SMA Rules Allow For Consolidation In Appropriate Cases. Where a headcharter and a subcharter incorporate the SMA rules, for instance, or when a dispute arises under a bill of lading which incorporates a charterparty’s arbitration clause incorporating SMA rules, the parties thereby agree that a dispute that implicates both agreements may be consolidated into a single arbitration proceeding. This is an important efficiency tool and can allow an “innocent” intermediate party to pass liability directly on to the responsible party.

New York Arbitration Allows Lawyers To Act As Arbitrators. Traditionally, arbitration was intended to provide commercially minded parties with commercial resolutions to commercial disputes. In most cases, this is still one of the true values of arbitration. On the other hand, there are times when the parties would prefer to have a dispute resolved by arbitrators with a legal background. There are various reasons for this, be it because there is a perception that the case may turn on a complex legal question or because more formal evidentiary procedures may be necessary.

This is easily accommodated in New York. In the first place, several SMA members have legal backgrounds. It is also entirely open to the parties to draft their arbitration agreement to allow whatever arbitrators they desire. For instance, I was recently involved in a case where the parties had agreed that the party-appointed arbitrators would be SMA members and not lawyers and that the chairperson would be a maritime lawyer familiar with maritime casualty matters but not an SMA member. In sum, there is significant flexibility to fashion an arbitration agreement that accommodates the parties needs, whatever they may be.

Conclusion

There are plenty of good reasons to decide to arbitrate a dispute in London, or Singapore, or Hamburg, or wherever. There remain, however, many good reasons why New York is a desirable forum for the arbitration of international maritime disputes. In particular, there is no question that the expertise exists here to accommodate any case. But whatever the decision on whether and where to arbitrate, the most important thing is to ensure that the decision is made based on facts and not on misperceptions.

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Pollution & Incident Response Team

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July 2008 No. 2

To The China Trade

In Aid Of Arbitration

The traditional rule that U.S. admiralty courts could not grant injunctions (based on the historic separation of Admiralty relief from the equitable relief available in Chancery) has been eroded. A leading treatise, Schoenherr, Admi-

rarily and Maritime Law, considers that injunctive relief is available if that relief is subsidiary to an admiralty claim—as it would necessarily have to be in order to fall within the Court’s admiralty jurisdiction.

This is pertinent when it comes to disputes sub-

ject to arbitration. Notwithstanding an obligation to arbitrate, an opponent may file suit in a pre-

ferred foreign jurisdiction seeking a declaration that underrmits the arbitration or award. Accordingly, the issue of when a party may obtain an injunction from a U.S. court to prevent an opponent from circumventing an arbitration agreement by filing suit abroad is of concern to maritime claimants.

The China Trade Test

Injunctions are, the Second Circuit Court of Appeals has pronounced, a remedy to be “used sparingly” and “only with care and great restraint.”

The prerequisite for obtaining an injunction in the United States is a showing by the Plaintiff that it is likely to prevail on the merits and that it will suffer irreparable harm (that is, injury not compensable by monetary damages) if an injunction is not granted or, as stated by the Second Circuit, “a clear showing of probable success and possible irreparable injury.”

The test for anti-suit injunctions in New York courts was set forth by the Second Circuit in China Trade and Development Corp. v. M/C CHONG YOUNG. The claimant, China Trade, brought a substantial cargo loss claim against the shipowner in New York after the grounding of the vessel. Following extensive discovery abroad, over a period of a year and a half, trial was scheduled. Some months prior to the U.S. trial date, the

(continued on page 4)
For those who take an interest in such things, there has been a long-running perennial debate whether to agree to arbitrate in New York or London. To be sure, there are many other jurisdictions making a legitimate play for the international shipping arbitration business these days, and the New York arbitration market has not exactly kept pace with London these last several years. And yet, the debate continues for various reasons, some academic and some very practical. Of course, representatives from each market can always be counted on to champion the relative merits of their own system to the exclusion of the other. And it will probably always be true that when someone from New York recommends arbitrating in New York, his motives will be suspect. Who wouldn’t doubt advice from someone who stands to personally benefit from his client’s agreement to have legal disputes resolved in his own jurisdiction? Surely, if someone from the London legal market told you that arbitrating in London was the only way to go, you’d take what he said with a grain of salt. (Right?)

And yet, as lawyers we have a long history of advising clients to do things that are against our own personal pecuniary interest. We have recommended filing motions to dismiss for lack of personal jurisdiction or to enforce foreign forum or arbitration clauses. We have suggested moving for summary judgment or to mediate or settle claims so as to avoid a costly trial. Indeed, the number of ways that we have counseled our clients on how to get out of New York are too numerous to itemize here. So, perhaps I will be forgiven for hoping that my comments here in favor of New York arbitration might not be entirely discounted as self-interested propaganda.

Why should one insist that his dispute resolution clauses call for arbitration in New York? For anyone who has been following the debate, my list is not new. And yet, I am constantly surprised to discover fundamental misperceptions that persist about arbitration in New York, so please forgive me if I appear to be stating the obvious.

New York Arbitration Is Less Expensive. Maybe this has not always been the case, but it certainly has been for a long time. In the first place, the practice commonly used in London of having barristers represent parties before the arbitrators introduces a double layer of cost (at very high hourly billing rates) that simply does not exist in New York. Lawyers in New York are well accustomed to filling the double duty of counseling clients on real world problems and meanwhile examining witnesses and arguing legal points before a tribunal once the dispute moves to that arena. I can recall sitting in on an arbitration in London a number of years ago in which each party was represented by a barrister, a junior barrister, a solicitor and a junior solicitor, at a combined hourly rate of about £1,300. You simply do not see that in New York.

There is a second reason why New York is less expensive than London these days. The last time I checked, one pound sterling buys nearly two US dollars. One Euro buys about a dollar and a half. As anyone who has recently been a tourist in New York fully understands, this is a dramatic—indeed, historic—swing in favor of foreign purchasing power in the United States. While it is pretty obvious that such exchange rates strongly favor a party buying goods or, as is discussed elsewhere in this edition of Mainbrace, property in the U.S., it is equally the case that foreign parties buying services here presently benefit from an extremely favorable exchange rate. Conversely, a

Conclusion

A public consultation and further rewrite of the Companies Ordinance is to be carried out in several phases. Another public consultation relating to share capital and statutory amalgamation proceedings is to be carried out in mid 2008.

It has been recognised that there is a practical need to modernise the Companies Ordinance to keep it in line with other major common law jurisdictions. Proposals relating to company names registration will, we anticipate be well received. Against that, it is anticipated that there will be opposition on the proposal to significantly widen duties of a director. We also think that the proposal to abolish corporate directorships may drive away private companies, especially companies holding assets which have a practical need for the flexibility provided by corporate directorships. Hong Kong is one of the world’s largest user of corporate directorships and this is something of growth industry, so we expect significant opposition to this proposal.

We will be sending further updates on this process in due course.

New York vs. London Arbitration (continued from page 2)

U.S. party paying for services in London has it doubly hard at the moment.

Third, awards issued by New York arbitrators are governed by the New York Convention. This means that they are easily and quickly enforceable in most jurisdictions. If a party feels that the arbitrators who are responsible for poorly reasoned decisions risk losing future appointments. To be sure, New York arbitrators are well equipped to handle these kinds of emergencies. If the parties wish to schedule a block of all-day hearings or, instead, wish to conduct individual hearings over a period of time to accommodate ongoing disputes, New York arbitrators are well equipped to handle these kinds of emergencies. If the circumstances warrant, the panel may provide interim rulings or partial final awards and may grant provisional remedies such as directing that security be posted. In short, the arbitrators are free to customize the proceedings to suit the needs of the parties to the dispute.

