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IN THIS QUARTERLY ISSUE

"SIXTH SENSE"[1] - SHOULD THE HONG KONG COURT ORDER WITNESS EVIDENCE BY VIDEO LINK OR VIVA VOCE IN SHIPPING CASES?

In a South African case - *The Joannis NK* - a court exercising admiralty jurisdiction made an order in favour of the owner of a cargo that was lost when the vessel carrying it sank. The applicant sought to commence arbitration in London. The judge concluded that the conduct of the shipowner and crew after the sinking made it unlikely that crew members would give evidence at the arbitration. The court was satisfied that the evidence would be lost if it were not taken on commission.

The court issued an order that provided for:
• appointment of counsel experienced in maritime matters as a commissioner to take evidence;
• proper arrangement to be made for taking evidence;
• appointment of a reputable transcription service; and
• transmission of the record of evidence by the commissioner to the applicant.

The case raises the question of whether similar remedies would be available in Hong Kong as a forum for obtaining evidence.

The new Civil Justice Rules came into effect on April 2 2009. They include a number of significant innovations, including interim relief in support of substantive proceedings commenced (or to be commenced) in Hong Kong. The effective abolition of the *Siskina* principle means that it is no longer necessary to establish a substantive cause of action in Hong Kong, subject to the court being satisfied of the existence of proceedings capable of giving rise to a judgment or award that would be enforceable in Hong Kong. Consequently, cargo interests, shipowners and other stakeholders would be able to obtain interim relief by means of Mareva injunctions and Anton Piller orders in relation to proceedings that are taking place or will take place outside the jurisdiction and where no such substantive proceedings have been contemplated in Hong Kong.

Certain general rules of the Hong Kong High Court would apply to obtaining witness evidence in shipping cases similar to *The Ioannis NK*[2]. There are also specific provisions for admiralty proceedings in Hong Kong that would assist in such a case.

Admiralty procedures for the inspection of ships and the examination of witnesses and other persons exist alongside non-admiralty provisions[3]. Under Order 75, Rule 28, the inspection of a ship may be ordered where the party seeking the order can demonstrate that it is necessary to obtain full information and evidence on any issue in the action - such as a vessel's unseaworthiness, which was a key point in *The Ioannis NK*. As The Good East ([1997] 3HKC 250) demonstrated, if it cannot be shown that the inspection will assist the court, or if the application is considered to be a speculative and non-specific 'fishing expedition', the order will not be granted.

An order for inspection that permits a party's surveyor to inspect a ship and its documents and to take samples from a vessel is mandatory in form, but does not constitute an injunction. It can be obtained on the basis of affidavit evidence which shows a good arguable case on the merits and more than a de *minimis* shortage of cargo on delivery. In addition, such evidence must show that the inspection, the taking of samples or the analysis is likely to assist the trial judge. As in the case of Mareva injunctions, plaintiffs must give an undertaking in damages against any

loss suffered as a result of the order. This requirement is intended to protect shipowners from unnecessary interference and to safeguard the interests of third parties that might be adversely affected by the order[4].

An admiralty order for the examination of witnesses and other persons[5] provides that an order must make provision for any consequential matters, such as recording of the proceedings - in this respect, it resembles its equivalent in the South African case.

In addition, video conferencing may be a key factor in shipping cases where crew members or technical experts are based abroad. A recent hearing considered the use in the Technology Court of video conferencing to take the evidence of a witness abroad[6].The judge, Justice Stone, set aside an earlier order permitting such evidence. It has previously been acknowledged that "the atmosphere of a court is highly important as regards [the] taking of evidence"[7]. Although this view does not exclude the use of technology, Stone concluded that it is for the party wishing to use a video link to justify this exceptional treatment. Although shipping cases frequently involve witnesses from outside Hong Kong, the Admiralty Court is likely to adopt a similar approach.

