THE ARREST news

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

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IN THIS QUATERLY ISSUE

THE PASSWORD IS: "SHIPARRESTED.COM"

We all are different – we come from different education, different culture, different background, but there is one thing that unites us all: we are maritime lawyers, people whose work has become their lifestyle.

Shiparrested.com is a big multinational family, where you can always rely on each other no matter where your office is located.

Years ago, when shipparested.com didn't exist I needed the vessel to be arrested in one of the European countries. Having attended a lot of ship arrest seminars in London, I had a lot of business cards of lawyers from different countries, and I approached one of them to help me in this matter. I got the response in a few days, saying that my colleague was ready to do the job, but requested to transfer 3 thousand Euros as an advance payment. As a result of this approach I had to give up arresting the vessel, because my client was not ready to understand why he had to pay for the work that hadn't been done yet.

Not long ago I needed to find a lawyer to represent my client in Albany. I contacted Valentine asking for help, and in an hour I had received few contacts and the work had already started (Claudio, special thanks to you).

I personally think that the idea of shiparrested.com came timely, is very interesting and sound, especially for me and other lawyers from former USSR countries. That is why I agreed to take part in the project back in 2002 with great pleasure. And the project turned out to be a success!

It is pleasant to realize that now I can contact and ask for advice to Steven d' Hoine, Henri Najjar, George Chalos, Paco Carreira-Pitti, George Zambartas and any another colleagues-members of the shiparrested.com network who are ready to help any time of the day. And what is important, first comes the work, and only then come financial matters.

The password for initiating a successful cooperation with new lawyers has now become "we are members of shiparrested.com".

We all work in different countries, but shiparrested.com widens the boarders of our professional abilities. Thanks to that, we work more efficiently, saving our time and our client's money. So remember the password "shiparrested.com".

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Before joining in 2007 as a partner to Marine Legal Services Edward Kuznetsov spent several years as manager of private Russian ship owning company with fleet of 12 vessels, then he spent twelve years as manager of Legal Dept. of Lloyd's agency in Latvia and of local correspondent for P&I Clubs.

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, UK. He is a member of the Saint-Petersburg Bar Association in Russia and is a practicing arbitrator with experience to decide disputes in maritime law.

In May 2008 Edward was one of the key persons who hosted 5th Shiparrested.com meeting in Riga. In 2010 Edward has been selected as being among the world's pre-eminent shipping and maritime lawyers (Who'sWhoLegal).

Edward is a well-known speaker on different maritime law conferences held in Latvia, Russia, Ukraine and is an author of several articles regarding maritime law practice in Latvia.

CASE NOTES ON RECENT DECISIONS IN SOUTH AFRICA

While South Africa is regarded as an extremely "liberal" arrest jurisdiction, it if as well to keep in mind that the courts here will not in all instances maintain jurisdiction once an arrest has been effected, albeit that in a recent decision, it was stressed by out highest court, whose decisions are binding on all Provincial Decisions of the High Court, the courts have a

wide discretion to stay proceedings commenced here where a foreign arbitration agreement exists, but require the security put up to obtain a release from an arrest, to remain in place pending a decision of a foreign arbitration tribunal.

Arbitration – stay of proceedings

The MV IRAN DASTGHAYB 1
So it was that this firm recently succeeded on behalf of IRISL before the Supreme Court of Appeal (SCA) in an appeal against a judgment in favour of Terra-Marine SA by the Durban High Court in the exercise of its admiralty jurisdiction. The judgment sets out the discretionary powers of an Admiralty Court to stay proceedings commenced before our courts, where there exists a London arbitration clause in the underlying agreement.

The facts
During 1995 Eco Shipping Company ("ESC"), a private joint stock company was registered and incorporated in Iran with a view to providing a vehicle to 10 Asian Islamic countries to enable them to engage in shipping as a joint venture. On the formation of ESC, IRISL bareboat chartered two vessels the *"Eco Elham"* and the *"Eco Ekram"* to ESC.

