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Arbitration and Ship Arrest in Hong Kong: Post-award arrest in *Handytankers KS v. Owners of The Alas*

The maritime industry has traditionally favoured arbitration as a method of dispute resolution. Disputes under charterparties, shipbuilding contracts, ship management and sale & purchase agreements will typically be subject to arbitration. Given the international character of shipping, obtaining financial security for arbitration claims through the arrest of ships has always been of vital importance.

As would be expected of a leading maritime centre, Hong Kong is supportive of arbitration, with strong legal institutions and a favourable statutory framework. Arbitration awards made in countries that are parties to the New York Convention are readily enforceable, and any court proceedings brought in breach of an arbitration agreement are subject to a mandatory stay. In addition, section 20(6) of Hong Kong's Arbitration Ordinance provides that the court may order that the ship arrested, or the security given, be retained for the satisfaction of any award made in the arbitration. The court will so order if there is a risk that the award may not be satisfied due to the defendant shipowner's inability or refusal to pay.

Generally, a claimant will try to obtain security for its claim at the outset of a dispute, as there is little point incurring costs in proceeding to an 'empty' judgment or award which cannot be enforced. Circumstances may however arise where an award is obtained at an early stage, before security can be obtained, perhaps because the ship has not yet called in a favourable arrest jurisdiction such as Hong Kong. The availability of ship arrest post-award was the subject of the recent judgment in *Handytankers KS v. Owners and/or Demise Charterers of Alas* [2014] HKEC 1206.

In the *Alas case* the Plaintiff applied for a warrant of arrest of the vessel in Hong Kong after it had obtained a London arbitral award in relation to unpaid hire. In so doing, the Plaintiff commenced in rem proceedings (i.e., against the ship) in respect of the underlying charterparty claim under section 12A(2)(h) of the High Court Ordinance.

Modelled on English law, the High Court Ordinance governs the admiralty jurisdiction relating to arrest. Section 12A(2) of the Ordinance lists 18 classes of claims in respect of which the Hong Kong court can exercise its admiralty jurisdiction, encompassing maritime claims such as charterparty, crew wages, salvage, and necessaries, etc. However, a claim on an arbitration award does not fall within the 18 classes and therefore does not generate a right of arrest.

Rejecting the Defendant's challenge to admiralty jurisdiction, the Hong Kong court followed the decision in *The Rena K* [1979] QB 377 which established the principle that a cause of action *in rem* (i.e., against the ship) does not merge in a judgment in *personam* (i.e., against the shipowning company), but remains available so long as the judgment remains unsatisfied, a principle which also applies to arbitration awards. The judge, Peter Ng J, observed:

"If a plaintiff is entitled to pursue its in rem claim notwithstanding the existence of an arbitral award, he must be entitled to invoke the Admiralty jurisdiction of the Court to arrest a vessel as security for that in rem claim… it is perfectly legitimate for the Plaintiff to invoke the in rem jurisdiction of the Court to arrest the Vessel and keep her under arrest as security in respect of any judgment which it may obtain".

Provided that the claim has been framed so as to fall within the s.12 classes of maritime claim, an arrest can be carried out for the underlying purpose of enforcing the award. There is thus an element of form over substance, as a claim brought solely on the award would be susceptible to challenge.

One loose end remains, namely, the anomaly that is the well-known House of Lords decision in *The Indian Grace* (No.2). In that case the Plaintiff, who had obtained a judgment in *personam* in proceedings in India, was prevented by section 34 of the Civil Jurisdiction and Judgments Act 1982 from pursuing an in rem action in England. The section reads:

"No proceedings may be brought by a person in England … on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court … of an overseas country, unless that judgment is not enforceable or entitled to recognition in England …"

This turned on whether the Defendant in the in *personam* proceedings in India and the Defendant in the in rem action in England were "the same parties" for the purpose of section 34. The House of Lords held that they were the same so that, after the in *personam* judgment had been obtained, the in rem action could not be pursued.

In Hong Kong, section 34 of the 1982 Act finds its equivalent in section 5(1) of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance. Section 5, like section 34, only becomes relevant where there is a judgment of a foreign court, as opposed to an arbitration award. The section does not affect the rule that an in remaction survives, i.e., does not merge in, an arbitration award.

In summary, Hong Kong does permit ship arrest for the underlying purpose of enforcing an arbitration award on a maritime claim.