Hong Kong has provisions for the examination of witnesses in foreign proceedings that are similar to those applied by the South African court in *The Ioannis NK*. Obtaining such witness evidence in shipping and transport cases may require the use not only of long-established procedures, commonly used in many maritime nations worldwide in obtaining evidence in a territory of another state by letters rogatory and by commission, but also of the specific admiralty procedures under Order 75 and certain innovations introduced by the civil justice reform. However, for all its potential, the use of video conferencing for collecting evidence in shipping cases in Hong Kong remains untested. It may be highly suitable for technical evidence by technical witnesses from abroad - although a experienced marine engineer witness has noted that, evidence having been given, it is impossible to have a beer with the other side's expert witness over a plasma screen. However, the courts may consider that the remote hearing of evidence is no substitute for an assessment of a witness's demeanour through at least the fifth (if not the sixth) sense.

1 1999 Psychological Thriller starring Bruce Willis
2 In particular Order 39, which is entitled "Evidence by Deposition: Examiners of the Court", and Order 70, which is entitled "Obtaining Evidence for Foreign Courts etc".
3 Order 29, Rules 2 and 3 and Order 35, Rule 8 in the case of ship inspection and Order 39, Rule 1 in the case of examination of witnesses and other persons.
4 The Mare Del Nord [1990] 1LL Rep 40.
5 Order 75, Rule 30.
6 A case management hearing on November 8 2010 in Asia-Pac Infrastructure Development Ltd v Ing Vim Leung Alexander (HCA 16778/1999).
7 Chow Kam Fai David [2004] 2HKC 645.

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THE PITFALLS OF ARREST IN THE UK A "CAUTIONARY" TALE

We are all familiar with arrest of vessels in the UK and there are some very good references setting out the criteria for doing so. What is of particular interest to our clients is - will they get paid or will they obtain security for their claim?

As we are also aware, arrest in the UK is quite straightforward. It does not require a hearing, the documents have been made simpler and the arrest can be put in place quickly. The vessel can be secured at short notice and it is simple for other parties to lodge a Caution Against Release or subsequently take over conduct of the arrest. There are standard court fees, including a standard undertaking to pay the Admiralty Marshal's fees.

By way of reminder the order of priorities is governed by the Supreme Court Act 1981 as:
1. Admiralty Marshal's costs, fees and expenses.
2. Court fees and expenses
3. Costs of the arrest of the arresting parties

The other claims are then settled in the order:
4. Any claim with a maritime lien;
5. Any claim of a mortgagee or any other party with a charge;
6. Any claims of others entitled to proceed *in rem* will rank equally.
7. Any other claims of *in personam* creditors.

If the arresting party has no priority, in that he has no registered charge, his claim will fall into category 3 above and he will recover with the other unsecured creditors. The arrest does not give the arresting party's claim priority over other creditors and if, after distribution, there is any remaining funds, these are returned to the owners.

The "Cautionary" part

The Scenario below is fiction but is based on actual circumstances. The names, nationalities and claimed sums have been changed to protect the innocent from innuendo.

MV "Alex" is a small vessel of around 3000 tonnes. She is entered on a foreign register and arrived in a busy UK port for grain loading, some repair work and crew changes. The owning company has cashflow problems, cannot pay its bills and has significant overdue invoices for outstanding supplies, including bunker suppliers.

The vessel owes several firms in respect of bunkers, one of which locates its whereabouts and arrests it for a claim of around $150,000 plus interest. The arresting lawyers do not yet know if there are other claims or if the vessel is charged to a bank.

Two days pass. The owners have not put the managers in funds and the ship remains under arrest. At this point it would be fair to say that the window of opportunity for its release is very quickly closing

The crew are unpaid and unhappy and consult English lawyers. They submit claims and join the arrest. As maritime lien holders they sit at the

top of the pile of claimants. Other bunker suppliers quickly surface. Various other suppliers file Cautions but do not file claims because they are not sure whether it is worth incurring the expense of proceeding to judgment. At this stage all claims amount to around $300,000 and is would not be unreasonable to conclude that there is a good prospect that everyone will get paid.
Two weeks pass. No bank appears to take over the arrest and investigations indicate that the vessel may be mortgage free. Various cautioners decide that there is a good prospect of complete recovery and prepare to file their claims.

