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Cover Story

Is the arresting party entitled to stop the judicial sale of the vessel as of right?

Introduction

In the recent case of *The "Long Bright"* [2018] SGHC 216, the Singaporean High Court had to decide on whether the arresting party who wishes to discontinue the action is entitled to release the arrested vessel and stop the judicial sale as of right even after bids from potential buyers have been received.

The facts

The Plaintiff claimed against the owner of the vessel "Long Bright" (the "**Vessel**") for wharfage and related charges. The Plaintiff applied for arresting the Vessel and an order for sale. The Vessel was subject to a mortgage in favour of the 1st intervener. There were also other interveners and caveators having claims against the Vessel. The sale order was eventually granted and the Vessel was put on advertisement for sale.

Shortly after that, the Plaintiff reached a settlement with the 1st intervener. By signing the settlement agreement, the 1st intervener wished the existing sale order to be discharged and so it could start its own *in rem* action against the Vessel. This was because the 1st intervener's claim was of a larger amount of money compared with the Plaintiff's. The 1st intervener believed that it was more eager to bargain for a higher selling price of the Vessel for the benefit of all interested parties including itself.

As a result of the settlement, the Plaintiff filed an application for release of the Vessel and discharge of the sale order.

Release of vessel

It was the Plaintiff's case that the settlement

agreement already settled the Plaintiff's *in rem* claim against the Vessel and so the Vessel must be released. However, the Court, without the benefit of knowing the terms in the settlement agreement which was confidential, was of the view that the settlement agreement would only bind the Plaintiff and the 1st intervener. The settlement agreement would not extinguish the Plaintiff's claim against the Vessel/ the Defendant. At most, it amounted to a promise made by the Plaintiff to the 1st intervener that the Plaintiff would no longer pursue its claim against the Defendant.

Even if the Plaintiff's claim was extinguished by the settlement agreement, it did not follow that the Vessel must be released as the Plaintiff's arrest of the Vessel (the *res*) in an action *in rem* affects all other parties having an *in rem* claim against the res. The Court found that once the sale order was granted, the Sheriff was under a duty to act for the benefit of all interested parties not limited to the Plaintiff. Thus, the sale order should not be discharged merely because the Plaintiff wished to discontinue its claim against the Vessel. There must be a discharge of the sale order before the Vessel could be released.

Discharge of sale order

The fact that the applicant for a discharge of sale order is the arresting party in the first place does not warrant the discharge. The Courts take into account of the interest of all persons with *in rem* claims against the vessel.

In this case, although there would be a delay in time if the sale process was re-started, the Court found that the costs would be nominal as the Plaintiff would bear the expenses incurred before the discharge of the sale order. Besides, since the Vessel was relatively new, its selling price should not drop significantly during the period of delay due to its relatively slow deterioration rate. More importantly, the Court found that the other interested parties would not be significantly disadvantaged if the sale process restarted as their priority would not be changed.

Conclusion

For the above reasons, the Court decided to discharge the order for appraisement and sale and allowed the release of the Vessel on the condition that the Plaintiff would undertake to pay the Sheriff's expenses before the discharge of the sale order and return any deposits received from the bidders of the Vessel.

This case shows that where the plaintiff has no further claims against the defendant ship-owner after the vessel is arrested and the sale order is granted, the Court may still proceed to the completion of the judicial sale of the vessel if it is in the interest of all other persons with *in rem* claims against the vessel. The party who wishes to release the arrested vessel and discharge the sale order must show to the courts that such release and discharge do not have prejudicial impact on other interested parties.

China denies plan to ban open loop scrubbers

The China Maritime Safety Administration has denied that it is planning to introduce a ban on the use of open-loop scrubbers. According to an official from the Chinese government agency, reports of a looming ban on the use of the scrubbers in Chinese waters were false. As long as equipment meets existing standards approved by the International Maritime Organization, their use was "not a problem", the official said.

The reports stemmed from comments made at a lunch organised by the Hong Kong Shipowners' Association where Dr Xie Xie, director of China's Waterborne Transport Research Institute, questioned aspects of the use of open loop scrubbers. According to Dr Xie, his comments were entirely his own opinion and he had not been speaking in any official government capacity.


