SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

In rem jurisdiction

The High Court of Hong Kong issued a Judgment on 21/7/2014, in which some legal principles relating to the *in rem* jurisdiction of the Court to arrest vessels were explained. [HCAJ 241/2009]

By a Shelltime 4 form Charterparty dated 9/1/2008 ("Charterparty"), Handytankers chartered its motor tanker "BETH" to APOL for five years. Handytankers' claim as pleaded in the Endorsement of Claim was for damages for breach of the Charterparty and unpaid hire due under it. In breach of clauses 8 and 9 of the Charterparty, APOL had repeatedly failed to pay hire in full and/or on time. In particular:

(1) APOL paid the January 2009 instalment of hire late.
(2) APOL paid the February, March and April 2009 instalments of hire late and only partially.
(3) APOL failed to pay the May and June 2009 instalments of hire altogether.
(4) On 2/6/2009, Handytankers sent APOL an anti-technicality notice pursuant to clause 9(a) of the Charterparty which stated *inter alia* as follows:
"In default of c/p, you have failed to pay the above hire by the 1/6/2009 deadline.
Accordingly, we hereby give you notice under cl 9(a) of the c/p of such default and that we require you to pay that hire together with interest… within seven (7) banking days of receipt of this notice; failing which we shall withdraw the vessel…"
(5) APOL failed to comply with the anti-technicality notice and on 12/6/2009 Handytankers exercised its contractual right of withdrawal by reason of APOL's repudiatory breaches and brought the Charterparty to an end.

Clause 79 of the Charterparty contained a L.M.A.A. Arbitration clause. The dispute between Handytankers and APOL was referred to arbitration in London. A Final Award in the sums of US$9,238,221.30 by way of damages and US$361,243 for unpaid hire ("Award") was issued in favour of Handytankers on 1/3/2013. These sums were slightly less than the amounts stated in the *in rem* Writ ie US$11,311,032.00 for damages and hire in the sums of US$58,508.00 + US$441,375.00 + US$246,681.00.

In April 2014, Handytankers invoked the Court's *in rem* jurisdiction by applying for a Warrant of Arrest in respect of the vessel "Dewi Umayi" ("the Vessel"). Handytankers' claim was that pleaded in the Endorsement of Claim and Handytankers specifically put its claim as one falling under section 12A(2)(h) of the High Court Ordinance, Cap 4 ("Ordinance") ie a claim "arising out of any agreement relating to …the use or hire of a ship". While Handytankers obtained the Award on 1/3/2013, it made plain that the arrest of the Vessel was sought for the purpose of providing security for the anticipated judgment *in rem* in the action in question and not as a means of enforcing the Award.

The owners of the Vessel ("the Owners") applied by Summons dated 29/4/2014 for orders that the Warrant of Arrest of the Vessel and the re-amended Writ of Summons be set aside and/or struck out on the grounds that the Court had no *in rem* jurisdiction in respect of Handytankers' claim and/or that Handytankers had improperly invoked the *in rem* jurisdiction of the Court. The Owners further sought a Release of the Vessel and damages for her wrongful arrest. The Owners submitted that the proceedings and the arrest of the Vessel were fundamentally in the nature of an application to enforce the Award and in Hong Kong there was no head of Admiralty jurisdiction which permitted Handytankers to enforce a foreign arbitration award as such. The proceedings and the arrest were therefore an abuse of process and ought to be set aside: *The Chong Bong* [1997] 3 HKC 579; *The Bumbesti* [2000] QB 559. The Owners further submitted that the procedure of arrest was not available once a plaintiff's claim had crystallised in a judgment or arbitration award. This was because *inter alia* in Article 1(2) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 ("1952 Convention"), "arrest" means "the

detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment". The Owners urged the court to construe section 12A(2) of the Ordinance consistently with Article 1 of the 1952 Convention.

It is of course correct that there is no head of Admiralty jurisdiction in Hong Kong for the enforcement of arbitration awards as such. The court's Admiralty jurisdiction is statutory and the reason why it cannot be invoked in respect of a claim based on an arbitration award is simply that, as a matter of construction, section 12A(2) of the Ordinance is not apt to cover a claim arising out of an arbitration agreement, even though the arbitration agreement is contained in a charterparty or some other agreement relating to the use or hire of a ship: *The Bumbesti*.

In *The Chong Bong*, the affidavit leading to the warrant of arrest expressly stated that the writ was issued to enforce an arbitration award and the statement of claim only contained causes of action for an award claim – there was not a line in the statement of claim which could be said to plead a cause of action for a charterparty claim: see [1997] 3 HKC 579, 589A-D. It was on this basis that the court held the award could not be enforced by an action *in rem* and set aside the service of the writ and the arrest of the ship.

Like the Chong *Bong*, the cause of action pleaded in *The Bumbesti* was expressed to be "founded on" an arbitration award: see [2000] QB 559, 565A-B. On that basis, Aikens J held the breach of contract relied on by the claimants to found their Admiralty claim concerned the implied term to fulfil an award made pursuant to the arbitration agreement in the charterparty and had nothing to do with "the use or hire of a ship" which was necessary to found the Court's Admiralty jurisdiction under section 20(2)(h) of the Supreme Court Act 1981 ("1981 Act"). It is however reasonably clear that Aikens J, following *The Rena K* [1979] QB 337, considered the Court would have *in rem* jurisdiction if the claim were to be based on the original cause of action under the charterparty: see 565H and 575C-D of the Judgment.