In the meantime we are into the holiday period. Negotiations are ongoing as to security or payment. Whilst more than willing to talk, the owners and managers are unable to comply with the demands. Claims continue to come in.

The vessel remains at the berth, under the control of the Admiralty Marshal. He has to supply diesel, shore power, food, fresh produce and cigarettes for the crew. The crew begin to file their claims and go home. They are assisted in this by their English lawyers, who have the cash from the safe and have booked tickets home.

Port State Control visit the vessel and list a number of deficiencies that render it unseaworthy.

Three months after the arrest the vessel remains at the berth and is virtually derelict. Proceedings have been progressed for its appraisement and sale and it is to be auctioned. It is valued at around $800,000. At this point one of the caution holders asks where the vessel is. He is informed that it remains at the loading berth. The standard port charges and terms and conditions of the load port are looked up and make bad reading. The daily rate is $4000 and we are now 120 days into the arrest. $4500 x 120 = $540,000!

Why were we not told this before? Can we do anything about these excessive fees? Why was the vessel not moved? The answer is that the Admiralty Marshal is not required to inform the parties of the fees being incurred and is certainly not in a position to challenge invoices properly raised under a contract between the vessel and the port. He is simply there to take custody of a ship and to maintain it until such time as it is released or sold. He simply protects the res and pays the bills.

Even if the Marshal had been asked to move the vessel, this would have been expensive and difficult because once it had been under arrest for more than a few days the crew had started to leave, little or no maintenance had been carried out and Port State Control had been on board. It was not immediately seaworthy and certainly not legal to move without significant expense.

There were alternative and considerably cheaper, non commercial berths nearby.

Sealed bids are received from buyers and one is accepted - $920,000 plus $50,000 for the bunkers. The vessel is sold as seen and taken away by its new owners. The proceeds are paid into court and the parties are free to discuss priorities or to proceed to a hearing.

At this point it is very clear that there are not sufficient funds to pay all the non priority creditors. The crew wages claim amounts to around $60,000 and the remaining in rem claims are now in excess of $400,000. Legal costs amount to $160,000 of which $40,000 have priority. The Admiralty Marshal pays all outstanding invoices, amounting to $600,000. The priority creditors and their costs are paid ($100,000), leaving about $270,000 for the non lien holders, who now stand to recover around 54%.

At this point and appreciating that everyone should close this off before further legal fees eat into the recovery, other more dubious small creditors join in the litigation. They are capable of holding up a distribution by the Admiralty Marshal and forcing him into a position whereby a priorities hearing would be the only solution.

The unsecured creditors now begin to look closely at each other's claims and there is some animated correspondence regarding them. Eventually the unsecured creditors, agree claims without the need for a priorities hearing. For reasons of costs they agree the small claims in full. A consent Order is finalised whereby the unsecured creditors, including the arresting party recover around 50%. The Admiralty Marshal's costs have been met, the maritime lien holders have been fully paid and the small claims agreed. There is nothing left to return to the owners!

The question arises - what if (in a volatile market) the vessel was sold for $500,000? The answer is that the Admiralty Marshal would still be liable to discharge the port fees and he is entitled to look to the arresting party for the shortfall!

The moral of this tale is clear - no matter how attractive the prospects look, if you are the arresting party look to minimise the costs at a very early stage. If you are a cautioner ask what fees are being incurred - nobody is obliged to tell you about them. In this scenario, the maritime lien holders were never in danger of not being paid. If the arresting party is also a maritime lien holder it is of no significant concern that the vessel in incurring charges. However, in this scenario the arresting party was not a maritime lien holder.