Photo by Chris LeBoutillier from Pexels

The incident is only the latest in a recent flurry of polarised comments and statements about the use of open loop scrubbers and rising speculation that restrictions may yet be imposed on their use owing to environmental concerns. Open loop scrubbers are currently banned in Belgium, where government legislation imposed a ban on all water discharges long before scrubbers came to the market. Germany also has a partial ban along sections of the Rhine River.

Sinotrans Shipping linked to possible privatisation

Share trading in Hong Kong-listed Sinotrans Shipping has been halted after the dry bulker and containership operator raised the prospect of a "possible privatisation of the company". The company announced a trading halt on 18 September 2018 and made the comment in a statement.

Sinotrans Shipping is about 68% owned by Sinotrans & CSC Holdings. The latter was acquired by state conglomerate China Merchants Group in 2015. In September 2017, China Merchants Energy Shipping, the Shanghai-listed dry bulker and tanker arm of CMG, announced a plan to acquire four non-listed shipping subsidiaries from Sinotrans & CSC, as part of an internal restructuring plan within the parent group to start integrating its shipping assets. The deal was closed earlier this year.

Hutchison invests in Chinese ocean-rail corridor

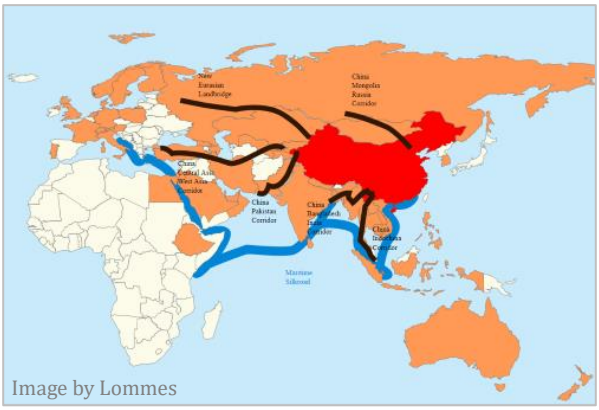
Image by Lommes

Hutchison Port Holdings Trust's logistics arm has pledged to establish a transport corridor linking Hong Kong to the Chinese interior. The move is being planned in support of China's so-called Belt and Road Initiative.

Hong Kong-based Hutchison Logistics has signed a Framework Agreement with CCI Eurasia Land Bridge Logistics Development. The two parties will jointly develop the Southern Transport Corridor – Hong Kong-Chongqing Ocean-Rail Intermodal Logistics Co-operation.

China Merchants Port profits boosted by equity disposal

China Merchants Port saw net profit surge 73.1% to HK$5.4bn ($694m) in the first half this year, having disposed of a controlled unit. Excluding one-off items, which include HK$3.7bn ($471.4m) gains from selling the stake in Shenzhen Chiwan Wharf, recurrent profit dropped 4.3% to HK$2.2bn, according to its results report.

But recurrent profit from its core business — port operation — still increased by 13.7% to HK$2.8bn, helped by a healthy growth in the number of containers throughput in the six months ended June 30.

The Hong Kong-listed company's total container throughput topped 53.8m teu, up 7.3% from the year-ago period. The overseas terminals outperformed those in China, recording an 18.2% growth in volume to 10.1m teu. The crown jewel, Colombo International Container Terminals Limited in Sri Lanka, posted a 16.4% jump in handling to 1.3m teu. Volume from Chinese mainland ports rose 5.6% to 40m teu, while that from Hong Kong and Taiwan declined 0.5% to 3.7m teu.

Deep Sea Maritime Ltd v Monjasa A/S

[2018] EWHC 1495 (Comm)

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The claimant, Deep Sea Maritime Ltd ("**Deep Sea**"), was the operator and owner of an oil product tanker. In November 2011, Deep Sea acknowledged the shipment of some bunker fuel, of which the Defendant, Monjasa A/S ("**Monjasa**"), was the shipper of the cargo. The bill of lading (the "**B/L**") had provided that the shipment was to be governed by the Hague-Visby Rules. The voyage charterparty between Deep Sea and Monjasa contained an exclusive English law and jurisdiction clause.