In terms of a written agreement dated 27 January 1997, Terra-Marine SA ("TM"), a Swiss company, was contracted to manage and administer the vessels on behalf of ESC. That agreement contained an arbitration clause which provided that in the event of disputes arising between TM and ESC such disputes should be referred to arbitration in London in terms of the provisions of English law.

Disputes did indeed arise and in consequence thereof TM commenced arbitration proceedings against ESC in London. A sole arbitrator was appointed during November 2003. During December 2005 and whilst the London arbitration proceedings were still pending TM commenced an action *in rem* against some 92 vessels said to be controlled by inter alia IRISL, including the MV Iran Dastghayb *("the ID")* in the Durban High Court.

On 6 March 2006 the *ID* was arrested in terms of a warrant of arrest issued pursuant to that action. This arrest was premised on the basis that it was alleged that the *ID* on the one hand and the *Eco Elham* and the *Eco Ekram* on the other, were associated ships within the meaning of that expression as defined in s 3(7) of the Admiralty Jurisdiction Regulation Act ("AJRA").

Apart from a denial that the ships were associated, in issue was whether the court should in terms of section 7(1) of the AJRA decline to exercise its jurisdiction or alternatively should stay the proceedings in South Africa in favour of the arbitration proceedings already commenced in London.

Section 7(1) (generally regarded as being a statutory codification of the common law jurisdictional objection of forum non conveniens) provides as follows –

"(a) A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body. (b) A court may stay any proceedings in terms of this Act if it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed"

The decision in the court a quo
During October 2006 IRISL launched an application to the high court in Durban for an order that, inter alia, the in rem proceedings in the high court be stayed in terms of s 7(1)(b) of the AJRA.

The high court held that IRISL, not being a party to the arbitration agreement between TM and ESC, was not entitled to invoke the arbitration agreement. It consequently dismissed the application.

The decision on appeal
On appeal the SCA held that the Act clearly differentiated between two situations when a court may grant a stay. The first where the parties concerned had agreed that the matter in dispute be referred to arbitration and the second *if for any other sufficient reason the Court is of the opinion* that the proceedings be stayed.

The SCA held that the high court appeared not to have appreciated that it was empowered by the legislature to grant a stay in two different circumstances and that in relation to the second circumstance, it had a far wider discretion.

The SCA in a wide ranging judgement dealing with a number of other important aspects related to associated ship and in rem proceedings, then set out various reasons why, in its view, the stay application ought to have succeeded. It accordingly upheld the appeal and granted the stay of proceedings sought by IRISL as well as certain ancillary relief.

THE POTENTIAL CONSEQUENCES OF FINANCIAL STRUCTURES BASED ON FAITH [2]

We have recently been successful in defending a claim by a local cargo owner (Hentiq) against the ocean carrier in the High Court in Durban.

Hentiq ordered three consignments of Indian long-grain parboiled rice from a supplier in India. The consignments were shipped in containers under MSC ocean bills of lading and onboard MSC vessels from India to Durban.

Hentiq required financial assistance to facilitate the purchase of the cargo but alleged that, according to the dictates of Islamic law, it was prohibited from obtaining a loan on which interest would be charged. The transaction was thus structured in such a way that it involved back to back sales from the supplier to a financial intermediary and on to Hentiq, with the financial intermediary charging Hentiq a percentage as a 'handling fee".

Upon delivery in Durban, Hentiq discovered that the rice was "100% sortexed rejection", a vastly inferior quality of rice to that which it had originally ordered. Hentiq rejected the cargo and refused to pay the purchase price. However, payment to the supplier by the financial intermediary had already been triggered in terms of a letter of credit. Subsequent investigations revealed that although the shipping bills and mates receipts had described the cargo as Indian long-grain parboiled

rice "100% sortexed rejection", this qualification was omitted from the MSC bills of lading.