In *The Rena K* [1979] QB 337, Brandon J established the principle that a cause of action *in rem* does not merge in a judgment *in personam*, but remains available so long as, and to the extent that, the judgment remains unsatisfied, and this principle equally applies to arbitral awards. At 405F-406E, Brandon J explained the law of merger in relation to arbitral awards and causes of action *in rem* and the so-called "no bar rule" in the following terms:

> "I am prepared to assume, without finally deciding, that, just as a cause of action in personam which is adjudicated upon by an English court merges in the judgment of that court, so also a similar cause of action which is adjudicated upon by an English arbitral tribunal merges in the award of that tribunal. That is the view which is expressed in *Spencer Bower and Turner, Res Judicata*, 2nd ed. (1969), p. 362, and it appears to be supported at least by *Gascoyne v. Edwards* (1826) 1 Y. & J. 19, and possibly also by certain other cases to which I was referred.
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> It has, however, been held that a cause of action *in rem*, being of a different character from a cause of action in personam, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied: *The Bengal* (1859) Swab. 468; *The John and Mary* (1859) Swab. 471; *The Cella* (1888) 13 P.D. 82; see also *The Sylph* (1867) L.R. 2 A. & E. 24 (although this may have turned partly on an express reservation made in the submission to arbitration concerned) and *Yeo v. Tatem (The Orient)* (1871) L.R. 3 P.C. 696. The situation must, in my view, be the same in the case of an arbitral award, which is likewise based on a cause of action in personam.
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> ….
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> The result is that I accept the argument of counsel for the cargo owners that, if an award should be made against the shipowners and they should be unable to satisfy it, the cargo owners would be entitled to have the stay of the action removed and to proceed to a judgment *in rem* in it."

The Rena K was expressly approved by the English Court of Appeal in *The Tuyuti* [1984] QB 838. At 850C-E, Robert Goff LJ (with whom Ackner LJ agreed) said he found the reasoning of Brandon J persuasive and accepted the *Rena K* principle as being well founded.

The *Rena K* and *The Tuyuti* have been followed in Hong Kong in *The Britannia* [1998] 1 HKC 221. In that case, Waung J held that the Court had jurisdiction to maintain the arrest of a ship despite the mandatory stay of proceedings under the Arbitration Ordinance, provided that the arrest was for the purpose of providing security for the judgment in the *in rem* action itself, rather than for an arbitration award and the stay might be lifted because of the defendant's failure to honour the award. Waung J also expressed the view at 226G that the analysis of the law in *The Rena K* and *The Tuyuti* was "obviously correct".

The Owners submitted that *The Rena K* had been "irretrievably undermined" by *The Indian Grace No. 2* [1998] AC 878. The Judge did not agree. The issue for the Court in *The Indian Grace (No 2)* was whether 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 ("1982 Act") from pursuing an *in rem* action in England. The section reads:

> "No proceedings may be brought by a person in England and Wales or Northern Ireland 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 another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England or, as the case may be, in Northern Ireland."

This turned on whether the Defendants in the *in personam* proceedings in India and the Defendants in the *in rem* action in England were "the same parties" for the purposes of section 34. Both the Court of Appeal and 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, Cap 46. It reads:

> "No proceedings may be brought by a person in Hong Kong 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 Hong Kong".

Section 5, like section 34, only becomes relevant where there is a judgment of a foreign court. Thus, it cannot possibly affect the rule that an *in rem* action does not merge in an arbitral award. In the Judge's view, neither section 5 nor *The Indian Grace (No 2)* affects the *Rena K* principle or its application to the case in question.

Handytankers' claim as pleaded in the Endorsement of Claim was for damages for breach of and for unpaid hire under a Charterparty. It was in substance and in form a claim "arising out of any agreement relating to…the use or hire of a ship" under section 12A(2)(h) of the Ordinance and not a claim on the Award. In the Judge's view, it was perfectly legitimate for Handytankers 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 might obtain after "the hearing and determination of a claim" falling within section 12A of the Ordinance.

Regarding the Owners' submission that the procedure of arrest was not available once a plaintiff's claim had crystallised in an arbitral award, the Judge was equally unable to accept it. The submission was contrary to *The Rena K* line of cases which held that an unsatisfied arbitral award is no bar to a cause of action *in rem*. 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.

Regarding the Owners' submission that the procedure of arrest was not available once a plaintiff's claim had crystallised in an *in rem* judgment, it did not assist the Owners in any way since Handytankers had not yet obtained *in rem* judgment in the action in question. Even that proposition of law, supported as it is by *The Alletta* [1974] 1 Lloyd's Rep 40, was of dubious weight - it was not followed by the High Court of Singapore in "*The Daien Maru No. 18*" [1986] 1 Lloyd's Rep 387 for good reasons. Arrest of a ship in an action *in rem* is a mere procedure the object of which is to obtain security from which the judgment can be satisfied: *The Beldis* (1936) 53 Ll L Rep 255; *The Cap Bon* supra. Like Thean J, the Judge found it extremely odd that the right of security by the arrest of a vessel was available to a plaintiff who merely asserted a claim whereas it was lost when he finally obtained a judgment in the action.

To conclude, the Judge was of the view that the Court's *in rem* jurisdiction had been properly invoked in the case in question. The Owners' application by Summons dated 29/4/2014 was dismissed.

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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