Monjasa commenced proceedings in relation to the alleged non-delivery of the cargo. The cargo was delivered without the production of the B/L. Monjasa alleged that the goods were not delivered to it and therefore constituted a misdelivery by Deep Sea. Deep Sea argued that it was entitled to a declaration of non-liability pursuant to Article III Rule 6 of the Hague-Visby Rules ("**the Rule**"), which provided that any claims would be discharged if suit had not been brought within the one-year of their delivery or of the date when they should have been delivered. In the High Court, David Foxton QC (sitting as the Deputy Judge) had to determine the following two issues:-

1. Did the time bar created by the Rule apply to claims for wrongful misdelivery, where Deep Sea had delivered the cargo to a third party without producing the B/L?
2. Had the suit been brought within the one-year period as stipulated in the Rule?

<u>Whether the time bar applied to claims for wrongful misdelivery</u>

The first question under this issue was whether, approached purely by reference to its language and purpose, the Rule was capable of applying to misdelivery claims. The judge held that the Rule would definitely apply to misdelivery claims. The words "in any event" were wide, and Courts in the past had also, in the context of Article IV Rule 5 of the Hague Rules, emphasised their width and rejected arguments that they were insufficient to apply to particular types of breach.

The second question was whether the Rule was limited in its application to breaches of the Hague Rules obligations. The judge was of the view that the Rule was not limited to such breaches. It was well-established that a cargo claimant could not circumvent the limitations and exclusions in the Rules by suing the shipowner in tort or other causes of action. Therefore, it also applied to breach of other duties owed by Deep Sea which occur during the period of responsibility under the Rules, and which have a sufficient connection with identifiable goods carried or to be carried. Hence, even though the obligation to deliver only upon production of the B/L was not a duty owed by Deep Sea under the Rules, the misdelivery could be regarded as a breach of Article III Rule 2, which set out the obligation carefully to load, handle, stow, carry, keep, care for and discharge the cargo. Hence, the Rule should be applicable in this case and the time bar applied.

The third question was whether there was a settled understanding that the Rule did not apply to misdelivery claims, to which the judge replied in the negative. According to his Lordship, the Rule did apply to misdelivery claims, at least where the misdelivery occurred during the period of the Hague Rules period of responsibility, and there was no fixed or settled interpretation of the Hague Rules to the contrary effect.

Whether the suit had been brought within the one-year period

The judge observed that where the claimant commenced proceedings before a court of competent jurisdiction, but was then required to proceed in an alternative forum for reasons which were not the claimant's responsibility, the first action would constitute the bringing of suit under the Rule. Thus, in this circumstance, this case would be regarded as having been brought within the one-year period. However, if the first proceedings were brought in a particular court in breach of the exclusive jurisdiction clause to bring claims in another forum, then they would normally not be considered as proceedings before a competent court and thus a "suit" under the Rule. In this circumstance, the present claim will be time-barred.

When the claimant commenced proceedings before a court of competent jurisdiction, those proceedings would be capable of defeating the Rule's time bar in another set of proceedings, providing that, at least in the time when the time bar defence was determined in the second proceedings: (i) the first set of proceedings remained effective; and (ii) the shipowner was unable to prove on the balance of probabilities that the first set of proceedings would be found to be ineffective proceedings in the forum in which they had been brought.

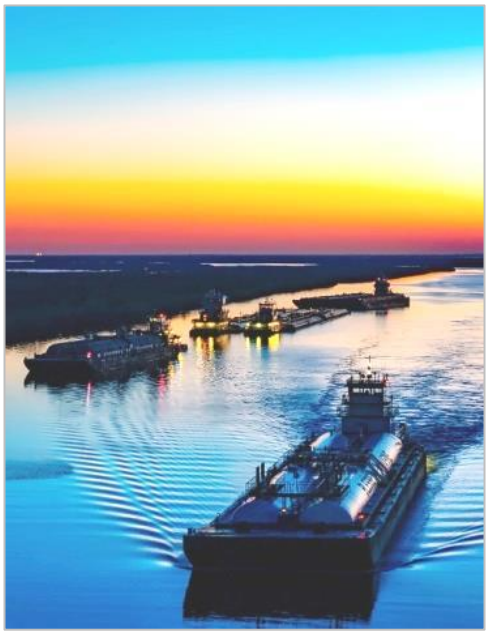
On the facts of the present case, the judge held that Monjasa could not rely on the merit proceedings first brought in Tunisia within the one-year limitation period, because firstly, they had been brought in breach of the exclusive jurisdiction clause in favour of the English Courts; and secondly, there was no exceptional circumstance, such as the first action ends due to the Defendant's election to require the proceedings to be pursued in another forum. Besides, Deep Sea had not applied for an anti-suit injunction in relation to the Tunisian proceedings.