Notwithstanding the fact that it was common cause that the supplier had committed the fraud, Hentiq advanced a claim against MSC for a failure of duty, either contractual or delictual, by the agent of MSC in failing to ensure that the bills of lading contained the qualification; "100% sortexed rejection". Hentiq argued that had the bills contained this qualification, the bank would have refused to pay out under the letter of credit, which required presentation of clean bills of lading.

The court dismissed Hentiq's delictual claim on the basis that MSC did not owe a duty of care to a third party endorsee of a bill of lading. In respect of its contractual claim, Hentiq argued that although it had not suffered a loss, it had a moral obligation (under Islamic faith), to reimburse the financial intermediary for the loss it had suffered. The Court held that a legal duty to pay must exist and it was not sufficient to allege that it had a moral duty to reimburse the financial intermediary. Accordingly, Hentiq had not suffered a 'recoverable loss' and its claim was dismissed with costs.

1 Islamic Republic Of Iran Shipping Lines V Terra-marine Sa [2010] Zasca 118
2 Hentiq 1320 (Pty) Ltd Vs Mediterranean Shipping Company Sa Geneva (Unreported)

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Born 5th April 1946, Shane Dwyer served with the South African Navy before attending Stellenbosch University and obtaining the BA & LL.B degrees. After serving as a State Prosecutor, he joined Shepstone & Wylie in 1972 and became a partner in 1975.

Shepstone & Wylie, although a general service law firm, have been the legal representative of most International Group P&I Clubs for many years. The firm now has some 75 lawyers, with specialist maritime offices in Durban, Cape Town, Richards Bay and Johannesburg.

He has specialized in Maritime Law since he joined the firm and has been involved in most, if not all, of the many major shipping casualties along the Southern African coast in the last 40 years.

He is recognized as one of the leading international transport lawyers in South Africa and has been published widely on both maritime and air law in numerous international publications.

SHIP ARREST IN NORWAY – DEVIATIONS FROM THE 1952 ARREST CONVENTION

The purpose of this article is to give an overview of requirements for arresting ships in Norway. Many different legal questions may arise when arresting, or attempting to arrest a ship, but in this context I will focus on the requirements under Norwegian law that deviates from the 1952 Arrest Convention.

INTRODUCTION

Norway is party to several international conventions within the maritime field, including the 1952 Arrest Convention (the "Arrest Convention"). The Arrest Convention has been incorporated into the Norwegian Maritime Code (NMC), and is mainly found in chapter 4 of the NMC. Norway has also signed the 1999 Arrest Convention, but this convention has not been ratified by Norway – pending international acceptance of this convention.

MAIN REQUIREMENT – "MARITIME CLAIM"

All "maritime claims" as listed in Article 1 (1) of the Arrest Convention may be the basis for an arrest of the ship. The list of "maritime claims" in Section 92 of the NMC corresponds to the "maritime claims" listed in Article 1 (1), with the exception that compensation for wreck removal is added to the list.

Even though the legislators of the NMC acknowledged the fact that the wording of Article 1 (1) did not mention compensation for wreck removal, it was in their view not the intention of the Arrest Convention to prevent arrest of ships based on such claims. Hence, the legislators did not consider the addition as a deviation from the Arrest Convention, but merely a clarification of the claims that were included in Article 1 (1). The underlying reason for adding compensation for wreck removal to the list of "maritime claims" in Section 92, was the objective that the list corresponded with the list of maritime liens in Section 51 of the NMC (see below).

In the event the claim falls outside the scope of section 92, and is thus not regarded as maritime claim, it is still possible to arrest other objects than the vessel, e.g. the bunkers onboard, claim for insurance proceeds and bank accounts. From a practical viewpoint, an arrest of the vessel's bunkers may be as effective as arresting the vessel itself, and may often lead to security being put up for claims which are not maritime claims under the NMC and the Arrest Convention. The bunkers must, however, be owned by the debtor, and it is important to keep in mind that under a time charterparty, the bunkers are normally owned by the Charterers, not the Owners.

