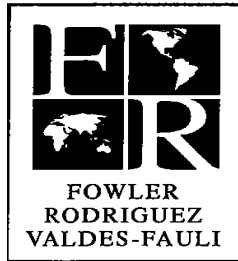


# TAKING A BEARING ON THE LAW



COUNSELLORS AT LAW

4 HOUSTON CENTER • 1331 LAMAR STREET, SUITE 1560 • HOUSTON, TEXAS 77010 • PHONE (713) 654-1560 FAX (713) 654-7930

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## Information Bulletin on Developments in American Maritime Law<sup>1</sup>

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### PROVISIONAL ATTACHMENT OF SHIPS IN THE U.S.A. UNDER RULE B<sup>2</sup> AS SECURITY FOR MARITIME CLAIMS

While the shipping community is relatively well informed about provisional attachment,<sup>3</sup> by means of Rule B, of electronic funds transfers passing through New York intermediary banks, it is less well informed about using the same provisional remedy for the attachment of other assets, including ships within the jurisdiction of the United States.

The advantage of maritime attachment of a ship is that the object is a visible asset, with definite dates of arrival and departure that cannot be “hidden” as easy as a money

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<sup>2</sup> The reference is to Rule B of the SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS, found in the Federal Rules of Civil Procedure.

<sup>3</sup> I refer to attachment under Rule B as “provisional attachment” because it is a provisional measure that brings about results similar to those of saisie conservatoire, though it differs materially from the provisional measure of saisie conservatoire, both in terms of substance and procedure.

transfer, where a change in the name of the beneficiary makes attachment all but impossible. Moreover, the amount that can be secured with maritime attachment of a ship is relatively greater than the usual electronic funds transfer of a few hundred thousand dollars.

In the next few pages I will set out the fundamentals of this very useful remedy that is most helpful in securing maritime claims.

## **A, The conditions for the attachment of a vessel or any other asset under Rule B**

The necessary conditions for attachment under Rule B are the following: (1) the substantive claim must be maritime, i.e. it must arise from a transaction or event which is within the maritime jurisdiction of the court;<sup>4</sup> (2) The defendant company or individual person cannot be found in the judicial district;<sup>5</sup> (3) The Defendant company or individual person own an asset which is present within the jurisdiction (the asset which will be attached)<sup>6</sup>; (4) There is no statutory or other rule of maritime law which prohibits the attachment<sup>7</sup>.

### (1) Maritime Claim

The claim must be “maritime” as Rule B expressly provides. Examples of claims readily acknowledged by the courts as maritime include, but are not limited to, the following: those arising out of charterparties<sup>8</sup>; cargo claims<sup>9</sup>; freight claims<sup>10</sup>; contracts of marine insurance<sup>11</sup>; for contributions to general average; contracts of towage<sup>12</sup>; ship collisions; etc. Some claims that one might think are maritime, are not, as for example, contract for the construction of ships – though those for the repair of ships are<sup>13</sup>.

### (2) The corporate or individual defendant cannot be found in the district

“Cannot be found” means that by exercising due diligence the plaintiff cannot find the defendant in the district in the sense of: (a) frequent and voluntary presence from which it is reasonable to conclude the defendant voluntarily, submitted to jurisdiction of court; and (b) presence, so that defendant can be served in the district personally or through an

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<sup>4</sup> *Winter Storm Shipping Ltd. v. TPI*, 310 F3d 263,268 (2<sup>nd</sup> Cir. 2002). It should be noted that Rule B attachment can be granted only by courts of the United States i.e. U.S. District Courts-as opposed to state courts.

<sup>5</sup> Rule B(1)(a). Judicial District is the geographic district within which the respective United States District Court exercises its local jurisdiction.

<sup>6</sup> *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty, Ltd.*, 460 F3d 434,445 (2<sup>nd</sup> CFir. 2006); *Limonium Maritime v. Mizushima Marinera*, 961 F. Supp 600,606-607 (S.D.N.Y. 1997). In this instance the asset would be a vessel within the geographic boundaries of the Federal judicial district.

<sup>7</sup> *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty, Ltd.*, 460 F3d 434,445 (2<sup>nd</sup> CFir. 2006).

