

The Decurion: Hong Kong court rules on meaning of “control” in the context of a ship arrest

Chimbusco Pan Nation Petro-Chemical Co Ltd v. The Owners and/or Demise Charterers of the Ship or Vessel “Decurion” (The Decurion) [2012] HKCFI 630; HCAJ141/2010 (4 May 2012)

This case arose out of the common scenario where a supplier delivers bunkers to a “fleet” of ships it believes are under common control and extends credit terms to its customer. If the customer fails to pay, the supplier will try to arrest one or more ships in the fleet to settle its invoices. As the supplier in this case found, there can often be considerable difficulties enforcing in this way.

The background facts

The bunker supplier, Chimbusco Pan Nation Petro-Chemical Co Ltd (“Chimbusco”) had supplied bunkers to the vessel, *Decurion*, for which it had not been paid. This vessel was owned by Maruba SCA, which was part of the Maruba Group. The claim for these unpaid bunkers amounted to about US\$85,000.

Chimbusco had also supplied bunkers to ten other vessels through bunker supply contracts with Maruba SCA. It had not been paid for the provision of these bunkers either; a claim in excess of US\$4.1 million.

Maruba SCA did not, however, own any of those other vessels. They were chartered by Clan SA, another company within the Maruba Group. Maruba SCA supplied those vessels with bunkers when they were in Hong Kong through another Maruba Group company and pursuant to a separate Services Agreement between the Maruba Group companies.

The *Decurion* called in Hong Kong and was arrested by Chimbusco. Chimbusco claimed against the *Decurion* the outstanding sums for the provision of bunkers for all eleven vessels, not just the bunkers supplied to the *Decurion*.

Maruba SCA accepted that Chimbusco had a claim against the *Decurion* for bunkers supplied to the *Decurion*. Maruba SCA denied, however, that Chimbusco could claim against the *Decurion* for the unpaid bunkers in relation to the other ten vessels. It sought to have this element of Chimbusco’s claim struck out.

The legal background

The Admiralty Jurisdiction in Hong Kong is governed by the High Court Ordinance (“HCO”). Under the HCO, a bunker supplier can arrest a ship in respect of claims for bunkers which are sold to the owners and supplied to that ship for her operation.

Where bunkers are supplied to ship A for her operation, a bunker supplier may also arrest ship B for claims for bunkers supplied to ship A only if two conditions are met. Those conditions are specified in the HCO and are as follows:

1. that when the cause of action arose, the defendant to the claim was the “owner, charterer of, or in possession or control” of ship A; and
2. that, at the time the action was brought (i.e. when the writ was issued), the defendant was

the beneficial owner of ship B.

In this instance, it was clear that Maruba SCA owned the *Decurion* at the time the writ was issued, so point (2) was not in issue. Maruba SCA were, however, neither the registered owners nor the charterers of the other ten vessels. The issue before the court was, therefore, the interpretation of the words “*in possession or control*,” as contained in the HCO.

The court’s decision: the meaning of “control” The court looked at the limited cases relating to “control” that had been heard previously in other common law jurisdictions. It found that there may be control of a ship without possession of it, and that the term “control” in such circumstances must mean something else other than the kind of control that comes with possession. The most obvious example of that kind of control would be the ability to tell the person in possession of the ship what to do with the ship.

In this instance, the court found that this ability lay with the charterers, Clan SA, by virtue of the employment clauses contained in the charterparties which it had entered into with the various ships’ registered owners.

Chimbusco pointed to many factors that it said meant Maruba SCA effectively controlled Clan SA and, therefore, the other ten ships. The court, however, refused to look beyond the charterers in determining who exercised control of the ships:

“[e]ven if (say) Maruba SCA might be treated as the parent of Clan or the individual companies owning the 10 vessels at the relevant times, there is no basis for piercing the corporate veil.”

Accordingly, Chimbusco’s claim in relation to the bunkers which it had supplied to the other ten ships was struck out.

Comment

By adopting the analysis above, the court in this case set out a clear and rigorous test for the meaning of “control” under the HCO. Control of a ship rests with the person who is able to tell the person in possession of the ship what to do with that ship. For a ship under time charter, control will normally rest with the time charterer.

The court refused to widen the circumstances in which a ship may be arrested in Hong Kong, which has helped to preserve certainty. It does, however, reinforce the need for bunker suppliers, if they are going to extend credit terms to owners, to have a properly drafted contract which would at least allow for the arrest of the vessel supplied if payment is not made on time. Equally, managers who decide to extend credit to a whole fleet should be aware that recovering payment may still require a series of separate arrests.

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