

## SHIPPING

# THE ROAD LESS TRAVELLED: ARRESTING SHIPS TO ENFORCE MARITIME ARBITRATION AWARDS

The layman rarely gets excited over legal developments unless they have very real, practical implications for its business. Normally the preserve of shipping litigators, the esoteric law of merger in relation to arbitral awards and causes of actions *in rem*, promises to change that.

A recent judgment of the Hong Kong High Court sheds light on a previously rarely used route to enforcement of maritime arbitration awards – arresting the defaulter’s ship. The Court upheld the arrest of a vessel despite the claimant already having obtained an arbitration award in England. The Court ruled that the arrest should stand because the claim out of which the award originated properly involved the *in rem* jurisdiction of the Court and this remained alive for as long as the arbitration award remained unsatisfied.

### The Facts

The claimant Owners time-chartered their vessel to the defendant Charterers for five years. The Charterers defaulted on hire and the Owners withdrew the vessel from the Charterers’ service and brought the charterparty to an end.

The charterparty contained an LMAA arbitration clause and the Owners commenced arbitration proceedings against the Charterers. At approximately the same time, the Owners issued *in rem* writs against the Charterers’ vessels in Hong Kong. Typically, the Owners hoped to arrest (a) vessel(s) so as to obtain security for their claim. The writs did not refer to the arbitration proceedings in respect of the underlying claim.

The Owners finally obtained an arbitration award on 1 March 2013. No vessels belonging to the Charterers had called in Hong Kong in the intervening period and, as such, no security for the Owners’ claim had been obtained.

About a year after the award, which remained unsatisfied, a vessel belonging to the Charterers called into Hong Kong. The Owners invoked the Court’s *in rem* jurisdiction by arresting the Charterers’ vessel.

The Owners made it clear in the arrest papers that:

- a. their claim fell under section 12(A)(2)(h) of the High Court Ordinance, Cap 4 (the “Ordinance”), i.e. it was a claim “arising out of an agreement relating to the use or hire of a ship”; and
- b. the arrest was sought for the purpose of providing security for the anticipated judgment *in rem* in the arrest action and not as a means of enforcing the award.

### The Judgment

The Charterers applied to set aside the arrest on the grounds that the Court had no *in rem* jurisdiction in respect of the Owners’ claim or that the Owners had improperly invoked the *in rem* jurisdiction of the Court.

The Charterers argued that the arrest of the vessel was in the nature of an application to enforce the award and in Hong Kong there is no head of Admiralty jurisdiction which permits the Owners to enforce a foreign arbitration award as such. The proceedings and arrest were therefore an abuse of process and ought to be set aside: *The Chong Bong* [1997] 3 HKC 579; *The Bumbesti* [2000] QB 559.

The Charterers further submitted that the procedure of arrest was not available once the Owners’ claim had crystallised in a judgment or arbitration award.

The Court agreed that there is no head of Admiralty jurisdiction in Hong Kong for the enforcement of arbitration awards as such. Nevertheless, following an established line of both English and Hong Kong authorities, the Court held that:

- a. the Court would have *in rem* jurisdiction if the claim were to be based on the original cause of action under the charterparty (*The Bumbesti*);
- b. a cause of action *in rem* does not merge in a judgment *in personam*, but remains available so long as, and to the extent that, the judgment remains unsatisfied, and this principle equally applies to arbitral awards (*The Rena K* [1979] QB 337);
- c. *The Rena K* was expressly approved by the English Court of Appeal in *The Tuyuti* [1984] QB 838, both of which were followed as “obviously correct” by the Hong Kong High Court in *The Britannia* [1998] 1 HKC 221; and

- d. In the circumstances, it was “perfectly legitimate” for the Owners to arrest the vessel and keep her under arrest as security in respect of any judgment which they may obtain after a hearing in the *in rem* proceedings.

### Clarification and Guidance

Justifiable confusion may arise as to how the same cause of action may be pursued in a new forum when it has already been adjudicated before another forum (in this instance, the Hong Kong High Court and the LMAA tribunal respectively), irrespective of whether it remains unsatisfied.

The answer lies in the peculiarity of the common law system. Whilst it is theoretically the same cause of action, it is against a different defendant/respondent. An action *in rem* is against the ship itself whereas an action *in personam* is against the shipowner.

It is for this reason that a potential claimant needs to frame its claim against the ship as one which falls within the category of maritime claims under the relevant legislation (rather than refer to it as being a claim to enforce an arbitration award).

### Final Comment

The judgment of the High Court caused some consternation when it came out. Yet, it did not broaden the Admiralty jurisdiction in Hong Kong nor did it offer a previously unavailable route to enforcement.

Albeit within strict parameters, the High Court did little more than re-affirm a well- established, if neglected, line of authorities with regard to the Court's *in rem* jurisdiction. If anything, the Owners deserve credit for pleading their claim so carefully.

The aggrieved should take note and the defaulters should beware.

(The full case citation of *The Kombos* is [2014] HKCU 1698 or [2014] 4 HKLRD 160)

*NOTE: The Charterers' leave to appeal to the Court of Appeal was denied by the first instance judge, as was a subsequent application directly to the Court of Appeal. At the time of publication of this article, the Court of Appeal has not handed down its reasoned judgment for refusing leave.*

### Contacts

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