THE MARITIME LAW YEAR IN THE UK

BY

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In dealing with this topic I have been specifically asked to consider the case of the *"Indian Grace"* and the House of Lords judgment in which their Lordships analysed the difference between a claim *"in rem"* and a claim *"in personam"*. Allied to the consideration of the effect of claims *in rem*, I will touch on the Arrest Convention 1999 and the new Admiralty Practice Direction relating to arrests. Finally, I will consider briefly the case of the *Herceg Novi* and the issue of forum shopping and limitation of liability.

The Indian Grace

While the case itself has occupied a considerable number of pages in the law reports, having gone to the House of Lords on two separate occasions, the background facts are reasonably simple.

The Plaintiffs were the Ministry of Defence of the Government of India who sued for damage suffered by a consignment of munitions carried on board the Defendants' vessel on a voyage from Sweden to Cochin in June 1987. A few days after departure on June 26 1987, the munitions, which were loaded in the number 3 hold above a cargo of woodpulp, caught fire. The fire was extinguished but, as a result of the woodpulp swelling after the hold had been flooded with water, 51 shells and ten charges were jettisoned and the remainder of the cargo was claimed to be a total loss as a result of the munitions being exposed to radiant heat. The cargo was discharged in India by September 4 1987 and in December 1987 the Minister of Defence wrote to the owners making a claim for the total loss of the cargo in the sterling equivalent of £2.6M.

On September 1, 1988 the Plaintiffs issued a plaint in the Subordinate Judges Court in Cochin, seeking damages for the 51 shells which were not delivered and the claim came on to a final hearing on 7 December 1989. Judgment for the sterling equivalent of £6,000 was given on December 16 1989 in respect of the claim for the short

delivery. It is important to note that in the Cochin hearing no application was made to enlarge the claim to encompass the total loss of the remainder of the cargo.

Pending the outcome of the judgment in the Cochin Court, on 25 August 1989 the Plaintiffs issued a Writ *in rem* in the High Court in England and, in its unamended form, the original Statement of Claim included a claim for the total loss of the munitions including that part of the cargo that was the subject matter of the Cochin proceedings. The defence pleaded issue estoppel on the basis that the Plaintiffs were capable of bringing the whole claim in Cochin but decided not to do so and, which is central to the further litigation, the Judge allowed the owners to amend their Defence to rely upon Section 34 of the Civil Jurisdiction and Judgments Act 1982 which effectively implemented Article 21 of the 1968 Brussels Convention. Section 34 states:

> "*No proceedings may be brought by a person in England and Wales... on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies...in a Court of an overseas country unless that judgment is not enforceable or entitled to recognition in England and Wales...*"

At first instance Sheen J. held that the cause of action in the English action was the same as that on which the Plaintiffs had relied when they obtained their Judgment in India and that therefore Section 34 was an absolute bar to the initial proceedings. The matter went to the House of Lords: *Republic of India and Another v. The India Steamship Limited [1993] 1 Lloyds Report 387* where Lord Goff, giving the Judgment of the House, held that, whilst there was an identity between the causes of action in the two sets of proceedings, nonetheless, Section 34 only operated as a bar against the proceedings rather than as an exclusion of jurisdiction. On that basis Section 34 could, in principle, be defeated by agreement, waiver or estoppel and the matter ought to be remitted to the Admiralty Court to consider those issues. It was also held (although it had been raised by the Plaintiffs for the first time in the House of Lords), that the Admiralty Court should consider the argument as to whether the judgment of the Cochin Court was a judgment between the same parties because it

was a judgment *in personam* whereas the action in the English Courts was an Admiralty action *in rem.*

When the matter came back before the Admiralty Court at first instance, Mr Justice Clarke held that the English proceedings, being an Admiralty action *in rem*, although an action brought on the same cause of action as the Cochin action was an action brought against a different party, that is the ship rather than the owners. That being so, the Plaintiffs were entitled to succeed. The owners appealed successfully to the Court of Appeal and the matter then came on before the House of Lords where Lord Steyn, giving the judgment of the Court, analysed the nature of an Admiralty action *in rem.*[1]

