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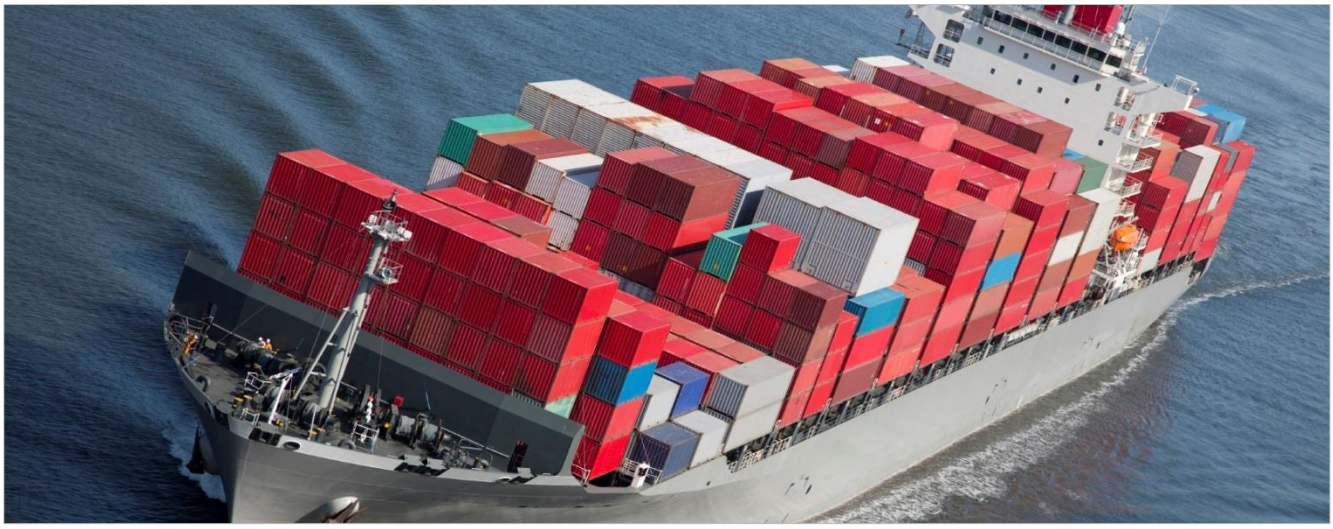

Cover Story

The Xin Chang Shu – Another Wrongful Ship Arrest Case

Introduction

Ship arrest, which allows a party to seize a vessel as security for a claim or to enforce a maritime lien, is a draconian remedy and may cause economic hardship on the shipowner's operations.

When facing a claim of ship arrest, the shipowner may apply to strike out the proceeding, set aside the warrant of arrest and claim damages for wrongful arrest. This article focuses on the principles governing wrongful arrest and award of damages, as demonstrated by a recent Singapore admiralty appeal case *The Xin Chang Shu* [2015] SGHC 308.

Background

The Plaintiff, Big Port Service DMCC, and OW Bunker Far East (Singapore) Pte Ltd ("**OW Singapore**") entered into a contract (the "**Contract**") for the supply of 4,000 metric tonnes of marine bunker fuel to Xin Chang Shu (the "**Vessel**"). On 29 November 2014, the Plaintiff, while alleging that OW Singapore had acted as the Defendant's agent in entering into the Contract on the Defendant's behalf, commenced admiralty *in rem* proceedings against the Defendant for money due under the Contract.

On 9 December 2014, the Plaintiff obtained a warrant of arrest against the Vessel (the "**Warrant of Arrest**"). The Vessel was arrested on 10 December 2014 and released on 12 December 2014 when the Defendant agreed to provide security by making payment to the court to secure the release of the Vessel. On 15 December 2014, the plaintiff applied for a stay of proceedings in favour of arbitration. Subsequently, on 29 December 2014, the defendant applied to strike out the proceedings, set aside the Warrant of Arrest and sought damages for wrongful arrest. The assistant registrar (the "**AR**") ordered that the *in rem* writ be struck out while the other applications be dismissed.

Both parties appealed against the decision of the AR, with the Plaintiff appealing against the strike out of its writ and dismissal of its stay application while the

Defendant appealing against the refusal in awarding damages for wrongful arrest and also in setting aside the Warrant of Arrest on the basis of material non-disclosure. This article will focus on the Defendant's claim for damages for wrongful arrest.

