Ship Arrest to enforce an Arbitral Award?

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Disclaimer[ii]

Introduction

Shipping contracts often include an arbitration clause, for example, a voyage charterparty in an amended BIMCO GENCON 1994. When a dispute arises between the parties, say the charterer alleges the cargo was short delivered which the owner denies, the charterer may commence arbitral proceedings to pursue his claim, and might ultimately obtain an award. At the same time, a cargo claim is one within the admiralty jurisdiction of the court,[1] for which the ship (or her sister ship) may be arrested.[2] Hence, questions of ship arrest come into play at three stages here. First, whether the charterer may arrest the ship before the arbitral proceedings to secure the claim. Second, whether he may arrest the ship during the arbitral proceedings to obtain security. Third, whether he may arrest the ship to enforce an award. This article concerns only the third question.

Summary

Enforcement of awards does not fall within any of the limbs of admiralty jurisdiction in 20 Senior Courts Act 1981 ("**SCA 1981**"). Consequently, a ship may not be arrested to enforce an arbitral award. But there is no barrier to arresting a ship on the original cause of action that falls within the admiralty jurisdiction in rem, even after obtaining an award, so long as, and to the extent, the award is unsatisfied: *The Atlas* [2014] HKCFI 1281. The position in England is no different from that in Hong Kong. The cases below will elaborate this.

[1] Sec 20(2)(h) Senior Courts Act 1981.
[2] Sec 21(4) Senior Courts Act 1981.

***The Bumbusti* and *The Chong Bong*: No arrest to enforce an arbitral award**

In *The Bumbusti* [2000] QB 559, the owners gave a bareboat charter of their vessel "Dacia" to the claimants. The charterparty contained an arbitration clause. A dispute arose between the them as to the termination of the charterparty and was arbitrated, resulting in awards in favour of the claimants. The awards remained unsatisfied, and the claimants commenced an action in rem against the vessel "Bumbusti", a sister ship of the vessel "Dacia", and arrested the vessel "Bumbusti". The sworn evidence leading to the arrest stated that one of the awards remained wholly unsatisfied and that the aid of the court was sought "*to enforce payment of or security for the same*." It was not doubted that a claim in respect of the original cause of action, that is the wrongful termination of the charterparty, would fall within s 20(2)(h), being a claim arising out of an agreement relating to the "use or hire" of a ship. Aikens J analysed the conflicting precedents on arresting a vessel to enforce an arbitral award. He observed that when an award was made, an original cause of action for the enforcement of the award arises, that replaces the original cause of action. He further observed that the basis of a claim to enforce an award is that the unsuccessful party breached an implied agreement to fulfil any award, such an agreement being implied in the arbitration agreement. He held that it is "*at least, one step removed from the 'use or hire' of a ship*". Consequently, he held that the claim to enforce an award was outside the scope of s 20(2)(h), hence outside the admiralty jurisdiction of the court, and set aside the action and the arrest.

A similar conclusion was reached by the Hong Kong High Court in the earlier case of *The Chong Bong* [1997] HKCFI 306. In that case, a writ in rem was issued to enforce an arbitral award given in a charterparty dispute. The statement of claim pleaded only the causes of action essential for an award enforcement claim, and not a single line to plead the cause of action for a charterparty claim. Waung J set aside set aside the writ and the arrest.

***The Atlas*: Arbitral award is no bar to arresting the ship on the original cause**

The Hong Kong case of *The Atlas* [2014] HKCFI 1281 then came. In that case, the plaintiff gave a time charter of their vessel "BETH" to the defendant-owners. Hire was

not paid and the plaintiff withdrew vessel from service. Pursuant to an arbitration clause in the charterparty, the plaintiff commenced arbitration for damages and hire, and obtained an award in their favour. The award remained unsatisfied, and the plaintiff commenced an action in rem against the vessel "Atlas" and arrested her.

The endorsement of claim specifically put the claim as one falling under s 12A(2)(h) of the Hong Kong High Court Ordinance, Cap 4, which is identical to s 20(2)(h) of the SCA 1981. The Plaintiff made it clear that the arrest was to obtain security for a judgment in rem in that action and not to enforce the award. The defendant applied to set aside the writ and the warrant of arrest on the ground that the court had no in rem jurisdiction in that matter. Ng J refused the application.

The judge distinguished *The Bumbusti* and *The Chong Bong* as those actions were said to be to enforce the awards, but the present action was based on the original cause of action and not on the award. He observed that the cause of action in rem does not merge in a judgment in personam, and the cause of action in rem was of a different character from that in personam and remains available to the claimant so long as and to the extent that the judgment remains unsatisfied. He found support for this principle from various cases such as *The Rena K* [1979] QB 337, expressly approved by the Court of Appeal in *The Tuyuti* [1984] QB 838, and followed by the Hong Kong court in *The Britannia* [1998] 1 HKC 221. He considered that the principle equally applies to arbitral awards.

He did not agree that *The Indian Grace (No. 2)* [1998] AC 878, decided by the House of Lords, changed the position. In that case, the House of Lords held that a plaintiff who had obtained a judgment in India was not entitled to pursue an action in rem in England. That was because s 34 of the Civil Jurisdiction and Judgments Act 1982 ("**CJJA 1982**") prohibited actions "*by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court of another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England or, as the case may be, in Northern Ireland.*" The court so construed the section that both the Indian proceedings in

personam proceedings and the English proceedings in rem were between the same parties for the purposes of s 34 CJJA 1982.

In Hong Kong, there is a statutory provision similar to s 34 CJJA 1982, that is s 5(1) of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, Cap 46. Ng J confined s 5 of Cap 46 to court "judgments" as opposed to arbitral "awards". Hence, he concluded that the arbitral award, which remained unsatisfied, was no bar to the plaintiff's invoking the court's admiralty jurisdiction in rem to arrest the ship.

Ng J made an interesting observation that he found "*it extremely odd that the right of security by the arrest of a vessel is available to a plaintiff who merely asserts a claim whereas it is lost when he finally obtains a judgment in the action*".

The defendant's application to the Hong Kong Court of Appeal for leave to appeal was refused.[3] The relevant statutory provisions in Hong Kong and England are identical or materially similar, hence the analysis made and the conclusion reached in *The Atlas* would, by analogy, apply in England.

<u>Post-arrest procedure</u>

When the admiralty jurisdiction in rem is invoked to arrest a ship after obtaining an award, it is opined, the appropriate course will be for the claimant to apply for "summary judgment" on the basis that the defendant has no defence. It will not be open for the defendant to defend the claim as that would only be an abuse of the process of the court in view of the award against the defendant on the same matter. The question of staying court proceedings in favour of an arbitration agreement does not arise because there is nothing to refer to arbitration, as the arbitration has already concluded and an award has been given.

[3] [2015] HKCA 691.

Time-bar is a bar to the no-bar rule

The “no bar rule” here, it is opined, will be subject to one practical limitation, that is time-bar. If the cause of action is time barred by the time the in rem proceedings are commenced, then the defendant would have valid “defence”. In some cases, the time limitation is a defence only if pleaded, for example, time limitation by virtue of the Limitation Act 1980. In some other cases, the time limitation will “extinguish” the right of action, for example, time limitation by virtue of Hague or Hague-Visby Rules.

In the former cases, a warrant may be issued as the right of action will remain effective until the defence of limitation is pleaded. In the later cases, no warrant should be issued as the evidence in support of arrest would show no prima facie case of an existing right of action.

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