LASER FOCUS ON ASSET RECOVERY – PRE AND POST JUDGMENT TOOLS FOR THE MARITIME INDUSTRY

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The only reason you are reading this article is because arbitration awards or court judgments are not always worth the paper they are typed on. Without a vessel arrest or attachment of other assets, owners and charterers often question whether it is worthwhile to go ahead with an LMAA or SMA arbitration. And for good reason; as a New York appellate court recognized a few years ago in *Aqua Stoli Shipping v. Gardner Smith Pty Ltd*, vessel arrests or attachment of assets are necessary because *"it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic, and their assets are often transitory.*"

This calls for what can be a delicate balancing act. Clubs and their members must be more proactive than ever in both searching for and retaining security in support of claims. Yet, at the same time, regard must be had to the costs and likely success of the pursuit of assets. In the two years since an appellate court ruled maritime practitioners could no longer attach a maritime defendant's electronic fund transfers passing through New York as security, lawyers have searched around the world for the next big thing. This mindset is wrong. There is no Rule B magic bullet useful for all occasions. However, so long as the maritime industry continues to contract in U.S. dollars, there are tricks of the trade to hunt for the assets of a non-cooperative wrongdoer.

In the following article Chris Nolan of Holland & Knight explores recent developments in U.S. asset recovery including: the risks and rewards of seeking pre-judgment security in unfamiliar jurisdictions like U.S. state courts; the extent of attaching assets of an alleged alter-ego company, successor-in-interest, or sister ships, and how SMA arbitrators are reacting to what used to be rare pre-judgment security applications.

The trusty carpenter wears a leather tool-belt carrying the most essential tools in order to deal with the emergency call of the day. The maritime industry executive or practitioner should be no different. Your tool-belt should be segregated into two sections; pre-judgment and post-judgment tools. Depending on the circumstances of the case, a particular tool may be more appropriate to use than another. So consider the rest of this article a checklist of sorts to confirm your tool-belt is up-to-date with the latest tools to help your company secure what is rightfully theirs – monies for claims soon to be, or already, adjudged in their favor.

A. Pre-Judgment Tools

1. Rule B Attachment: Though battered in recent years by the *Jaldhi* decision which now precludes the attachment of EFTs passing through New York intermediary banks, Rule B attachments still results in the restraint of all different types of tangible and intangible property so long as the underlying dispute concerns a maritime claim. There are three critical issues to consider with Rule B attachments; **the type of claim, the target companies, and the target property.** Concerning the *type of claims*, courts routinely find disputes involving C/P, COA, FFA, cargo, performance guarantees, ship repair, collision, and piracy disputes are "maritime claims." Plaintiffs have been aggressive lately in seeking Rule B relief for commodity type contracts, sale and purchase

contracts which may require a maritime transport component to ship the commodity. This has not been found to be maritime in nature.

Target companies are more complicated. An alleged alter-ego, successor-in-interest, and even sister ship companies have been sued as defendants for Rule B security relief. The most prevalent are alter-ego claims likely because maritime companies, on average, are not the best at maintaining corporate formalities. Employees, wearing many company hats, are bound to send emails from the account of one company on behalf of another which could result in binding both companies for alter ego purposes. Just recently, courts have sustained alter ego claims on similar email evidence grounds, payments by one company for the debts of another, and the sharing contact phone numbers, website information, or office space when publicizing in trade journals. All a party needs is some evidence of these intermingling actions in order to seek further discovery to support the allegations. In the interim, the property remains restrained.

What *type of property* is being targeted? Bank or escrow accounts are simple if you know of them. Physical cargo like petroleum coke, bunkers aboard a ship, and reefer containers at the pier all have been attached by Rule B court orders throughout the U.S. If the defendant does business in the U.S., its customers may also be Rule B targets as debts owed are attachable. The business logistics nightmare for a company often times result in a security agreement - whether it be a bond or escrow agreement. Even an arbitration award in the defendant's favor may be restrained. There is no limit to property targets (save EFTs). Its just a matter of getting to know an opponent's business practices or lawsuit activities in the U.S.