Publication Of Awards Is Good. It is well known that the SMA ordinarily publishes its awards. The parties can stipulate that an award in a given matter will be confidential, but few do in practice. This question of whether arbitration awards should be published has, of course, been the subject of extensive debate. To my mind, however, it seems obvious that a system that publishes as a matter of practice but maintains the flexibility to allow confidentiality in the appropriate case is superior to one that insists on confidentiality as a matter of course.

Publication engenders consistency. It allows the parties to look at past cases, see how they were resolved, and use that knowledge to shape their conduct and make decisions about how to resolve ongoing disputes. This doesn’t mean that arbitrators are legally bound to follow past decisions, but it does mean that well reasoned decisions become part of the common information base of the shipping community.

Publication also engenders accountability. Arbitrators who are responsible for poorly reasoned decisions risk losing future appointments. To be sure, New York arbitrators don’t get it right every single time. And yet, if it appears that New York arbitrators are more often criticized than their London counterparts (which may or may not be the case), I would submit that this is largely because one is much less likely ever to even see a London arbitration award unless it is in one’s own case.

New York Arbitration Is Flexible. If the parties require emergency relief or prompt resolution of an ongoing dispute, New York arbitrators are well equipped to handle these kinds of emergencies. If the parties wish to schedule a block of all-day hearings or, instead, wish to conduct individual hearings over a period of time to accommodate schedules, either can be easily accomplished. If the circumstances warrant, the panel may provide interim rulings or partial final awards and may grant provisional remedies such as directing that security be posted. In short, the arbitrators are free to customize the proceedings to suit the needs of the parties to the dispute.

Notes from the Editor: New York vs. London Arbitration

by Thomas H. Belknap, Jr.

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The Hong Kong Companies Ordinance—A Major Rewrite In The Pipeline

by Nigel J. Binnersley

The Hong Kong Companies Ordinance is the statutory equivalent to the English Companies Act. The Companies Ordinance was first enacted in 1865 and has been constantly revised and updated in line with the English companies law reforms. In 1984, the Ordinance was substantially updated on the basis of the English Companies Act 1948. There has been no major revision since then apart from several but minor amendments.

The Financial Services and the Treasury Bureau of the Hong Kong Government, together with assistance of the Law Reform Commissions has launched a comprehensive review and rewrite of the Companies Ordinance. A public consultation is now being conducted on, amongst other things, the following issues:

- Company names
  Problem arisen when rogue traders set up “shadow companies” with names similar to existing and established trademarks or trade names. Although Court action can be brought against such rogue traders for passing off or trademark infringement, the Hong Kong Companies Registrar does not possess administrative powers to enforce the order to change the company’s name. Similarly, the listing of shadow companies’ name on the website and a placement of a warning statement in the Certificate of Incorporation and Certificate of Change of Name do not help to alleviate this problem. It has been proposed to empower the Companies Registrar to act on a court order to direct a company change the infringement and substitute it with a simple registration number if so required.

- Directors’ duties
  Presently, although directors’ duties can be found in a company’s Articles of Association, generally speaking the duties of directors are found mostly in common law. A proposal to codify the common law duties to expand these to cover the duty to promote the success of the company as a whole, including the interest of the employees, suppliers and customers and its social responsibilities, has been put forward.

- Corporate directorship
  To improve accountability, transparency and corporate governance, it has been recommended that corporate directorship is abolished and to keep in line with other common law jurisdictions which have gone down the same route including Australia, Singapore, Canada, New Zealand, Malaysia and the USA (under its Model Business Corporation Act).

- Registration of charges
  Under current arrangements, a charge created on a company’s assets listed in section 80 of the Companies Ordinance is required to be registered with the Companies Registry within 5 weeks of creation. It is proposed to extend this time to 10 weeks for charges created overseas. Failure to register would render the charge void against the liquidator and any other creditors of the company.

- Restricting the registration of hybrid names with Chinese characters and English wording.

In addition, it’s also proposed to allow registration of hybrid names with Chinese characters and English wording.

U.S. And International Developments On Emissions From Ships

by Jonathan K. Waldron

There continues to be much discussion and scrutiny on action to tighten up the MARPOL Annex VI air emission requirements internationally at the International Maritime Organization ("IMO") and anticipation of when the United States will finally pass MARPOL Annex VI implementing legislation. The following is an update.

**IMO Action**

Between March 31 and April 4, 2008, the IMO Marine Environment Protection Committee ("MEPC") approved a number of proposed amendments to the MARPOL Annex VI regulations, to reduce harmful air emissions from vessels. It is expected that these amendments will be formally adopted at IMO in October this year. Once adopted, the amendments would enter into force in February 2010. The following discusses the most important elements of the proposed amendments to Annex VI.

**SOx Emissions: A substantial number of these proposed amendments involve significant reductions in SOx and Particulate Matter ("PM") emissions from vessels. Some of the major changes include the following:**

- the global sulfur cap would be reduced from 4.5% (45,000 ppm) to 3.5% (35,000 ppm) from January 1, 2012; this cap would progressively be reduced to 0.5% (5,000 ppm) effective January 1, 2020, subject to a feasibility review to be completed no later than 2018.
- the sulfur limit applicable in Sulfur Emission Control Areas ("SECAs") would be reduced from 1.5% (15,000 ppm) to 1.0% effective March 1, 2010; this SEA limit would progressively be reduced to 0.1% (1,000 ppm) until January 1, 2015.

**NOx Emissions: Amendments adopted would also solidify the three tier structure for new marine diesel engines with more stringent NOx emission standards depending on the dates of installation for the engines.**

- **Tier I** – standard will continue to be 17 g/kW
  - This is the current NOx emissions level listed in the existing Annex VI regulations and it applies to diesel engines installed on vessels built between January 1, 2000 and January 1, 2011.
- **Tier II** – standard will be reduced to 14.4 g/kW
  - This will be the NOx emissions level for diesel engines installed on vessels built after January 1, 2011.
- **Tier III** – standard will be further reduced to 3.4 g/kW
  - If a vessel is operating in a designated Emission Control Area this will be the NOx emissions level for diesel engines installed on vessels built after January 1, 2016.
  - If the vessel is not operating within a designated Emission Control Area, Tier II limits (14.4 g/kW) will continue to apply.

**Other Matters under MEPC Consideration:**

Further progress was also made on a number of other emission related issues as follows:

- **Exhaust Gas Cleaning Systems – Agreement was reached on draft revised guidelines for Exhaust Gas Cleaning Systems.**
- **Halon – A draft circular was adopted decreasing the availability of Halons.**
- **Volatile Organic Compounds ("VOCs") – Draft guidelines were adopted for the development of a VOC Management Plan to minimize VOC emissions from tankers.**
- **Fuel Oil Specification Standard – It was decided to invite the International Standardization Organization to consider the development**
of fuel oil specifications for future considerations by IMO.

- **Green House Gas (GHG) Emissions** – It was agreed to expedite work on GHG emissions to develop short and long term measures to address CO2 emissions from ships.

**U.S. Action**

On April 24, 2008 the House of Representatives passed H.R. 2830, the Coast Guard Authorization Act of 2008. Section 601 of this bill, the Maritime Pollution Prevention Act of 2008, would amend the Act to Prevent Pollution from Ships (33 U.S.C. §1901, et seq.), to implement MARPOL Annex VI in the United States. This section was adopted from H.R. 802 introduced in 2007 to implement MARPOL Annex VI. Meanwhile, the Senate Commerce, Science and Transportation Committee considered H.R. 802 on April 24, 2008 and approved the measure in the form of a substitute amendment by voice vote. Accordingly, the Maritime Pollution Prevention Act of 2008, implementing MARPOL Annex VI, could be enacted this year whenever the Senate decides to take action on the Coast Guard Authorization Act of 2008. This action would then need to be followed by a Conference of the House and the Senate to finalize the bill. In the alternative, Congress could decide to separately take action on H.R. 802 in case action on the Coast Guard Authorization Act of 2008 gets stalled this year because of the elections, the war on Iraq, or the economy.

