyprus in 1999 to take up the position as in house Legal Advisor of a global Shipping Company with a fleet of over 100 vessels. In August 2008 he set up his own law firm L.G. Zambartas LLC.

Recent ship arrest cases in Latvia

On the 4th of August 2011, in the port of Ventspils, a passenger ferry that runs the line Ventspils – Travemunde was arrested. The arrest was initiated by foreign pilots whose services were not rendered by the previous charterer.

I will not comment on the question of arresting a passenger ferry that runs the line according to its strict timetable, like any kind of public transport, and which transported over 200 passengers and a great deal of cargoes and how unprofessionally the arrest was organized.
From the legal perspective everything was clear – the debt to pilots is a maritime lien which follows the vessel.

Marine Legal Bureau lawyers managed to lift the arrest of the ferry in less than 24 hours, which helped to avoid the delays in her schedule and accordingly to avoid further claims against the ship owner. Having lifted the arrest, we litigated the validity and lawfulness of the arrest in the Higher Court based on the following:

1. Neither the ship owner, nor the Master had ever received pilots invoice and therefore were not aware of the fact that it was not paid by previous charterer.
2. The ferry was not the asset of the defendants. According to the interpretations of the Latvian Supreme Court a claim can only be assured by the assets of the debtor. In case of arresting the assets which are not owned by the debtor, the arrest must be canceled.
3. The Latvian Maritime Code can be applied only to vessels which are located in Latvian territorial waters. In this case, the court decided to arrest the ferry when she was not in Latvian territorial waters; therefore the court had no right to take the decision.

According to Latvian civil law of procedure, that kind of complaints must be considered in written form without the presence of the parties. In our case, the court of appeal set oral proceedings and invited the representatives of the parties.

The court did not take into account our arguments and confirmed the lawfulness of the arrest of the ferry. The main argument of the High Court was that the debt to pilots was a maritime lien, which stays with the vessel no matter who holds the vessel.

As respect to the argument that the court had no right to arrest the vessel as she was not in Latvian territorial waters, the court explained that the term «application» means not only "decision making" but also "execution".

The ferry came to the port of Ventspils on the 4th of August at 8 p.m. The decision to arrest was made by the court on the same day, and on the same day the court ruling was presented to the Harbour Master of the port of Ventspils. Thereafter everything was in accordance to the law.

Now the parties are in process of amicable settlement discussions.

***

In October 2011, Marine Legal Bureau lawyers were asked by suppliers to arrest a vessel in Riga. The supply services were provided to the vessel at the request of the ship manager and were outstanding for a long time.

On September 14th 2011, the 1999 International Convention on arrest of ships came in force in Latvia. The Convention was ratified by the Latvian government on October 18th, and its statutes of the first article were incorporated into the Latvian Maritime Code. Before this, Latvia had also been a member to the 1952 ship arrest Convention.

The vessel we intended to arrest flied a Malta flag. As it is known, Malta is not a signatory to none of the above mentioned ship arrest conventions. The provisions of the 1999 Convention are not applicable to arrest a vessel under the request of the ship manager. At the same time, provisions of the 1952 Convention are more flexible in this respect. That is why we were interested in applying the provisions of the 1952 Convention in order to successfully arrest the vessel.

According to Latvian legislation, when submitting an application, the potential plaintiff has to submit evidences that confirm his rights in accordance with the applicable obligation and the necessity of securing the claim.

In order to arrest the vessel, we specified in our claim that, under these particular circumstances, the provisions of the 1952 Convention must apply. We referred to the 4th part of clause 30 of the 1969 Vienna Convention on the Law of Treaties which regulates the relations between the countries that became parties of the Convention above and later: ≪4. When the parties to the later treaty do not include all the parties to the earlier one: (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations».

The court accepted our arguments, applied the provisions of the 1952 Convention and arrested the vessel.

Thereby, now, in Latvia it is possible to apply the provisions of both Arrest Conventions – the 1952 and the 1999 - depending on the circumstances.