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New (and better) ship arrest rules in Spain

The new Spanish Shipping Act that will enter into force next 25 of September 2014 has introduced interesting changes into the law of arrest of ships in Spain.

The introductory chapter of the Act states that the new Shipping Act regarding the arrest of ships is aimed to ensure that these are carried out without the need for the claimant to prove the credit, the risk, or the urgency of the matter. The mere allegation of a credit or of a right under the 1999 Arrest Convention will suffice.

The main law on ship arrest in Spain remains the 1999 Arrest Convention but new Act introduces a set of rules worth noting that are expected to to improve and clarify ship arrest practice in Spain.

(i) The competent Commercial Courts for the arrest will be the Court where the claim on the merits is to be pursued, or the competent port Court where the ship is to arrive, at the choice of the claimants. If the ship does nor arrive to the port, the port Court will lose its competence for the arrest of the ship. This, *sensu contrario,* should mean that such port Court should be able to deal with an arrest application before the ship arrives to the port. Presenting the arrest application of a ship before her arrival in the past posed sometimes reactions by commercial Courts where the judge refused to deal with the application, alleging lack of competence, before the ship had arrived to the port.

(ii) The time limit to request the arrest of a ship will be the date where a judgment or an arbitration award is issued or obtained. From this moment the claimants must arrest the ship via an enforcement application. Some Courts have in the past refused to arrest ships, for instance, after arbitration had been commenced. This new clear time limit should prevent such narrow and wrong interpretation of the law.

(iii) The security to be put by the claimants will need to be of a minimum of 15% of the claimed amount. This amount of security can be revised ex officio, or ex application, to take into consideration the circumstances of the case. The form of the security can be any permitted in law, including a bank guarantee. P&I Clubs LOU might now have more chances of being accepted by the Court. The rise from 10% to a minimum of 15% is not welcome but it make sense when the claimed amount is very small.

(iv) Ships flying the Spanish flag can be arrested for any other claim in addition to those set out within Art. 1 of the 1999 Arrest Convention provided the creditor has its usual residence in Spain, its principal place of business in Spain, or has obtained the credit via subrogation, or assignment. Ships not flying a flag of a 1999 Convention signatory State, the great majority, can be arrested in Spain for maritime claims as well as for any other claims.

(v) The Maritime Authorities can withdraw the ship's documents to ensure compliance with the arrest order. This will be in addition to the usual detention measures. This measure was already undertaken in most of the arrest enforcements but its codification is welcome to ensure uniformity.

(vi) A copy of the arrest order and of the arrest application is to be served either to the ship agent or to the Master of the ship. The action on the merits must be lodged within the period of time fixed by the

Court, that will range from a minimum of 30 days to a maximum of 90 days.

Overall, this new set of rules will have the effect of widening the scope of claims where many ships can be arrested in Spain and it should increase uniformity in Spanish arrest practice.

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Felipe is lecturer at the Spanish State Institute for International Trade and has lectured widely in Spain and abroad, including: England (Newcastle University; Lloyd's Maritime Academy), Russia, Ukraine, Netherlands, France, and Turkey. Felipe is supporting member of the LMAA.

Court blocks private sale of arrested vessel

The First Hall of the Civil Court did not allow a company to purchase a vessel arrested in Malta after it incurred a number of debts.

This was held on 25 August 2014 in Malta Towage Limited –v- MV Irmak decided by Mr Justice Mark Chetcuti.

Malta Towage Limited filed an application asking the Court to authorise that MV Irmak be sold to Britannia Shipping Limited, which company is registered in the UK. The applicant company in its Court application explained that it is owed €197,609 which represents the sum the ship was condemned to pay to the captain and the crew in a judgment dated 13 July 2012. The Company managed to find a purchaser of the vessel and is seeking the court's approval for the sale. They also produced two valuations of the vessel, one of €55,000 and the other €60,000.

Cassar Ship Repair Limited and Mediterranean Trading Shipping Company Limited objected to this sale, since they are also owed money from the vessel. They also objected for not being notified by Malta Towage Limited's application for the sale of the vessel.