Vessel owners, ship managers, shipyards and other interested parties in the maritime industry need to continue to monitor developments in this area in order to prepare for these amendments to MARPOL Annex VI and implementation of Annex VI in the United States.

Korean shipowner filed suit in Pusan, Korea seeking a declaration from the Korean court that it was not liable for China Trade’s loss. When China Trade eventually was informed of the Korean action it immediately requested the New York trial court to enjoin the shipowner from proceeding with its suit in Korea. That court used a test, now known as the “China Trade Test,” to consider whether to issue an “anti-[foreign] suit injunction.”

First, the parties must be the same in both matters and, secondly, the “resolution” of the case before the enjoining court must be dispositive (i.e., fully determinative) of the foreign action to be enjoined. Once those two threshold requirements are passed the court should consider five other factors, including frustration of the home court’s policy, vexatiousness of the foreign action, and the delay, inconvenience and expense of adjudication of the same issues in separate actions. Chana Trade, the trial court held, passed the threshold tests and showed the vexatiousness and the expense, etc. of the shipowner’s “race to judgment” in Korea so as to justify the shipowner’s being permanently enjoined from proceeding with its action there.

On appeal, the majority opinion side-stepped the issue of whether an admiralty court could issue an injunction on the basis it was vacating the injunction. It recognized that concurrent jurisdiction in two courts does not necessarily present a conflict or justify an injunction even if the parties and the issues are the same. Although the majority agreed with and approved the test used by the trial court, it considered two other factors, besides “vexatiousness” and “race to judgment,” had to be considered in weighing the propriety of the injunction, namely: (1) whether the foreign action threatens the jurisdiction of the adjoining [U.S.] forum; and (2) whether strong U.S. public policies are threatened by the foreign action. The majority found neither. Neither the Korean Court nor the shipowner had sought to prevent the New York court from proceeding to trial nor was it clear that assets within the jurisdiction and there is a real risk of dissipating the assets. Although an overall order covering all the defendant’s assets may be made, it is usual for the applicant to state a specific sum to be frozen in the order. Provisions should be made to cover the reasonable living expenses of the defendant to avoid undue hardship.

The maritime law of the United States provides for an attachment of assets of a defendant if the plaintiff has a “maritime” claim and if the defendant cannot be “found” in the judicial district but the defendant has property in that district. This is the by now familiar “Rule B attachment.” To be “found” in a district, the defendant must be doing business there and have an agent for service of process in that district. Upon a showing by affidavit that the defendant cannot be “found” in the district accompanied by a verified complaint alleging a “maritime” claim, the court will issue, ex parte, an order attaching any property of the defendant in the district.

If property is attached, the plaintiff must give prompt notice to the defendant, and the defendant is entitled to a prompt post-attachment hearing at which the plaintiff has the burden to show that the attachment was proper. At this hearing the plaintiff must show that the technical requirements were met, i.e., that plaintiff has stated a “prima facie admiralty claim,” that the defendant cannot be found in the district, that the defendant’s property may be found in the district, and that there is no statutory or maritime law bar to the attachment.

If the plaintiff meets this burden, the court may still vacate the attachment if the defendant shows that it is subject to jurisdiction in a convenient adjacent jurisdiction, the plaintiff could obtain in personam jurisdiction over the plaintiff in the district where the plaintiff is located, or the plaintiff has already obtained sufficient security.

Under Rule B attachments are simpler to obtain and maintain than “freezing orders” under English law. Notably, they do not require plaintiff to show that the defendant is dissipating assets or to post a bond; however, they are available only in a district where the defendant is not “found” but its property is and only in maritime cases. Until 2002, when a federal appeals court held that dollar-denominated electronic funds transfers were attachable “property” as they were cleared by banks in New York, Rule B was an established, but spec- tacular and only occasionally useful vehicle for obtaining prejudgment security in maritime cases. Since the holding of the case in 2002, however, in light of the dominance of the dollar for commer- cial transactions and the volume of electronic funds transfers cleared by banks in New York, Rule B has been transformed into a Cinderella of the prejudgment security ball, asked to dance by virtually every maritime creditor in the world.

If the case is non-maritime, the creditor must use state court attachment procedures. New York’s statutory procedures are broadly similar to those that apply to obtain a freezing order under English law and are not favored. There are similar provisions in the statutes and rules of our neighboring state of Connecticut, but Connecticut has a long tradition of interpreting them much more liberally than in New York so that state court attachments are much easier to obtain in Connecticut than in New York.

A maritime creditor may also make use of these state court procedures if for some reason an attachment under Rule B is not available. Also, real estate may not be attached under Rule B but may be attached under state court procedures. So, if the property sought to be attached is real estate, state court procedures must be used.

In addition to providing the creditor the comfort of knowing that an eventual judgment in its favor will be paid, seeking and obtaining prejudgment security inevitably focuses the minds of parties to a dispute on the merits and often leads to an earlier resolution than would otherwise be the case. Whenever its dispute is being resolved on the merits, whether in New York, London, Hong Kong or elsewhere, a creditor should investigate and determine whether it may obtain prejudgment security through an attachment in the United States or a freezing order in England or Hong Kong or other common law jurisdictions.
Although there are no cases yet deciding the issue, where a fishing or recreational vessel is involved in a collision, the owner may well find itself defending against the argument that it was negligent in failing to equip the vessel with an AIS. Most fishermen and recreational boaters already outfit their vessels with a range of devices for navigational safety. Where fishing and recreational vessels routinely operate in waters with fog and heavy commercial traffic, prudent navigation practice dictates also equipping them with devices to ensure that they will be visible on the radars of the commercial vessels they may encounter, especially as such devices become more affordable. Such a practice may not be the current U.S. norm, but in the end, in a collision case, the courts will say what is required. As Judge Hand said, “there are precautions so imperative that even their universal disregard will not excuse their omission.”

George Bernard Shaw is usually credited with the remark that the United States and England are “two nations divided by a common language,” although some credit Oscar Wilde. Since the United States and England are “common law” jurisdictions, lawyers in the U.S. and in England, not to mention the present and former Commonwealth nations who are also said to be “common law” jurisdictions, are quick to assume that terms used in one common law jurisdiction have the same meaning in another. In addition, many colleagues in civil law jurisdictions deal primarily with arbitrations and litigations in England and less so with arbitrations and litigations in the U.S. We find that many of our civil law colleagues assume that the “same” result will be reached in the U.S. as would be reached in England. In fact, the two systems are often as divided by their “common law” as they are by their “common language.”

In many disputes, and in maritime disputes in particular, the “winner” is not determined at the end of the case “after appeal, if any,” but rather at the beginning of the dispute when the creditor succeeds, or fails, in obtaining security for its claim. We describe below the primary ways prejudgment security can be obtained for in personam claims under English and United States law. In a subsequent issue, we will discuss the similarities and differences between the two systems with respect to “in rem” claims.

Under English law, a claimant may apply to the Court for a “Mareva Injunction,” now called a “freezing order.” This freezes the defendant’s assets, preventing the defendant from removing its assets out of the jurisdiction, so as to defeat the judgment. The applicant must have an accused cause of action against the defendant, which is within the jurisdiction of the Court. There must also be a real risk of dissipation of assets. The Court will only exercise its discretionary power if the case before it is one of urgency.

