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# soundings

In this issue: Message from the Managers | South African arrest | Shipbuilding



## New UKDC website launches

We are pleased to be able to report on the launch of the Association's new website. The website has been completely updated.

It contains detailed information about the Association along with a review of a number of recent cases and a complete list of the publications and circulars. We encourage all Members to visit the website at [www.ukdefence.com](http://www.ukdefence.com). Any feedback on the new site is very welcome.

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## Ship arrest - focus on South Africa

South Africa has traditionally been a useful venue for ship arrest, largely because of the ability to arrest associated ships. While the popularity of Rule B attachments in the USA resulted in a decline in the number of ship arrests, the recent collapse in the shipping markets has placed South Africa firmly back on the map.

What then does South Africa offer claimants wanting to enforce or obtain security for maritime claims? Whilst an arrest can be made to found jurisdiction either for an action in rem against the ship, or an action in personam against the owner of the ship, what will be of most interest to claimants is the availability of a security arrest.

This allows ships or other property (including bunkers) to be arrested as security for proceedings either contemplated or already commenced, both locally and abroad, and either before a foreign court or arbitration tribunal.

In order to obtain an arrest for security for foreign proceedings, a claimant must show the following:

i) it has a claim enforceable by an action in personam against the owner of the ship to be arrested, or an action in rem against that ship or an associated ship;

ii) it has an enforceable prima facie case in respect of such claim; and  
iii) it has a genuine and reasonable need for security in respect of the claim.

Looking at these three requirements in turn, the first requires that the claimant has (a) a maritime claim as defined in terms of South African law (which more or less covers any claim linked to the sea and maritime matters), which is (b) enforceable by means of an action in rem against the ship in question.

A prima facie case amounts to little more than an arguable claim. The court will not involve itself with the merits of the claim to any great extent (although a claimant must express a belief in the merits of the claim) and once a ship has been arrested and security put up to obtain its release, the South African Court is able to divest itself from any further dealings with the case.

## Shipbuilding - common sense prevails

**The Court of Appeal has very recently ruled (*Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 750) that a buyer under a shipbuilding contract who makes a claim for pre-delivery instalments under a refund guarantee can also pursue the yard for other damages.**

The buyer had contracted with the yard for the construction of three ships which were never delivered. The buyer chose to terminate the contracts and claim back the pre-delivery instalments under the refund guarantee. It also brought proceedings against the yard in respect of its other losses for breach of contract.

There was little debate that the yard was in repudiatory breach of the contracts and that the buyer had the right to terminate. It was held however in the English High Court, on appeal from a London arbitration award, that in making a claim under the refund guarantee, the buyer had enforced a term in the contracts, and that in doing so the buyer had elected to affirm the contracts and was not entitled to common law damages.

It is fair to say that this decision was received with some concern within the shipping community. The decision seemed to establish that where a yard chose not to deliver, a buyer had a

choice. It could recover instalments - but only those instalments - quickly from the bank which issued the guarantee, or it could pursue all of its remedies against the yard, including the recovery of the instalments, slowly in arbitration and take its chances at the end of the day with the yard's solvency.

The Court of Appeal has now reversed this decision. In a unanimous ruling the court noted that the right to obtain payment under the refund guarantee arose only upon termination of the contract, and that it was clearly intended that this right survived termination, just as the arbitration clause survived the contract.

Ironically this may prove something of a hollow victory for the buyer as it is widely reported that the yard in question may be experiencing difficulties. However at a time when there are question marks over many newbuilding projects, the decision will be widely welcomed within the shipowning community as a return to good sense.

## Ship arrest - focus on South Africa

*continued*

As to a genuine need for security this might previously have caused difficulty when faced with an apparently asset rich opponent, but in the current market uncertainty it is thought that most claimants will be able to establish a need for security.

Accordingly the requirements for an arrest are relatively simple, and most claimants will be able to satisfy these tests. However what attracts many claimants to South Africa is the ability to arrest ships which may be owned by a separate one ship company but which are under the same beneficial ownership or control, a feature which is not found in other jurisdictions. A ship can be arrested on the basis that it is owned by the same entity as the ship which the claim relates to, or that it is (or was) controlled directly or indirectly by the same person, at the time of the cause of action arose.

So what evidence needs to be shown to establish association? The evidence most frequently relied upon will be commonality of directors or shareholdings, cross mortgages or collateralisation between ships and common guarantors of mortgages. Sometimes even press releases or websites claiming ownership can be produced. However, obtaining evidence is not always straightforward and can require intensive investigations.

Although arrest in South Africa is relatively straightforward a degree of preparation is required, and the Managers have good relationships with a number of South African law firms who can assist in this regard. Whilst the US court continues to struggle with the volume of Rule B attachments currently being filed, South Africa represents a viable alternative.

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