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a presentation by  
**HILL DICKINSON**



# Arresting Ships to Enforce a Maritime Arbitration Award: A Back-Door?

*Recent Developments in Hong Kong*

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## Introduction

- Origins of Arrest Procedure in Maritime Law and Relationship with Maritime Arbitration
- Decision of Peter Ng J in *M/V “Alas”* (subsequently renamed “*Kombos*”) HCAJ 241 of 2009 (referred to as the *Dewi Umayi*)

# Origins of Arrest Procedure in Maritime Law

# Origins of Arrest Procedure in Maritime Law

*“The history of what the law has been is necessary to the knowledge of what the law is”*

*Oliver Wendell Holmes*



# Origins of Arrest Procedure in Maritime Law

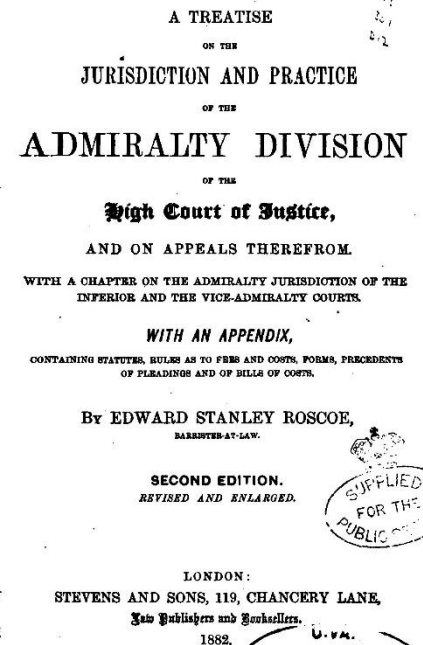
- Rampant piracy and the need to seek restitution from the wrongdoers
- Battle of Sluys on 24 June 1340, over the English Channel



# Origins of Arrest Procedure in Maritime Law

E.S. Roscoe, *Admiralty Practice*, 2<sup>nd</sup> Ed. (1882)

“Until the twenty-eight year of the reign of Henry VIII. the **Court of Admiralty exercised a criminal jurisdiction over offences committed on the high seas**, but in this reign it was enacted that such crimes were to be tried by the Lord High Admiral and commissioners in the same manner as offences committed on land; and in the reign of George III. these offences became triable by the ordinary tribunals....



# Origins of Arrest Procedure in Maritime Law

- Offending Ship
- Arrest
- Bail



# Origins of Arrest Procedure in Maritime Law

- Personal Claim Against Wrongdoer (Owners of Wrongdoing Ship); and **IN PERSONAM**
- Claim Against Chattels (Goods or Ship) of Wrongdoer: to obtain surety for recovery **IN REM**

# Origins of Arrest Procedure in Maritime Law

*The “Beldis”* [1936] P 51

“There is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of **two methods of procedure for bringing the defendant before the Court: (i.) the arrest of his person; (ii.) the seizure of his goods.** There is more than one case in the Selden Society’s Select Pleas in the Court of Admiralty which illustrates the arrest of goods other than the goods or ship concerned in the particular cause of action, for the purpose of founding jurisdiction. But it seems to be equally clear that both methods had fallen into disuse before the beginning of the 19<sup>th</sup> century, probably as a result of the incessant war of jurisdiction waged by the common law courts on the Admiralty Court in the 16<sup>th</sup> and 17<sup>th</sup> centuries. A full account of this long quarrel is contained in the 3<sup>rd</sup> edition of Roscoe’s Admiralty Practice, and that account may, I believe, be accepted as substantially accurate.

During the first half of the 19<sup>th</sup> century there emerges a fact of dominant significance. A **belief had grown up in the minds of the Admiralty practitioners that the ambit of Admiralty procedure *in rem* was co-terminus with the ambit of the maritime lien; that where there was a maritime lien the right to proceed *in rem* existed, and where there was no maritime lien the right to proceed *in rem* did not exist.”**

# **Rights of Arrest: A Court-given Privilege?**

# Rights of Arrest: A Court-given Privilege?

- The '*Cap Bon*' [1967] 1 Lloyds LR 543
  - parties are compelled to choose between resolving their disputes by court litigation (in rem proceedings) vs. arbitration proceedings.
  - for arbitration proceedings, plaintiff is not entitled to use court mechanism to obtain security or bail bond

# Rights of Arrest: A Court-given Privilege?

- Rationale

My decision was based on two propositions of law, one positive and one negative, which I considered flowed from the nature and form of the provisions in the Administration of Justice Act 1956, by which jurisdiction in rem is conferred on the Admiralty Court. The first and positive proposition is that the **purpose of arresting a ship in an action in rem is to provide the plaintiff with security for the payment of any judgment which he may obtain in such action**, or of any sum which may become payable to him under a settlement of such action. The second and negative proposition is that **it is not for the purpose of arresting a ship in an action in rem to provide the plaintiff with security for payment of an award which he may obtain in an arbitration of the same claim** as that raised in the action, and the court therefore has no jurisdiction to arrest a ship, or keep under arrest, for such other purpose.