Principles governing wrongful arrest

A shipowner may be entitled to damages if the ship arrest is proved to be wrongful. An arrest is wrongful if "*the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence on the plaintiff's part*": *The Evangelimos* (1858) 12 Moo PC 352; 14 ER 945 (the "**Test**"). The Test entails on the one hand a subjective enquiry into whether the arresting party had a genuine and honest belief at the time of the arrest that the arrest was legitimate, and on the other hand an objective enquiry into the prevailing circumstances and the evidence available at the time of arrest.

The focus of the enquiry is on the malice of the arresting party. Malice can be actual if there is direct evidence on the arresting party's state of mind or belief at the time of the arrest. Malice can also be inferred if the case is so hopelessly lack of merit which warrants a finding that the claim is brought "*unwarrantably*" or seriously lacking in "*colour*" or "*foundation*". Inferred malice may be found if there is material non-disclosure on the part of the arresting party or the writ of summons does not disclose a reasonable cause of action: *The Vasiliy Golovnin* [2008] 4 SLR(R) 994.

Judgment

The Court held that the arrest of the Vessel was wrongful:

1. the arrest of the Vessel was both factually and legally unsustainable; and
2. the Plaintiff failed to disclose material facts when seeking the Warrant of Arrest.

The lack of factual and legal basis for the Warrant of Arrest

The Plaintiff's claim, which was solely premised on the allegation that OW Singapore acted as the Defendant's agent in entering into the Contract, was held to be both legally and factually unsustainable.

The factual foundation of the Plaintiff's case was held to be misconceived. While the Plaintiff alleged that OW Singapore provided the Plaintiff important commercial details in respect of the supply of marine bunker fuel, which purportedly gave the Plaintiff the appearance that OW Singapore was acting as the Defendant's agent, the Court however found that such important commercial details in fact emanated from the Plaintiff instead of OW Singapore. Also, the Court referred to the correspondence between the Plaintiff and the Defendant prior to the arrest of the Vessel. While the direct communication between the parties began with a letter of demand dated 12 November 2014, no assertion of OW Singapore being the Defendant's agent could be found in any of the correspondence until the Plaintiff's solicitors' letter to the Defendant dated 17 December 2014 (which was issued after the arrest of the Vessel). The Court rejected that the alleged agency of the Defendant was the Plaintiff's genuine belief during the time of the arrest of the Vessel. Otherwise, the same would be specifically highlighted in the parties' correspondence all along.

The legal foundation of the Plaintiff's case was premised on its own General Terms and Conditions for Sale and Delivery of Marine Bunkers ("**GTC**"), which asserted that OW Singapore was contracting as agent on the Defendant's behalf. OW Singapore was alleged to have confirmed acting as the Defendant's agent by signing the Bunker Sale Confirmation dated 25 September 2014 issued by the Plaintiff, which incorporated the GTC by reference. The Court held that the GTC could not assist the Plaintiff to establish an agency relationship between OW Singapore and the Defendant, as a person cannot hold itself out as an agent on

behalf of a principal. On the same footing, a third party cannot unilaterally establish an agency relationship by relying on its own terms without the principal's consent. Examining all the evidence, nothing suggested that the Defendant was aware of OW Singapore's involvement in the Contract, let alone the appointment of OW Singapore as its agent.

The Court held that the Plaintiff's case, which was premised on the alleged agency of the Defendant, lacked both factual and legal basis. The Plaintiff therefore knew or ought to have known that there was no agency relationship between the Defendant and OW Singapore. The Plaintiff's claim and the arrest of the Vessel were held to be so unwarrantably brought, or brought with so little colour that malice could be implied, which rendered the arrest wrongful.

The non-disclosure of material facts

Apart from the lack of factual and legal basis of the Plaintiff's case and the arrest of the Vessel, the Court also found malice on the basis of the non-disclosure of material facts. The Court held that the Plaintiff was obliged to disclose "*defences that might be reasonably raised by the defendant*", which extended to "*plausible, and not all conceivable or theoretical, defences*". Plausible defences refer to matters which are "*of such weight as to deliver the "knock-out blow" to the claim summarily*": *The Vasiliy Golovnin* [2008] 4 SLR(R) 994

The plaintiff was aware of the fact that the Defendant had entered into a contract with OW Bunker China Limited ("**OW China**") for the purchase of the same bunkers on different terms as well as at a higher price (the "**OW China's Contract**"). The Court held that the OW China's Contract was not only relevant to the Plaintiff's claim, but operated as the effective "knock-out blow" to the Plaintiff's claim. This significant fact should have been brought to the attention of the AR specifically. Given the importance of the differences in the terms between the Contract and the OW China's Contract, the mere exhibiting of the OW China's Contract in the Plaintiff's arrest affidavit was held to be insufficient to discharge the duty of full and frank disclosure. The Court further held that this case was not simply a case with "so little foundation", or "no foundation", but was a case based on a false foundation.