Therefore, except the claim being pursued in the Tunisian proceedings, Monjasa's claims against Deep Sea were time barred in accordance with the Rule.

Evergreen Marine (UK) Ltd v Nautical Challenge Ltd

[2018] EWCA Civ 2173

In 2015, a ship named "Alexandra I" and owned by Nautical Challenge Ltd ("**Nautical**"), and a ship named "Ever Smart" and owned by Evergreen Marine (UK) Limited ("**Evergreen**"), collided at night in the pilot boarding area outside the narrow dredged channel by which vessels enter and exit the port. Alexandra I was inbound and waiting in the pilot boarding area to enter the narrow channel whereas Ever Smart was maintaining an outbound course after disembarking the pilot.



The Admiralty Court held that the crossing rules in Rule 15 of International Regulations for the Prevention of Collisions at Sea, 1972 ("**the Collision Regulations**") did not apply since Alexandra I was not on a sufficiently constant direction or heading to be on a course. It was waiting to pick up a pilot and not being on a course at the relevant time. Therefore, Alexandra I, as the inbound vessel, was not under a duty to keep out of the way of Ever Smart, the outbound vessel, when approaching the narrow channel.

Instead, it was held that the navigation of the two vessels in and around a narrow channel was governed by the narrow channel rules in rule 9 of the Collision Regulations in the case of Ever Smart, and the requirement of good seamanship in rule 2 of the Collision Regulations in the case of Alexandra I. Under the narrow channel rule, a vessel proceeding along a narrow channel should keep as near to the starboard side as far as was safe and practicable. By proceeding along the portside, Ever Smart has breached the narrow channel rule. This is further exacerbated by the fact that Ever Smart was traveling at an excessive and unsafe speed and was not keeping a proper lookout at the relevant time.

Due to the excessive speed, Ever Smart had contributed more to the damage resulting from the collision, and that the causative potency of her fault was therefore greater. Since Alexandra I has also breached rule 2 of the Collision Regulations, and this fault was comparatively less culpable than Ever Smart's fault. Thus, it was held that Alexandra I should bear 20% liability for the collision while Ever Smart should bear 80% of the liability.

The Issue

Evergreen appealed against the decision of the Admiralty Court on the ground that the crossing rules should apply and Alexandra I has therefore breached its duty to keep out of the way of Ever Smart.

The main issues are:

1. whether the crossing rules applied in the vicinity of a narrow channel;

2. whether the apportionment of liability for the collision by the Admiralty Court was correct.

The Court of Appeal's Decision

The Court of Appeal has dismissed the appeal as a whole and upheld the finding of the Admiralty Court.

On the first issue, the Court confirmed that the crossing rules did not apply and also expressed his concern over potential risks of conflicting requirements imposed by the crossing rules and narrow channel rules being applied at the same time. Crossing rules require the Ever Smart to keep her course on the port side whereas the narrow channel rules require the Alexandra I to keep to the starboard side. Hence, it was highly unlikely that two rules would apply at the same time. The Court also followed the well-established authorities in the first instance which stated that the crossing rules would not apply when two vessels approach each other in a narrow channel. These authorities are not meaningfully distinguishable from this case.

The Court of Appeal further held that "***both vessels****, the give-way vessel included, must be on sufficiently defined courses for the crossing rules to apply. That is of the essence of the crossing rules.*" For the duties under the crossing rules to apply, such as the duty to give way, both stand-on vessel and the give-way vessel must be on a steady course involving risk of collision and should be able to ascertain whether the other vessel is also on a defined course, having regard to some decisions of the first instance, including the obiter therein. Court also confirmed the finding of the Admiralty Court that Alexandra I was not on a sufficiently defined course as there was no sufficient basis for the Court to depart from such conclusion.