<sup>8</sup> See e.g. *Sonito Shipping Co. v. Sun United Maritime Ltd.* 478 F.Supp. 2d 532,536 (S.D.N.Y. 2007).

<sup>9</sup> *J. Gerber & Co. v. Holland-America Lijn*, 261 F. Supp. 893 (E.D. La. 1966).

<sup>10</sup> See e.g. *Isthmian Steamship Company v United States*, 130 F. Supp. 336(C.C. 1955).

<sup>11</sup> *Big Lift Shipping Co. v. Bellefonte Ins, Co*, 594 F. Supp 701 (S.D.N.Y. 1984).

<sup>12</sup> *W.F. Magann Corp. v Tug Delilah*, 434 F. Supp 517 (E.D. Va. 1977).

<sup>13</sup> *Hyundai Heavy Industries, Co. v. M/V Saibos FDS*, CA 01-0403-S (S.D. Ala.6/20/2001).

agent for service of process that defendant has duly appointed<sup>14</sup>. If the defendant is present in the district or has appointed an agent for service of process, his assets in the district cannot be attached.

(3) There is an asset of the defendant within the district that can be attached

In this case the asset would be a vessel registered either in the name of the defendant or in the name of an affiliated or related company so that from the contents of the complaint (which needs to be in verified form) it appears reasonably probable that the affiliated or related company is the “alter ego” of the defendant<sup>15</sup>. In such cases both the affiliated /related company must be also named defendant in the complaint. It must be emphasized that at this stage, of provisional measures, the allegations of the Complaint must appear reasonably possible and it is not necessary for plaintiff to provide complete evidentiary proof<sup>16</sup>

(4) There must not be a statutory law or other rule of maritime law that prohibits the attachment.

Such an obstacle is encountered infrequently. Examples of such cases are those involving assets of the United States, which are immune from attachment, or assets of a foreign government-owned company<sup>17</sup>.

## **B. Some of the advantages of attachment under Rule B**

It is not necessary for the court to have jurisdiction over the particular dispute, i.e. it is not necessary for the dispute to be justiciable in the U.S.A. as is the case with freezing (Mareva) injunctions in English law. Rule B attachment is extensively used in aid of foreign arbitration or judicial proceedings in which the foreign court / tribunal has been contractually chosen by the parties.

It is not necessary to make a showing that the claim is at risk and in need of being preserved or secured with monetary security.

It is not necessary for the plaintiff to provide monetary security in the form of a guarantee against the damages that a defendant might sustain as a result of the encumbrance of his asset by the attachment. In other words, an undertaking in damages is not a condition for the court’s ordering issuance of the writ.

It is not easy for the defendant to effectively challenge the attachment as unfounded in fact and thereby succeed in vacating it. The court does not deal with the merits, nor does

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<sup>14</sup> *La Banca v. Ostermuncher*, 644 F2d 65,67 (5<sup>th</sup> Cir. 1981).

<sup>15</sup> *Wilhelmsen Premier Marine Fuels v. Ubs Provedores*, 519 F. Supp. 2d 399, 408-410(S.D.N.Y. 2007)

<sup>16</sup> *Idem*.

<sup>17</sup> Note however in this issue the summary of the decision in *Ocean Line Holdings Ltd. v. National Chartering Corp* in which the court applied strict criteria in deciding whether a company is owned by a foreign government or not.

it make an evidentiary assessment of the claim. It is sufficient that it appears probable from the factual account of the verified complaint that the claim is maritime and prima facie well founded. From the published decisions it seems that the chances of a defendant successfully challenging the Rule B attachment and obtaining a vacatur – provided that the complaint is adequately supported – are perhaps less than 10%.

The defendant's side is not heard when plaintiff submits the application for provisional attachment to the court, because the defendant is not notified to appear at this stage of the proceedings. The attachment proceeding is *ex parte*. The application and supporting documents filed therewith<sup>18</sup> are reviewed by the judge to whom the case is assigned. Usually the judge asks the plaintiff's attorney who files the complaint, at a brief (*ex parte*) hearing, regarding the contents of the application and asks for any clarifications he feels might be needed, and if the four conditions discussed above are met, he signs the order directing the Clerk to issue the writ of attachment.<sup>19</sup> The writ is delivered to the U.S. Marshal, for service on the vessel. The Marshal, once the writ is served stations a guard onboard the attached vessel to prevent her from sailing.

