

31 May 2012

Ref : Chans advice/137

To: Transport Industry Operators

Ship arrest

The High Court of Hong Kong issued a Judgment on 4/5/2012 explaining some legal principles as to when shipowners should fear the arrest of their ships. [HCAJ 141/2010]

Maruba SCA owned the "DECURION". Maruba SCA was a company within the Maruba Group. Chimbusco arrested the "DECURION" to recover the price of bunkers supplied to that ship and to 10 other vessels. Maruba SCA accepted that Chimbusco had an *in rem* claim against the "DECURION" for bunkers supplied to that ship. But Maruba SCA did not accept that Chimbusco had an *in rem* claim against the "DECURION" for bunkers supplied to the 10 other vessels. Maruba SCA therefore applied for relevant parts of Chimbusco's Statement of Claim to be struck out. Chimbusco's claimed a total of US\$4,217,419.89 for bunkers supplied to all 11 ships. But the claim for bunkers supplied to the "DECURION" was only about US\$85,000.

Maruba SCA entered into a Services Agreement with South Atlantic in April 2004. Maruba SCA then entered into an Agency Agreement with Maruba Asia in June 2004. Maruba SCA thereafter provided the contractually agreed services to South Atlantic through Maruba Asia. Among such services was the supply of bunkers in Hong Kong to vessels chartered by Clan SA. South Atlantic made the bunkers available to Clan pursuant to an agreement between South Atlantic and Clan. Clan was related to Maruba SCA, but was a different legal entity.

Under High Court Ordinance (Cap.4) (HCO) s.12A(2)(1), the Court can exercise Admiralty jurisdiction in respect of claims for goods (such as bunkers) supplied to a ship for her operation. HCO s.12B(4) provides that, where goods are supplied to ship X for her operation, the Court may exercise *in rem* jurisdiction against ship Y if two conditions are met. First, the defendant was "when the cause of action arose, the owner or charterer of, or in possession or in control" of ship X. Second, at the time when the action is brought, the defendant is "the beneficial owner as respects all the shares" of ship Y.

There was no difficulty with the second condition. Maruba SCA beneficially owned all shares in the "DECURION" when the Writ was issued. The problem lay with the first condition. On this, to resist strike-out, Chimbusco must show that, when it supplied bunkers to the 10 other vessels, Maruba SCA owned those vessels or had chartered them or was "in possession or in control" of them. At the time when bunkers were supplied to the 10 other vessels, Maruba SCA was not their registered owner. Nor were the 10 vessels chartered to Maruba SCA. At the relevant time, the 10 vessels were under time charter to Clan. The charters were all in NYPE Form (1946 edition). They provided as usual in cl.8 that "[t]he Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers [that is, Clan] as regards employment and agency".

Chimbusco's case was that, at the time when the bunkers were supplied to the 10 other vessels, they were under Maruba SCA's "control" as that term is used in HCO s.12B(4). As evidence of "control," Chimbusco relied on a number of facts and matters. First, when entering into a contract with Chimbusco for the supply of bunkers, Maruba Group personnel gave a Power Point presentation to Chimbusco. That presentation stated that the Maruba Group "proceeded to service trade between Far East and South America under the brand name CLAN". More specifically, in a Power Point slide on the Maruba Group, Maruba SCA was characterised as the:-

"Mother company of the group, currently concentrating on the tug boat business, it retains the ownership of these tug boats. Besides which it retains the ownership of other assets (ships and real estate), earning rent over them."

Second, "Sea-Web Ship Overviews" described Maruba SCA as having been the "Operator" of 6 of the 10 other vessels at material times. Third, there was evidence that Maruba SCA guaranteed and paid charter hire due from Clan. Fourth, name cards provided to Chimbusco by personnel of the Maruba Group, displayed the logos

of Clan and Maruba SCA. Fifth, in a press release issued in January 2009 concerning its financial difficulties, the Maruba Group stated that “[a]t Maruba/Clan we guarantee in all earnest that ours is a reversible impasse”. Sixth, there was evidence that Maruba SCA guaranteed certain of South Atlantic’s obligations.

There is little authority as to what the expression “in possession or in control” of a ship in HCO s.12B(4) means.

When considering the UK equivalent of HCO s.12B(4), the English Court of Appeal in *The “TYCHY”* [1999] 2 Lloyds Law Rep 11 (at 20) suggested that the words in the provision should simply be given “their ordinary and natural meaning”.

When construing the expression “in possession or control” in s.19 of the Commonwealth Admiralty Act 1988 in *The “LAEMTHONG PRIDE”* (1997) 149 ALR 675 (at 688), the High Court of Australia pointed out that “there may be control without possession” and “one party may have possession and another control”. To come within the expression, it was not necessary for a person to be an owner or charterer. By way of example, the High Court suggested that a salvor or mortgagee could, in taking over a vessel pursuant to a salvage contract or mortgage agreement, be said to be “in possession or control” to the exclusion of an owner or charterer.

The English Court of Appeal said much the same thing in *The “GIUSEPPE DI VITTORIO”* [1998] CLC 149 (at 157). There, again considering the English equivalent of HCO s.12B(4), Evans LJ noted that the provision “extends expressly to any case where the person concerned does have either possession or control, apparently regardless of whether that person is or can be described as a charterer, or not”.