Historically, an Admiralty action could only be brought in respect of a maritime lien: *The Bold Buccleugh*[2]. After the Judicature Acts 1873 to 1875 actions *in rem* were extended to new categories. While originally, according to the personification theory the ship was herself the wrongdoer, in the case of *The Dictator*[3] Sir Francis Jeune P, explained – so Lord Steyn said - the modern form of admiralty action as being a procedural means whereby an action *in rem* was an action against the owners of the vessel. Once the owners entered an appearance to the writ *in rem* then there were two parallel actions; an action *in personam* against the owners and an action *in rem* against the ship. In his judgment Sir Francis Jeune said that the action *in rem*:

> *"not only determines the amount of liability, and in default of payment enforces it on the res but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the Plaintiff so far as the owners are liable to meet it"*

This was the extract quoted by Lord Steyn in the "*Indian Grace*" in support of the proposition that a claim *in rem* is a claim against the owners, but the following sentence in the judgment of Jeune J. perhaps gives a clearer indication of his views:-

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[1] [1998] 1 LR 1 Republic of India v. India Steamship Co. Ltd. *"The Indian Grace"* (No.2)
[2] 7MOO.PCC.267
[3] [1892] P.304

> *"It appears to me consonant with common sense that if the owners have had no personal notice, and are not, save in the sense indicated in the "Parlement Belge" before the Court, the effect of its judgment should be limited to the res in its hand but that, if the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the Court by a personal notice".*

However the procedural theory was followed in later cases – with a few dissenting judgments which I will deal with later – and was in particular reinforced by the Sovereign Immunity cases the most notable of which was the *Parlement Belge*[4] in which the Court of Appeal held that an action *in rem* indirectly impleaded a Sovereign, who was the owner of the vessel served, on the grounds that his property was affected by the judgment of the Court. This was followed, in the case of *The Cristina*[5]. In the *"Indian Grace"* Lord Steyn, referring to the Sovereign immunity cases, went on to say:

> *"The proposition that the Foreign Sovereign is directly impleaded as a defendant by service on his vessel is therefore conclusively established. That proposition must carry with it the legal consequence that the Sovereign is a party to the action in rem."*[6]

In fact, that is not a necessary analysis. In the "*Cristina*"[7] Lord Wright analysing the *Parlement Belge* said:

> *"But the modern writ in rem has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce a maritime or statutory lien, or in a possessory action against the ship whose possession is claimed. To take the present case, the writ names as defendants the "Cristina" and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice*

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[4] [1880] 5 P.D. 197
[5] [1938] A.C.485
[6] [1998] 1 LR at page 8
[7] [1938] AC 485 at page 504

> *that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment in rem is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question de facto enjoy. The writ by its express terms commands the defendants to appear or let Judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett LJ the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the Sovereign State unless it consents".*

He went on to say[8]:

> *"Under the modern and statutory form of a writ in rem, a defendant who appears becomes subject to liability in personam. Thus the writ in rem becomes in effect also a writ in personam. This emphasises the view that the writ directly impleads the Spanish Government".*

On that basis, it is difficult to see how it can be asserted that the mere issue of a writ *in rem* before an appearance is entered makes the owner a party to the action. This does no more than confirm what was said by Lord Denning in *"The Banco"*[9]*:*

> *"If no appearance is entered, however, the action remains, as it began, an action in rem only, operating only against the ship arrested. If judgment is entered in default of appearance, it can be enforced by sale of the ship but not against the defendant personally."*

Furthermore, the decision in the *"The Indian Grace"* does not explain the position of writs *in rem* which are issued in respect of maritime liens. As is well known, a writ *in rem* can be served on a vessel in respect of a claim giving rise to a maritime lien notwithstanding a change of ownership of the vessel in question. It does not require

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[8] at p.505
[9] [1971 P.137

that the owner of the vessel was the person who would have been liable *in personam* on the original claim.