### **G. Application to vacate or modify the terms of attachment and Security**

The defendant has the right to file an application to vacate the attachment or modify its terms and is entitled to a prompt hearing in this regard<sup>20</sup>. At the hearing the plaintiff bears the burden of proof to show why the attachment should not be vacated or other relief consistent with the Rules should not be granted.<sup>21</sup> As I have already noted, the chances of lifting the attachment by means of an order that vacates it are indeed very small at this stage of the proceedings – provided that the complaint establishes a prima facie maritime claim and the defendant is not found in the district.

The defendant may release the vessel by providing security and if the parties cannot agree on the amount, then it is determined by the court, but in no event may it exceed twice the amount claimed.<sup>22</sup>

Finally, provided that the defendant has furnished security for the release of the vessel, if he has a counterclaim arising from the same events as the claim, he may require the plaintiff to provide security for the counterclaim. However, the plaintiff may show cause why security for the counterclaim should not be provided, and in such event the court has discretion to deny security for the counterclaim<sup>23</sup>. Moreover, it should be noted that the courts in these circumstances scrutinize counterclaims closely, and have discretion to

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<sup>18</sup> These include the filing attorney's verification regarding the veracity of the application contents as well as his sworn declaration that having exercised due diligence he could not find either the defendant or the defendant's agent for service of process.

<sup>19</sup> Of course there are cases in which the judge refuses to sign the order for substantive or procedural reasons, if e.g. the claim is not maritime, or the complaint does not contain the necessary verification.

<sup>20</sup> Rule E(4)(f). How prompt the "prompt" hearing is varies from district to district. In some of these the hearing setting seems to be anything but prompt.

<sup>21</sup> Rule E(4)(F).

<sup>22</sup> Rule E(5).

<sup>23</sup> Rule E(7).

deny security if they determine that the right is exercised abusively<sup>24</sup>. In actual practice there are very few cases in which the plaintiff is required to provide security for a defendant's counterclaim or security for costs.

### **D Practice in the Houston-Galveston Area**

The United States District Court for the Southern District of Texas includes not only the Houston –Galveston port but also the Port of Corpus Christi. These ports taken together are the largest oil tanker port in the United States and the second largest tanker port in the world (in tonnage). If one adds to these the very large number of dry cargo vessels that use these ports, it is quite probable that a sought-after vessel is likely to turn-up here. New technology makes it fairly easy to track down ships that are in or en route to this district. The Houston-Galveston range is a major world shipping center, and the Federal Courts have undoubtedly vast expertise in this specialized area of the law, and wide maritime jurisdiction over shipping matters,

A necessary condition for the attachment of a vessel is the issuance of a check in the amount of \$ 10,000 payable to the order of the U.S. Marshal as a deposit for the costs of the attachment, which will be incurred<sup>25</sup> if the vessel remains attached for any appreciable amount of time. Of course any unused balance is promptly refunded when the vessel is released against security and the Marshal's involvement ends.

With the written consent of the plaintiff who has obtained the attachment, it is possible to allow the ship to continue cargo handling operations and shifting within the port.

The issuance of an order of maritime attachment in the Southern District of Texas is relatively easy and quick. Usually the defendants concerned provide the security demanded within hours from its service on the ship's Master and, in such event, the ship is released from attachment.

Maritime attachment based on Rule B is a relatively simple and effective method for securing maritime claims, that can applied quickly, usually with satisfactory results. In the event the parties have agreed to submit their dispute to arbitration or adjudication under foreign law that governs their substantive claims, the court orders the attachment, but stays adjudication of the merits. The court retains jurisdiction for the enforcement of the eventual arbitration award, and refers the parties to the tribunal or court they have chosen as arbiter of their disputes.

### **NEW CASE LAW**

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<sup>24</sup> See *Ocean Line Holdings Ltd. v. China National Chartering Corp.*, 2008 U.S. Dist. LEXIS 78865 (S.D.N.Y.2008), [\*] 14. Under Rule E(2)(b) the court in the exercise of its discretion may order any of the parties to provide security for costs at any stage of the proceedings.

<sup>25</sup> 28 USC 1921, and according to local rule of the Marshals Service that requires the payment in advance of the sum of \$ 10,000.