If the vessel in question is flying Norwegian flag, it might also be possible to make a so called "register arrest". A "register arrest" means that instead of physically seizing the vessel, the arrest order is registered by the Norwegian Ship Registry. A register arrest prevents a sale of the vessel but may not provide an offer of immediate security.

BACKGROUND FOR NORWAY'S DEVIATIONS FROM THE ARREST CONVENTION

Norway did not become a party to the Arrest Convention until 1994. The reasons for this are important for the understanding of why Norwegian law deviates from the regulations found in the Arrest Convention.

The main concerns expressed when Norway decided not to enter into the Arrest Convention in 1952, were that the Arrest Convention opened for the possibility to arrest a vessel for a claim that the vessel's owner is not personally liable for and that the Arrest Convention did not contain a requirement for security for possibly unlawful arrest.

The same concerns as expressed in 1952 were still present when Norway entered into and ratified the Arrest Convention in 1994. The decision to enter into the Arrest Convention was mainly based on the fact that it was necessary to ratify the Arrest Convention as a consequence of the decision to become a party to the 1993 Lugano Convention, cf. the 1993 Lugano Convention Article 54a (Norway has also ratified the 2007 Lugano Convention). Another contributing factor was the advice from the Norwegian Justice Department with regards to the interpretation of the Arrest Convention, which was given in connection and prior to entering into the

Arrest Convention and the Lugano Convention. According to the Justice Department, the Arrest Convention did not regulate the enforcement process, and hence the domestic enforcement rules in Norway would still apply. This interpretation of the Arrest Convention has resulted in the below mentioned deviations from the Arrest Convention.

"ARREST GROUND"

In addition to the main requirement for a "maritime claim", the applicant must prove upon a balance of probability that he has an "arrest ground". This requirement is set out in the Norwegian Dispute Act (originally found in the Norwegian Enforcement Act), which contains different rules regarding arrest in general, rules which apply both to arrest of ships and other assets. The relevant rule is found in section 33-2 (1), which reads as follows:

"Arrest of assets of economic value can be decreed when the behavior of the debtor gives reason to fear that the enforcement of the claim otherwise will either be made impossible or made substantially more difficult, or has to take place outside the Kingdom"

In short, this means that the Norwegian Courts are provided with discretion as regards whether or not an arrest shall be granted. On this point, Norwegian law deviates from the Arrest Convention.

An arrest in Norway may only be granted if the debtor's conduct gives reason to assume that enforcement of the claim will either be impossible or significantly more burdensome if an arrest is not granted, or that any enforcement will otherwise have to be made abroad. If it may be proven that the debtor has tried to dissipate his assets (e.g. by transferring assets to other companies), an arrest will most certainly be granted. The same will generally apply if his course of business indicates that there will probably not be any money left unless an arrest is granted. Also, it may prove sufficient if he has failed to settle or respond to an undisputed claim after a number of reminders. It should, however, be noted that it is the actions of the debtor that is relevant; the fact that a debtor is financially weak does not in itself constitute a ground for arrest.

In my opinion, this additional requirement means that Norway in fact has not adopted the Arrest Convention in the way it was meant to work. It should be mentioned that the additional requirement complies with the purposes of the Arrest Conventions, which was to reduce the situations that could lead to an arrest. However, the main objective was to introduce uniform rules with respect to the type of claims that would give basis for an arrest of a vessel, which vessels that could be object to an arrest, and the correct legal venue for an arrest proceeding. The additional requirement is clearly not in compliance with the main objective of the Arrest Convention.

One of the advantages of the closed list of maritime claims in Article 1 of the Convention is that if the claim falls within the scope of maritime claims, one knows that an arrest will be granted provided that the claim is proven and overdue. This is how the convention works in many jurisdictions, e.g. the UK. The Norwegian approach means that it is more difficult to predict in advance whether the courts will grant an arrest, as the Norwegian Courts have been provided with a discretion they are not meant to have under the Arrest Convention. However, in practice the Courts seldom apply this additional requirement very strictly, and an arrest of the ship is often made without this requirement being a major obstacle. The Claimant is usually able to produce some kind of evidence showing a disloyal behavior on the part of the Owner, e.g. several reminders which have not been answered.