The decision in the *"Indian Grace"* itself can, of course, be explained in terms of the fact that the jurisdiction of the English Court arose under Section 21(4) of the Supreme Court 1981 being an action *in rem* arising in connection with a ship and against the person who would be liable on the claim in an action *in personam* and who was when the cause of action arose, the owner or charterer of or in possession or in control of the ship. Furthermore once the owners entered an appearance then, of course, there was an *in personam* action continued against them.

To that extent Section 34 of the Jurisdiction and Judgments Act 1982 was entirely in point in that the proceedings in England arose out of a cause of action between the same parties. That being so it was probably not necessary to analyse the nature of a writ *in rem* in the way the House of Lords did. Nonetheless, the position in English law as a result of the decision in the *"Indian Grace"* is that an action *in rem* is an action against the owners from the moment the Admiralty Court is seized of jurisdiction and that jurisdiction is invoked by the service of the writ. Perhaps a better way of looking at the decision is that it can in fact be seen purely as giving a purposive effect to Section 34, namely that it would be wrong to permit an action *in rem* to proceed despite a foreign judgment *in personam* obtained on the same cause of action against the same *in personam* defendants.*

The Arrest Convention 1999 and the New Admiralty Civil Procedure Rules relating to Arrests

The Convention was approved on 12 March 1999 and by Article 14 will enter into force six months following the date on which 10 states have expressed their consent to be bound by it. Its main purpose is set out in the 22 sub-paragraphs to Article 1, being the definitions of a Maritime Claim which will give rise to a right to arrest. However by Article 9 it is expressly stated that nothing in the Convention shall be construed as creating a Maritime lien.

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* A much fuller and more learned analysis of the nature of an *in rem* action can be found in articles by Trevor Hartley at 105 LQR 640 and by Nigel Teare, QC at 1998 LMCQR 33.

Article 1(2) defines "arrest" as meaning any detention or restriction on the removal of the ship by order of the Court to secure a Maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.

There are two new major changes under the new Admiralty Practice Directions. In paragraph 6.1 it states that:

> *"Except as provided in this practice direction, the Claimant in a claim in rem and a judgment creditor in a claim in rem is entitled to have the property proceeded against arrested by the Admiralty Court...."*

Secondly, in paragraph 6.7(3) of the Practice Direction it states that:

> *"Where in relation to a claim in rem security has been provided to obtain the release of the property under arrest or to prevent the arrest of the property the Admiralty Court may at any stage:*
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> *(a) Order that the amount of security be reduced, and may stay the claim pending compliance of such order;*
> *(b) Order that the Claimant be permitted to arrest or re-arrest the property proceeded against for the purpose of obtaining further security, provided that total security provided shall not exceed the value of the property at the time of the original arrest or at the time security was first given this property was not arrested."*

This is mirrored in Article 5(1) of the Convention which confirms that where a ship has already been arrested or released or security in respect of that ship has been provided, the ship shall not thereafter be re-arrested or arrested in respect of the same Maritime claim unless the nature or amount of security is inadequate, provided that the aggregate amount of security may not exceed the value of the ship.

Article 5(2) provides for the arrest of, in effect, a sister ship for additional security and, if the Arrest Convention is adopted into English law this will certainly have the effect of Section 21(8) of the Supreme Court Act 1981 having to be repealed. This Section gives statutory effect to the decision in the "*Banco*"[10] where it was held that once a ship had been served with a writ or arrested in an action *in rem* no other ship could be served with a writ or arrested to enforce that claim. Furthermore, the new Rules of Court give a plaintiff the ability to re-arrest for security notwithstanding he may be holding a standard letter of undertaking which provides security for his claim: "in consideration of his releasing and/or refraining from arresting or otherwise detaining the vessel in question or any other vessel or property in the same or associated ownership of the defendant". Given that the Rules of Court provide for a re-arrest to increase security and, if the Convention is ratified into English law there will be a statutory ability to re-arrest, it is difficult to see how the Court's powers can be excluded. The defendant owner is not a party to the letter of security and even though that contract is made for his benefit he cannot, of course, sue on it. His P. & I. Club/underwriters would not probably be able to claim any damages as a result of any breach of the security agreement albeit that they may be able to apply for an injunction, at least in theory, to prevent such a breach and issues of estoppel may indeed arise.