**Maritime attachment under Rule B to secure claim arising from sale and purchase contract of a vessel.** A claim for breach of an S&P contract is a maritime claim and, therefore, within the class of claims that can be secured with this procedure.

A series of older decisions which have had effect as precedents not only in the Second Circuit Court of Appeals but in several other Circuits –and are still good law- hold that a ship S&P contract is not maritime . It follows that claims arising from its breach are not maritime claims. Therefore, always according to this view, the provisional measure if Rule B attachment is unavailable, because it can be used to secure maritime claims only.

However, the United States District Court for the Southern District of New York ruled that the S&P contract under a Memorandum of Agreement was a maritime contract and denied the motion to vacate the Rule B attachment that Plaintiff had obtained to secure its claim (in London arbitration) for breach of the M.O.A.

The court relied on relatively recent jurisprudence of the United States Supreme Court, (*Norfolk Southern Railway Co. v. James N. Kirby. Pty. Ltd.* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed. 2d 283 (2004)) which holds that the boundaries of maritime jurisdiction in claims arising from contracts are not determined by the place of performance but by the concepts and, thus, whether a contract is or is not maritime depends on the nature of the contract and its character, and the criterion used is whether it concerns maritime services or maritime business. The court also relied on a precedent of the 2<sup>nd</sup> Circuit Court of Appeals, *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F 3d 307 (2<sup>nd</sup> Cir. 2005) which held that a contract is or is not maritime depending on whether its primary object is maritime, and not on whether the non-maritime components of the contract are merely incidental. *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd.*, 2008 U.S.Dist. Lexis 78247 (S.D.N.Y. 2008).

**Maritime attachment under Rule B to secure claim arising from a sale and purchase contract of a vessel.** The claim arising from a vessel S & P contract is not maritime because the sale and purchase of vessels is not a maritime transaction. Accordingly the maritime attachment and garnishment under Rule B was vacated and discontinued. It is a necessary condition for the issuance or continuation of attachment under Rule B that the claim secured must be maritime. In this case, in which all of the disputes, which arose from the M.O.A. or a related charter party, had been submitted to London arbitration one of the contracting parties applied for the attachment to secure its claims arising under the S&P contract. *Exmar Shipping NV v. Polar Shipping S.A.*, 2008 U.S.Dist. LEXIS 65504 (S.D.N.Y. 2008).

**Editor’s Note:** *The above two decisions from two different judges of the same court are diametrically opposite, and this divergence of opinion creates difficulties particularly in the current market in which disputes arising under S&P contracts are certain to regularly appear in the courts. In the Fifth Circuit Court of Appeals which includes the states of Texas, Louisiana, and Mississippi, the jurisprudence is quite clear. A contract for the sale and purchase of a ship is not a maritime contract. See, Richard Bertram & Co. v. Yacht ‘WANDA’*, 447 F 2d 966; (5<sup>th</sup> Cir. 1971); and also *S.C. Loveland Inc. v.*

*East West Towing Inc., 608 F 2d 160, 1979 U.S. App. LEXIS 9742 (5<sup>th</sup> Cir 1979). The editor's view is that the better view is that expressed in the Kalafrana case above.*

**Sinchart is not “government owned” and its assets may be attached under Rule B to secure maritime claims.** In this case the vessel owner had a claim against this well known Chinese chartering company for the actual total loss of its vessel which Sinchart had chartered. The merits of the claim are going to be decided in London arbitration, but the owner succeeded in attaching under Rule B in New York EFT's of Sinchart, who moved to : (1) vacate the attachment, on the grounds that it is a government owned entity, and for this reason its assets are immune from attachment under the Foreign Sovereign Immunities Act ;(2) for the plaintiff to provide security for the claims of Sinchart arising from the same events as the claim of the owners; (3) for the plaintiff owner to provide security for the cost incurred by Sinchart in providing security for the owner's claim.

The United States District Court for the Southern District of New York ruled that Sinchart was a subsidiary of Sinotrans, a company the capital of which was controlled by the Chinese government. But the capital of Sinchart is not owned by the Chinese government. It is owned by another company –Sinotrans - and, for this reason, it was not entitled to immunity from attachment that foreign government-owned companies enjoy in the U.S.A. under the Foreign Sovereign Immunities Act<sup>26</sup> . With regard to Sinchart's other two claims for relief, the court accepted them and ordered the payment of the security requested. *Ocean Line Holding, Ltd. v. China National Chartering Corp.* 2008 U.S. Dist. LEXIS 78865 (S.D.N.Y. 2008).

