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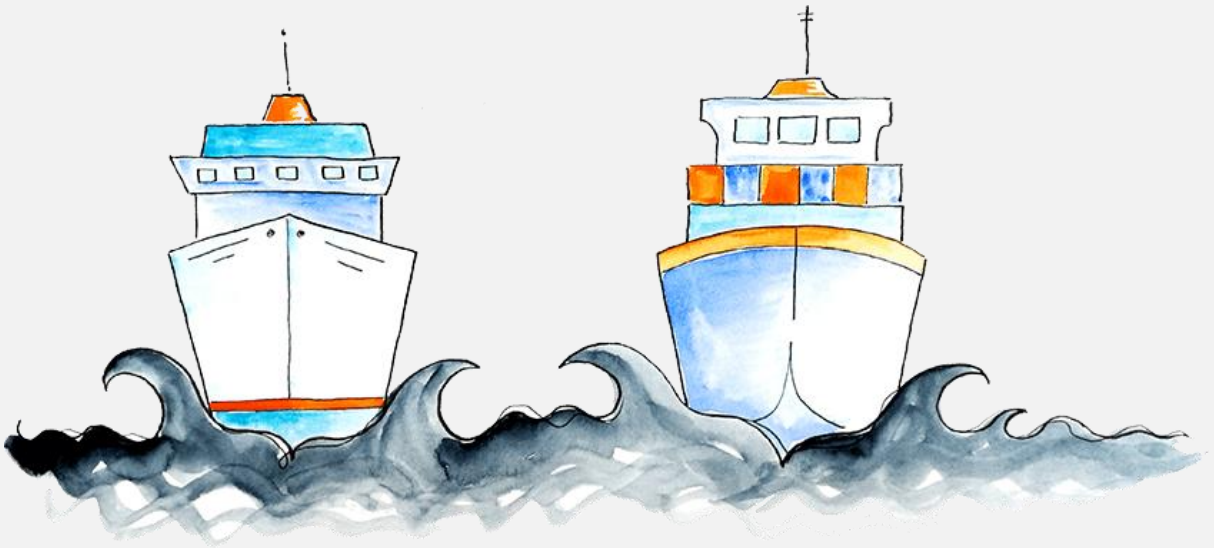

Asset Related Protection Guide

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY

1. INTRODUCTION

This guide has been prepared with international businesses in mind. The team at Zeiler Floyd Zadkovich have put together the pack which contains all of the key points that you need to know about asset related protection.

Zeiler Floyd Zadkovich manages sophisticated commercial disputes in forums all over the world. We draw upon extensive, multi-faceted experience acting for clients in transactional and contentious matters. In this guide we draw on that experience and cover both US and English law, with references to other jurisdictions all over the world.

This guide covers arrest, followed by maritime liens in both jurisdictions; we then cover demands for adequate assurances; s.1782 discovery proceedings; freezing injunctions in England and Wales; fraudulent conveyances; bankruptcy proceedings; arbitral forum interim measures; and early contract and charterparty review.

2. ARREST

2.1. **Introduction**

Ships are by their nature transitory and shipowners and operators are located worldwide. The laws of the US, UK and other nations recognise that enforcement of judgements against shipowners, the enforcement of liens against vessels, and attachment of shipowner's property (including other vessels) can be challenging.

In this section we are going to discuss arrest in both the US and United Kingdom, giving some insight as to how they work and how they can be used to protect you and your business.

These procedures have been an important part of our work from the start and are generally reliable means to secure a Client's financial interest, particularly when communications between the parties deteriorate and parties are exposed to losses.

2.2. Arrest in the US

The US is not a signatory to any international conventions that concern attachment and arrest. However, US law provides creditors with a set of remedies for pre-judgment attachment of property that is subject to a maritime claims, and also allow for the arrest of vessels or other property based on maritime liens. The procedures

for enforcing these rights are set out in the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (Supplemental Rules).

RULE C - VESSEL ARREST

Vessel arrest generally allows a party to bring a claim against vessel interests in respect of liabilities created by that ship. Using Rule C of the Supplemental Rules in the US allows a party to bring claims against the vessel itself, often providing enough security on account of the vessel value, a LOU that is issued in the aftermath of the arrest, or even drawing in the vessel owner into the proceeding in personam. Under Rule C, a party seeking enforcement needs to demonstrate a maritime lien that may be exercised against a vessel or other property in rem (that is considered part of the vessel). The vessel or property must be located in the district where and when the court order is served.