In order for the injunction to be efficacious, it must be swift and secret, so that it is always applied for and granted ex parte. Since the order can have the most inhibitory and restraining effect upon the defendant, it should only be issued if justice and convenience require it. The applicant must have a good arguable case against the defendant. The applicant must also give an undertaking providing assurance of some financial redress against the loss and/or damage which may be suffered by the defendant or third parties, in the event the order is subsequently discharged.

The application should be made with affidavit, attaching a writ or a draft writ, setting out the details of the claim, the amount and the points for and against the application. There must be a full and frank disclosure of all material matters. It must be reasonably believed that the defendant has the shipowner was seeking to evade any important U.S. public policy. Consequently, the injunction was vacated and the “test” established.

Anti-Suit Injunctions And Arbitration

The New York Courts have applied the China Trade test in considering whether to enjoin foreign actions derogating from an asserted right of U.S. arbitration. One such case involved a Brazilian distribution company, Tecniamed, that filed suit in Brazil against GE and its local subsidiary while, at the same time, responding to a demand for arbitration. In New York, GE obtained an order to compel arbitration and an injunction of the Brazilian action. The New York court later entered a contempt penalty against the Brazilian entity for continuing its action rather than agreeing to dismiss it.

The Second Circuit, in reviewing the two threshold factors, agreed that GE and its Brazilian subsidiary were of sufficient similarity and affiliation to pass the "same parties" test. Next came the issue of whether the New York Court’s ruling on the arbitrability of the claims was “dispositive” of the Brazilian action. The Second Circuit agreed that it would be because the order directing arbitration meant that all the claims asserted in the Brazilian action were to be arbitrated. Tecniamed claimed that its tort claim for “moral damages” was unique to Brazilian law and could not be arbitrated properly in the U.S. The Court disagreed based on the broad arbitration clause in the parties’ agreement. Having passed the threshold tests, the Second Circuit reviewed the other factors such as “public policy.” It did not decide whether an attempt to avoid arbitration, was in itself a sufficient basis for an injunction. Given that the lower court had already ruled in favor of arbitration it held that an injunction protecting a court’s jurisdiction, once a judgment has been issued, weighed against granting comity and in favor of the injunction. The anti-suit injunction was upheld.

A similar case, also heard by the Second Circuit in 2004, involved an action filed in Mexico that the U.S. plaintiff sought to enjoin as being in derogation of the contractual obligation to arbitrate. The Second Circuit held that, irrespective of whether the two threshold tests were satisfied, the Mexican lawsuit was not “directed at sidestepping arbitration” because the Mexican plaintiff was participating in the AAA arbitration and principles of comity weighed strongly against an injunction based on issues arising under Mexican law.

More recently, in the case of Ibito Petrochemicals Industries Ltd. v. M/T IBEFFEN, the cargo receiver, Ibito, brought an action in Nigeria, where the Vessel was arrested, for contamination. To prevent it against any possible time bar it also demanded arbitration in London and filed suit in New York. The shipowner responded in New York seeking an order declaring the claim subject to London arbitration and enjoining Ibito from proceeding in any other forum inconsistent with its agreement to arbitrate. The New York court granted that relief and denied Ibito’s motion to voluntarily dismiss its New York complaint and, thereby, jurisdiction over it. On review, the Second Circuit held that the two threshold factors were clearly met and next considered the other factors. It expressly endorsed the “strong” public policy in favor of arbitration that might be frustrated by the Nigerian litigation to justify the injunction, notwithstanding that the Nigerian action was filed first. The injunction’s scope was modified to prevent Ibito from proceeding in the Nigerian Court until the conclusion of the London arbitration. The Second Circuit has since upheld an injunction against a foreign suit that would undermine the U.S. Court’s judgment enforcing a foreign arbitration award under the New York Convention.

Although not available in all cases, when appropriate anti-foreign-suit injunctions can be a potent weapon in enforcing arbitration agreements calling for arbitration in the U.S. and, indeed, in other venues so long as the New York court can exercise personal jurisdiction over the party seeking to “side-step” the obligation to arbitrate.

Electronic Navigation and Collision Law

by Nigel J. Binnersley and LeRoy Lambert

George Bernard Shaw is usually credited with the remark that the United States and England are “two nations divided by a common language,” although some credit Oscar Wilde. Since the United States and England are “common law” jurisdictions, lawyers in the U.S. and in England, not to mention the present and former Commonwealth nations who are also said to be “common law” jurisdictions, are quick to assume that terms used in one common law jurisdiction have the same meaning in another. In addition, many colleagues in civil law jurisdictions deal primarily with arbitrations and litigations in England and less so with arbitrations and litigations in the U.S. We find that many of our civil law colleagues assume that the “same” result will be reached in the U.S. as would be reached in England. In fact, the two systems are often as divided by their “common law” as they are by their “common language.”

In many disputes, and in maritime disputes in particular, the “winner” is not determined at the end of the case “after appeal, if any,” but rather at the beginning of the dispute when the creditor succeeds, or fails, in obtaining security for its claim. We describe below the primary ways prejudgment security can be obtained for in personam claims under English and United States law. In a subsequent issue, we will discuss the similarities and differences between the two systems with respect to “in rem” claims.

Under English law, a claimant may apply to the Court for a “Mareva Injunction,” now called a “freezing order.” This freezes the defendant’s assets, preventing the defendant from removing its assets out of the jurisdiction, so as to defeat the judgment. The applicant must have an accused cause of action against the defendant, which is within the jurisdiction of the Court. There must also be a real risk of dissipation of assets. The Court will only exercise its discretionary power if the case before it is one of urgency.

In order for the injunction to be efficacious, it must be swift and secret, so that it is always applied for and granted ex parte. Since the order can have the most inhibitory and restraining effect upon the defendant, it should only be issued if justice and convenience require it. The applicant must have a good arguable case against the defendant. The applicant must also give an undertaking providing assurance of some financial redress against the loss and/or damage which may be suffered by the defendant or third parties, in the event the order is subsequently discharged.

The application should be made with affidavit, attaching a writ or a draft writ, setting out the details of the claim, the amount and the points for and against the application. There must be a full and frank disclosure of all material matters. It must be reasonably believed that the defendant has the shipowner was seeking to evade any important U.S. public policy. Consequently, the injunction was vacated and the “test” established.

Anti-Suit Injunctions And Arbitration

The New York Courts have applied the China Trade test in considering whether to enjoin foreign actions derogating from an asserted right of U.S. arbitration. One such case involved a Brazilian distribution company, Tecniamed, that filed suit in Brazil against GE and its local subsidiary while, at the same time, responding to a demand for arbitration. In New York, GE obtained an order to compel arbitration and an injunction of the Brazilian action. The New York court later entered a contempt penalty against the Brazilian entity for continuing its action rather than agreeing to dismiss it.

The Second Circuit, in reviewing the two threshold factors, agreed that GE and its Brazilian subsidiary were of sufficient similarity and affiliation to pass the "same parties" test. Next came the issue of whether the New York Court’s ruling on the arbitrability of the claims was “dispositive” of the Brazilian action. The Second Circuit agreed that it would be because the order directing arbitration meant that all the claims asserted in the Brazilian action were to be arbitrated. Tecniamed claimed that its tort claim for “moral damages” was unique to Brazilian law and could not be arbitrated properly in the U.S. The Court disagreed based on the broad arbitration clause in the parties’ agreement. Having passed the threshold tests, the Second Circuit reviewed the other factors such as “public policy.” It did not decide whether an attempt to avoid arbitration, was in itself a sufficient basis for an injunction. Given that the lower court had already ruled in favor of arbitration it held that an injunction protecting a court’s jurisdiction, once a judgment has been issued, weighed against granting comity and in favor of the injunction. The anti-suit injunction was upheld.