2. Rule C Arrest: Unlike Rule B attachments of all types of property, Rule C concerns the traditional arrest of specific property, a specific vessel, as security in connection with a maritime lien claim. It is secret in that liens are for the most part not recorded; it adheres to the vessel until the obligation is satisfied or the vessel is judicially sold following arrest. Traditional maritime liens concern salvage, GA, crew wages & pilotage, contractual matters such as cargo or a repair claims, tort matters such as personal injury or collision claims or statutory matters like preferred ship mortgages or necessaries.

Recently, priority of lien battles have resulted in a number of disputes. And holders of a First Preferred Ship Mortgage are realizing they may not be as protected as they thought if the vessel mortgage was not properly documented. For a vessel documented under U.S. laws, the mortgage holder must perfect its interest by properly recording the mortgage with the U.S. Coast Guard National Vessel Document Center. In the event of a default in monthly payments, the mortgagee could then enforce the mortgage by arresting the vessel. This interest should only be primed by the payment of custodial fees associated with the vessel arrest and by certain "preferred maritime liens" in effect at the time of mortgage registration.

Shipowners must continue to be cognizant of lien disputes resulting from charterer failures. Unpaid bunker suppliers continue to arrest vessels regardless of the fact that it is the charterer who failed to make payment, not the owner. In a recent case, *Cockett Marine Oil. Ltd. v. M/V Lion*, 2011 WL 1833286, (E.D. La. May 12, 2011), by way of a restricted appearance, defeated an arrest order under similar circumstances because the choice of law clause in the bunker supply contract pointed to English law which does not provide a lien for this kind of necessaries, as opposed to U.S. law. Because US law recognizes this lien, savvy bunker supplies are pushing for US law clauses or at a minimum writing the law clause to state a "lien on ships" is contingent on the local law where the lien is being enforced, i.e., the U.S. (while the remainder of the contract provides for a foreign law,

typically, English). Shipowners can continue to face these perils if they do not insist on a clause in the c/p with the charterer preventing charterers from agreeing to such clauses with bunker suppliers.

3. New York State Court Attachments: New York State is the leader in pre and post judgment recovery actions for the same reason bank robbers rob banks; they go to where the money is. As the financial capital of the world, major global banks must maintain a presence in New York. As a result, one is more likely to find a bank account or escrow account owned by the debtor in New York.

There are instances where a charterer or owner cannot use Rule B to attach a bank account. For example, if the defendant is registered to do business in New York or the underlying claim is a wheat or iron ore contracts, i.e., not maritime in nature. A state court attachment is then worth exploring while bearing in mind the following caveats. Unlike Rule B attachments, the petitioner seeking a state law attachment is required to post a bond (the amount being at the discretion of the judge), which would forfeited if the underlying litigation is not resolved in the petitioner's favor. Attorneys' fees can also be awarded for a wrongful attachment. There is also little latitude in blindly searching for assets; state court judges expect there to be a good faith basis in seeking assets from a particular garnishee. Courts also require evidence the debtor is taking actions that may render an eventual award ineffectual.

A recent decision by the New York appellate state court, in *Sojitz Corp. v. Prithvi Information Sol. Ltd.*, 2011 WL 814064 (1st Dep't 2011), illustrates the advantages and disadvantages of a state court attachment in aid of arbitration under New York's wide-reaching arbitration statute. The appellate court confirmed that so long as the creditor commences an arbitration within 30 days, an attachment order may issue even if: (1) the arbitration is seated outside New York (here, in Singapore applying English law), the parties are foreign (Japanese and Indian, respectively), and the transaction is foreign (nearly $40 million owed for communications equipment made in China which the Indian company failed to pay for). The only connection to New York that is required is the situs of the property. In this instance, the account of the debtor was not in New York; the debtor's *customer* owed it money and the amount of the debt was restrained at the customer's New York back account.

While the relief in *Sojitz* was significant, consider that the petitioner was required to post a $2 million bond in support of the $40 million attachment. The amount of the bond was later reduced to $900, 5% of the amount of the customer debt owed and attached, around $18,000. The petitioner also faced a wrongful attachment claim, though it was rejected. On balance, if aware of specific assets or debts located in New York, pre-award security can be restrained.

