Unpaid bunkers: Australia allows ship arrest for a foreign maritime lien

A change in approach by the Western Australia Federal Court has opened up the possibility for claimants having a maritime lien under foreign law to arrest ships in Australia.

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Introduction

Previous Gard Insights and Alerts on the OW Bunker (OWB) saga have highlighted the challenges posed by lack of international uniformity in dealing with the consequences of unpaid bunkers. One factor concerns the treatment of maritime liens, which attach to a vessel and provide a ground for arrest. In Australia, it has been unclear whether *foreign* maritime liens are enforceable through ship arrest, when the underlying claim would not give rise to a maritime lien under Australian substantive law. On 11 September 2015, the Western Australia Federal Court (the FCA) made a groundbreaking decision in the *SAM HAWK [2015] FCA 1005* allowing the vessel to be arrested for a claim for unpaid bunkers.

Facts

The vessel was time-chartered to Egyptian Bulk Carriers (EBC), which was required to provide bunkers to the vessel. EBC was not authorised to contract for necessaries on behalf of the owners nor to bind the vessel with a maritime lien for necessaries.

EBC contracted with Reiter Petroleum (RP) for bunkers to be stemmed at Istanbul. RP arranged with KPI Bridge Oil for Socar Marine to supply the bunkers. The supply contract was subject to Canadian law and provided that RP was entitled to a lien wherever it finds the vessel and US law to determine the existence of a maritime lien.

The vessel owners were not involved in the negotiations for the supply and delivery of bunkers and were not aware of RP's role. They had advised Socar Marine that neither they nor the vessel accepted any liability to pay for bunkers and EBC were responsible.

On 5 November 2014, RP filed an *in rem* claim for unpaid bunkers and arrested the vessel in Albany, Western Australia.

Application to strike out the arrest

The owners applied for the writ to be set aside for lack of jurisdiction on the ground that the supply of bunkers was not a recognisable maritime lien under Australian law. They relied on the (controversial) majority decision set out in the Privy Council case of the *Halycon Isle [1981] AC 221,* which held that the existence of a maritime lien was a matter of procedure and therefore subject to the domestic law of the place of arrest.

RP argued that under the contract with EBC, RP had a maritime lien under Canadian or US law, which was sufficient to constitute a *proceeding on a maritime lien* under section 15 of the Australian Admiralty Act 1988 (the Act).

Maritime liens under the Australian Admiralty Act 1988

When drafting the Act, the Australian Law Reform Commission concluded that the question of which maritime liens should be recognised under Australian law should be left open for the courts to resolve. Therefore, section 15 (2) is carefully worded as follows:

A reference in subsection (1) to a maritime lien **includes** *a reference to a lien for:*

• *Salvage*

• *damage done by a ship*

• *wages of the master or of a member of the crew of a ship*

• *master's disbursements.*

In the *GLOBAL PEACE (2006) 154 FCR 439* case, the FCR noted that the word *includes* in section 15(2) means the Act leaves open the possibility of other maritime liens being recognised beyond those listed - such as a foreign maritime lien. Nine years later along comes the SAM HAWK judgment.

Judgment

The FCA found that there was jurisdiction for the purposes of section 15 of the Act. The FCA rejected the Halycon Isle case, finding that a lien will operate independently of the fortuitous choice of venue in which a ship is arrested. The court followed the reasoning in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (Pfeiffer), where the High Court of Australia found that matters affecting the existence, extent or enforceability of the rights or duties of the parties are *substantive* not procedural issues.

Conclusion

This decision will be highly persuasive on the State Courts and Federal Court in Australia. While not a binding precedent from the High Court, the fact that this decision applies the High Court's findings in Pfeifferon the distinction between substantive and procedural matters makes its reasoning all the more forceful. Bearing in mind the OWB scenario, this decision may result in more ship arrests in Australia by aggrieved physical suppliers, particularly as this may not be possible in other jurisdictions in the region, such as Singapore, Malaysia and Hong Kong. It remains to be seen whether courts in other common law jurisdictions will adopt the Sam Hawk approach.

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