A further decision of the Court of Appeal in the case of the "*Bos 400*"[11] has altered the position with regard to what was commonly thought to be the position with regard to re-arrest. Under Article 13 of the 1976 London Limitation of Liability Convention, where a limitation fund has been constituted, any person having made a claim against the fund is barred from exercising any right in respect of such a claim against any other assets of a person by, or on behalf of whom, the fund has been constituted. On that basis a ship owner against whom a claim has been made of a sort that fell within the 1976 Convention could constitute a fund in a Convention country and then rely on Article 13 as a bar to having its vessels arrested.

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[10] [1971] p.137
[11] [1998] 2 LR. 461]

The facts of the "*Bos 400*" litigation are almost too complicated to summarize conveniently but arose from the barge being towed from the Congo to Capetown. The towline parted in stormy conditions and the barge was driven ashore, becoming a total loss. Proceedings on the merits were started in both South Africa and in England and various interlocutory applications were made in the English proceedings both as to the constitution of the fund and anti-suit injunctions. The whole scope of the litigation was reviewed in the Court of Appeal and Sir John Knox, with whom the other members of the Court agreed, held:

> "*That until both liability is established and a limitation decree granted, the mechanism in the 1976 Convention for protecting ship owners entitled to limit their liability thereunder does not become operational.*"

Despite the clear wording of Article 13: "Where a limitation fund has been constituted" and the previously accepted practice that where ship owners constitute a limitation fund in a Convention country that their ships are protected from arrest to secure claims, at least in other Convention countries, this decision has certainly altered the position, as requiring the matter to be tested in Court and a decree granted before the owner is safe from arrest.

Dealing further with the alteration to the new Admiralty Practices Direction, the provision that the right of a judgment creditor in a claim *in rem* to arrest the vessel proceeded against overturns the decision in the "*Alletta*"[12] where it was held that the plaintiff's right of arrest was lost because it had become merged in the judgment which the plaintiffs had earlier obtained in previous proceedings. Previously once judgment had been obtained a writ of execution or fi.fa. could be issued but the vessel could not be arrested. This has now been altered.

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[12] [1974] 1 LR 40

Dealing with the issue of arrest, two recent cases *"The Tychi"* (Court of Appeal 31.3.99) and the *"Bumbesti"* (Admiralty Court 22.6.99) show that the Admiralty Court jurisdiction for arrest is still capable of further analysis. In the *"Tychi"* the plaintiff and defendant entered into an agreement under which the plaintiff would charter to the defendant, as a container operator, container "slots" on vessels operating on the plaintiff's North Atlantic service. The defendant got into financial difficulties and the plaintiff arrested one of the defendants' vessels. The issue then arose as to whether a "slot" charterer fell within the definition of "charterer" for the purposes of Section 21(4) of the Supreme Court Act 1981 – the section giving rise to the right of arrest. It was held that the term "charterer" as used within Section 21(4) was not limited to demise charterers and that there was nothing in the 1952 Brussels Arrest Convention to suggest that "charterers" should be given a limited interpretation and further the Court supported the decision of the Australian Court in *Laemthong International v. BRS Shipping* [1997] 149 ALR 675.

In the *"Bumbesti"* the claimants alleged that the defendants wrongfully terminated a charter and obtained arbitration awards in two Romanian Arbitrations. The claimants arrested the defendants' ship *"Bumbesti"* in order to enforce payment of one of the awards and the defendants sought the release of the vessel. The issue arose as to whether the claim was one arising out of an ageement relating to the use or hire of a ship within Section 20 of the Supreme Court Act. It was held that the claim was one to enforce a Romanian Arbitration Award and the nature of such a claim was damages for breach of an implied term in the submission to arbitration that any award would be fulfilled. That being so, an agreement to refer disputes – the arbitration agreement – was not the same as the charterparty and was not therefore an agreement relating to the use or hire of a ship.