Maruba SCA drew the Judge’s attention to *Dolfus Mieg et Compagnie SA v. Bank of England* [1950] Ch 333. The question there was whether certain foreign governments retained “possession” or “control” of gold bars deposited in the Bank of England. In their discussions of “control” all 3 judges of the English Court of Appeal referred to *The “CRISTINA”* [1938] AC 485 (HL). In the latter, the Spanish Government was held “to have de facto possession of the ship, because the master and crew, who were in fact in actual control and charge of the ship ... asserted they so ‘held’ the ship as servants or agents on behalf of the Spanish Government”. Nonetheless, the judges in *Dolfus* differed on whether as a matter of fact the gold bars were under the “control” of the foreign governments. In light of further evidence (not material to the case in question), they eventually held that the bank could not assert that the foreign governments had been in possession or control of the gold bars. Putting to one side the additional late evidence, Somervell LJ in *Dolfus* (at 359) explained the concept of “control” thus:-

“I am assuming ... that the bars were held by the bank for the three governments so that, through the agreed machinery of the Tripartite Commission, the bank would on demand deliver the bars in accordance with any instructions which they might receive. I would have said that the three governments retained control. Some meaning must be given to the word ‘control’. Some person other than the foreign government has *ex hypothesi* possession and that measure of control which goes with possession. Control would therefore, as it seems to me, cover the right to tell the possessor what is to be done with the property....”

It seemed to the Judge that, as Somervell LJ stated, “control” in HCO s.12B(4) must denote something more than the control which would normally come with possession of a ship. A natural person could be in possession of a ship by being on board and in control of her navigation. A company could be in possession of the ship if it employed the master and crew in the navigation of the vessel. Something else must be involved when determining whether a person is in control, despite not being in possession. The most obvious scope for that “something else” must be the ability to tell the person in possession of a vessel (for example, the registered owner) what is to be done in relation to the vessel. In this case, by cl.8 of the time charters for the 10 vessels, that ability to direct the master and crew in the employment of the 10 vessels was expressly conferred by their owners upon Clan as charterer. Given that fact, there was no room for postulating that, despite the control contractually conferred by the owners of the 10 vessels on Clan, some other party such as Maruba SCA nevertheless also controlled the 10 vessels.

Chimbusco suggested that Clan and South Atlantic were closely connected with Maruba SCA. Chimbusco relied heavily on this connection in support of the contention that Maruba SCA was in “control”.

There was undoubtedly evidence that Maruba SCA, Clan and South Atlantic were associated with each other. But that alone would not mean that Maruba SCA was in “control” within the meaning of that term in HCO s.12B(4). The Power Point slides did not go so far as to claim that Maruba SCA was in a position to instruct Clan or respective individual owners on the navigation of the 10 ships.

Even if Maruba SCA might be treated as the parent of Clan or the individual companies owning the 10 vessels at the relevant times, there was no basis for piercing the corporate veil. To assess “control,” one looks to see who is in a position to direct the master and crew of a vessel in relation to the navigation of the same. One does not without good reason go beyond that to see whether a natural or corporate person is in a position as shareholder or director of a company to cause that company to instruct the master and crew in relation to the navigation of a vessel.

Similarly, the mere fact that a document described Maruba SCA as the “operator” of a vessel was unhelpful. The expression “operator” is extremely vague. It can mean all sorts of things, including seeing that a ship is properly supplied with fuel and provisions or attending to logistical arrangements so that a vessel functions smoothly. It is not self-evident that an “operator” is in a position to tell the master and crew where to sail a vessel.

The Judge was also unable to infer anything from the fact that Maruba SCA guaranteed certain obligations of Clan or South Atlantic or paid charter hire due from Clan. That evidence was consistent with there being a close relationship between Maruba SCA, Clan and South Atlantic. But it did not go towards establishing the requisite degree of control under HCO s.12B(4). That in its press releases or in name cards, the Maruba Group stressed its relationship with Clan equally did not go far enough as evidence that Maruba SCA was in “control” of the 10 vessels.

It followed that Chimbusco was unable to demonstrate on the available evidence and the balance of probability that Maruba SCA was in “control” of the 10 other vessels at the material times.

Somervell LJ’s dictum has the merit of providing a simple, clear and rigorous test for “control” within HCO s.12B(4).

In contrast, Chimbusco proposed a looser, more ambiguous test. That test would equate “control” with “having a say (but not necessarily a complete say) in the operation of a vessel”. That test would obviously widen the possibilities for maritime arrest. But, in so doing, it would introduce a high degree of uncertainty in shipping affairs. Applying the looser test, one asks rhetorically: how much say in what aspects of the operation of a vessel would amount to “control” under the test? The answer will inevitably depend on an assessment (most likely, time-consuming) of all the relevant circumstances in a case. But that means that shipowners will be uncertain at any particular time whether their ship may or may not be arrested as a result of the involvement of some person in some aspect of their vessel’s operation. The uncertainty which would ensue from the adoption of the looser test would be commercially undesirable. It cannot have been what the framers of the arrest legislation had in mind.

Maruba SCA’s strike out application succeeded. There would be a Declaration that the Court had no *in rem* jurisdiction in relation to the unpaid bunkers for the 10 other vessels. Those parts of the Statement of Claim listed in para.2 of Maruba SCA’s Summons dated 14/2/2012 were struck out. There would be an Order *Nisi* that Chimbusco pay the costs of Maruba SCA’s application, such costs to be taxed if not agreed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096

E-mail: gm@smicsl.com Website: www.sun-mobility.com

CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

True professional dedication endures the test of time. SMIC devoted a great deal of time in fostering awareness of the importance in transport document constructions. In the last decade SMIC seminars covered HBL, HAWB, FCR, Claims handling, international sea, and air freight conventions. The same last decade also witnesses 120 issues of effort written Chans Advice circulated monthly to about 20,000 readers who read them for more than 2,400,000 times.

Discerning forwarders realize the importance to boost up loss prevention and claim handling ability for long term profitability. SMIC’s ability in helping forwarders achieving that goal is proven – SMIC forwarders are fortified by in depth transport legal knowledge truly essential for successful loss prevention. Such ability is not convincing without the test of time. Drop us a line for a try.