A similar case, also heard by the Second Circuit in 2004, involved an action filed in Mexico that the U.S. plaintiff sought to enjoin as being in derogation of the contractual obligation to arbitrate. The Second Circuit held that, irrespective of whether
In the United States, the Coast Guard has enacted regulations implementing the SOLAS requirements and establishing which vessels must carry which types of electronic navigation equipment. In the United States, for example, most fishing and recreational vessels are exempt from the requirement to carry an Automatic Identification System ("AIS"). But strict compliance with the carriage requirements may not obviate the owners of such vessels from liability when they are involved in collisions. Instead, in a collision case, liability may be imposed for negligence even when no violation of the regulations is found.

Governmental regulations do not necessarily measure the scope of an owner’s duty. Rather, courts have found that regulations reflect merely a “minimum requirement,” so that noncompliance usually leads to imposition of civil responsibility almost as a matter of course. In some situations, either prudent navigation practice or what has been termed “the exacting standards of seaworthiness” may require an owner to supply more than the bare minimum called for by statute or regulatory law.

The argument that it is not customary to carry a certain type of electronic navigation equipment also may not insulate an owner from liability. The standard of care in a collision case is not limited to complying with the customary practices of the industry. In one of the first electronic navigation cases, The T. J. Hooper, Judge Learned Hand imposed liability for the failure to carry a radio to receive weather broadcasts, even though such carriage was not customary in the industry. As the court said in rejecting custom, “... a whole calling may have unduly lagged in the adoption of new and available devices.”

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Editor’s note: This article is the first in a series in which we will be introducing some of our other practice groups at Blank Rome. In this article, contributed by our Real Estate Practice Group, we discuss possible real estate investment opportunities for foreign investors in the United States arising out of the recent currency movements and credit crunch.

Foreign Direct Investment In Real Estate: Some Benefit From The Liquidity Crisis

by Pelayo Coll

Day after day the headlines scream at you: “Liquidity Crisis!” “Bank Write Downs!” “Sub-Prime Losses!” Though the depths of the current credit crunch are not yet known, one item is clear—the U.S. real estate market has suffered a serious setback over the last 10 months; or has it? The answer appears to depend on who you are and (almost as importantly) where you are. In the midst of these headlines one story may have been missed—the story of the highest per square foot price paid for commercial office space in the District of Columbia.

In mid-April, Vico Capital, an Irish investment vehicle, paid $867 per square foot for the trophy Class A office building located at 2099 Pennsylvania Avenue, N.W., in Washington, DC. The price surpassed the prior highest price paid for similar properties by $41 per square foot.

In the U.S. commercial real estate market is in the doldrums, how are record-breaking deals happening? The answer is a combination of factors which give some foreign investors a competitive advantage in the current real estate market, but are also creating greater competition among them. In fact all of these headlines are interrelated. As U.S. investors are squeezed by the liquidity crisis, foreign direct investors are finding less domestic competitors for commercial real estate in many major U.S. real estate markets such as the District of Columbia. This would typically lead to price deflation; however, as the Dollar has depreciated in comparison to the Euro and other foreign currencies, the weaker Dollar creates a built-in discount for foreign direct investors and creates a competitive pricing environment for the typically conservative foreign investor. Furthermore, as foreign currencies appreciate, so do the prices of foreign real estate, which leads to increased foreign investment in certain sectors of U.S. real estate and greater competition among foreign investors. This convoluted formula has yielded some record prices for U.S. commercial real estate in the midst of the liquidity crisis, particularly with respect to some trophy properties like the property at 2099 Pennsylvania Avenue, N.W., in Washington, DC.

Foreign direct investors have also found that the scaling back of competition is giving them the time to perform complete financial due diligence and familiarize themselves with the intricacies of the particular market, which is in contrast with the high flying times in the mid 2000s, where readily available and cheap financing alternatives led to highly competitive auctions for commercial real estate assets. U.S.-based investors flocked to the opportunities ignoring the risks inherent in short due diligence periods, while some conservative foreign investors stayed away or were simply unable to react quickly enough. As a result of the credit crunch, the available pool of U.S.-based purchasers is shrinking, while the foreign pool may be expanding.

In addition to the foregoing economic reasons for the growth in foreign direct investment in U.S. real estate, additional factors give comfort to foreign direct investors:

- The U.S. economy is seen as resilient (as evidenced by the foregoing survey results which were taken prior to the sub-prime collapse).
- The safety and stability of the political environment and of investments in the U.S.
- Increased cost of commercial real estate in some top-tier foreign markets.
- U.S. legal systems and markets operate to protect investors.

A recent survey conducted by the Association of Foreign Investors in Real Estate reflected the growing advantage as respondents expected that more than 50% of their real estate acquisitions in the year 2008 will be in the U.S., and that investments in the U.S. in 2008 would increase by 16% from 2007. The outlook of foreign investors may help to buoy some sectors of the U.S. real estate market.

Based on these survey results, the trend appears to be that despite the liquidity crisis, foreign direct investment will continue in 2008. Though not all markets have shown an increase in foreign investment so far in 2008, markets like the District of Columbia that saw an exponential increase in foreign investment in commercial real estate from 2006 to 2007 are seeing 2008 investment numbers on par with 2007 despite the liquidity crisis that is keeping many other investors on the side lines.

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Investments in real estate carry many legal risks. With significant practices in New York, Philadelphia and Washington, D.C., Blank Rome’s real estate groups, together with our tax and corporate practices, can assist in the proper structuring and completion of complex transactions in U.S. real estate. Our professionals understand the nuances of U.S. real estate transactions as well as the intricacies of cross-border investments.

Blank Rome’s real estate group received a top-tier practice ranking by Chambers & Partners USA. Four of our partners are individually ranked by Chambers, including Craig Lord, who market commentators say “belongs in the top echelon” of real estate practitioners.


2. For example, New York City’s office market (including trophy properties) has shown some softening in foreign direct investment due to the weak outlook of the financial services industry which is a significant factor in the City’s economy. Source: New York Times, May 21, 2008.

3. Foreign investment in DC commercial real estate totaled $153.5 million in doldrums, how are record-breaking deals happening? The answer is a combination of factors which give some foreign investors a competitive advantage in the current real estate market, but are also creating greater competition.

2. For example, New York City’s office market (excluding trophy properties) has seen a significant price increase. The price surpassed the prior highest price paid for similar properties by $41 per square foot. The price is a testament to the resilience of the U.S. commercial real estate market, even in the midst of a liquidity crisis.


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A recent survey conducted by the Association of Foreign Investors in Real Estate reflected the growing advantage as respondents expected that more than 50% of their real estate acquisitions in the year 2008 will be in the U.S., and that investments in the U.S. in 2008 would increase by 16% from 2007. The outlook of foreign investors may help to buoy some sectors of the U.S. real estate market. Based on these survey results, the trend appears to be that despite the liquidity crisis, foreign direct investment will continue in 2008.
Electronic Navigation and Collision Law
(continued from page 7)

Although there are no cases yet deciding the issue, where a fishing or recreational vessel is involved in a collision, the owner may well find itself defending against the argument that it was negligent in failing to equip the vessel with an AIS. Most fishermen and recreational boaters already outfit their vessels with a range of devices for navigational safety. Where fishing and recreational vessels routinely operate in waters with fog and heavy commercial traffic, prudent navigation practice dictates also equipping them with devices to ensure that they will be visible on the radars of the commercial vessels they may encounter, especially as such devices become more affordable. Such a practice may not be the current U.S. norm, but in the end, in a collision case, the courts will say what is required. As Judge Hand said, “there are precautions so imperative that even their universal disregard will not excuse their omission.”