The legal scheme in the US allows for Rule C arrest of property of different kinds, these include: vessels, freights, bunkers, and vessel equipment. Maritime lien and mortgage creditors with rights under certain federal statutes providing for in rem proceedings may enforce their rights in rem against vessels or other property. Maritime mortgages and certain liens are defined in the Federal Maritime Lien Act and the Ship Mortgage Act (46 U.S.C. §§31301-31343).

The US regime is special in that it recognises “personification” of the vessel in rem. The vessel itself is liable for example, a claim for payment for necessaries that grants a maritime lien to the providing party (46 U.S.C. § 31342). Similarly, in a proceeding following the arrest of a vessel, the vessel itself is the defendant.

It is common for the vessel owner to only make a special appearance to fight the arrest as the vessel owner is conscious of the danger of being drawn into the proceeding in personam. In practice, a P&I Club may issue a letter of undertaking and the vessel can be released. If the vessel owner makes a general appearance, they too can be target of the proceeding.

Based on the personification, there is no associated or sister ship arrest regime in the US under Rule C, which provides for in rem jurisdiction only over the vessel or other property subject to the lien.

RULE B - MARITIME ATTACHMENTS

Other property of the vessel owner may be attachable under the right circumstances under Rule B. Rule B is a quasi in rem proceeding. Rule B allows a party to obtain

jurisdiction over the defendant if that defendant cannot be found in the district where the attachment action is filed.

Using Rule B, a party can attach tangible and intangible property of a counterparty for security. Rule B allows attachment of non-vessel property of all kinds and no maritime lien is required. Rule B attachment merely requires a maritime claim that can be alleged with prima facie validity, property located in the district where the attachment is filed, and the defendant not being present in the district.

Rule C arrest is complemented by Rule B by allowing an attachment of a sister ship to a vessel the party has obtained a maritime lien on. The party can attach another vessel of the same vessel owner simply by attaching it as other property of the vessel owner. If ownership is unclear, the attachment of a vessel can be combined with alter ego allegations. This allows for attachment of vessels under actual shared ownership and helps overcome strategic asset management by the counterparty vessel owner. This is often necessary where the counterparty operates vessels in the formal ownership of several special purpose vehicles (SPVs).

2.3. Vessel Arrest in the UK

GROUNDS FOR ARREST

Under English law, a vessel may only be arrested in very specific circumstances. The grounds for arrest can be found in the Senior Courts Act 1981, sections 20(2) (a)-(s), which implements the terms of the Brussels Convention Relating to the Arrest of Seagoing Ships, 1952. There are 19 types of maritime claims in total that can result in arrest, which include; claims relating to possession or ownership of, or mortgage on, a ship; claims for damage done by a ship; claims for loss of life or personal injury due to a defect in a ship; claims for loss or damage to goods carried on a ship; other claims relating to carriage of goods on a ship; and, in support of a claim arising out of an agreement related to the carriage of goods or the hire of a vessel.

In the United Kingdom you can arrest a vessel irrespective of her flag. It is the ship against which there is a claim and its contents which are subject to arrest (The Silia [1981] 2 Lloyd's Rep 534). This can cause some issues where the Charterers own the bunkers (The Span Terza [1984] 1 Lloyd's Rep 119.).

Quite importantly, maritime arrest can only occur in the UK under the above Acts if the party who was the owner at the time the cause of action arose is still the owner at the time of the arrest.

Further it is possible in the UK to arrest a sister ship. Sister ships are those which are connected to the Defendants vessel, and for them to be arrestable they must have been owned by the same person who is the owner of the ship in connection with the claim at the time when the action is brought.

Under Article 3 of the Convention a ship should not be arrested more than once in a contracting state (The Tjaskemolen (No.2) [1997] 2 Lloyd's Rep. 476). This is subject to security being given (see below), and if this is not the case then re-arrest may be possible if it is not "vexatious or oppressive" (The Alletta [1974] 1 Lloyd's Rep. 40).

Procedure

In order to arrest a vessel in the United Kingdom the claimant will need to file and serve an Admiralty Claim Form (Form ADM4) and an arrest application. The vessel will need to be situated within the territorial jurisdiction of the court (territorial waters of England and Wales or Scotland or Northern Ireland) for this to be possible.