On the second issue, Evergreen argued that the Admiralty Court had erred in singling out and double-counting its excessive speed in relation to causative potency. The excessive speed was double-counted on the fact that the collision occurred and the damages sustained. The Court held that the apportionment of liability entailed a board assessment of the culpability and causative potency of each vessel's fault. The Court rejected the argument of Evergreen and held that the causative policy had two aspects. First, the extent to which the fault contributed to the fact that the collision or other casualty occurred at all. Second, the extent to which the fault contributed to the damage or loss resulting from the collision or other casualty. Since excessive speed was likely to contribute to the extent and severity of the damage, the Court is entitled to take the excessive speed into consideration again when considering the magnitude of the damage sustained.

Fehn Schiffahrts Gmbh & Co KG v Romani SPA

[2018] EWHC 1606 (Comm)

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<u>Background</u>

The goods in the cargo were fumigated during the voyage and prior to the discharge. Due to the fumigation, the cargo could not be sold as organic and the charterers had to negotiate with the buyers on a discounted price.

The charterers commenced arbitration against the shipowners and sought to recover the difference between the discounted price and the original price. The shipowners disputed the charterers' title to sue while the charterers defended by claiming the title to sue pursuant to the assignment by the consignee or themselves as the charterers. The tribunal ordered the shipowners to pay damages which were found to have been caused by the unauthorised fumigation of the cargo whilst it was in the shipowners' care and custody to the charterers.

The shipowners appealed against the tribunal's decision, arguing that since the consignee as assignor would not have been able to claim damages itself, the charterers were not entitled to substantial damages according to the general principle that "an assignee could not recover more from the debtor than the assignor could have done had there been no assignment" as contained in Chitty on Contracts (32nd edition at paragraph 19-075).

<u>The Court's decision</u>

The Court found that there was no express finding in the Award that the consignee did not suffer loss. Therefore, the Court could not decide whether there was an error of law in the tribunal's decision that the charterers had title to sue. The Court could not infer on the facts found by the Tribunal that the Tribunal was of the view that there was a substantial loss suffered by the consignee. The Court commented that the Tribunal does not appear to have distinguished between the issue of title to sue and the issue of whether the consignee suffered a loss. Thus, only if the Tribunal had explicitly found that the consignee has suffered no substantial damage would the Tribunal have incorrectly applied the law.

In the alternative case, the Counsel for the charterers submitted that the charterers had a right to sue the shipowners in its own right independent of the assignment. The Court held that, since Tribunal referred expressly to the fact that the consignee was the holder of the bill of lading and the consignee had assigned any interest in the cargo to the charterers in the assignment letter, thus, the Award was based on the Tribunal's finding that the charterers had title to sue under the assignment letter rather than under the charterparty in its own right. Thus, the Court could not uphold the Tribunal's award based on the fact that the charterers had suffered loss which would therefore entitle them to recover loss and damage under the charterparty. The appeal was therefore allowed.

How to get prepared for the 2020 global sulphur limit? (Part I)

Commencing from 1 January 2020, new regulations imposed by the United Nations International Maritime Organisation ("**IMO**") known as the 2020 global sulphur limit will take effect for ships to observe the international low sulphur fuel oil requirement. Hong Kong ship owners should not underestimate the effects of the 2020 global sulphur limit in view of its financial impacts and legal implications.

What are the current regulations?

For ships in Hong Kong, under the Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation (the Fuel at Berth Regulation) (Cap 311AA) in force, Hong Kong has required all ocean-going vessels to switch to fuels with a sulphur content not exceeding 0.50% while berthing in Hong Kong. This is soon to be repealed by the new Air Pollution Control (Fuel for Vessels) Regulation (Cap. 311AB) (the "**Regulation**") which will extend the standard to all vessels except for specified vessel types as set out in the Regulations operating within Hong Kong waters. This means that they are required to use fuel with a sulphur content not exceeding 0.50% within Hong Kong waters, irrespective of whether they are sailing or berthing.