Two Systems Divided By A Common Law—
Prejudgment Security For In Personam Claims

by Nigel J. Binnersley and LeRoy Lambert

George Bernard Shaw is usually credited with the remark that the United States and England are “two nations divided by a common language,” although some credit Oscar Wilde. Since the United States and England are “common law” jurisdictions, lawyers in the U.S. and in England, not to mention the present and former Commonwealth nations who are also said to be “common law” jurisdictions, are quick to assume that terms used in one common law jurisdiction have the same meaning in another. In addition, many colleagues in civil law jurisdictions deal primarily with arbitrations and litigations in England and less so with arbitrations and litigations in the U.S. We find that many of our civil law colleagues assume that the “same” result will be reached in the U.S. as would be reached in England. In fact, the two systems are often as divided by their “common law” as they are by their “common language.”

In many disputes, and in maritime disputes in particular, the “winner” is not determined at the end of the case “after appeal, if any,” but rather at the beginning of the dispute when the creditor succeeds, or fails, in obtaining security for its claim. We describe below the primary ways prejudgment security can be obtained for in personam claims under English and United States law. In a subsequent issue, we will discuss the similarities and differences between the two systems with respect to “in rem” claims.

Under English law, a claimant may apply to the Court for a “Freeze Order,” now called a “freezing order.” This freezes the defendant’s assets, preventing the defendant from removing its assets out of the jurisdiction, so as to defeat the judgment. The applicant must have an accrued cause of action against the defendant, which is within the jurisdiction of the Court. There must also be a real risk of dissipation of assets. The Court will only exercise its discretionary power if the case before it is one of urgency.

In order for the injunction to be efficacious, it must be swift and secret, so that it is always applied for and granted ex parte. Since the order can have the most inhibitory and restraining effect upon the defendant, it should only be issued if justice and convenience require it. The applicant must have a good arguable case against the defendant. The applicant must also give an undertaking providing assurance of some financial redress against the loss and/or damage which may be suffered by the defendant or third parties, in the event the order is subsequently discharged.

The application should be made with affidavit, attaching a writ or a draft writ, setting out the details of the claim, the amount and the points for and against the application. There must be a full and frank disclosure of all material matters. It must be reasonably believed that the defendant has the shipowner was seeking to evade any important U.S. public policy. Consequently, the injunction was vacated and the “test” established.

Anti-Suit Injunctions And Arbitration

The New York Courts have applied the China Trade test in considering whether to enjoin foreign actions derogating from an asserted right of U.S. arbitration. One such case involved a Brazilian distribution company, Tecnimed, that filed suit in Brazil against GE and its local subsidiary while, at the same time, responding to a demand for arbitration. In New York, GE obtained an order to compel arbitration and an injunction of the Brazilian action. The New York court later entered a contempt penalty against the Brazilian entity for continuing its action rather than agreeing to dismiss it. The Second Circuit, in reviewing the two threshold factors, agreed that GE and its Brazilian subsidiary were of sufficient similarity and affiliation to pass the “China Trade” test. Next came the issue of whether the New York court’s ruling on the arbitrability of the claims was “dispositive” of the Brazilian action. The Second Circuit agreed that it would be because the order directing arbitration meant that all the claims asserted in the Brazilian action were to be arbitrated. Tecnimed claimed that its tort claim for “moral damages” was unique to Brazilian law and could not be arbitrated properly in the U.S. The court disagreed based on the broad arbitration clause in the parties’ agreement. Having passed the threshold tests, the Second Circuit reviewed the other factors such as “public policy.” It did not decide whether an attempt to avoid arbitration, was in itself a sufficient basis for an injunction. Given that the lower court had already ruled in favor of arbitration it held that an injunction protecting a court’s jurisdiction, once a judgment has been issued, weighed against granting comity and in favor of the injunction. The anti-suit injunction was upheld.

A similar case, also heard by the Second Circuit in 2004, involved an action filed in Mexico that the U.S. plaintiff sought to enjoin as being in derogation of the contractual obligation to arbitrate. The Second Circuit held that, irrespective of whether the two threshold tests were satisfied, the Mexican lawsuit was not “directed at leastening the arbitration” because the Mexican plaintiff was participating in the AAA arbitration and principles of comity weighed strongly against an injunction based on issues arising under Mexican law.

More recently, in the case of Ibeto Petrochemicals Industries Ltd. v. MT BEFFEN, the cargo receiver, Ibeto, brought an action in Nigeria, where the vessel was arrested, for contamination. To prevent it against any possible time bar it also demanded arbitration in London and filed suit in New York. The shipowner responded in New York seeking an order declaring the claim subject to London arbitration and enjoining Ibeto from proceeding in any other forum inconsistent with its agreement to arbitrate. The New York court granted that relief and denied Ibeto’s motion to voluntarily dismiss its New York complaint and, thereby, jurisdiction over it. On review, the Second Circuit held that the two threshold factors were clearly met and next considered the other factors. It expressly endorsed the “strong” public policy in favor of arbitration that might be frustrated by the Nigerian litigation to justify the injunction, notwithstanding that the Nigerian action was filed first. The injunction’s scope was modified to prevent Ibeto from proceeding in the Nigerian Court until the conclusion of the London arbitration. The Second Circuit has since upheld an injunction against a foreign suit that would undermine the U.S. Court’s judgment enforcing a foreign arbitration award under the New York Convention.

Although not available in all cases, when appropriate anti-foreign-suit injunctions can be a potent weapon in enforcing arbitration agreements calling for arbitration in the U.S. and, indeed, in other venues so long as the New York court can exercise personal jurisdiction over the party seeking to “side-step” the obligation to arbitrate.
of fuel oil specifications for future considerations by IMO.

- Green House Gas (GHG) Emissions – It was agreed to expedite work on GHG emissions to develop short and long term measures to address CO2 emissions from ships.

**U.S. Action**

On April 24, 2008 the House of Representatives passed H.R. 2830, the Coast Guard Authorization Act of 2008. Section 601 of this bill, the Maritime Pollution Prevention Act of 2008, would amend the Act to Prevent Pollution from Ships (33 U.S.C. §1901, et seq.), to implement MARPOL Annex VI in the United States. This section was adopted from H.R. 802 introduced in 2007 to implement MARPOL Annex VI. Meanwhile, the Senate Commerce, Science and Transportation Committee considered H.R. 802 on April 24, 2008 and approved the measure in the form of a substitute amendment by voice vote.

Accordingly, the Maritime Pollution Prevention Act of 2008, implementing MARPOL Annex VI, could be enacted this year whenever the Senate decides to take action on the Coast Guard Authorization Act of 2008. This action would then need to be followed by a Conference of the House and the Senate to finalize the bill. In the alternative, Congress could decide to separately take action on H.R. 802 in case action on the Coast Guard Authorization Act of 2008 gets stalled this year because of the elections, the war on Iraq, or the economy.

Vessel owners, ship managers, shipyards and other interested parties in the maritime industry need to continue to monitor developments in this area in order to prepare for these amendments to MARPOL Annex VI and implementation of Annex VI in the United States.