The Herceg Novi[13]

This is a useful case in showing how the English Courts will consider staying proceedings in England in favour of proceedings already commenced in a foreign

[13] 1998 2 LR 454

jurisdiction. In effect the Court of Appeal held that the perceived benefits of the 1976 Limitation Convention operating in England over the 1957 Limitation Convention, operating in Singapore, was not a relevant consideration when the Court was being asked to exercise its discretion and thereby permit a party to sue in England rather than the foreign jurisdiction which was otherwise the most natural and appropriate forum.

On the 18th August 1996 a collision took place between the plaintiff's ship *"Herceg Novi"* and the defendant's ship *"Ming Galaxy"* in Singapore territorial waters within the Traffic Separation Scheme. The *"Herceg Novi"* sank as a result of the collision. *"Herceg Novi"* was fully laden and the total claim of the ship and cargo was in excess of US$14 million but the *"Ming Galaxy"*, although badly damaged had a claim of only around US$3 million. They commenced proceedings in Singapore by attaching a copy of the writ to the mast of the *"Herceg Novi"* being the only part of the vessel still visible above the waves. The *"Herceg Novi"* owners thereafter commenced proceedings in England by serving a sister ship of the *"Ming Galaxy"*. The limit of the *"Ming Galaxy's"* liability for damages under the 1957 Convention as applied in Singapore was around US$2.9 million whereas under the 1976 Convention in England the limit would be nearly US$6 million.

Not unnaturally the *"Ming"* owners applied to stay the English action on the grounds that England was not the appropriate forum and that there were proceedings pending elsewhere. At first instance Mr. Justice Clarke, following his earlier decision in the *"British Skill"*[14] refused a complete stay of the English proceedings though he stayed the action pending the determination of two issues in the High Court of Singapore namely the responsibility for the collision and the amount of the claim of the *"Ming"* owners for damages. However, the effect of this Order was that if the *"Ming"* owners wished to limit their liability in England they would have to rely on English statute and the higher limit.

There could be no argument that England was not the natural or appropriate forum for the trial of the action and that Singapore was clearly and distinctly shown to be the

[14] [1996] 1 LLR 286

more appropriate place. On that basis, following the principles in "*Spiliada Maritime*"[15] it followed that there would have to be a stay unless "*there is some other tribunal having competent jurisdiction in which the case may be heard more suitably for the interests of all the parties and for the ends of justice*". However, Clarke J. found that while the natural and appropriate forum for resolving issues of liability and quantum was Singapore he accepted that the "*Herceg Novi*" had demonstrated that the very substantial difference between the 1957 Limitation Convention limits in Singapore and the 1976 Limitation Convention limit in England amounted to a "special circumstance" which the Court should notice. He said that the policy of the IMO was to encourage countries who had not ratified the 1976 Limitation Convention to do so and that Convention should be seen as an internationally sanctioned view of the correct balance between the interests of the ship owner and those seeking to claim from them.

This view which he previously expressed in the "*British Skill*" and which has been described by the Judge at first instance in the "*Kapitan Shvetsov*"[16] as being expression of "judicial imperialism or chauvinism" was not sustained by the Court of Appeal. The Court found that the 1976 Convention had not received universal acceptance or anything like it. It was not "*an internationally sanctioned and objective view of where substantial justice is now viewed as lying*" but was simply the view of some 30 states. Further, the IMO whilst being in a position to recommend the 1976 Convention to the international community was not a legislature and, of course, more importantly, it was quite impossible to say that substantial justice was not available in Singapore.

However, unfortunately the Court of Appeal did not really give any assistance as to what would be a "special circumstance" in a forum dispute of this nature so that no doubt the issue will have to be revisited again.

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[15] [1987] AC 460
[16] 1998 1 LLR 199

Whilst this talk has been limited solely to purely Admiralty matters rather than extending it to charterparty and other commercial disputes involving maritime law that is not to say that the last maritime year in the UK has not involved many of these claims but simply that issues of time prevent them being touched on.

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