EXEMPTIONS FROM THE ARREST GROUND REQUIREMENT

A claimant whose claim is secured by a mortgage or lien on the vessel can arrest the vessel without showing any other cause for an arrest if the secured claim has fallen due. This rule is set out in section 33-2(3) of the Dispute Act, and it is an important exemption from the arrest ground requirement.

In practice, there are two different categories of claims that may be secured this way. Firstly, claimants with loans secured by a registered mortgage on the vessel can arrest the vessel without any additional reason for arrest, other than the claim is overdue. The claimant would usually be a bank, acting as lender and mortgagee.

Secondly, a claim secured by a maritime lien will also be entitled to arrest without this additional requirement. Maritime liens are recognized under Norwegian law, and the list of maritime liens in the section 51 of the NMC corresponds with the list in the 1967 Maritime Lien Convention article 4 no 1.

OWNERSHIP OF VESSEL – ARREST OF SISTER SHIP

In contrast to some jurisdictions, Norwegian law is strict on the fact that the debtor/defendant must be the owner of the vessel that is being arrested. The Enforcement of Claims Act, sections 11-4 and 7-1, clearly states that the debtor must be the legal owner of the asset that is being arrested.

Arrest of a sister ship is therefore not possible, unless the sister ship is also owned by the same legal entity as owning the vessel that is subject for the arrest. Claims against time or bareboat charterers do not give the right of arresting the vessel, as the vessel is not owned by the charterers. Norwegian legislators have deviated from the Arrest Convention on this point, as claims against bareboat charterers are subject to arrest pursuant to article 3(4) of the Arrest Convention. However, under a time charter, arresting the bunkers onboard may still be a possibility, as the bunkers usually are owned by the charterers.

COSTS AND PROCEDURE

There are no substantial fees payable to the court in connection with an arrest (only a minor fee in the region of approx. EUR 250-350). The claimant may, however, be requested to post security if the Court, in its sole discretion, make the arrest order conditional upon the claimant providing security for a fixed amount for potentially wrongful arrest.

The application for an arrest must be submitted to the District Court of the port where the ship has called or is expected to arrive, alternatively to the District Court in the judicial district where the ship owner resides if the ship owner is resident in Norway.

The application has to specify the claim, the size of the claim, the so-called "arrest ground" and provide for an outline of the allegations of the applicant.

The application may be forwarded to the Court prior to the vessel entering the port, if one can present evidence showing that the vessel most likely will call a named port in the very near future.

SUMMARY

Although there are some deviations from the Arrest Convention which are unfortunate in my view, I would like to emphasize that it is a relatively straight forward matter to arrest a ship under Norwegian law. The additional requirement of "arrest ground" seldom causes difficulties, as the Claimant is usually able to produce some kind of evidence showing a disloyal behavior on the part of the Owner as mentioned above. In conclusion, a ship arrest in Norway can normally be arranged quickly at a reasonable cost.

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MULTIPLE ARREST IN DUTCH PORTS

Introduction

Modernization of the shipping industry, advanced navigation systems and improved cargo loading operations appear to have led to less ship arrests in Dutch ports over the last decade. However, perhaps due to the economical crisis, re–arrests on ships seem to occur more often in recent years.

A re-arrest is a conservatory arrest on a ship for a claim for which that ship was arrested earlier by the same claimant. Within this same category, a *multiple or double arrest* aims at arresting sister ships to increase security already given to a claimant. Re-arrest cases have triggered case law in the Netherlands, which may be of interest to practitioners in other jurisdictions.

General Rule for Re-arrest

The Brussels Arrest Convention of 1952 (the "Convention"), to which the Netherlands is a party, prohibits additional arrests on the same ship for the same claim. But if the Convention does not apply, little stands in the way for multiple arrests in Dutch ports as long as the claimant is not satisfied in his pursuit for obtaining security for his claim.