Based on the above, the Court held that the Plaintiff knew or ought to have known that there was no agency relationship between the Defendant and OW Singapore and that it had no right to arrest the Vessel at the time of the arrest. Due to the lack of factual and legal basis of the Plaintiff's claim and the non-disclosure of material facts in establishing the agency relationship, the Plaintiff's case had "so little foundation" that the malice threshold was crossed.

The Court therefore ordered that the Warrant of Arrest be set aside and that the Plaintiff shall pay the Defendant damages to be assessed for the wrongful arrest of the Vessel. It was noteworthy that the Court also suggested that the setting aside of the Warrant of Arrest was not a prerequisite to pursue a claim for damages for wrongful arrest.

Conclusion

This case demonstrates that in order to seek damages for wrongful arrest of vessels, the shipowners must prove that the arrest was so unwarrantably brought or brought with so little colour or foundation which implies malice. While the Test is the guiding principle on wrongful arrest of vessel, the issue of how malice can be inferred is in practice inevitably a matter to be determined on a case-by-case basis.

Dry bulk company CSC Phoenix to become dredging firm

According to the exchange filing record, the Shenzhen-listed CSC Phoenix has announced a plan involving asset swaps and new offerings which amount to more than ¥19.6 billon ($3bn). Following the reorganization, CSC Phoenix would become a dredging and sea reclamation company.

The plan involves disposal of loss-making listed units and consolidation of operations. CSC Phoenix had sustained ¥7.3 billion in losses between 2011 and 2013. Notwithstanding the slight recovery from losses, CSC Phoenix can merely maintain its listed status with weak sustainability and it is difficult to meet investors' demand. Therefore, plan is made to inject assets. Tianjin Shunhai Shipping Co, a private Chinese shipping firm, will inject 100% equity of its subsidiary Ganghai Tianjin Construction Co into CSC Phoenix, while returning all assets and liabilities of CSC Phoenix's original dry bulker business to Sinotrans & CSC Holdings. The gap in value will be filled by new offerings from CSC Phoenix to the shareholders of Ganghai Tianjin Construction Co.

DP World confirms $1.9bn Chinese port venture

Dubai-based DP World is set to take part in a landmark $1.9 billion investment project on port development in China. It is confirmed that DP World's stake in each of the venture inside the project would be around 20%.

All partners of the project, including DP World, involved in a joint venture in Chinese terminals for years up to 2020. It is expected that a smart container terminal in the port of Qingdao and a second port in Tianjin City will be built.

Courage Marine sells 1997 panamax for demolition

Following the moves to dispose of its subsidiaries and to close some offices in Asia in early December, it is announced that the Singapore- and Hong Kong-listed bulker owner, Courage Marine, has sold an 18-year-old pananmax dry bulk carrier, the 72,000 dwt Courage, to a scrapyard for $2.5 million, in order to generate cash or funding for other purposes. The vessel was originally bought in January 2014 at $8.6 million. Amid the dismal dry bulk market and slowing demand for raw materials, especially from China, Courage Marine, is reported to suffer losses most of the year.

Brightoil buys 10 bunker barges for $84m

Hong-Kong listed energy company, Brightoil, bought 10 bunker barge newbuilding contracts for $84 million from Shenzhen Brightoil Shipping. Shenzhen Brightoil Shipping is a private company owned by Dr Sit Kwong Lam, the chairman, chief executive and controlling shareholder of Brightoil. Negotiations were made on the basis that each vessel would be valued at $8.5m, based on an independent valuation of a similar specification ship, Guang Hui 326, earlier this year.

It is expected that the construction costs for each vessel is around $7.9 million. The ships will be built by Rizhao Kingda or other shipyards agreed by the parties.

Hong Kong Liner Shipping Association seeks exemption under the new Competition Ordinance

In mid-December, Hong Kong Liner Shipping Association has formally applied to the Competition Commission for a block exemption order for liner shipping agreements. Over 95% of the liner ships in Hong Kong have these agreements including "vessel sharing agreements" in which parties agree on technical and operational arrangements relating to the provision of liner shipping services, including the coordination or joint operation of vessel services.