*The Rena K* [1979] 1 QB 377

# Rights of Arrest: A Court-given Privilege?

- The '*Rena K*' [1977] 1 QB 377
  - legislative amendments: Arbitration Act 1975

If any party to an arbitration agreement to which this section applies ... commences any legal proceedings in any court against any other party to the agreement... any party to the proceedings... may apply to the court to stay the proceedings; **and the court ... shall make an order staying those proceedings.**

- Parliament still did not give any discretion or power to order that vessel be kept under arrest, or alternative security furnished.
- But if there is a likelihood that the claim will not be satisfied, can commence separate *in rem* proceedings

# Rights of Arrest: A Court-given Privilege?

- Response from Parliament

## Section 20(6), Arbitration Ordinance (Cap. 609) :

In the case of Admiralty proceedings—

- (a) the reference of the parties to arbitration and an order for the stay of those proceedings may, despite subsections (1) and (5), be made **conditional on the giving of security for the satisfaction of any award made in the arbitration**; or
- (b) if the **court makes an order under subsection (5) staying those proceedings**, the court may (where property has been arrested, or bail or other security has been given to prevent or obtain release from arrest, in those proceedings) **order that the property arrested, or the bail or security given, be retained as security for the satisfaction of any award in the arbitration.**

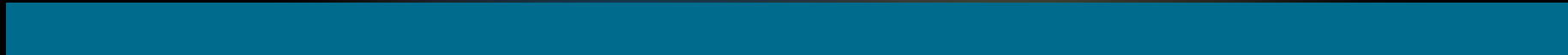
# **No Right of Arrest to Enforce a Maritime Arbitration Award**



# No Right of Arrest to Enforce a Maritime Arbitration Award

- *The Chong Bong* [1997] 3 HKC 579
  - Arrest for security on the original claim vs. arrest for enforcement of an award
  - Court held that a claimant is not entitled to arrest a vessel, to enforce an arbitration award, even though the underlying claim of the arbitration award is one which falls under the admiralty jurisdiction of the court.
  - Affirmed by the English decision of “*The Bumbesti*” [1999] QB 559

# Summary



## Summary

- Arrest of ships only for the purpose of securing claims in the Court *in rem* proceedings; cannot arrest ships to secure and/or to enforce an arbitration award  
(*The Rena K, The Chong Bong, The Bumbesti*)
- If there is a likelihood that the Arbitration Award will not be satisfied, you then have to commence or continue with the *in rem* proceedings in Court so as to enforce against your security

# **Arrest of Vessel to Enforce a Maritime Arbitration Award:**

## **The Backdoor**

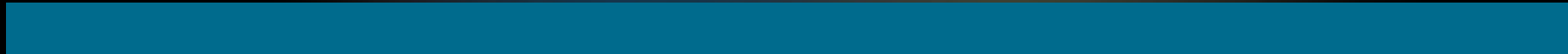
# Arrest to Enforce a Maritime Arbitration Award: The Back Door

... I find it extremely odd that the right of security by the arrest of a vessel is available to a plaintiff who merely asserts a claim whereas it is lost when he finally obtains a judgment in the action...

# Arrest to Enforce a Maritime Arbitration Award: The Back Door

- *M/V ALAS* (renamed as “KOMBOS”) HCAJ 241/2009
  - *The Chong Bong* [1997] 3 HKC remains good law in Hong Kong, and is a correct decision.
  - Distinguishing facts:
    - Affidavit leading arrest makes it clear that commencement of court action in Hong Kong is for the underlying admiralty claims
    - It is not for the enforcement of the arbitration award
  - Claimant can still commence court proceedings to arrest a vessel, even after an arbitration award has been obtained, even though its’ indirect purpose is to enforce the arbitration award.

# The Way Forward



## The Way Forward

- Is there an artificial distinction between arresting a vessel as security for the claim in court proceedings vs. arresting a vessel to enforce a maritime arbitration award?
- Perhaps legislature may wish to consider expanding the jurisdictional head under Section 12A, High Court Ordinance to include the right of arrest for a maritime arbitration award that arises from the determination of a claim listed under Section 12A(2), High Court Ordinance.



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