Shipping & Transport - South Africa

How effective are protective writs?

Contributed by **Bowman Gilfillan**

February 12 2014

Author

Jeremy Prain

Introduction

Given the ease with which ships can be arrested in South Africa as security for legal proceedings, commenced either locally or in foreign forums, the question frequently arises as to whether it is possible to issue arrest proceedings in South Africa as a protective step to guard against a change of ownership or a possible time bar of the claim.

In principle, a claimant can obtain a writ of summons *in rem* from the High Court of South Africa before the property is located within the jurisdiction of the court. This is subject to the proviso that the property "is likely to come into the Republic after the making of the order".

It follows that the issuance of blanket protective writs may expose the claimant to a challenge if, at the time that the arrest order was made, there was little likelihood of the vessel coming within the jurisdiction. While there is no direct authority on the point, the passage of time between the order for arrest being granted and the vessel coming into the jurisdiction should be a factor that the court takes into account when considering a challenge of the arrest. A further consideration for a claimant is that no summons or warrant may be served if more than one year has passed since the date it was issued, other than with the leave of the court.

A more pertinent issue in the context of protective writs arises when the claim is founded on a contract (eg, a charterparty or bill of lading) that contains a foreign dispute resolution clause and the application of foreign law. The nub of the difficulty for claimants is that a protective writ *in rem* contemplates substantive proceedings on the merits in South Africa, which would stand in direct conflict with the dispute resolution terms agreed on by the parties in the contract.

Furthermore, the claimant may not want to litigate in South Africa; and even if it does, the arrest is open to challenge by the owner on the grounds that the court should decline to hear the matter. The South African court, exercising its admiralty jurisdiction, has the discretion to decline jurisdiction if it is satisfied that another court will exercise jurisdiction in respect of the proceedings and if it is more appropriate that another court/arbitrator or tribunal/body adjudicate the proceedings.

Case

The issue is well illustrated in the recent decision of the Kwazulu-Natal High Court in Durban in *Pacific International Lines v Capewinds Trading*. The case concerned a claim by cargo interests under a bill of lading for the carriage of apples, which were found to be damaged on arrival and could be neither sold nor salvaged. The carriage was from Cape Town, South Africa to Douala, Cameroon. The bill of lading provided for dispute resolution by the Singapore courts to the exclusion of the jurisdiction of the courts of another country.

Notwithstanding the dispute resolution clause, Capewinds chose to proceed in the Durban court on the strength of a club letter of undertaking put up to prevent the arrest of its vessels in South Africa.

Pacific International Lines argued that the Durban court should decline to exercise its jurisdiction in respect of the claim because the parties had agreed that Singapore would be the forum for disputes.

Two important points emerge from the case. First, that the court found that provision of security by way of a letter of undertaking did not constitute a submission to the jurisdiction of the Durban court in respect of the claim.

Second, the position under South African law is that the claimant has the burden of proving that the court should exercise its discretion to allow the claim to proceed in South Africa, notwithstanding the foreign dispute resolution clause. This discretion must be exercised judicially and only when a claimant makes a very strong case. On this point, the South African authorities followed the principles outlined in the English case of *The Eleftheria*. Of those principles, the claimant has the burden of proving that a strong cause exists for the court not to grant a stay of proceedings by taking into account all the circumstances of the particular case.

In *Pacific International Lines*, the court considered factors such as:

- where the evidence was situated;
- which law applied;
- the connection that the parties had with South Africa and Singapore;
- whether Pacific International Lines genuinely desired a trial in Singapore or whether it sought only a procedural advantage; and
- whether Capewinds would be prejudiced by having to sue in Singapore.

One of the main factors advanced by Capewinds as to why the matter should be heard in South Africa was that the claim had become time barred in Singapore. However, after reviewing all of the evidence the court was not persuaded that this prejudice discharged the onus on Capewinds to make out a "very strong case". Therefore, the court declined to exercise jurisdiction. This decision effectively ended Capewinds' claim.

Comment

It follows that, in the context of protective writs, it is by no means a foregone conclusion that once the target vessel comes within the jurisdiction, the South African courts will be prepared to entertain a contractual claim where the parties have agreed a foreign forum for dispute resolution While claimants are free to issue protective writs, their ultimate effectiveness should be viewed with a degree of caution.

For further information on this topic please contact Jeremy Prain *at Bowman Gilfillan Inc by telephone (+27 21 480 7800), fax (+27 21 424 1688) or email (* j.prain@bowman.co.za*). The Bowman Gilfillan website can be accessed at* www.bowman.co.za*.*