**False entries in the deck log** regarding the circumstances of a marine collision, are an element of culpability that must be taken into account in apportioning liability for the collision, even though the false entries, obviously, had no causal connection with the incident.

The Second Circuit Court of Appeals in reviewing the appeal of one of the vessel owners concerned, who alleged that the apportionment of liability was made incorrectly, remanded the case to the U.S. District Court with instructions to re-apportion liability and in doing so to take into account not only the extent of the departure from the International Rules for the Prevention of Collision at Sea but also the fact of the false log entries. This case is particularly interesting because it applies two factors in apportioning liability for the incident i.e. on the one hand the relative culpability of each vessel and on the other hand the extent to which the culpability of each vessel contributed to the collision. Culpability as to the vessel with the false deck log entries has two components i.e. the extent of the departure from the International Rules and the falsity of the entries in the deck log. *Otal Investment Ltd v. M/V CLARY*, 2008 U.S. Dist. LEXIS 40815, 2008 AMC 1561 (S.D.N.Y. 2008).

**False entries in the oil record book.** What is criminally prosecuted are not the violations occurring in international waters or in foreign jurisdictions, but the violations

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<sup>26</sup> 28 U.S.C. § 1602 *et seq.*

committed whilst the ship is in a port of the U.S.A. where the Master or other responsible person are required to maintain an oil record book with correct entries. This decision concerns the PACIFIC RUBY of OSG. The substantive law violation which is criminally prosecuted is maintaining an oil record book which contains false entries whilst the ship is within the jurisdiction of the United States, and representing to the authorities of the United States that the entries are truthful. So long as the criminally culpable act is committed in the U.S.A. and its authorities have not relinquished the right to criminally prosecute such conduct, the arguments which are based on United Nations Convention on the Law of the Sea (UNCLOS) 1983 are unfounded. *United States v. Kun Yun JHO*, 354 F3d 398 (5<sup>th</sup> Cir 2008).

*Editor's Note: On remand the United States District Court for the Eastern District of Texas assessed against the owner of the vessel an additional fine in the sum of U.S. \$ 3,000,000 in respect of the counts which were being appealed. A fine of \$ 7,000,000 was assessed in respect of counts that were not being appealed.*

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### Recent litigation

#### **Rule B attachment and piercing the corporate veil**

While an unsafe berth dispute was pending in London arbitration, where owners were claiming unpaid hire and other amounts under the charter, the time charterer - a small privately owned American company - stopped its business activity and appeared to have become inactive.

The business activity of the charterer was taken over by an offshore company with a similar sounding name employing the same people. In these circumstances, owners became concerned about the continuing solvency of the charterer. The results of owners' Rule B attachment were not satisfactory (only small sums were "caught"). Owners filed suit against charterers, the offshore company with the similar name, and the individuals who acted on behalf of the corporate entities alleging that each defendant was the alter ego of the other defendants, and jointly and severally liable with them to owners. The defendants filed a series of motions, claiming that the London arbitration tribunal was exclusively seized with jurisdiction -whether the claims of plaintiff were based on the charterparty or in tort-and asked the court to dismiss the suit or, in the alternative, to stay it and direct plaintiff to submit all claims in the London arbitration.

Plaintiff disputed the competence of the arbitration tribunal to deal with alter ego issues, and argued that exclusive jurisdiction over alter ego matters was in the United States District Court for the Southern District of Texas and requested an order allowing limited discovery to probe the alter ego relationship of the defendants. The court denied the defendants' motions and granted plaintiff's request for limited discovery. Plaintiff pursued discovery requiring principally the production of accounting documents and records. A few weeks later, the charterer asked for a negotiated settlement and all claims -including those pending in London arbitration - were settled.

The laws of the U.S.A. and specifically the Federal Rules of Civil Procedure provide very effective means of discovery, and the jurisdiction of the federal courts over maritime claims, provided that it can be established, is very wide. Of course the results vary from case to case, depending in each instance on the facts.

George A. Gaitas\*

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