Mr Justice Chetcuti held that the private sale of the vessel was permitted on 10 June 2014, however, this was attacked by Mediterranean Shipping Company Limited on the grounds that the assignment of the debt of the crew's wages to Malta Towage Limited is not known since the sum was removed. It resulted that the assignment of the debt from the crew to Malta Towage Limited took place before the applicant company had the valuations of the vessel. Furthermore, Mediterranean Shipping Company Limited was not informed of the agreement of sale between Malta Towage Limited and Brittania Shipping Limited, which two companies share the same shareholder and director.

The Court in its judgment noted that the procedure for the private sale of a vessel is similar to other jurisdiction including that in the United Kingdom. The difference is that in Malta a judicial sale or an authorised private sale extinguishes any hypothecs or privileges on the vessel. The Court commented that in these proceedings, the Court is not a spectator and has to make sure that; there are two valuations of the vessel, that the sale is in the interest of all the creditors, and that the price is reasonable. This requires the applicant company's actions to be transparent in such a manner that the Court will not suspect that this procedure is being used to escape justice. It is understandable that the applicant has to safeguard its own interest, but this must not be confused with doing away with its obligations to the Court.

Mr Justice Chetcuti held that this is what took place when it had originally approved the private sale on 10th June 2014. Malta Towage Limited had failed to mention that its shareholder Joseph O'Connor was the same shareholder of the purchasing company, Brittania Shipping Limited. Therefore, Mr O'Connor was selling the vessel to himself. The Court further commented that this omission put in doubt Malta Towage Limited's good faith, which as a result allowed the same Court to reconsider the other elements such as the valuations presented originally. The Court held that the applicant company failed to inform the surveyors that the shareholder of the applicant company was the same person of the purchasing company. This meant that the towage which the vessel needed could have been done by Malta Towage Limited and this could have altered the valuation price of the vessel.

The Court also took note of the submission of Mediterranean Trading Shipping Company Limited particularly to the fact that the assignment of debt of the crew's wages took place before a valuation was given. The crew assigned the debt of €197,000 to Malta Towage Limited for USD 50,000. The valuation before one deducts the towage expenses vary from €130,000 to €180,000. The Court held that, apart from the towage expenses, it was not convinced that the scrapping of the vessel had to take place in Turkey as stated by one of the surveyors. The Court, in its judgment, noted the discrepancy in price between the valuation of €180,000 and the price offered of €57,000 and the fact that there was no clear explanation of the expenses which the purchasing company had to incur for the vessel to be sold as scrap in Turkey. The Court held that the fact that Malta Towage Limited was not a creditor of the vessel until it bought the debt from the crew left a

serious doubt as to whether the requisites stated in Article 358 of Chapter 12 of the Laws of Malta were satisfied. Therefore, the Court is no longer convinced that the sale is in the interest of the creditors and that the sale is reasonable.

The Court in its judgment sought it appropriate to make reference to the case International Marine Banking Corp vs. Dora decided by the UK Admiralty Court in 1977 which court held that:

> *"The fact of the matter, as I view it, is that the procedure is one prescribed by the plaintiff as satisfactory for its own purposes and the proposed sale which has resulted from it is not a sale by the Court at all but a sale by the plaintiff for which it now seeks the endorsement of the Court to give the transaction the appearance of a sale by the Court. I would not, therefore be prepared to grant the order sought even if I were satisfied that the 5.9 million price is as high as any price likely to be obtained on a sale by the Court."*

The Court also referred to the case Den Norsk Bank ASA vs. Owners of the Ship "Margo L" decided in 1997 and concluded that a private sale, as contemplated by the law, should not be interpreted in such a way as to protect the interest of the seller but also to protect the interests of all the parties involved.

The Court then moved to revoke the Company's request for a private sale of the vessel.

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Dr. Joseph Mizzi was called to the Bar in the year 2012. He was conferred with the degree of Bachelor of Laws in Legal and Humanistic Studies from the University of Malta in 2008, graduated as a Notary Public in 2009 and was subsequently conferred with the degree of Doctor of Laws (LL.D.) in 2011 with his title of his doctoral thesis being 'Taxation of Trusts in Malta; and Anti-Abuse Perspective' In 2012 Dr. Mizzi was also awarded the Diploma Course of Studies in Tax. After graduating as an advocate, Dr. Mizzi commenced his relationship with Mifsud and Mifsud Advocates, specialising in litigation, representation, Company Law, Taxation, Maritime claims and contract drafting and negotiation.
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