If you are the port, in this scenario it is in your interests to remain silent. I am sure that if there are not sufficient funds, the port would have made this known to the Admiralty Marshal and demanded removal of the vessel from the berth.

As I have said, these facts are cautionary!

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SOME CONSIDERATIONS CONCERNING THE ARREST OF SHIPS IN CHILE

The purpose of this article is to highlight some legal considerations that need to be taken into account when arresting a vessel in Chile. For this, we will first summarize the legal regime applicable to ship arrest in Chile. Second, we will emphasize the situation concerning the arrest of sister ships and the practical effect of article 280 of the Code of Civil Procedure. Finally, we will indicate some conclusions.

Before we begin, two annotations for clarification: (1) although under the Code of Civil Procedure it is possible to obtain a court ruling ordering the retention of a vessel, ship arrest in Chile is specifically regulated in the Code of Commerce. (2) A vessel may be arrested in order to exercise a privileged credit (i.e. credits which enjoy a special status and may be deemed to be a statutory lien) or to enforce a final judgement that may result in the judicial sale of a vessel. The contents of this article deal with the arrest of a ship resulting from the former, the exercise of a privileged credit.

1.- Summary of the legal regime applicable to ship arrest in Chile:

The list of privileged credits is contained in articles 844 to 846 of the Code of Commerce. The creditor, or titleholder of a listed privileged credit, may request the duty Civil Court of the port where the vessel presently is or is expected to arrive to place the vessel under arrest. No guarantee is needed from the arresting party and only sufficient evidence to presume the existence of the privileged credit being claimed is required. Given these conditions, the Court is required to grant the arrest with no further formalities. Notice of the arrest is given to the local Maritime Authorities who are those putting the arrest into effect. It should be noted that the "privilege" - which benefits the credit and which is required to request the arrest – normally expires after one year, although in some specific circumstances it may expire before one year. With regard to the steps to materialise the petition to arrest a vessel, the arresting party needs to present a written petition requesting the arrest of the vessel. The presentation will need to include the elements of fact and law which support the arresting petition as well as attaching evidence to presume the existence of the privileged credit being claimed. The petition should also indicate the nature and amount of the guarantee, which would be acceptable for the claimant to lift the arrest.

Strictly speaking, the only condition to lift the arrest is to present the exact guarantee indicated in the arrest petition. In these circumstances, the Court is again required to lift the arrest with no further formalities. Alternative guarantees may be presented, but whether they are suitable substitutes will not immediately be decided by the Court, which will typically submit the alternative guarantee to the arresting party. The arresting party thereby has three days to consider their decision. Consequently, if (as it is normally the case) the arrest is to be lifted by way of a P&I LOU, it is advisable to agree on the LOU as an acceptable guarantee with the claimant ahead of time. If a decision is made to fight the arrest, it should be noted that the ship will remain under arrest until the objection is resolved. Again, it is advisable to grant the guarantee, get the ship freed and then fight the arrest if so decided. The same goes in the case of petitions requesting changes in the amount or nature of the guarantee.

Finally, once the arrest has been granted, article 280 of the Code of Civil Procedure requires that within 10 working days (which may be extended to a maximum of 30) from the day in which the arrest is granted, the petitioning party must present the lawsuit and request that the arrest be maintained. Failure to do so results in the immediate cessation of the arrest and in liability for the party that has obtained it.

2.- Arresting a vessel in Chile to secure the enforcement of a judgement or award issued abroad:

As just mentioned, once the arrest has been granted, there is a ten-working day time limit (which may be extended to a maximum of 30) to present the lawsuit and request the arrest be maintained. This may present a substantial problem when the arrest is obtained in Chile to secure the enforcement of a future judgement or award issued abroad. Namely, if the creditor wants to start substantive proceedings abroad (e.g. London arbitration), then within the time limit of 10 or 30 working days the creditor will need to prove to the satisfaction of the Chilean Court that granted the arrest, that the relevant substantive proceeding has been started in London according to English Law. For this, the documentation required in England to commence the proceeding will need to be obtained and duly legalized according to English Law up to the Chilean Consul in England. Subsequently, the documentation will need to be sent to Chile to complete its legalization and then presented (duly translated) to the Court before which the arrest has been obtained. As a result, when approached to obtain an arrest in Chile to secure the enforcement of a future (and foreign) judgement or award, detailed regard must be given to this provision (i.e. article 280) to determine - beforehand - whether or not it will be possible to comply with it. This is the case since failure to do so results in the immediate cessation of the arrest and in liability for the party that has obtained it.