Brussels Arrest Convention 1952

The Brussels Arrest Convention of 1952 (the "Convention") encompasses a regime for disallowing repeated arrests. Article 3(3) expresses that a ship may not be arrested in respect of the same maritime claim by the same claimant in a Contracting State after a previous arrest was affected in the same or another member state.

However, the Convention gives an opening for a subsequent arrest in the last sentence of Article 3(3) in cases where:

(a) the security has finally been released before the subsequent arrest[1]*, or (b) there is a good cause for maintaining that arrest.* The general opinion – based on the travaux prépraratoir of the Convention - seems to be that only in exceptional cases is a re-arrest permissible2. Consequently, defining *"a good cause"* for an additional arrest is left open to debate.

Dutch case law

M/V Golfo de Guanahacabibis [arrested in Ravenna, Italy, then in IJmuiden, Netherlands]

In what seems to be the landmark case, in *The Golfo de Guanahacabibis*[3], it was ruled that a good cause for a second arrest requires circumstances of a *"different kind than the not so unusual case"*, in which the first arrest in Ravenna was lifted against a bail lower than the claim amount. The appeal court, giving much weight to the travaux préparatoir[4], looked for circumstances like: obvious mistake, deceit, expiry of the bail, currency depreciation, or an apparent imbalance between the initial estimate of the damages and the amount on which the damages were determined afterwards. In this case, the claimant failed to show any of these special circumstances.

M/V Bumbesti [arrested in Syros, Greece, then in Terneuzen, Netherlands]

The Middelburg Court[5] maintained a second arrest on the *Bumbesti* concerning an already awarded claim under a boar boat charter with sister ship *Dacia*. "Good cause" was found based on the fact the Greek court, preliminary granting the initial arrest, had ordered release against security of an amount which was considerably lower than the adjudicated claim amount. After the ship had left, the Greek court deemed the arrest definitely permissible up to the full amount. Owners refused to put up additional security. The ship was successfully re-arrested in the Netherlands.

M/V Lehmann Timber [arrested in Kotka, Finland, Tanger, Morocco and Rotterdam, Netherlands]

The very recent hijacking/general average case of *The Lehmann Timber*[6] is another example of a maintained re-arrest. The Court found that the Convention does not prevent a repeated arrest if the previous arrests were lifted without security provided. Nor does the EC-Regulation 44/2001[7] stand in the way of a repeated arrest, the Court added.

M/V Histria Topaz [arrested twice in Rotterdam, Netherlands]

In an earlier case, *The Histria Topaz*, the Court of Appeal of The Hague had ruled that the Convention has priority over the EC-Regulation when it concerns issues dealt with by the Convention[8]. While the Convention does not encompass the seizure of a ship *in execution* of a judgment (Article 1(2)), an arrest enforced by virtue of an enforceable judgment[9], does fall in the category of exceptions as per Article 1(2) of the Convention. As a result, the second arrest was upheld.

M/V Orastar [arrested in Klaipeda, Lithuania, then in Rotterdam, Netherlands]

In another 2009 case, *The Orastar*[10] was re-arrested because of the expiry of the bank guarantee given for the release of the previous arrest in Klaipeda. The guarantee was valid for five years and the second arrest occurred six years after the first arrest. The ship owners had refused to agree on an extension of the guarantee, which was given for the *"purpose of the release and prevention"*[11] of - as owner's had argued - further arrests of the ship. Despite of this, the Court found that claimants had not waived the right to apply for another arrest after expiry of the guarantee.

Geneva Arrest Convention 1999

The 1999 Convention, which is as we know not in force, is more explicit as to when a re-arrest is permitted and seems to give less uncertainty. The Convention applies in cases where the initial security proves insufficient as to the amount, if the guarantor is unlikely to fulfill its obligations, or if the ship was released outside claimant's control. However, the Netherlands is not a party to the 1999 arrest convention.