Edward Kuznetsov
Marine Legal Bureau
ek@mlb.lv office@mlb.lv
www.mlb.lv
17a Duntes street, Riga, LV-1005, Latvia
Tel: +371-67-399985
Fax: +371-67-399984

In August 2011 Edward established own law firm Marine Legal Bureau (MLB), since 2007 till Aug 2011 he was a managing partner in another maritime law firm in Riga. Before he spent several years as manager of private Russian ship owning company, then during twelve years he was manager of Legal Dept. of Lloyd' s agency in Latvia and of local correspondent for P&I Clubs.
In May 2008 Edward was key person who hosted 5th Shiparrested.com members meeting in Riga. Edward is a member of the Saint-Petersburg Bar Association in Russia and also is practicing arbitrator himself with experience to decide disputes in maritime law sphere. Since June 2011 Edward is Supporting Member of the LMAA.
As a lawyer Edward has experience in resolution of a wide range of both dry and wet shipping matters. Edward represents clients in courts and in arbitrations in Latvia, Russia, Germany, and UK.

Ship arrest in England and Wales – An attempt to bind the ship owner in contract

A ship arrest in England and Wales can only be effected if, at the time of the arrest, there is a claim in personam against the owner or demise charterer. It is therefore common practice for suppliers of goods and services to ships to include a clause in their terms and conditions whereby the customer warrants that they have authority from the ship owner to be bound by the terms. This is intended to ensure that a claim in rem can be brought. In other words the supplier seeks to contract with the owner as principal.

LA Marine was instructed to arrest a ship pursuant to a claim for unpaid bunkers on the basis that the debtor was the demise charterer. The claim was made under section 20(2)(m) of the Senior Courts Court Act 1981 (formerly known as the Supreme Court Act 1981), in an action in respect of goods or materials supplied to a ship for her operation or maintenance.

The supplier's terms and conditions included a warranty given by the debtor that it had authority from the owner of the ship to purchase the bunkers. Furthermore the delivery note in respect of the delivery of the bunkers was signed by the ship's Master and bore the ship's seal. Following the arrest it transpired that the debtor was in fact the sub-time charterer.

It was clear that the arrest as against the debtor could not be upheld. The alternative was to consider a potential claim against the owner by relying on the warranty given by the debtor that it had in fact contracted with the owner's authority, and/or that the delivery note with the ship's seal was evidence of a contract with the owner.

In absence of clear contractual intentions (or actions) of the owner to be bound by the terms of a contract, the English courts will find warranty clauses purporting to bind an owner unenforceable. The basic agency

principles apply that there must be actual or ostensible authority for the purchaser to bind the owner (or demise charterer).

English case law is also of the view that a delivery note with the ship seal is not evidence of a contract with the owner, but rather that this is merely evidence of receipt of goods. In The Yuta Bondarovskaya [1998] 2 Lloyds Rep 357 it was held that a time charterer did not have authority to contract for the purchase of bunkers on behalf of demise charters. It follows, therefore, that no such authority exists to bind the owner of a ship.

Whilst it appears to be a good idea to treat the purchaser as an agent of the ship owner (or demise charterer), in practice the English courts are unlikely to consider these clauses enforceable. A ship arrest based solely on the reliance of a warranty clause is risky, and may give rise to a claim for wrongful arrest.

LA Marine was able to achieve a satisfactory settlement on behalf of its client by relying on a retention of title clause and, ironically, the ship owner agreed to purchase the remaining bunkers on-board and the ship was released. The alternative to this was to de-bunker, which would have taken between 7-10 days, resulting in increased costs and losses to all parties concerned.

In conclusion, whilst the outcome was not as anticipated at the outset the matter nevertheless raised some important issues. Firstly suppliers should establish the identity of the purchaser. A contractual warranty as to higher authority (sufficient to give a claim in rem), will be ineffective unless it comes from the owner or demise charterer.

Secondly, a delivery receipt (regardless of it bearing the ship's seal) is not contractually binding on the ship owner, but is exactly as its nomenclature suggests – it provides evidence as to receipt of goods. Whilst in the English courts one does not have to prove a substantive case before the warrant for arrest is issued, the effect of an arrest where there is no claim in personam does leave the arresting party at risk of a counter-claim in damages.

