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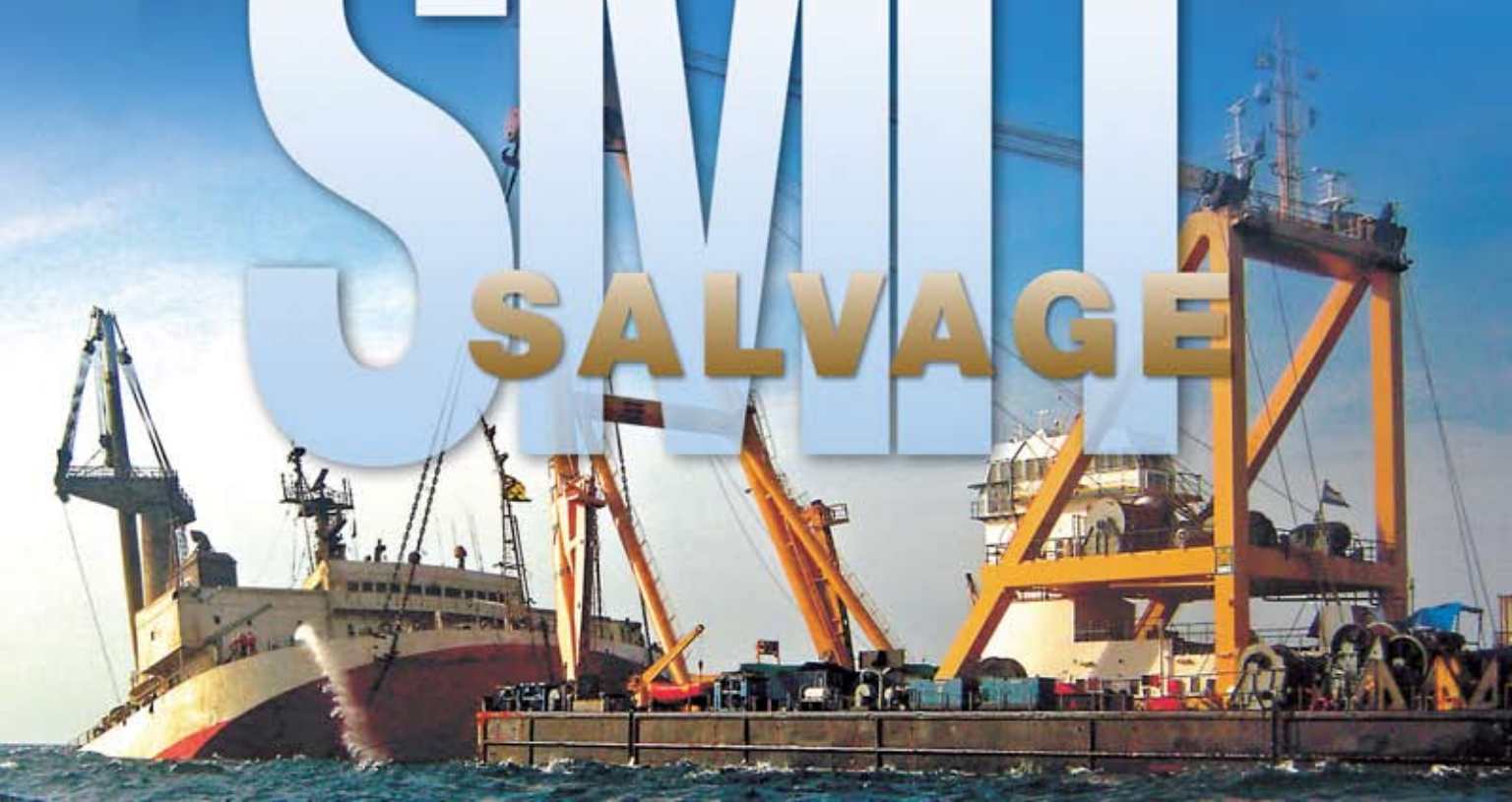
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Contents

26 Case Study:

SMIT Salvage

MarEx takes an intimate look at one of the world's oldest and most recognizable maritime brand names.

BY JOSEPH KEEFE

32 Executive Interview:

Caspar Domstorff & Douglas Martin

A Conversation With the Director SMIT Salvage, Caspar Domstorff, and the President & General Manager, SMIT Salvage Americas, Douglas Martin.

BY JOSEPH KEEFE

11 | Bunker Profile

Todd McKenna, Partner,
Glander International Inc.

BY MAREX STAFF

40 | Maritime Claims

Phil Brickman on the complex issue of obtaining security for....

BY PHILIP C. BRICKMAN

44 | Protecting the Supply Chain

World commerce will continue despite the threat of...

