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To: Transport Industry Operators

Wrongful ship arrest

The Hong Kong High Court issued a Judgment on 13/1/2012 setting aside the arrest of a ship "JIMRISE" (the "Vessel"). [HCAJ 180/2011]

The Owner of the Vessel, Jimrise, brought the application to set aside the Vessel's arrest. Jimrise contended that Cosmotrade had wrongly invoked the Admiralty Court's in rem jurisdiction to arrest the Vessel. These proceedings arose out of a time charterparty (TC) dated 4/8/2009 between Cosmotrade and Jimei (a BVI company) in relation to the Vessel. In such situation, under High Court Ordinance (Cap.4) s.12B(4), an action in rem leading to the arrest of the Vessel may be commenced if the following conditions are met:-

- (1) Jimei (the person alleged by Cosmotrade to be liable for breach of the TC) was, at the time when Cosmotrade's cause of action arose, the owner or charterer of, or in possession or in control of the Vessel; and,
- (2) Jimei was, at the time when the action was brought (here the time of arrest), the beneficial owner of all shares in the Vessel or the charterer of the Vessel under a demise charterparty.

On 23/12/2011 Cosmotrade had the Vessel arrested on the basis that:-

- (1) Jimei was the Vessel's charterer at the time of Jimei's alleged breach of the TC; and,
- (2) Jimei was, at the time of arrest, the demise charterer of the Vessel.

There was no dispute that Jimei met condition (1). Jimrise had exhibited a time charterparty dated 22/11/2008 between itself and Jimei running for between 36 and 38 months.

The question was whether Jimei met condition (2).

Jimrise was registered as Owner of the Vessel in the Panamanian Registry. Lloyds List Intelligence identified Jimei as the Vessel's Commercial Operator. An insurance cover note dated 16/1/2009 and issued by The London Steam-ship Owners' Mutual Insurance Association Ltd. referred to Jimrise as "Member" and Jimei as a "Co-Assured". COSCO Shanghai Ship Management was mentioned in the cover note as another "Co-Assured". A Continuous Synopsis Record issued by the Government of Panama indicated that the Vessel was not subject to a demise (bareboat) charterparty as at 17/7/2009.

The TC was to run for between 4 and 6 months. In the TC, Jimei was described in line 2 as "Owners of the good M/V Jimrise". But TC clause 63 identified Jimrise as "ORIGINAL OWNERS" and Jimei was described with the expression "OWNS/MANAGERS/FULL STYLE". On 30/10/2009 Cosmotrade signed a Letter of Indemnity (LOI) in favour of Jimrise (described as "The Owners of the MV JIMRISE"). This first LOI agreed to indemnify Jimrise against the release of cargo carried on board the Vessel without production of a bill of lading. On 18/1/2010 Cosmotrade signed another LOI in favour of Jimrise. This second LOI also requested the release of cargo carried on board the Vessel without production of a bill of lading. Jimrise was similarly described in the 2nd LOI as the Vessel's Owners.

On 26/1/2010 Jimei, Cosmotrade and Jaldhi (acting by their solicitors (respectively, Rodgers & Co, Ross & Co, and Swinnerton Moore)) entered into an Escrow Agreement to resolve disputes among them by arbitration. Jaldhi sub-sub-chartered the Vessel from Cosmotrade. In the Escrow Agreement Jimei is defined as "the Owners," Cosmotrade as "the Charterers," and Jaldhi as "the Sub-Charterers".

On 1/1/2011 Jimrise entered into a Crewing and Vessel Management Agreement with TOSCO Keymax International Ship Management. This was said by Jimrise to evidence its continuing control over the Vessel.

By fax dated 11/3/2011 Rodgers & Co (acting for Jimei) initiated the arbitration in relation to the TC. On 8/6/2011 Jackson Parton (acting for Cosmotrade) sent an email asking Rodgers & Co to state whether Jimei or Jimrise was the Owner of the Vessel. Jackson Parton pointed out the contradictory statements in the TC. On 9/6/2011 Rodgers & Co replied:-

“Finally, with regard to Owners’ identity, we attach a copy of the Clean Fixture Recap which we trust clarifies your query. As you can see, Owners are Jimei ..., PRC. They are the party who commenced arbitration against your clients and the party to the Escrow Agreement. If you look through your files (although we appreciate the volume given the extensive exchanges at the time!) there were discussions prior to signing the escrow agreement in this regard and we clarified at the time that the Owners are Jimei. This would suggest that you have not even read the files and stalling for time. However, our clients’ patience is at an [e]nd.”

On 22/7/2011 Cosmotrade by its solicitors Jackson Parton issued claim submissions in the arbitration. The submissions defined Jimei as “Owner”. The arbitration dispute related to the time of re-delivery of the Vessel. Cosmotrade claimed that it re-delivered the Vessel earlier than Jimei contended. Cosmotrade refused to pay the hire that Jimei was demanding and instead argued that Jimei owed it money. HFW act as Jimei’s London solicitors for the arbitration and Jimrise’s solicitors in the proceedings in question.

On 22/9/2011 Infospectrum submitted a report to Jackson Parton on Jimrise. The report noted that Jimei was a BVI company. The report stated:-

“We then got one of our ethnic Chinese staff to telephone Jimei ... today, 22 September 2011, in order to get more information from the company. He was told by the latter’s chartering manager that anyone wanting to charter the four ships will have Jimei ... , not the ship’s registered owners, as their counter party. This was partly confirmed by a shipping company which told us that it has mv Jimrise on time charter from mid-June 2011 to mid-August 2011. The shipping company told us that it had chartered the ship from Jimei ...”

