

Maritime Attachments

Under the United States' Supplemental Admiralty Rule

Since the Decision in

Winter Storm Shipping

■ ■ As reported in a recent court filing in New York, in December 2005 one bank in New York received 797 writs of maritime attachment. Another bank received 70 writs on February 1st 2006 alone. Still another bank has 70 active writs pending, the combined total of which seek to attach USD 195 million.

The recent flood of maritime attachment litigation in New York resulting from the decision of the United States Court of Appeals for the Second Circuit in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), makes it important to review how maritime attachments under the United States' Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule B") can and cannot be obtained in the United States. The *Winter Storm Shipping* decision altered the prevalent use of maritime attachments from a procedure to attach tangible assets (such as vessels, charters, real property and bank accounts) to a procedure used to attach intangible assets (electronic fund transfers). With electronic fund transfers now fair game in the wake of *Winter Storm*, the frequency of maritime attachments filed in New York has increased dramatically.

When Rule B can be used

In maritime disputes, if a defendant "cannot be found" within the district in which the court is located, a plaintiff can commence a Rule B proceeding for either (or both) of the following purposes: (1) to obtain jurisdiction over a defendant in a maritime claim, where the attachment of the defendant's assets serves to establish jurisdiction over the defendant, or (2) to obtain security for a maritime claim. A plaintiff can commence a Rule B proceeding and can obtain a court order to seize the defendant's assets within the jurisdiction in which the Rule B proceeding has been commenced without giving notice to the defen-

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dant. The defendant gets notice only after its assets have been attached. In a situation where a defendant's assets are attached but the defendant does not appear to defend the attachment action, the plaintiff can take a judgment against the defendant in the court in which the assets have been attached and, if it proves its claim, can then execute against the attached assets.

Turning to the two separate uses for Rule B, we examine each in turn:

Obtaining jurisdiction over a defendant

Rule B can only be used when a defendant does not have a presence within the jurisdiction of the district court in which the Rule B proceeding is commenced. A plaintiff can use Rule B to attach funds in the jurisdiction and then use the attached assets as a basis for the court to exercise jurisdiction over the defendant. In other words, a plaintiff can commence a primary lawsuit against a defendant using Rule B to obtain jurisdiction – it is not just a procedural device that can be used in conjunction with other proceedings.

For example, an Indian company having no contacts with the United States breaches a maritime contract with a Singapore company. The contract has no forum selection clause. The Singapore company could commence a lawsuit in a U.S. District Court under Rule B and prosecute its lawsuit against that Indian company in the United States, even though the Indian company had no connection with the United States. The same analysis applies to a dispute in which there is no contract between

the plaintiff and defendant. If, for example, a collision occurred between one foreign flagged (and owned) ship and another, and one of the shipowners desired to sue the other owner in New York, the party seeking relief could commence a Rule B action and seek to attach the other owner's assets in New York. In these situations, a defendant might be able to transfer the lawsuit to another jurisdiction under doctrines such as *forum non conveniens*, but even if such a transfer were obtained, the plaintiff likely would retain the security attached.

One limitation on using Rule B as a jurisdictional device is that the plaintiff only obtains jurisdiction over the defendant up to the amount of the funds attached and an *in rem* judgment obtained in a Rule B proceeding cannot be recognized in another jurisdiction. Therefore, if a Rule B attachment attaches USD 20,000 where the claim is for USD 1,000,000, the plaintiff would have to seek the defendant elsewhere and commence a separate proceeding to recover the balance of its claim.

Obtaining security for a maritime claim

Rule B can also be used as a means of obtaining security. It can be used both where the U.S. Rule B lawsuit is the primary proceeding or in conjunction with a proceeding in another U.S. state or in a foreign country. It also can be used at virtually any point in a proceeding from the date of its filing through (and even after) trial. Furthermore, despite the fact that Rule B requires that a defendant "cannot be found" within the district, a plaintiff still can



The importance of not befriending stowaways

■ The recent incident at Durban, South Africa, involving stowaways allegedly forced off a vessel in the harbour has received worldwide coverage.