Conclusions

Dutch courts have embraced the notion expressed in the Travaux Préparatoires of the Brussels Arrest Convention 1952 that a re-arrest should only be granted in exceptional circumstances. However, as we have seen in above quoted case law, Dutch courts tend to allow a re-arrest, however under circumstances, which seem in my view not always so "exceptional".

1 Berlingieri, page 197: The reason for which the release has taken place is immaterial. It can be the effect of an order of the court or of a decision of the claimant.
2 Berlingieri on Arrest of Ships, Fourth Edition, 2006, page 195 (…a second arrest should not normally be permitted).
3 Court of Appeal Amsterdam, 6 April 1995, Schip & Schade 1995, 107.
4 The appeal court pointed at the compromise on this issue between on the one hand "continental" (cargo-minded) and on the other the "Anglo-Saxon" (owner-minded) principles.
5 Middelburg Court, 19 August 1998, Schip & Schade 2000, 29.
6 Rotterdam Court, 26 May 2009, Schip & Schade 2009, 134.
7 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
8 Court of Appeal The Hague, 29 March 2007, Schip & Schade 2009, 109.
9 I.e. as per Article 47(2) EC-Regulation 44/2001, being a judgment rendered in a EC-Country for which execution is granted.
10Rotterdam Court, 20 August 2009 (unpublished). This matter is currently under appeal.
11 This is the standard wording of the Rotterdam Guarantee Form 2000.

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Peter van der Velden is a founder and partner of Kiveld International Lawyers. His expertise, a result of 25 years of experience, includes Commodity Trade, Distribution/Agency/Franchising, Shipping/Aviation, Letters of Credit, International Arbitration, Complex Commercial Litigation and Business Law. His strength lies in combining these specialized areas, which is illustrated in his ability to draft highly protective, yet commercially viable, business contracts and his repeated success in handling disputes in international arbitration and other types of litigation. Additionally, Mr. van der Velden has unique knowledge about ship arrest/release and steel trade disputes. He is an author of several published trade, shipping and banking law articles and regularly speaks at seminars about his legal experiences.

PRE- AND POST-JUDGMENT REMEDIES AFTER SCI V. JALDHI

It has been more than one (1) year since the Second Circuit Court of Appeals issued its decision in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd.*, ending the Rule B attachment of electronic fund transfers (EFTs). In the months that followed the Second Circuit's landmark decision, many suggested that Rule B was "dead." However, despite the uncertainty that still exists more than one (1) year following *Jaldhi*, it is important to remember that the decision did not eliminate or modify the rights and remedies available under traditional maritime attachment principals. Rule B remains alive and well with regard to "old fashioned attachment" of a defendant's tangible or intangible property in the district and, along with vessel arrests under Rule C, remains an excellent tool for obtaining pre-judgment security in aid of foreign litigation or arbitration. In addition, recent developments in New York law have provided post-judgment alternatives for a claimant seeking to recover from a defaulting party.

Arresting or Attaching a Vessel Under U.S. Law

The Federal Rules of Civil Procedure (F.R.C.P.)'s Supplemental Rules for Certain Admiralty and Maritime Claims govern the procedure for arresting or attaching a vessel in the United States. Rule B provides for the pre-judgment attachment of a defendant's property, including a vessel, if the claimant has an *in personam* maritime claim against the owner of the vessel, provided that the defendant/owner cannot be "found" in the district where the attachment is sought. Rule C is the procedural mechanism that is used to arrest property (i.e. – a vessel) that is subject to a maritime lien or other U.S. statute that creates an *in rem* cause of action. Accordingly, the main difference between a Rule B attachment and a Rule C arrest of a vessel is that under Rule B, the property attached may be unrelated to the events giving rise to the claim and the Plaintiff does not need to have a maritime lien on the vessel.