The fees for these applications vary depending on the value of the claim, and the sliding fee scale is as follows:

- Claim value between £10,000 and £200,000 – 5% of the claim;
- Claim value over £200,000 – 5% of the claim, but is capped at £10,000.

There is also an additional £225 payable to issue the arrest warrant, and for this to be done the claimant will need to give full information as to the ships location and the port of registration.

SECURITY AND RELEASE

There is no need, unlike in some jurisdictions, for the claimant to provide counter security for the arrest. They will only need to cover the expenses of the Admiralty Marshal. This is something that the claimants solicitors will usually do on their behalf, but there may be costs that the claimant will need to pay directly such as berthing charges.

The procedure for releasing a ship from arrest is described in Civil Procedure Rule (CPR) 61.8. A vessel owner can provide security for their vessel in order to have it released. The amount of security is generally the subject of negotiations but where there is no agreement the court may decide on the type and amount of security (The Moscanthy [1971] Lloyd's Rep. 37., see also CPR 61.6). There is a rule however, which is that the security cannot be more than the value of the ship (CPR 61.6(3)). Security will thus be determined on the basis of the claimant's reasonably arguable best case (The Gulf Venture [1984] 2 Lloyd's Rep. 445).

SALE OF A SHIP

Applications may be made to the Admiralty Court by any party for the sale of a vessel that is under arrest, and the procedure for this can be found in CPR 61.10. The sale of the ship will extinguish all liens (The Cerro Colorado [1993] 1 Lloyd's Rep. 58). The value of the vessel should be appraised by the Admiralty Marshal and an appointed shipbroker. The sale will go to the highest bidder. A sale of the vessel below the value given by the Admiralty Marshal will only be allowed with the leave of the court and this will only be done in exceptional circumstances.

WRONGFUL ARREST

The common law position is that unless the arrest is done in bad faith or gross negligence there are no damages for a ship that has been wrongly arrested (The Evangelismos (1858) 111 E.R.). This makes arrest a very powerful weapon in the hands of a claimant as without consideration in the size of the claim and without an examination of the possibilities of success on the merits, the ship could be stopped from trading without any obligation on the claimant to pay damages. In general, there is no remedy against the arrest if it turns out to be unjustified in the sense that the claim fails or is not proceeded with.

2.4. Conclusion

Zeiler Floyd Zadkovich have experience in arresting vessels all over the world, and have been involved in around 50-60 arrests between the Partners themselves.

We take a creative approach to finding and attaching different types of property – that can be cash, bank accounts, a claim, judgement, receivables, documents of title, cargo, bunkers, freight payments,

and of course, vessels.

We regularly arrest and attach ships in the US and England. However, we also conduct arrests in various other countries and manage them with local counsel. We are currently involved in a Rule B attachment proceeding under an alter-ego theory in the US.

What is more, since the attachment of EFTs under Rule B in New York is no longer possible, there may be other, creative ways to gain security by arresting freight

payments under Rule C based on the fact that freight can be arrested as property when a maritime lien is found to rest on it. We would be happy to discuss any of the above options with you at your convenience.

3. MARITIME LIENS

3.1. Maritime Liens in the US

We will begin this section with the shipowner's lien on cargo. The upshot is that as disponent owners you may have lien rights over cargo, sub-freights and other property under the charter party.

This is critical to understand and there are fundamental differences between the US approach and the English approach to shipowner lien rights over cargo. For example, the US has the concept of a conditional delivery, where you can still maintain your lien notwithstanding the bankruptcy of the receiver/consignee, but it requires a formal, specific notice. In England, once you lose possession, you lose your lien. These differences make it necessary to involve counsel early, so that the law can be taken into account before actions such as delivery prejudice the Client's recovery and to improve chances of maintain and recovering under their lien rights.

On the flipside, charterers, cargo interest, and parties providing services to the vessel may have a maritime lien on the vessel. Maritime liens are unique in that the vessel itself owes obligations. Jurisdictions may differ in the underlying causes that give rise to maritime liens.

In the US, maritime liens allow a lien holder to arrest the vessel under Rule C of the Supplemental Rules. The vessel itself will become the defendant in that action under the "personification" doctrine. The vessel owner may appear as defendant in the action to defend the matter.