3.- The arrest of sister ships in Chile:

According to article 1234 (b) of the Chilean Code of Commerce, it is possible to arrest another vessel (i.e. a sister ship) provided that she is under the same ownership, management, or is operated by the same person. In few words, with regard to liability *in rem* under Chilean Law, there is no need to have the connection between the relevant person (the person liable i*n personam*) who also owns the ship to be arrested. As a creditor, in Chile you only need to have a credit that falls within the list of the privileged credits mentioned above which is the basis for arresting a vessel according to the Code of Commerce. Provided that you have a privileged credit, you can arrest either the relevant vessel or any other sister ship as defined by Chilean Law. Under Chilean Law, the definition of a sister vessel is wider that under English Law. Sister vessels are not only those under the same ownership (as if both vessels are owned by the debtor) but also vessels under the same management and/or operation. Consequently, in Chile it is possible to successfully arrest vessel "X" as a sister ship of vessel "Y" on condition that both vessels are managed or operated by the same company, and even if they be owned by different companies.

As should be expected, this broad definition of a sister vessel under Chilean Law has given rise to a fair amount of litigation and controversy. In essence, the constitutionality of this provision has been severely questioned. This since accepting this wide interpretation may lead to a situation where the owner of a vessel may end up having to suffer the judicial sale of his vessel only because she shared the same management

or operation with the vessel owned by the person liable *in personam*. Our Firm has maintained that the broad interpretation of a sister ship mentioned above is possible only if within the arresting proceeding the claimant is able to produce enough evidence to pierce the corporate veil so as to prove to the satisfaction of the Court that ultimately both vessel belong to the same owners / shareholders.

4.- Conclusions:

All in all, we conclude this brief article reiterating that its purpose is to highlight at least two issues (article 280 of the Code of Civil Procedure and the situation of the arrest of sister ship) that should be considered before arresting a vessel in Chile.

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APPLICABILITY OF THE DISREGARD DOCTRINE UNDER BRAZILIAN LAW POSSIBLE ARREST OF A SHIP OWNED BY A SHAREHOLDER AND/OR AFFILIATED AND/OR SUBSIDIARY COMPANY

Introduction:

The matter of applicable legal action in the event of ship arrest in Brazil has already been discussed in our previous article called SHIP ARREST UNDER BRAZILIAN LAW[1], in addition to the recently published article SHIP ARREST IN BRAZIL[2].

However, with the advent of the recent financial crisis and in view of the obligations defaulted upon by debtors, we have been asked many times to opine on the so-called "disregard doctrine" under Brazilian Law and the possibility of using the assets[3] owned by subsidiaries (and/or affiliates) of such debtors to settle the outstanding debts.

The purpose of this article is, precisely, to comment on the events in which the disregard doctrine may be applied under Brazilian Law.

The recognition of the disregard doctrine by the law

To some entities, often called corporations or companies created by groups of persons (whether natural or corporate), the law grants a corporate personality with an independent existence from their members, i.e., with separate property, their own rights and obligations as they act on their own behalf, without, in principle, any connection to the rights, obligations or acts of (i) their partners; (ii) their managers; or (iii) their subsidiaries or associated companies of any kind.

As a result, we may say that legal entities and their members[4] have separate property. Likewise, the liability of a legal entity is also distinguished from that of its members. Therefore, as a general rule, the liability of the legal entity will not fall on the members'[5] personal assets.