If the application fails, shipping companies may face a penalty up to 10% of their turnover. The application results are not yet known at the moment but it is hoped that the exemption can help to maintain Hong Kong's competitiveness and prevent more container ships from switching to another port.

Essar Shipping Ltd v Bank of China Ltd

[2015] EWHC 3266 (Comm), Queen's Bench Division, Commercial Court, Mr Justice Walker, 13 November 2015

The claimant operated the vessel "The MV Kishore" under a bareboat charter. The defendant bank, having paid the seller of the cargo, became the holder of a bill of lading which incorporated the charterparty. The charterparty was to be governed by English law and disputes were to be submitted to arbitration in London. The defendant bank brought proceedings in both Qingdao and Tianjin Maritime Court. The claimant challenged the jurisdiction of the Qingdao Maritime Court but it was unsuccessful. There had not been judgment on the claimant's appeal yet. The claimant now sought an anti-suit injunction to restrain the defendant from continuing proceedings (in Qingdao) in breach of the London arbitration agreement.

The grant of injunction under section 37 of the Senior Courts Act 1981 is discretionary. Following *Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, the Court found that in considering to grant an injunction to restrain proceedings in a foreign court in breach of an arbitration agreement governed by English law, it is not about whether it is reasonable to challenge the foreign court jurisdiction, nor whether there will be long delay there, but it is a question of whether the application in the English court had been made properly. In this case, the anti-suit injunction should have been made no later than the end of November 2014. The decision of the claimant to defer issuing a claim form pending its Qingdao jurisdiction challenge is not a good reason to extend the time bar for the anti-suit injunction application. Given there was also no real prospect of success to the Qingdao jurisdiction challenge, the delay was sufficiently serious that the injunction should be refused. Therefore, the claim was dismissed.

The M/V Melissa K v The M/T Tomsk

[2015] EWHC 3445 (Admlty), Queen's Bench Division, Admiralty Court, Mr Justice Males, 27 November 2015

Vessels of the claimant and the defendant collided and resulted in damage to both vessels. In consideration of agreements not to arrest the vessels, the P&I insurers of both vessels provided letters of undertaking for the damage to the other vessel. Pursuant to Merchant Shipping Act 1995 (the "Act"), proceedings should be brought within 2 years from the date of collision (i.e. 28 April 2014). The claimant would have 12 months thereafter for service. By way of a Collision Jurisdiction Agreement, the 2-year time bar was consecutively extended for 6 months twice. The second agreement introduced a deadline for service by 28 April 2015. However, the claimant issued (but did not serve) an in rem claim on 28 April 2015. In May 2015 the claimant accepted the offer made in March 2015 of 50/50 liability with quantum to be referred to the Admiralty Registrar (the "Offer").

The Court dismissed the claimants' application for (1) an order confirming the liability was settled upon acceptance of the Offer; or (2) an extension of time and (3) remedy for procedural error. It is held that the true meaning of an offer is to be ascertained applying ordinary principles of construction (including taking account of the relevant background and context) without attempting to shoehorn it into any particular category. Taking into account the background of the second extension containing the time bar for service, the Court found that the Offer would expire and the Offer was clearly not intended to displace the time bar. Further, mandatory extension of time under section 190(6) of the Act did not apply here when a jurisdiction agreement had been concluded enabling proceedings to be served whenever a party chose to do so, and where the parties had agreed not to arrest the other's vessel. There is also no discretionary extension of time under section 190(5) of the Act because the claimants could have issued and served a claim form at any time prior to the agreed deadline.

Crescendo Maritime Co v Bank of Communications Co Ltd

[2015] EWHC 3364 (Comm), Queen's Bench Division, Commercial Court, Mr Justice Teare, 25 November 2015

A Chinese shipyard ("the Builder") agreed to construct and sell a vessel to the claimant Crescendo. Crescendo was funded by a loan from Alpha Bank ("Alpha"). If the shipbuilding contract is cancelled, the Builder needs to repay the instalment price. As a security for such repayment, Refund Guarantees were provided by the respondent bank to Crescendo. Both the shipbuilding contract and the Refund Guarantees were governed by English law and disputes were to be referred to arbitration in London.

