



## **“ALAS” –Hong Kong Court of Appeal allows arrest to enforce an award**

A significant decision for claimants offering the option of a ship arrest where the underlying purpose is to enforce an unsatisfied arbitration award.

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The position that the right to a ship arrest is lost once an arbitration award is made thereby merging the original cause of action into it was recently addressed by the Hong Kong court in the case of *Handytanker KS v Owners and/or Demise Charterers of Alas*.<sup>1</sup>

In the reasons for the decision handed down on 9 July 2015, the Court of Appeal confirmed the availability of a cause of action *in rem* following an arbitration award so long as it remains unsatisfied.

### **The background**

The claimant owners obtained a final award in their favour in relation to unpaid hire under the charter for the ALAS. The award was not paid and the owners applied to arrest one of the charterers' vessels, the DEWI UMayI.

In the application, the owners submitted:

1. The claim was within section 12A(2)(h) of the High Court Ordinance,<sup>2</sup> being a claim “*arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship*”; and
2. The arrest was not for the purpose of enforcing the award but to obtain security for the anticipated judgment in the Hong Kong proceedings.

### **The High Court decision**

The arrest application was granted and the vessel arrested. However, the charterers applied to set aside the arrest on the following grounds:

1. The arrest was an abuse of process;
2. The arrest was to enforce the arbitration award which was not a recognised head of claim under section 12A(2) of the High Court Ordinance and accordingly the court had no jurisdiction; and
3. The arrest procedure was not available to the owners since their claim had crystallised into the award.

The court held that owners were entitled to arrest since their claim was pleaded on the basis of the original cause of action which was for unpaid hire and not based on a claim arising out of the award. The court followed the *no bar rule* established in *THE RENA K*,<sup>3</sup> by which a cause of action *in rem* (e.g. a right to arrest a ship) does not merge into a judgment *in personam* (i.e. a judgment against a party) so long as the judgment remains unsatisfied. The *no bar rule* also applies to arbitration awards.

The charterers argued that in light of the House of Lords decision in *THE INDIAN GRACE* (No. 2),<sup>4</sup> *THE RENA K* and the *no bar rule* should no longer be regarded as good law except in situations involving maritime liens. In *THE INDIAN GRACE* (No. 2), the plaintiff who had obtained a judgment in Indian *in personam* proceedings was 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. The court rejected the charterers' argument by referring to the Hong Kong equivalent of the 1982 Act - section 5(1) of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, Cap 46 (Cap 46). It held that section 5(1) does not prevent *in rem* actions from being commenced in Hong Kong involving foreign made arbitration awards.

### **The Court of Appeal decision**

The charterers applied for leave to appeal. This was dismissed by the Court of Appeal which held that the owners were not prevented from bringing the *in rem* proceedings given that the arbitration award had remained unsatisfied.

The Court of Appeal explained that in *THE INDIAN GRACE* (No. 2) where the same parties appeared in the foreign *in personam* proceedings and the English *in rem* proceedings, section 34 of the 1982 Act operated to prevent the *in rem* action being pursued, thereby nullifying the *no bar rule*. There was no disapproval of *THE RENA K* nor a scale back of the “*no bar rule*”.

Like section 34 of the 1982 Act, section 5(1) of Cap 46, applies only to foreign judgments and not to arbitration awards. The section has no application and the “*no bar rule*” applies.

## Comments

This is an important decision for claimants offering the option of a ship arrest where the underlying purpose is to enforce an unsatisfied arbitration award. To release the ship from the arrest, the respondents will need to provide security for the claim.

However, it should be emphasised that care must be taken to properly frame the claim so that it falls within one of the categories of claim in section 12A of the High Court Ordinance and not as an application to enforce the arbitration award.

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1 HCMP2315/2014.

2 The High Court Ordinance governs the admiralty jurisdiction in relation to arrest. There are 18 classes of claims under Section 12A(2) of the Ordinance which the Hong Kong court can exercise its admiralty jurisdiction.

3 [1978] 1 Lloyd’s Rep 545.

4 [1998] 1 Lloyd’s Rep 1.