However, it has been recognized by the legal community that a legal entity happens to be used as a veil by their members in order to perform fraudulent acts or abuse[6]. From the XIX century on, scholars and courts worldwide started to become concerned about the use of the legal entity for purposes different from those for which they were constituted. For this reason, some doctrines, especially the disregard doctrine[7] have been formulated with the objective of reprimanding such misuse of the corporate personality. As you know, the disregard doctrine, often called "disregard of legal entity doctrine" or "lifting of the corporate veil doctrine" was strongly developed in the U.S. and spread out across Europe.
The Brazilian legal system started enacting express provisions on the application of the disregard doctrine at the beginning of the '90's.

The first express legal reference to the disregard doctrine was made in Law No. 8,078, of September 11, 1990, ("Consumer Protection Code")[8]. The second express reference is found in Law No. 8884 of June 11, 1994 - Brazilian Anti-trust Law[9]. With the purpose of permitting owners of a corporation to be held personally liable for giving rise to environmental damages, Federal Law No. 9,605 – which, enacted on February 12, 1998, provided for the criminal and administrative liability arising from environmentally hazardous activities – set forth in article 4 that *"the legal person may be disregarded whenever its personality is an obstacle to the compensation of damages caused to the quality of the environment".*

As applicability of those rules was restricted, in 2002 the current Civil Code was enacted, definitively incorporating the Disregard Doctrine as a general rule into the Brazilian legal system, expressly recognizing and consolidating its application:
"Art. 50. In case of abuse of the corporate personality, characterized by a departure from the purpose of the legal entity or by comingling of assets, the judge may decide, on application of the party or by the Public Prosecutors' Office, when that Office has the power or duty to intervene in the proceeding, that the effects of certain defined obligations be extended to the private property of the managers or members of the legal entity."

According to article 50, quoted above, the application of the disregard of the legal entity doctrine is allowed upon evidence and verification by the court or by the arbitrator(s) that the legal entity has been involved in a so-called "abuse of corporate personality", and it can be deemed proven if at least one of two requirements is present:[10] (i) the legal entity is not used for the purposes for which it was set up under the legal system (the so-called "deviation of purposes"); and/or (ii) there is comingling between the partner's or manager's or subsidiaries' or associated companies' assets and those of the company whose veil is expected to be pierced (the so-called "confusion of property").

The diversion of purposes is the utilization of the company in a fraudulent or abusive manner with the intention of circumventing the law11, evading

from its application or the failure to fulfill of an obligation, or even the unlawful prevention of the rights or interests of third parties.

The comingling of assets, on the other hand, is verified through the factual and absolute or relevant absence of distinction between the partners/managers' and the company's assets or between the subsidiaries' or associated companies' and the company's assets with the unlawful prevention of the rights or interests of third parties.

Under Brazilian Law, the clear evidence of the existence of at least one of the elements of article 50 of the 2002 Civil Code is required for the purpose of piercing the corporate veil.

In addition to the foregoing, we should note that Brazilian law requires a justified (court and/or arbitral) decision[12] determining the piercing of the corporate veil in order to hold a partner, manager and/or subsidiary liable for any noncompliance with the company's obligations.[13]

Conclusion:
Individuals and legal entities are different persons, each with their own personality (arts. 45 and 985 of the 2002 Civil Code), legal autonomy and separate property. If there is no comingling of property, then the partners, managers and/or subsidiaries and/or affiliated companies are not held liable for the debts contracted by the company (art. 1,024 of the 2002 Civil Code and art. 596 of the Code of Civil Procedure), unless and pursuant to law, they are assured of the benefit of secondary liability *(beneficium ordinis).*

Even in the case of insolvency (or bankruptcy) of the debtor, or fraud to the judgment execution perpetrated by partners and/or managers and/or subsidiaries and/or affiliates, obtaining a court decision or arbitral award determining that the corporate veil be pierced is not only essential, but a requirement for holding any of them (third party) liable for a debt contracted by the company.