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Korean shipowner filed suit in Pusan, Korea seeking a declaration from the Korean court that it was not liable for China Trade’s loss. When China Trade eventually was informed of the Korean action it immediately requested the New York trial court to enjoin the shipowner from proceeding with its suit in Korea. That court used a test, now known as the “China Trade Test,” to consider whether to issue an "anti-[foreign] suit injunction." First, the parties must be the same in both matters and, secondly, the "resolution" of the case before the enjoining court must be dispositive (i.e., fully determinative) of the foreign action to be enjoined. Once those two threshold requirements are passed the court should consider five other factors, including frustration of the home court’s policy, vexatiousness of the foreign action, and the delay, inconvenience and expense of adjudication of the same issues in separate actions. China Trade, the trial court held, passed the threshold tests and showed the vexatiousness and the expense, etc. of the shipowner’s “race to judgment” in Korea so as to justify the shipowner’s being permanently enjoined from proceeding with its action there.

On appeal, the majority opinion side-stepped the issue of whether an admiralty court could issue an injunction on the basis it was vacating the injunction. It recognized that concurrent jurisdiction in two courts does not necessarily present a conflict or justify an injunction even if the parties and the issues are the same. Although the majority agreed with and approved the test used by the trial court, it considered two other factors, besides “vexatiousness” and “race to judgment,” had to be considered in weighing the propriety of the injunction, namely: (1) whether the foreign action threatens the jurisdiction of the enjoining (U.S.) forum; and (2) whether strong U.S. public policies are threatened by the foreign action. The majority found neither. Neither the Korean Court nor the shipowner had sought to prevent the New York court from proceeding to trial nor was it clear that assets within the jurisdiction and there is a real risk of dissipating the assets. Although an overall order covering all the defendant’s assets may be made, it is usual for the applicant to state a specific sum to be frozen in the order. Provisions should be made to cover the reasonable living expenses of the defendant to avoid undue hardship.

The maritime law of the United States provides for an attachment of assets of a defendant if the plaintiff has a "maritime" claim and if the defendant cannot be "found" in the judicial district but the defendant has property in that district. This is the by now familiar “Rule B attachment.” To be "found" in a district, the defendant must be doing business there and have an agent for service of process in that district. Upon a showing by affidavit that the defendant cannot be "found" in the district accompanied by a verified complaint alleging a "maritime" claim, the court will issue, ex parte, an order attaching any property of the defendant in the district.

If property is attached, the plaintiff must give prompt notice to the defendant, and the defendant is entitled to a prompt post-attachment hearing at which the plaintiff has the burden to show that the attachment was proper. At this hearing the plaintiff must show that the technical requirements were met, i.e., that plaintiff has stated a "prima facie" admiralty claim, that the defendant cannot be "found" in the district, that the defendant’s property may be found in the district, and that there is no statutory or maritime law bar to the attachment.

If the plaintiff meets this burden, the court may still vacate the attachment if the defendant shows that it is subject to jurisdiction in a convenient adjacent jurisdiction, the plaintiff could obtain in personam jurisdiction over the plaintiff in the district where the plaintiff is located, or the plaintiff has already obtained sufficient security.

Attachments under Rule B are simpler to obtain and maintain than "freezing orders" under English law. Notably, they do not require plaintiff to show that the defendant is dissipating assets or to post a bond; however, they are available only in a district where the defendant is not "found" but its property is and only in maritime cases. Until 2002, when a federal appeals court held that dollar-denominated electronic funds transfers were attachable “property” as they were cleared by banks in New York, Rule B was an established, but unspec-tacular and only occasionally useful vehicle for obtaining prejudgment security in maritime cases. Since the holding of the case in 2002, however, in light of the dominance of the dollar for commercial transactions and the volume of electronic funds transfers cleared by banks in New York, Rule B has been transformed into a Cinderella of the prejudgment security ball, asked to dance by virtually every maritime creditor in the world.

If the case is non-maritime, the creditor must use state court attachment procedures. New York’s statutory procedures are broadly similar to those that apply to obtain a freezing order under English law and are not favored. There are similar provisions in the statutes and rules of our neighboring state of Connecticut, but Connecticut has a long tradition of interpreting them much more liberally than in New York so that state court attachments are much easier to obtain in Connecticut than in New York.

A maritime creditor may also make use of these state court procedures if for some reason an attachment under Rule B is not available. Also, real estate may not be attached under Rule B but may be attached under state court procedures. So, if the property sought to be attached is real estate, state court procedures must be used.

In addition to providing the creditor the comfort of knowing that an eventual judgment in its favor will be paid, seeking and obtaining prejudgment security inevitably focuses the minds of parties to a dispute on the merits and often leads to an earlier resolution than would otherwise be the case. Wherever its dispute is being resolved on the merits, whether in New York, London, Hong Kong or elsewhere, a creditor should investigate and determine whether it may obtain prejudgment security through an attachment in the United States or a freezing order in England or Hong Kong or other common law jurisdictions.
Developments On Emissions From Ships

by Jonathan K. Waldron

U.S. and International

There continues to be much discussion and scrutiny on action to tighten up the MARPOL Annex VI air emission requirements internationally at the International Maritime Organization ("IMO") and anticipation of when the United States will finally pass MARPOL Annex VI implementing legislation. The following is an update.

**IMO Action**

Between March 31 and April 4, 2008, the IMO Marine Environment Protection Committee ("MEPC") approved a number of proposed amendments to the MARPOL Annex VI regulations, to reduce harmful air emissions from vessels. It is expected that these amendments will be formally adopted at IMO in October this year. Once adopted, the amendments would enter into force in February 2010. The following discusses the most important elements of the proposed amendments to Annex VI.

**SOx Emissions:** A substantial number of these proposed amendments involve significant reductions in SOx and Particulate Matter ("PM") emissions from vessels. Some of the major changes include the following:

- The global sulfur cap would be reduced from 4.5% (45,000 ppm) to 3.5% (35,000 ppm) from January 1, 2012; this cap would progressively be reduced to 0.5% (5,000 ppm) effective January 1, 2020, subject to a feasibility review to be completed no later than 2018.
- The sulfur limit applicable in Sulfur Emission Control Areas ("SECAs") would be reduced from 1.5% (15,000 ppm) to 1.0% effective March 1, 2010; this SECA limit would progressively be reduced to 0.1% (1,000 ppm) until January 1, 2015.

**NOx Emissions:** Amendments adopted would also solidify the three tier structure for new marine diesel engines with more stringent NOx emission standards depending on the dates of installation for the engines.

- **Tier I** – standard will continue to be 17 g/kW
- This is the current NOx emissions level listed in the existing Annex VI regulations and it applies to diesel engines installed on vessels built between January 1, 2000 and January 1, 2011.
- **Tier II** – standard will be reduced to 14.4 g/kW
- This will be the NOx emissions level for diesel engines installed on vessels built after January 1, 2011.
- **Tier III** – standard will be further reduced to 3.4 g/kW
- If a vessel is operating in a designated Emission Control Area, this will be the NOx emissions level for diesel engines installed on vessels built after January 1, 2016.
- If the vessel is not operating within a designated Emission Control Area, Tier II limits (14.4 g/kW) will continue to apply.

Indirectly, IMO has initiated revisions to the SOLAS IMO annex that will be required to be incorporated into the MARPOL Annex VI regulations. The initial revisions to SOLAS that were included into the Annex VI regulations in January 2005 are to be substantially revised and updated in line with the English Companies law reforms. In 1984, the Ordinance was substantially updated on the basis of the English Companies Act 1948. There has been no major revision since then apart from several but minor amendments.

The Financial Services and the Treasury Bureau of the Hong Kong Government, together with assistance of the Law Reform Commissions has launched a comprehensive review and rewrite of the Companies Ordinance. A public consultation is now being conducted on, amongst other things, the following issues:

- **Company names**
  Problem arisen when rogue traders set up "shadow companies" with names similar to existing and established trademarks or trade names. Although Court action can be brought against such rogue traders for passing off or trademark infringement, the Hong Kong Companies Registrar does not possess administrative powers to enforce the order to change the company’s name. Similarly, the listing of shadow companies’ name on the website and a placement of a warning statement in the Certificate of Incorporation and Certificate of Change of Name do not help to alleviate this problem. It has been proposed to empower the Companies Registrar to act on a court order to direct a company change the infringement and substitute it with a simple registration number if so required. In addition, it's also proposed to allow registration of hybrid names with Chinese characters and English wording.