The facts of the matter were that seven stowaways hid on board the vessel whilst she was at Mombasa, Kenya, and the stowaways then made themselves known to the crew after the vessel had sailed from that port. The vessel was on route to Durban.

The crew followed the IMO guidelines with regard to stowaways found on board a vessel. The stowaways were kept in confinement and given three meals per day. They were given clothes. They were allowed 30 minutes of exercise each day. They were given bathroom facilities. However, the master failed to notify the owners of the presence of stowaways on board the vessel. The crew then

broke the cardinal rule when it comes to stowaways in that they allowed the stowaways to befriend them.

Stowaways will always seek to befriend the crew in the hope that the crew will feel sorry for them. They will tell the crew gruesome tales of life in the home countries and that the reason that they are stowing away, is to get to Europe or North America in order to seek out a better life for themselves.

Crews should be advised not to befriend stowaways, as stowaways are not their “friends”. The case of the vessel at Durban is such an example.

The crew felt sorry for the stowaways and the master failed to report the presence of stowaways on board the vessel to the owners. Had the owners been aware of the fact that stowaways had boarded the vessel they would have reported the matter to their P&I Club who in turn would have contacted the local P&I correspondents to assist in having the stowaways removed from the vessel and arranging for their repatriation.

When the vessel arrived in Durban, the stowaways were not declared to the port authorities and the crew agreed to allow the stowaways to sneak off the vessel at Durban since the vessel was not heading to what they would term a favourable destination. The crew listened to the stowaways rather than following the proper guidelines. In order to avoid detection by Port security personnel on the quayside, the stowaways climbed off the vessel by way of a rope, fixed to the offshore side of the vessel, and dropped down into Durban harbour where they would swim to a more remote quayside, no doubt in search of the next vessel to stowaway on.

However, the plan was not executed as was envisaged and as everyone had in mind and as result two of the seven stowaways drowned. The five surviving stowaways made it to the quayside where they then alleged that they had been forced off the ship. The police were called in and the master and three crewmembers were arrested.

The stowaways made statements to the police, which they subsequently enhanced in a later statement made to the prosecuting authorities. The stowaways subsequently became the victims and the crew the accused.

The stowaways turned on the crewmembers who they had befriended on the way to Durban in order to get off the vessel. Although the vessel was on route to South Africa, the stowaways would most probably have used the same tactics if the vessel were going to Europe. The stowaways befriended the crew in the hope that the crew will feel sorry for them and will then help them to get to where the stowaways want to go.

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use Rule B to obtain security for its claim even if the parties have agreed to use that jurisdiction as their forum in which to resolve disputes. Thus, even if the parties selected New York as the venue for resolution of their disputes, a plaintiff still could execute a Rule B attachment so long as the defendant did not have a presence within the jurisdiction of the district court.

Recent decisions

Over the course of the last few years, federal courts in New York have issued rulings that make the seizure of electronic fund transfers much easier. Therefore, if a defendant transacts business in U.S. dollars anywhere in the world, all funds that “clear” through New York banks are subject to seizure. These asset seizures are subject to a post-seizure hearing at which the attachment can be challenged by the defendant. Rule B attachments generally have been upheld. Recently, however, some district court judges in New York have required that the plaintiff show some “need” for the attachment to remain in place. Two ways in which this can be shown are (i) where the defendant is financially unstable and (ii) where the defendant has been evasive in paying its debts, has refused to participate in previously-agreed arbitration, or has failed to answer a lawsuit commenced by the plaintiff.

The law surrounding the use of Rule B is evolving rapidly. The numerous cases being decided can affect the foregoing analysis. Indeed, two of the recent Rule B decisions decided in New York have been appealed and the decisions on appeal may affect the application of Rule B.

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