Accordingly, in Brazil a claim for the arrest of a ship owned by a partner and/or affiliate and/or subsidiary of a debtor company which has defaulted upon its obligations, will necessarily need to be supported by: (i) proven requirements for the arrest of the ship in Brazilian waters (mentioned in footnotes 1 and 2 above); and (ii) a decision (by a court of law and/or an arbitral court) disregarding the legal personality of the debtor company (defaulting entity) and holding any of them (or all of them) liable for settling the outstanding debt.

1 www.shiparrested.com
2 "Ship Arrests in Practice" 5th edition - 2010. Please, see also prior editions at - www.shiparrested.com.
3 Ship and/or Cargo.
4 Its members, administrator(s), subsidiary(ies) and/or associated entities.
5 Its members, administrator(s), subsidiary(ies) and/or associated entities'.
6 Actually, due to its separate property structure, in which the personal assets of the partners, administrators, subsidiary or associated entities remain, as a general rule, excluded from any liability, the company may be used in an abusive manner and may serve as an instrument of fraud, in order to avoid compliance with the law or with the obligations assumed.
7 in Portuguese "teoria da desconsideração da personalidade jurídica" or "teoria da desconsideração da pessoa jurídica"
8 Article 28
9 Article 18
10 Although both requirements may be deemed as a complement of the other.
11 Provided that such fraud or abuse is caused by means of the corporate personality. In other words, the company's manager, partner or associated legal entity must have taken advantage of the company's property in order to carry out such illegal acts.
12 Article 5ºLV c/c art. 93, IX of Brazilian Constitution. Providing grounds for the judgment is the judge's duty and an uncontestable right of the party seeking relief.
13 If the court or arbitral decision is rendered in a jurisdiction other than Brazilian jurisdiction, then it will need to be ratified by a Brazilian judicial authority in order to be valid in the Brazilian territory. The formal aspects of and requirements for the ratification of a foreign (court and/or arbitral) decision in Brazil will be furnished in the future in another article, considering that, especially in regard to a foreign decision determining the arrest of a ship in Brazilian waters, such matter has been the main topic of several consultations.

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FORCED SALE OF VESSELS IN POLAND - something better to avoid

Poland is a country where vessel may be arrested in rather quick and efficient way. This takes about 72 hours as from filing motion to the Court which does not seem to be the worst option – especially when the vessel is in shipyard or its sailing schedule is already known. Arresting the vessel in Polish jurisdiction is effective way of securing creditor's claims. As each day of detention of the vessel generates losses most of shipowners prefer to pay the amount of the claim to the court deposit in exchange for quick release of the vessel. Payment of court deposit by the debtor gives creditor opportunity to have its claim secured, on the other hand debtor may quickly release vessel so that it may normally operate and does not generate further losses.

However, this mechanism does not work with respect to old vessels, especially from some FoC (flag of convenience) jurisdictions (Panama, Liberia etc.). Owners of these vessels often simply have no money for the deposit or, sometimes, value of the vessel is lower than value of the claim. In this situation debtors often remain passive and simply abandon their vessels. In this case creditors' situation may become really complicated – especially when they have to rely on Polish court and enforcement procedure.

To cut a long story short, main source of problems are Polish provisions regarding delivery of judicial correspondence abroad. In the arrest procedure this is enough to deliver security order to the master of the vessel but unfortunately this does not apply in the court and enforcement procedure.

Practice shows that if the vessel is registered in some FoC jurisdiction with which Poland does not have any agreements on cooperation in civil matters delivery of writ of summons becomes really complicated and time-consuming process.

Basically, writ of summons after its prior translation and legalisation has to be sent to foreign defendant via Polish Ministry of Justice to Polish Ministry of Foreign Affairs which then transfers it to respective Polish embassy which finally tries to deliver the documents. As Poland does not have diplomatic relations with some FoC jurisdictions sometimes embassies from neighbouring countries have to be engaged. Not surprisingly only delivery of writ of summons may take 9-12 months.