BY GORDON FELLER

48 | Silent but Deadly Undersea Threat: Four Billion Gallons of Oil

BY JOSEPH KEEFE

56 | Deck Machinery Directory

Find the right company to fit your machinery needs.

Executive Achievement

8 | Joseph E. Farrell

Founder & President,
Resolve Marine Group, Inc.

BY MAREX STAFF

Washington Insider

13 | Cosco Busan Guilty Plea Highlights Complacency and Bolsters the Case for Reform

On August 13, 2009, the ship manager of the *Cosco Busan*...

BY LARRY KIERN

MarEx OP-ED

18 | Security & Defense

Shipboard Security and
Vessel Defense

BY CAPTAIN JEFFREY L. KUHLMAN

Upgrades and Downgrades

22 | When Will Tanker Stocks Rebound?

Earnings Touched Bottom in the Second Quarter. The Third Quarter Could Be Worse.

BY JACK O'CONNELL

By Philip C. Brickman

Maritime Claims in Uncertain Economic Times



Phil Brickman, attorney and partner with the law firm of Fowler Rodriguez Valdes-Fauli, weighs in on the complex issues of obtaining security for judgments, unpaid invoices and other maritime claims in uncertain economic times, as well as on recent developments in Supplemental Rule B Maritime Attachments.

THE UNCERTAIN STATE OF THE WORLD economy has created a rising need for maritime businesses to utilize procedural tools available under U.S. maritime law to obtain security for past due invoices and broken charter parties, collect unpaid freight, and secure arbitration awards. The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (“Supplemental Rules”) provide maritime businesses with the unique ability to monetarily secure these claims. Recently, the U.S. Federal Courts have rendered opinions addressing the attachment of electronic funds transfers (EFT) in intermediary banks, seizing assets of corporate alter egos, and setting standards for reducing the amount of attached assets.

Supplemental Rule B

Supplemental Rule B is a procedural mechanism by which jurisdiction is obtained over a foreign entity that has no presence in a particular judicial district by attaching its property as it passes through a particular district in the stream of commerce. Rule B applies to *in personam* actions only, as opposed to *in rem* actions, for the enforcement of maritime liens against a vessel itself. A plaintiff seeking attachment must demonstrate that (1) it has a prime facie admiralty claim, (2) the named defendants cannot be found within the federal judicial district, (3) the attached defendants’ property is within the district, and (4)

there is no statutory or maritime law barring attachment.

Attachments are typically challenged on the grounds of (1) failure to state a *prima facie* maritime claim, (2) the property at issue is not subject to maritime attachment, and (3) a defendant is “found within the district” for purposes of Rule B attachment.

Electronic Funds Transfers

The practice of attaching EFTs being routed by foreign banks through New York financial institutions has increased dramatically in recent years. In attaching an EFT, a plaintiff encounters unique issues particular to the nature of that asset. Because an EFT is sometimes an instantaneous transaction, attaching parties have become creative when serving process on the garnishee (*i.e., financial institution*) to ensure seizure of the asset. In addition, there are legal impediments to attaching property acquired after the garnishee order has been served with process, so the timing of attachment is critical. A plaintiff must sufficiently allege in the complaint that a defendant’s property will be in the hands of garnishees at the time it is served with the writ of attachment.

In a recent New York Federal District Court case (*Cala Rosa Marine, Co., Ltd. v. Sucres*, 613 F. Supp. 2d 426 (S.D.N.Y. 2009)), the Court addressed an attaching party’s request for continuous service. The plaintiff was seeking to secure a claim arising out of a breach of charter party. Included with the required pleadings was a proposed attachment order that contained a provision for continuous service of process and also that the process would be effective on the garnishee bank throughout the remainder of the day upon which service is made and continuing to the next business day. The plaintiff also requested that the Court appoint a special process server, along with the U.S. Marshal, to serve the attachment order and any supplemental process on the garnishee bank. This would allow the plaintiff to attach the defendant’s EFT funds that arrived after process had been initially served. Without continuous service, it would be practically impossible to attach EFTs.

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In its opinion, the Court noted the Second Circuit Court of Appeals' decision in *Reibor (Reibor International Limited v. Cargo Carriers Limited, 759 F.2d 262 (2d Cir. 1985))*, which prohibits attaching after-acquired property, meaning that a plaintiff cannot attach property that was not in the hands of the garnishee at the time the attachment order was served. The Court elected to follow New York State law and concluded that a garnishing bank may consent to continuous service, but a court cannot require continuous service because it may result in disruptions in commerce.