Although different claims will give rise to Rule B attachments or Rule C arrests, the procedure for arresting or attaching a vessel are very similar. Both Rules require the claimant to first file a Verified Complaint asserting an admiralty/maritime claim. An Agreement of Indemnity must also be provided, agreeing to hold the U.S. Marshal harmless for damages if the arrest/attachment is later found to have been wrongful. The Marshal will also require the claimant to pay a deposit to the Court to cover insurance, guard services, and other costs related to arresting/maintaining the vessel. A Rule C proceeding also requires an Affidavit to be filed with the Court, setting forth the grounds for the arrest, while a Rule B application must be accompanying by an attorney affidavit certifying that the defendant cannot be found within the district that the attachment is sought.

Upon filing an emergent motion with the Court, an attachment and/or arrest order can be obtained within hours. Where the Claimant's attorney certifies that exigent circumstances exist that make court review impracticable, both Rule B and Rule C require the Clerk of the Court to issue the summons and warrant for arrest of the vessel or process of attachment and garnishment.

A Rule B claimant may also seek to attach a vessel owned by the primary defendant's alleged alter-ego. Although there are no mandatory requirements for piercing the corporate veil under U.S. law., the U.S. Courts generally consider ten (10) factors in determining whether the corporate veil may be pierced. These factors include: disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors, and personnel; common office space, address & telephone numbers of corporate entities; the degree of discretion shown by the allegedly dominated corporation; whether the dealings between the entities are at arms length; whether the corporations are treated as independent profit centers; payment or guarantee of the

corporation's debt by the dominating entity; and intermingling of property between entities.

Although each Federal District Court has its own individual local rules, a Rule B attachment or Rule C arrest of a vessel may be sought in any U.S. jurisdiction where a vessel may be calling, provided that the general requirements set forth above by the Federal Rules have been met.

New York State Court Remedies

Although the Jaldhi decision has significantly limited the availability of pre-judgment attachments in the United States, several state court alternatives to Rule B have developed in the last twelve (12) months. Recent decisions of the New York State Court of Appeals have opened the door to new pre- and post-judgment attachment remedies when a defendant is registered to do business in New York State and/or otherwise subject to the jurisdiction of the New York State Courts.

In Hotel 71 Mezz Lender LLC v. Falor, et al., the New York State Court of Appeals held that where a New York Court has jurisdiction over a defendant who is not a domiciliary of New York, a pre-judgment order of attachment may be issued to attach the defendant's tangible and intangible property, even if it is located outside of New York State. The Court found that that the obligation of a debtor to pay his debt clings to and accompanies the debtor wherever he goes and, accordingly, debts owed by a party subject to New York jurisdiction are given a New York situs because of the Court's personal jurisdiction over that party.

Hotel 71 followed last year's decision from the New York Court of Appeals in Koehler v. Bank of Bermuda Ltd., in which the Court of Appeals held that a New York Court with personal jurisdiction over a judgment debtor and/or a defendant garnishee holding a judgment debtor's property may be ordered to bring out-of-state property (including property located abroad) into New York State to be turned over to the judgment creditor in satisfaction of the outstanding judgment. According to Koehler, any party with an unsatisfied judgment or arbitration award for any claim may seek to enforce its award against a judgment debtor that has property in the possession of a garnishee subject to personal jurisdiction in New York or against the debtor, itself, that is registered to do business in New York. Koehler is a particularly useful alternative to Rule B, as it does not require the judgment creditor to have a "maritime claim" against the debtor.

Although the full effects of these decisions have yet to be seen, they are important options to be considered for parties with any claims and/or judgments against a debtor that is subject to the personal jurisdiction of the New York Courts.

Conclusion

Although the Second Circuit's decision in Jaldhi significantly limited the scope of property that could be attached under Rule B, the Rule B attachment of a defendant's tangible or intangible property, such as its vessels, continues to be a viable means of obtaining pre-judgment security for maritime claims. Similarly, New York State Court pre- and post-judgment attachment remedies will likely prove to be an excellent alternative to Rule B for claimants (with both maritime and non-maritime claims) seeking to recover from defendants that are subject to personal jurisdiction in New York.

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