On 26/12/2011, following the Vessel’s arrest, HFW provided Cosmotrade’s solicitors HG with the Continuous Synopsis Record and with Jimei’s certificate of incorporation. Shortly thereafter HFW provided HG with a draft copy of the November 2008 time charterparty between Jimrise and Jimei. HFW exhibited a final copy of the November 2008 charterparty in an affidavit dated 30/12/2011. The final charterparty copy differed in some respects from the draft copy. For instance, the daily rate of hire in the final copy was US\$7,500, in contrast to US\$9,000 in the draft version. The draft copy directed that hire be remitted to the specified bank account of Jimrise as beneficiary. The final version merely stated that hire was “payable to Owners’ nominate bank account”. HFW’s affidavit of 30/12/2011 explained why the final copy differed from the draft.

The evidence consistently pointed to Jimrise being the Vessel’s Owner and Jimei being only the Vessel’s Commercial Operator. Further, there was no evidence that at the time of arrest the Vessel was under a demise charterparty to Jimei. Cosmotrade inferred that Jimei was a demise charterer from the fact that Jimei was named as Co-Assured in the cover note. Reliance was also placed on the Escrow Agreement’s description of Jimei as Owner and in the fact that emails from the Vessel’s Master were routinely copied to Jimei. The Judge did not find such evidence to be compelling.

After arresting the Vessel, Jackson Parton obtained an opinion from London P & I brokers on the significance of Jimei being named as Co-Assured. The brokers pointed out that there was separate insurance available for time charterers. Jimei (the brokers speculated) might not have arranged that latter type of insurance “because, as operators, they may not have undertaken any genuine liabilities under the time charter for it may not have been entered into at arm’s length”. Consequently, the brokers suggested that Jimei’s insurance “is more akin to that of an Owner (be it as the actual owner, demise or barboat charterer) than that of a time-charter”. But it seemed to the Judge that the most likely (and natural) explanation was that Jimei was named as Co-Assured because (rightly or wrongly) it believed that as Commercial Operator or time charterer of the Vessel it had an insurable interest akin to that of an Owner. A COSCO entity, presumably (from its name) a manager of the Vessel, was also named as Co-Assured, even though there was no suggestion that such company was a demise charterer or Owner of the Vessel.

Cosmotrade submitted that the signing of the Escrow Agreement estopped Jimrise from asserting that it owned the Vessel or denying that the Vessel was let by demise to Jimei. But the Judge was unable to treat the Escrow Agreement as any such representation by Jimrise. This was because Jimrise was not a party to that document. If by the Escrow Agreement (and later by the statements of Rodgers & Co) Jimei held out that it was the Vessel’s Owner, such representation could not estop Jimrise. Obviously, if Jimei could not be

treated as Jimrise's agent, there would be no reason to regard Jimei's representation as binding on Jimrise. Assume that Jimei might be treated as Jimrise's agent. That would still not help. A representation by an agent as to the scope of its authority (here to act as owner of the Vessel) could not without more bind a principal. It was only if Jimrise could somehow be linked to statements as to Jimei's ownership, made in the Escrow Agreement and made by Rodgers & Co, that Jimrise would be estopped from asserting that Jimrise was the true Owner. There was no hint of a link. The best Cosmotrade could do was to observe that Jimei and Jimrise were related companies and point to HFW acting for Jimei in London and Jimrise in Hong Kong. But the Judge did not think that those circumstances alone could support a conclusion that Jimrise expressly authorised Jimei to hold Jimei out as Owner or demise charterer of the Vessel.

Jimei being Commercial Operator of the Vessel, it was hardly surprising that the Master would copy email or other correspondence concerning the Vessel to Jimei.

Cosmotrade submitted that the Judge should not summarily decide on the Vessel's actual beneficial ownership. Cosmotrade made much of the discrepancies between the draft and final versions of the charterparty between Jimrise and Jimei. Cosmotrade suggested that that charterparty was a mere fiction and the Court should await discovery of documents evidencing actual payment of hire under that charterparty. For example, one should see (Cosmotrade argued) whether Jimei actually paid hire to Jimrise pursuant to that charterparty. But the Judge did not see how that was going to help. Assume no hire was paid by Jimei to Jimrise. That fact alone would not have the logical implication that Jimei (as opposed to Jimrise) was the Owner or Jimei was a demise (as opposed to time) charterer of the Vessel.

On the balance of probability, Cosmotrade had failed to make out a case that condition (2) had been met. The Judge should therefore set aside the arrest and release the Vessel.

Jimrise asked that the Judge order an inquiry in respect of damages (if any) arising from the wrongful arrest of the Vessel.

However, damages are only granted where there is evidence of malicious negligence in relation to an arrest.

Jimrise suggested that there had been material non-disclosure. The Judge did not think so. In the Judge's view, the initial evidence was just about sufficient to justify an arrest on the basis of an inference that Jimei was a demise (not time) charterer.

While the Judge accepted that soon after the arrest HFW provided information clarifying the relationship between Jimrise and Jimei, the Judge was not persuaded that Cosmotrade had shown any degree of malicious negligence to justify an inquiry into damages. There was confusion whether or not Jimei was the Owner of the Vessel at the time of arrest. That confusion was compounded by statements in the Escrow Agreement and by Rodgers & Co in correspondence with Jackson Parton. In light of such statements, Cosmotrade could not be said to have acted in a grossly negligent or malicious manner by not taking HFW's materials at face value, by investigating the matter further, or by arguing the point before the Judge in the Court on 13/1/2012. The Judge did not think that anyone could fairly describe the conduct of Cosmotrade as cavalier or in bad faith. The Judge refused to order an inquiry into damages.

There was no in rem jurisdiction to arrest the Vessel. The arrest was set aside.

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

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