The U.S. Second Circuit Court of Appeals has determined that EFT funds remain the property of the originator while in the hands of an intermediary bank and, therefore, are subject to a Rule B maritime attachment. The Court affirmed that EFT funds are an asset subject to maritime attachment, which is consistent with traditional admiralty principles that Rule B can provide for jurisdiction over defendants where its assets can be found, instead of requiring a plaintiff to search the globe for delinquent debtors.

To properly attach EFT funds, the plaintiff must set forth enough facts to render it plausible that a defendant's property will be in the hands of the garnishee at the time the writ of attachment is served. In *Peninsula Petroleum (Peninsula Petroleum, Ltd. v. New Econ Line Pte., Ltd., 2009 AMC 643 (S.D.N.Y. 2009))*, the attaching plaintiff's petition lacked sufficient specificity to show that it would be plausible that the defendant's property would be in the hands of the garnishee at the time the attachment order was served. The Court denied the plaintiff's motion seeking a writ of attachment for failing to allege the required specificity and instead showing "little more than a speculative hope that the defendant's assets, in the form of EFTs, will fortuitously appear" in one of several financial institutions. A plaintiff must show the Court that there is a likelihood that certain funds will be in the hands of specified banks at a specified time.

Alter Ego

Federal Courts recently addressed the issue of whether a corporate alter ego or parent company is considered "found within the district" for purposes of Rule B. In a case from the Second Federal Circuit, the plaintiff sought a writ of attachment against two defendants. One defendant, ICI, was a party to a charterer agreement with the plaintiff and also registered with the New York Department of State. The other company, Weaver, was not registered as a New York corporation but was alleged to be the corporate alter ego of ICI. Weaver filed a motion to vacate the attachment on the grounds that if it was not the alter ego of ICI, then there would be no *prima facie* maritime claim against it; or, alternatively, if Weaver was the alter ego of ICI, then Weaver would be considered "found within the district" because ICI was registered with the New York Department of State. The Court held that if a corporation

is registered with the New York Department of State and is found within the district for purposes of Rule B, then the alter ego corporation is also not subject to maritime attachment because it too is found within the district.

Reduction of Security

The Second Federal Circuit recently considered the standards that should be applied when reducing the amount of maritime attachment under Supplemental Rule E. During the course of a dispute, a claim may be reduced, possibly resulting in a reduction of security. District Courts have discretion to make a preliminary assessment of the reasonableness of a plaintiff's claimed damages when setting security. The Court should be satisfied that the plaintiff's claims are not frivolous but should not require the plaintiffs to prove damages with exactitude. In *Transportes (Transportes Navieros y Terrestres v. Fairmount Heavy Transport, 2009 U.S. App. Lexis 13394 (2d Cir. 2009))*, the plaintiff sought over ten million dollars for damages arising from an alleged cancelled charterer party and lost net earnings under that charter party. In assessing the defendant's request to reduce security, the Court noted that the plaintiff's damages were unreasonable and reduced the security to an amount it was more likely to recover.

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Attorney's Fees

Attorney's fees may sometimes be awarded if the defendant is successful in vacating an attachment. In a case decided in the Southern District of New York, a marine terminal operator had provided prior services to a vessel and sought to attach the vessel owner's assets in New York for failure to pay past due invoices. The vessel owner directly asked the plaintiff to vacate its attachment, citing a bareboat charter party that had been in effect between the head owner and charterer. A bareboat charter serves to shift all responsibilities for costs incurred from the head owner to the charterer and, therefore, there is no claim against the head owner for breach of charter party by third parties that have subsequently contracted with the charterer. Despite the bareboat charter agreement, the plaintiff refused to lift the attachment. Thereafter, the head owner moved to vacate the attachment. The Court ruled that the bareboat charter prevented the plaintiff from sustaining a

valid prima facie case against the head owner and vacated the attachment. Attorney's fees were awarded to the head owner because the attaching plaintiff refused to release the attached funds after being informed of the existing bareboat charter.

Conclusion

Rule B attachment remains a very effective tool by which companies can obtain security for unpaid invoices, ongoing arbitration disputes, judgments or other maritime claims. However, businesses seeking attachment must be certain that all requirements for maintaining the attachment are satisfied and that the methods of a particular attachment will ensure that the desired security will remain in place. In some cases courts may award attorneys fees upon vacating wrongful or deficient attachments, particularly when the attaching party has been informed of the deficiency but refuses to release the asset.

MarEx

Philip C. Brickman obtained his law degree from Tulane University in 1998. He has practiced all aspects of maritime and environmental law, representing major international and domestic marine, liability and energy underwriters, members of the international group of protection and indemnity associations, vessel owners and energy companies. In addition to maritime and environmental law, he is experienced in commercial and general casualty defense litigation. Mr. Brickman has extensive personal experience in investigating major shipping casualties, pollution incidents, stowaway attempts and drug smuggling onboard cargo vessels.

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