- **Directors’ duties**
  Presently, although directors’ duties can be found in a company’s Articles of Association, generally speaking the duties of directors are found mostly in common law. A proposal to codify the common law duties to expand these to cover the duty to promote the success of the company as a whole, including the interest of the employees, suppliers and customers and its social responsibilities, has been put forward.

- **Corporate directorship**
  To improve accountability, transparency and corporate governance, it has been recommended that corporate directorship is abolished and to keep in line with other common law jurisdictions which have gone down the same route including Australia, Singapore, Canada, New Zealand, Malaysia and the USA (under its Model Business Corporation Act).

- **Registration of charges**
  Under current arrangements, a charge created on a company’s assets listed in section 80 of the Companies Ordinance is required to be registered with the Companies Registry within 5 weeks of creation. It is proposed to extend this time to 10 weeks for charges created overseas. Failure to register would render the charge void against the liquidator and any other creditors of the company.

It is thought that the registration system is operating well, so no substantial rewrite are proposed. Transparency is to be increased by shortening the time limit registration to facilitate the registration procedure by implementing an electronic filing system.

(continued on page 11)
New York vs. London Arbitration

by Thomas H. Belknap, Jr.

For those who take an interest in such things, there has been a long-running perennial debate whether to agree to arbitrate in New York or London. To be sure, there are many other jurisdictions making a legitimate play for the international shipping arbitration business these days, and the New York arbitration market has not exactly kept pace with London these last several years. And yet, the debate continues for various reasons, some academic and some very practical. Of course, representatives from each market can always be counted on to champion the relative merits of their own system to the exclusion of the other. And it will probably always be true that when someone from New York recommends arbitrating in New York, his motives will be suspect. Who wouldn't doubt advice from someone who stands to personally benefit from his client's agreement to have legal disputes resolved in his own jurisdiction? Surely, if someone from the London legal market told you that arbitrating in London was the only way to go, you'd take what he said with a grain of salt. (Right?) And yet, as lawyers we have a long history of advising clients to do things that are against our own personal pecuniary interest. We have recommended filing motions to dismiss for lack of personal jurisdiction or to enforce foreign forum or arbitration clauses. We have suggested moving for summary judgment or to mediate or settle claims so as to avoid a costly trial. Indeed, the number of ways that we have counseled our clients on how to get out of New York are too numerous to itemize here. So, perhaps I will be forgiven for hoping that my comments here in favor of New York arbitration might not be entirely discounted as self-interested propaganda.

Why should one insist that his dispute resolution clauses call for arbitration in New York? For anyone who has been following the debate, my list is not new. And yet, I am constantly surprised to discover fundamental misperceptions that persist about arbitration in New York, so please forgive me if I appear to be stating the obvious.


Maybe this has not always been the case, but it certainly has been for a long time. In the first place, the practice commonly used in London of having barristers represent parties before the arbitrators introduces a double layer of cost (at very high hourly billing rates) that simply does not exist in New York. Lawyers in New York are well accustomed to filling the double duty of counseling clients on real world problems and meanwhile examining witnesses and arguing legal points before a tribunal once the dispute moves to that arena. I can recall sitting in on an arbitration in London a number of years ago in which each party was represented by a barrister, a junior barrister, a solicitor and a junior solicitor, at a combined hourly rate of about £1,300. You simply do not see that in New York.

There is a second reason why New York is less expensive than London these days. The last time I checked, one pound sterling buys nearly two US dollars. One Euro buys about a dollar and a half. As anyone who has recently been a tourist in New York fully understands, this is a dramatic—indeed, historic—swing in favor of foreign purchasing power in the United States. While it is pretty obvious that such exchange rates strongly favor a party buying goods or, as is discussed elsewhere in this edition of Mainbrace, property in the U.S., it is equally the case that foreign parties buying services here presently benefit from an extremely favorable exchange rate. Conversely, a


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SMA Rules Allow For Consolidation In Appropriate Cases. Where a head charter and a subcharter incorporate the SMA rules, for instance, or when a dispute arises under a bill of lading which incorporates a charterparty’s arbitration clause incorporating SMA rules, the parties thereby agree that a dispute that implicates both agreements may be consolidated into a single arbitration proceeding. This is an important efficiency tool and can allow an “innocent” intermediate party to pass liability directly on to the responsible party.

New York Arbitration Allows Lawyers To Act As Arbitrators. Traditionally, arbitration was intended to provide commercially minded parties with commercial resolutions to commercial disputes. In most cases, this is still one of the true values of arbitration. On the other hand, there are times when the parties would prefer to have a dispute resolved by arbitrators with a legal background. There are various reasons for this, be it because there is a perception that the case may turn on a complex legal question or because more formal evidentiary procedures may be necessary.

This is easily accommodated in New York. In the first place, several SMA members have legal backgrounds. It is also entirely open to the parties to draft their agreement to allow whatever arbitrators they desire. For instance, I was recently involved in a case where the parties had agreed that the party-appointed arbitrators would be SMA members and not lawyers and that the chairman would be a maritime lawyer familiar with maritime casualty matters but not an SMA member. In sum, there is significant flexibility to fashion an arbitration agreement that accommodates the parties needs, whatever they may be.

Conclusion

There are plenty of good reasons to decide to arbitrate a dispute in London, or Singapore, or Hamburg, or wherever. There remain, however, many good reasons why New York is a desirable forum for the arbitration of international maritime disputes. In particular, there is no question that the expertise exists here to accommodate any case. But whatever the decision on whether and where to arbitrate, the most important thing is to ensure that the decision is made based on facts and not on misperceptions.

Anti-Foreign Suit Injunctions In Aid Of Arbitration

by Jeremy J.O. Harwood

Introduction

The traditional rule that U.S. admiralty courts could not grant injunctions (based on the historic separation of Admiralty relief from the equitable relief available in Chancery) has been eroded. A leading treatise, Schoenbaum, Admiralty and Maritime Law, considers that injunctive relief is available if that relief is subsidiary to an admiralty claim—as it would necessarily have to be in order to fall within the Court’s admiralty jurisdiction.

This is pertinent when it comes to disputes subject to arbitration. Notwithstanding an obligation to arbitrate, an opponent may file suit in a preferred foreign jurisdiction seeking a declaration that undercuts the arbitration or award. Accordingly, the issue of when a party may obtain an injunction from a U.S. court to prevent an opponent from circumventing an arbitration agreement by filing suit abroad is of concern to maritime claimants.

The China Trade Test

Injunctions are, the Second Circuit Court of Appeals has pronounced, a remedy to be “used sparingly” and “only with care and great restraint.”

The prerequisite for obtaining an injunction in the United States is a showing by the Plaintiff that it is likely to prevail on the merits and that it will suffer irreparable harm (that is, injury not compensable by monetary damages) if an injunction is not granted or, as stated by the Second Circuit, “a clear showing of probable success and possible irreparable injury.”

The test for anti-suit injunctions in New York courts was set forth by the Second Circuit in China Trade and Development Corp. v. M/V CHONG YOUNG. The claimant, China Trade, brought a substantial cargo loss claim against the shipowner in New York after the grounding of the vessel. Following extensive discovery abroad, over a period of a year and a half, trial was scheduled. Some months prior to the U.S. trial date, the