4. SMA Arbitration - Pre-Award Security: There is one non-judicial avenue for pre arbitration award security which merits careful consideration. Over the last few decades, the Society of Maritime Arbitrators have relied on broad language in one of its internal Rule to grant a wide range of relief, including partial final awards of security in aid of the SMA arbitration claims. This is in stark contrast to LMAA Rules which specifically provide that security may be ordered in respect of a party's costs only; there is no corresponding provision which empowers them to order security for the principal of a party's claim. The SMA Rules, like the LMAA Rules, explicitly provide security may be awarded for costs.

The SMA relies on Rule 30 when invoking its powers to award security for claims: "[t]he panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not

limited to, specific performance." One would expect the SMA to explicitly state in its Rule that it has the power to award security for claims as opposed to relying on the general language of Rule 30. It has not and New York courts have recognized the SMA's power to award security for claims.

New York courts have yet to consider the SMA's broad powers since the U.S. Supreme Court's ruling in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, -- U.S. --, 130 S.Ct. 1758, 176 L.E.2d 605 (2010), where the Court ruled that in the absence of express enabling language in an arbitration clause, arbitrators do not have the power to impose a class action arbitration on a party objecting to such relief. In so holding, the majority noted that parties to a contract could not be compelled to submit their dispute to class arbitration when the contract's arbitration clause was silent concerning class action in arbitration relief. One may argue that if an arbitration clause is silent concerning security, and the arbitral Rules do not explicitly provide for claim security as opposed to costs security, then *Stolt-Nielsen* precludes such relief.

An SMA panel has yet to opine as to whether *Stolt-Nielsen* limits its powers derived from SMA Rule 30. It is an issue an aggrieved party will challenge in court in the years to come and all parties should be aware of when seeking pre-award security for claims, along with the fact SMA panels tend to grant counter-security to put the parties on equal footing.

B. Post-Judgment Tools

This year marks the 150th anniversary of the U.S. Civil War. With it, one of the nation's greatest Presidents, Abraham Lincoln, has had every aspect of his life examined and reexamined. His bustling law practice before seeking elected office is of particular interest ... to lawyers. It is fascinating that in 1858, only a few years before he would become the 16th President of the United States, Lincoln the legal practitioner wrote the following with respect to judgment enforcement:

> "My mind is made up. I will have no more to do with this class of business. I can do business in Court, but I can not, and will not, follow executions all over the world." Roger D. Billings, Jr., A. Lincoln, Debtor-Creditor Lawyer, 8 Journal of Ill. Hist. 82, at 102 (2005).

Lawyer Lincoln had every right to be frustrated as the judgment enforcement business is chess match between the eager judgment creditor and evasive judgment debtor. However, I cannot help but think Mr. Lincoln would have been pleased with the tools courts and legislatures have provided lawyers in recent years. The oft-discussed *Koehler v. The Bank of Bermuda Limited ("Koehler")*, 12 N.Y.3d 533 (2009), ruling may ultimately result in lawyers not having to follow executions all over the world. Rather, the assets will come to New York.

Before utilizing judgment enforcement tools, however, a foreign arbitration award or foreign money judgment must be recognized by a U.S. court. It is designed to be a straight-forward process.

1. Recognition of Foreign Judgments: New York's Uniform Foreign Money Judgments Recognition Act, is applicable to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." N.Y.C.P.L.R. § 5302. In *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.,* 762 N.Y.S.2d 5 (2003), New York State's highest court observed, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts"). New York's federal appellate court similarly noted, "internationalization of commerce requires that American courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play." *Ackermann v. Levine*, 788 F.2d 830, 845 (2d Cir.1986).

The universal respect New York courts show for foreign money judgments has resulted in very limited grounds for denying recognition: the lack of personal jurisdiction over the defendant in a foreign proceeding, failure to provide adequate notice of the proceedings, or the court system of the foreign country is patently unfair resulting in an abuse of process. There are a few discretionary factors a court may consider as well, such as fraud in obtaining the judgment, but the grounds are narrow and courts tend to place the burden of proof on the objecting defendant to defeat recognition.

