SUN MOBILITY
Insurance and Claims Services Limited

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Ref : Chans advice/177

To: Transport Industry Operators

In rem jurisdiction (II)

The Hong Kong Court of Appeal issued a Judgment on 9/7/2015 in relation to the High Court Judgment dated 21/7/2014 (reported in our Chans advice/167 dated 28/11/2014). [HCMP 2315/2014]

The factual background can be briefly stated. Handytankers chartered its vessel "BETH" to APOL for a period of five years by a charterparty dated 9/1/2008. According to the Handytankers, APOL repeatedly failed to pay the charter hire on time or in full. In the result, Handytankers commenced an arbitration against APOL pursuant to an arbitration clause in the charterparty, obtaining a substantial final award in its favour on 1/3/2013. That award went unpaid. Faced with that situation, Handytankers (which had issued an *in rem* writ in December 2012), applied for and executed a warrant of arrest in respect of the vessel "Dewi Umayi". Handytankers made it clear that the arrest of the vessel was not for the purpose of enforcing the award in its favour, but in order to provide security for the judgment it expected to obtain in the in rem proceedings in question.

In the court below, the owners of the "Dewi Umayi" ("the Owners"), submitted that the in rem proceedings and arrest of the vessel were an abuse of process as they were in the nature of an attempt to enforce the arbitration award, which is not something which falls within the recognised heads of Admiralty jurisidiction. Ng J rejected this argument, holding that it was clear from the writ that Handytankers' claim was brought on the basis of the original cause of action which led to the arbitration (i.e. the claim for unpaid hire) and not on the award itself. Ng J went on to hold that although that original cause of action might ordinarily have merged in the arbitral award so as to bar a fresh action upon it, it did not do so in the case in question as a result of the "no bar rule" recognised in *The Rena K* [1979] QB 337, by which a cause of action *in rem* does not merge in a judgment *in personam*, so long as (and to the extent that) that judgment remains unsatisfied. *The Rena K* also established that the "no bar rule" applies to arbitral awards in the same way as it applies to judgments. Ng J rejected a submission by the Owners to the effect that in the light of the decision of the House of Lords in *The Indian Grace (No. 2)* [1998] AC 878, *The Rena K* and the "no bar rule" should no longer be regarded as good law, save in relation to situations involving maritime liens.

The Owners then made an application to the Court of Appeal seeking leave to appeal against the order of Ng J dated 21/7/2014, by which he dismissed their application to set aside the arrest of their vessel, the "Dewi Umayi", and the service of the *in rem* writ upon them. That application was made on the grounds that the court had no Admiralty jurisdiction in respect of the claim, and, alternatively, on the basis that the proceedings were an abuse of process. Before the Court of Appeal, the Owners put forward two arguments, which were basically those rejected by Ng J.

In the Owners' statement in support of the application for leave to appeal, the Owner argued first that the arrest in the case in question was fundamentally an application to enforce, and obtain post-trial security in respect of, the arbitral award obtained by Handytankers. However, at the hearing, the Owners did not press this point. In the Court of Appeal's view, the Owners were right not to do so, as it was clear from the terms of the in rem writ that the proceedings were brought to enforce the original liability for non-payment of charter hire, and not for the purpose of enforcing the arbitral award. Whether or not this was permissible depended on whether or not the "no bar rule" applied so as to permit Handytankers to proceed with the action *in rem* notwithstanding the arbitral award it had already obtained.

The Owners focussed their efforts on their second argument, which was that, in the light of the judgment in *The Indian Grace (No. 2)*, it was arguable that the "no bar rule" should henceforth be restricted to situations involving a maritime lien, and that, to this extent, *The Rena K* should no longer be followed.

The question that arose in *The Indian Grace (No. 2)* was whether the plaintiff in that case, who had obtained an *in personam* judgment in proceedings in India, was thereby prevented by section 34 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") from pursuing an *in rem* action in England, based on the same underlying cause of action. Section 34 prevents a person from bringing proceedings 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 foreign judgment, unless that judgment is not enforceable or entitled to recognition in England. It was held in the House of Lords that the parties in both the Indian *in personam* proceedings, and the English *in rem* action, were "the same parties", and that section 34 operated to prevent the *in rem* action being pursued, thereby abrogating the "no bar rule" to this extent. The provision has its Hong Kong equivalent in section 5(1) of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, Cap 46. In the course of his judgment, Lord Steyn commented on the "no bar rule" in the following terms (at p.911H-912A):

> "Counsel were agreed that the ['no bar rule'] was established in cases involving maritime liens. The House was not referred to authority extending the rule beyond maritime liens. It is an ancient and strange rule which I would not wish to extend beyond the limits laid down by authority".

The Owners submitted that this statement fatally undermined the authority of *The Rena K*. The Court of Appeal was unable to agree with this proposition. *The Rena K* was cited in argument before the House of Lords, and it would be surprising for it not to be explicitly addressed by Lord Steyn in his judgment if he were intending to express disapproval of it. To the Court of Appeal's mind, all that Lord Steyn was saying in the passage set out above, was that the "no bar rule" should not be further extended, not that it should in some way be scaled back. In this connection, the Court of Appeal noted that *The Rena K* was expressly approved by the English Court of Appeal in *The Tuyuti* [1984] QB 838, and in *The Bazias* [1993] QB 673. It has also been followed in Hong Kong in *The Brittania* [1998] 1 HKC 221, and in New Zealand in *The Irina Zharkikh* [2001] 2 Lloyds Rep 319. It has also been accepted as good law in England after *The Indian Grace (No. 2)*, in *The Bumbesti* [2000] QB 559 (although it does not seem that the argument the Owners put forward was raised in that case, and *The Indian Grace (No. 2)* does not appear to have been referred to). Having regard to the long history of the "no bar rule", the Court of Appeal did not think that it was reasonably arguable that it should be regarded as having been cut back as a result of Lord Steyn's observations in *The Indian Grace (No. 2)*. The Court of Appeal did not read those observations as expressing any disapproval of *The Rena K*. The Court of Appeal also noted that it was in any case unnecessary to do so, as the decision in *The Indian Grace (No. 2)* was based on the construction of section 34 of the 1982 Act, and did not require consideration of the scope of the "no bar rule".

It was common ground that section 5 of Cap 46, like section 34 of the 1982 Act, applies only to foreign judgments, and not to arbitral awards. This being the case, it had no application in the case in question, and the "no bar rule" applied so that Handytankers was not prevented from bringing the *in rem* proceedings, given that the arbitral award it had obtained remained unsatisfied.

For the foregoing reasons, the Owners' application for leave to appeal was dismissed by the Court of Appeal.

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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