The Builder terminated the contract and commenced arbitration in London. Crescendo thus sought repayment under the Refund Guarantees but the respondent declined to pay pending the outcome of dispute between Crescendo and the Builder. Crescendo thus commenced arbitration in London and the tribunal concluded that Alpha could be joined to the proceedings. The respondent then played no further part in the arbitration and commenced proceedings in China against the Builder, Crescendo and Alpha, arguing that there was fraudulent ante-dating of the shipbuilding contract and the Refund Guarantees were void. Crescendo and Alpha successfully obtained interim anti-suit injunction. In 2014 the arbitrators concluded that Crescendo had validly cancelled the shipbuilding contract and the Builder was liable to repay the instalments and that there was no fraud and the respondent should honour the Refund Guarantees.

The Court granted the present application by Crescendo for a permanent anti-suit injunction against the Chinese proceedings as the claimant has a contractual right to arbitrate disputes within the clause in London. Although Chinese court is the natural forum to determine the issue of fraud, it is irrelevant when the parties have chosen London arbitration as the forum. The respondent could not argue there is a risk of inconsistent decisions as it is the respondent who decided to allege fraud both in arbitration and in China.

The owners and/or demise charterers of the vessel "Nordlake" v The owners of the vessel "Seaeagle"

[2015] EWHC 3605 (Admlty), Queen's Bench Division, Admiralty Court, Mr Justice Teare, sitting with Commodore David Squire and Captain Stephen Gobbi as Nautical Assessors, 18 December 2015

The vessel "Nordlake" tried to avoid a collision with vessel "Seaeagle" but thereafter collided with the Indianan warship "Vindhyagirl". A fire broke out on "Vindhyagirl" and she sank. The owner of "Vindhyagirl" sued the owner of "Nordlake" in India, who later sued the owner of "Seaeagle" in the current proceedings and alleged that collision was partly caused by the negligence of "Seaeagle" and three other Indian ships. "Seaeagle" counterclaimed that it was the negligence of "Nordlake" and three other Indian ships which caused the collision.

The Court held that Rule 9 of the Collision Regulations applied that "Nordlake" was obliged to keep as near to the outer limit of the channel as lay on her starboard side as was safe and practicable. It is also found that the collision was caused by the fault of both "Nordlake", "Vindhyagirl", "Seaeagle" and another Indian warship and they are apportioned with 6%, 20%, 10% and 10% fault respectively, pursuant to section 187 of the Merchant Shipping Act 1995. The "Nordlake" is entitled to limit its liability to "Seaeagle" because the burden of proof is upon "Seaeagle" (i.e. the person challenging a right to limit) to prove conduct barring the right to limit but "Seaeagle" had not submitted any positive case.

How to Register a Mortgage of a Vessel in Hong Kong?

How to register?

For local vessels, registration is to be made with a cover letter to the Marine Department for endorsement with (1) the original and copy of the Mortgage Deed and (2) original of Certificate of Ownership. The original documents would be returned later. There is no need to submit any specific form.

Regarding flag ships, a specific form (form no. "RS/M1") in A3 size must be used for the registration of a mortgage. It is also recommended to provide a cover letter stating when the mortgage would commence and whether a certified transcript is needed.

If the ship is a local vessel and also a flag ship, then it is necessary to do registration under both procedures mentioned above.

For provisionally registered ships, the mortgagee is also required to produce a "Confirmation by Mortgagee" to the Hong Kong Shipping Registrar. This confirmation in the specified form is to confirm that the mortgagee has sighted the original title document; and knows that the original title document has not been produced to the Registrar at the time of registration.

Further, if the mortgagor is a company incorporated in Hong Kong or a non-Hong Kong company registered under Part 16 of the Companies Ordinance (Cap. 622), the mortgagee should also register the mortgage and other documents evidencing the mortgage (e.g. Deed of Covenant and General Assignment) against the mortgagor as a charge at the Companies Registry.

What are the effects of registration?

According to section 45 of the Marchant Shipping (Registration) Ordinance, mortgages rank in priority according to the date and time when they are presented and accepted for registration, instead of the date of the actual mortgage instrument.

Who can register?

An individual, joint mortgagees or bodies corporate may be entered in the Hong Kong Shipping Register as mortgagees. Mortgagees need not be "qualified persons". Foreign bodies corporate can also be registered as mortgagees.

Can a mortgage be discharged?

Yes, it can. A mortgagee should submit a memorandum of discharge of mortgage in a specified form (Form No. "RS/M2") together with the original mortgage instrument to the Registrar for its discharge, otherwise, it would remain on the Hong Kong Shipping Register. The discharge with the date and time will then be entered on the Hong Kong Shipping Register. A memorandum of discharge by a body corporate must be executed under its seal.

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