2. Recognition of Arbitral Awards: The Convention on the Recognition and Enforcement of Arbitral Awards (commonly referred to as the New York Convention), is well known to practitioners. Ratified by over 140 countries, a signatory nation is required to recognize arbitral awards issued by another signatory nation. The Panama Convention extends the New York Convention to Latin American countries in nearly all respects. The grounds for refusal to enforce an award, enumerated in Article V of the New York Convention, are limited to issues such as a lack of notice, its failure to be binding, or it being contrary to public policy. Domestic arbitration awards, such as SMA Awards, may be subject to the Convention or domestic vacatur laws. New York State, for example, has its own statute for arbitral awards.

3. Collection Post-Judgment: When the non U.S. judgment or arbitration award is ultimately recognized by a U.S. court, the creditor can have the now domesticated judgment recorded in any U.S. state where assets of the debtor are located. What makes the *Koehler* process so intriguing is New York's highest court ruled that tangible property outside the jurisdiction of New York in the possession of a garnishee subject to New York jurisdiction could be ordered delivered into New York and be made the subject of judgment turnover proceedings. In that case, the Bank of Bermuda, which held shares of the debtor in Bermuda, was ordered to have the shares brought to New York to satisfy the judgment. Because the Bank's New York subsidiary was within the Court's jurisdiction, the judgment order had extraterritorial effect.

The logistics for a *Koehler* turnover order are summarized in an article prepared earlier this year: http://www.hklaw.com/id24660/publicationid3063/returnid31/contentid55376/.

Since *Koehler* was issued, banks have reacted poorly to the decision as it creates a great deal of concern for its customers around the world. As such, banks have fought *Koehler* actions with mixed results in the courts and unsuccessfully in the New York state legislature. Concerning legislation, bills have been introduced in the New York legislature which would have eviscerated key aspects of the *Koehler* ruling; the bills never made it out of committee.

In New York state court, a judge recently found New York's separate entity rule (which provides each bank branch is a separate entity and does not have to be concerned with accounts in another branch or the main office), remains viable and limited *Koehler* to the particular facts of the case. The court was not in favor of the idea of Chinese banks having to search for assets in any branch of the bank around the world. *Samsun Logix Corp. v. Bank of China,* 2011 WL 1844061 (Sup. Ct. N.Y. County 2011). Federal court treatment of *Koehler* has faired better, with one judge rejecting the separate entity rule reasoning in *Samsun* by finding that so long as the court has jurisdiction over garnishee Commerzbank, it can be forced to direct monies of the debtor held in the bank's Germany branch be transferred to an account in New York. All due process and comity arguments by the bank were rejected on various grounds. *JW Oilfield Equip., LLC v. Commerzbank AG*, 2011 WL 507266 (S.D.N.Y. Jan. 14, 2011).

Finally, if a creditor is not fortunate enough to know the location of assets of the debtor, as the creditor did in *Koehler*, all is not lost. Creditors are entitled to a broad range of discovery from a debtor present in the U.S., its customers, its garnishees, and even its lawyer. Concerning customers, a creditor can subpoena document concerning business activities with the debtors which may well include bank account information. New York garnishee banks have responded to subpoenas for wire transfer information which not only can provide bank account details, but information concerning customers which may owe a debt to the debtor, frequent business activities, and the like. Concerning lawyers, as surprising as this may sound, state courts have required a debtor's lawyer to provide information concerning its fee arrangements with the debtor, debtor bank account details, current litigation involving the debtor, debtor escrow accounts, and addresses and phone numbers of debtor board members -- all without being able to assert the privilege of client confidentiality. At bottom, courts show a willingness to assist the creditor in all reasonable actions against the debtor.

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Warning: This checklist of security and judgment enforcement tools is lethal against an opposing party who refuses to post security for claims or the evasive deadbeat judgment debtor. Happy asset hunting.