For ships sailing or berthing outside waters of Hong Kong, they need to observe the current global limit for sulphur content of ships' fuel oil being 3.50% m/m (mass by mass) for emissions of sulphur oxides (SOx).

Apart from the global limit, ships have to comply with the existing 0.1% m/m sulphur cap in designated Emission Control Areas ("**ECAs**") when they are within waters of the ECAs. Under the International Convention for the Prevention of Pollution from Ships ("**MARPOL**") Annex VI for SOx, the ECAs established are the Baltic Sea area, the North Sea area, the North American area, and the United States Caribbean Sea area.

What is the 2020 global sulphur limit?

The 2020 global sulphur limit imposes a new international regulatory standard for sulphur

content of ships' fuel oil on board of 0.50% m/m. This means that ships using fuel with a sulphur content higher than 0.50% percent will be banned unless equipment is used to clean up the sulphur emissions. The term "fuel oil used on board" covers the use of fuel oil in main and auxiliary engines and boilers in ships.

There are two exemptions under the 2020 global sulphur limit. One is for situations which concern the safety of the ship, damaged

equipment, or saving life at sea. As for the other exemption, a ship is allowed to conduct trials for certain purposes, such as development of pollution reduction technologies, upon obtaining a special permit from the Flag State.

What controls and sanctions will be imposed on ships once the 2020 global sulphur limit come into effect?

It is compulsory for ships using fuel oil on board to obtain a bunker delivery note stipulating the sulphur content of the fuel oil. Samples may be obtained from the fuel oil for verification.

The Flag State of ships must issue an International Air Pollution Prevention Certificate to ships. The Certificate should state that fuel oil with sulphur content within the applicable limit value, or equivalent methods approved by the Flag State to clean the emissions before they are released into the atmosphere, is used by the ship. Examples of such methods include the installation of exhaust gas cleaning systems or "scrubbers" to clean up the emissions.

Port and coastal states can verify that the ship complies with the 2020 global sulphur limit through Port State Control. Moreover, they can measure sulphur oxide emissions and detect possible violations through the use of surveillance and various techniques.

Individual states to the State Parties to MARPOL may develop additional measures or controls to ensure compliance with the 2020 global sulphur limit to ensure the effective implementation of the global sulphur limit.

What are the sanctions for non-compliant ships?

Ships will be subject to sanctions by the individual State Parties to MARPOL in the event of non-compliance with the global sulphur limit. IMO does not establish any fine or sanction on ships for non-compliant ships.

How to meet the lower sulphur emission standards?

Ships can either use low-sulphur compliant fuel oil at higher costs, such as marine gasoil, a lower sulphur distillate fuel. They can also use alternative fuels such as gas and methanol, or install exhaust gas cleaning systems on their ships. Ships may also use the aforementioned approved equivalent methods, such as a scrubber, which is a kit to strip out sulfur emissions and allow ship owners to use fuel oil with higher sulphur content.

What are the financial impacts on ship owners?

Meeting the lower sulphur emission standards is easier said than done. The equipment of a scrubber alone costs between 1 million euros and 5 million euros. Even if ship owners are able to afford the cost, they may face difficulties in installing the scrubbers before 1 January 2020 due to the limited number of manufacturers and time constraints on facilities to install the scrubbers. For example, a customized engineering plan is required for installing a scrubber and the entire process can take as long as a year.

Ships without the scrubbers have to burn lower-sulphur fuels such as marine gasoil or ultra-low-sulphur fuel oil in order to comply with the 2020 global sulphur limit. It is anticipated that the 2020 global sulphur limit will increase the demand for such cleaner fuels. For instance, according to the forecast by Morgan Stanley, the demand growth for distillate fuels will

increase by at least 3.2 million barrels per day in the next three years. It goes without saying that the increase in demand will drive up the price of distillate fuels. While fuel accounts for approximately half a ship's daily operating cost, the rise in fuel cost will pose a challenge for ships already coping with various environmental regulatory challenges.

To conclude, the challenges facing ship owners are real in view of the significant increase in the daily operating cost of ships in the future. Ship owners may struggle with the cost of fitting ships with the scrubbers and the high price for cleaner fuels.

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