Lily Chan
LA Marine
lily.chan@LA-law.com
www.la-marine.co.uk
70 Chancery Lane, London EC4Y 8EN
No.12 Tesvikiye, Istanbul, Turkey
Tel: + 44 (0) 20 7492 9803
Fax: + 44 (0) 843 290 4117

Lily Chan is a solicitor in the marine team of Lester Aldridge LLP (LA Marine). Lily graduated from King's College London, and qualified into LA Marine in 2008. Lily deals with a multitude of issues within the shipping and marine field including the sale and purchase of vessels and contract/negligence disputes. She is also experienced in the area of ship arrest, registration of vessels, personal injury claims and advising on policy coverage.

Flying the flag of a contracting state

The Admiralty Court in Ireland recently considered if there was jurisdiction to arrest an unregistered pleasure yacht in a dispute relating to ownership. A dispute as to ownership is a ´maritime claim´, but under the 1952 Arrest Convention, a ´ship´ must be "flying the flag" of a State to be susceptible to an arrest.

Certain academic writers have interpreted the phrase "Flying the flag of a contracting State" as denoting a requirement that, for a ship to be susceptible to arrest, it must be registered in a contracting state (or indeed in a "non-contracting" state).

The arresting party, however, argued that "flying the flag of a contracting state" was a requirement that a ship had assumed the nationality of a particular state and, in this regard, it was argued, that the flag is a symbol of the ship´s nationality.
The 1982 United Nations Convention on the Law of the Sea provides that ships have the nationality of the State whose flag they are entitled to fly. That 1982 Convention also provides that it is a matter for each individual State to fix the conditions for the grant of nationality to ships, the registration of ships in its territory, and, for the right to fly its flag.
In Ireland, pursuant to the Mercantile Marine Act 1955, a ´ship´ wholly owned by an Irish citizen or body corporate, of less than 50 tons, not engaged in trade and navigating solely in the waters of Ireland and UK, is exempt from the requirement to be registered. Importantly, however, under the Mercantile Marine Act 1955, such a ´ship´ is still considered to be an "Irish Ship", and, is thus entitled to fly the Irish flag.
Under the UK Merchant Shipping Act 1995, there are similar exemption provisions for registering small pleasure craft in UK, which, nevertheless, would be "British Ships" and thus have the right to fly the British Red Ensign (less than 24 metres).

The substantive issue, which party owned the yacht, would determine the nationality of the yacht, and, whether it was entitled to fly the Irish flag or British ensign. However, for the arrest proceedings, the Admiralty Court held that it did not need to determine that ownership issue because, in either event, the unregistered yacht was a 'ship'. In both Ireland and the UK, the particular unregistered yacht clearly fell within the exemption criteria to be registered in both States but would nevertheless still be considered to be a 'ship' in either State. The pleasure yacht was therefore a 'ship' flying the flag of a contracting state, and, the Admiralty Court held that it had jurisdiction to maintain the arrest under the 1952 Arrest Convention.

This case would appear to be one of the first of its kind on the definition of the term "flying the flag of a contracting state" in 1952 Arrest Convention. This might be surprising, were it not the fact that both the Irish and British jurisdictions have relaxed rules relating to the registration of small vessels. Lavelle Coleman acted on behalf of the successful arresting party.

Hugh Kennedy
Lavelle Coleman
hkennedy@lavellecoleman.ie
www.lavellecoleman.ie
20 On Hatch Lower Hatch Street, Dublin 2
Tel: + 353 16445862
Fax: + 353 16614581

Hugh Kennedy is a shipping lawyer who specialises in ship arrest in Ireland. After completing a LLM in shipping law at Southampton University, Hugh worked in London and Copenhagen before returning to Ireland. Hugh is instructed by the prominent P&I Clubs, cargo and hull underwriters, and by leading International law firms who specialise in shipping, transport and insurance law.
Hugh regularly advises and lectures on all aspects of Admiralty law, including ship arrest, collisions, salvage, and casualty investigations. Hugh's clients include ship-owners, P&I Clubs, charterers, cargo underwriters, shippers and receivers for all types of cargo.