Even if the case as to the merits is not tried by Polish court, foreign court judgements (given outside the EU) and arbitration awards have to be recognised by the Polish court. In this situation motion for recognition thereof filed to the Polish court will be delivered exactly in the same way as described above.

According to Polish judges, only when the writ of summons is properly delivered to the defendant the court will be able to admit that the defendant has been properly informed about the proceedings and therefore was not deprived of possibility to defend his rights.

Of course, all this may be simplified if a representative for reception of correspondence is appointed in Poland by the defendant. However, defendants are rather not interested in this solution. Such representative may be also appointed by the court but generally courts choose to take the actions described above which are slower but less risky, of course as from the court's perspective.

When it comes to enforcement procedures, situation seems to be even more complicated. Unfortunately, the experience shows that forced sale of vessel in Poland may take up to five years („Gazgan" case). Main reason of the above are strict provisions of the civil procedure regarding forced sale of vessels. These provisions date back to sixties of the 20th century when vessels flying flags of convenience, registered in exotic jurisdictions were not as frequent as today.

Under Polish law, forced sale of the vessel is conducted under provisions regarding forced sale of the real estate (with some modifications) which is a bit more complex and time-consuming compared to forced sale of movables. Moreover, the vessel is sold by the bailiff but under supervision of the court.

Problems with deliveries of the correspondence appear again in the enforcement proceedings seeming to be even more serious.

Under the Polish civil procedure, the court and the bailiff who conduct enforcement proceedings are obliged to inform the debtor practically about each step of the proceedings taken in Poland with respect to the debtor's assets.

Other obligations of the bailiff are to inform foreign registry authority and local organ of maritime administration of the vessel (if any) about enforcement proceedings.

The bailiff will not set any auction before he gets confirmations of delivery of the above mentioned correspondence. As practice shows, this may be complicated for many different reasons – in the most extreme case (sale of „Gazgan") local Russian maritime authorities demanded bribe for signing of such confirmation.

As a result of the above the longer proceedings take place, the higher are costs thereof (including but not limited to the supervision of the vessel) and interest due to creditors. Moreover, due to lack of technical maintenance for all this time, value of a vessel usually dramatically decrease – in practice, vast majority of the vessels sold in this way in Poland end up as scrap. This of course has an impact on the amount to be divided among the creditors.

Once the auction is set the vessel is offered for the first time at its initial price (which is 3/4 of the vessel's value determined by the expert). If there are no bidders second auction is set where vessel's initial price is reduced to the level of 2/3.
Most vessels are sold during the second auction which means lower final price and less money to divide among the creditors.

If there are no bidders for the vessel in the second auction, the creditors may take over its property. If not, another forced sale of vessel proceedings can commence no sooner than after one year. (Fortunately, due to high demand for cheap scrap in Poland, situations like this do not happen in practice– this is, however some risk factor that has to be taken into account).

Final outcome of the auction depends also on the type of the claim. Like in other legal systems there are privileged categories of claims which enjoy priority before others. Privileged categories of claims are in particular: enforcement procedure costs, employees' wages and compensations claims secured by the maritime mortgage, tax and duty dues. Unsecured personal creditors' claims usually rank in the lowest category and therefore have the lowest chance of recovery.

This is important to explain that claims in lower categories can be satisfied only when claims in higher cathegories are paid in full (with interest and costs of proceedings). In practice, this means that unsecured claims are to be satisfied from the sum remaining after the claims of the creditors with higher priority are fully satisfied. This remaining sum (if any) is to be divided between all creditors in the lowest category.

To sum up, before any decision is taken concerning arrest of an old vessel from FoC jurisdiction in Poland all the possible obstacles listed above should be given due consideration. Sometimes it is better to make a write-off for tax purposes than to get involved in the undertaking final outcome of which is quite unsure – especially in terms of invested time, money and efforts.

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