A lien generally is a charge on property for the payment of a debt. A maritime lien is a special property right in a vessel given to a creditor by law as security for a debt or claim. These arise from some service rendered to the ship to facilitate her use in navigation or from an injury caused by the vessel in navigable waters.

In the US, almost all maritime claims give rise to maritime liens – but there is pecking order of priority amongst liens. For example, seamen's claims under the Jones Act and premiums due under marine insurance contracts are not supported by a lien.

Generally, liens can arise from torts and contracts. Any tort for which the vessel is responsible is going to give you a maritime lien on the vessel. Contract liens are

governed by the general maritime law with the exception of liens for necessaries that are statutory.

Liens for necessaries are those arising for the benefit of a party that furnishes supplies or materials to a vessel in a foreign port and in the process acquires a maritime lien. Foreign port only excludes the actual home port of the vessel. A person providing necessaries to a vessel must do so on the order of the owner or a person authorized by the owner and may then bring action in rem to enforce the lien.

Recall in that context the lawsuits in the aftermath of the O.W. Bunker collapse. The issue of whether bunkers were provided "on the order of the owner" was central to the lawsuits that arose across the globe.

It is worth noting that liens apply to the vessel itself and, generally, all equipment which is an integral part of the vessel and is essential to it navigation and operation. This includes bunkers and even equipment owned by an entity different from the vessel owner such as charterer, lessor, or vendor. If

the vessel is auctioned off with non-vessel owner equipment, the equipment owner may have claims against the vessel owner. Ultimately, when a vessel is arrested and the vessel owner did not make a general appearance or is bankrupt, priorities of liens become relevant as more than one claimant are likely to look to the vessel in order to satisfy their claims. Priorities are generally based on jurisprudence and there is no overarching scheme.

Finally, lien holders must be aware that maritime liens can undergo extinction. Ways to extinguish a maritime lien are by payment of the claim, latches (a common law time bar); judicial sale "Free and Clear of Liens"; waiver; and, finally, the destruction of the res.

It should be noted that the law in other jurisdictions may from time to time vary substantially

3.2. Maritime Liens in the UK

In England, a shipowner has a common law possessory lien over cargo for freight or hire which is enforceable as an in personam action against shipowners or third party cargo owners (Robert How and John Walker v. Wiliam Kirchner (1857) 14 E.R. 602). The lien in England is essentially a self-help remedy in the form of a passive right of detention until the debt owed is discharged. It gives shipowners a right at common law to refuse to comply with an order for the delivery of the cargo until they have been paid the due amount for freight or hire owing (Landgley Beldon & Gaunt Ltd. v. Morely [1965] 1 Lloyd's Rep 297). The right is, however, entirely dependent upon possession and does not confer a proprietary right in the goods over which it exists.

Shipowners' liens in England can arise under the common law or by express contract (ENE 1 Kos Ltd. v. Petoleo Brasileiro SA Petrobras (The Kos) [2012] 2 AC 164). No form of registration is required to perfect them; however, two elements must be satisfied for a shipowner to properly enforce its right under the lien. Firstly, the shipowner must make a demand for the freight or hire by making it clear that it will not release the cargo until it has been paid the amount owed (Albemarle Supply Co. Ltd. v. Hind & Co [1928] 1 K.B. 307, 318). The specific amount can be identified, or the shipowner can give the consignee particulars from which it can calculate the amount for which a lien is due. Secondly, the shipowner must maintain possession of the cargo at all times (The Boral Gas [1988] 1 Lloyd's Rep 342).

English courts have held that shipowners must deny possession to anyone who wants it, they must not give up possession of the cargo to a consignee or waive its right to a lien, and must uphold a duty to take reasonable care of the cargo. Shipowners may however, take reasonable steps to maintain possession and uphold their lien, particularly where a bill of lading holder does not claim delivery in a reasonable time. Shipowners therefor have the right to land the cargo to their own order, or to relocate from the discharge port to another convenient port to discharge.

Upon discharging cargo, a shipowner is entitled to store and safeguard the cargo on premises in their exclusive possession, and later recover any costs of such storage, or for having to sail to another port to discharge (The Lehmann Timber [2014] QB 760). Where a valid lien is in place, such action will not amount to the tort of conversion (The Bao Yue [2015] 2 C.L.L 415). If the consignee further refuses to pay the amount owed, the shipowner can seek an order to sell goods pursuant to CPR 25.1(1)(C)(V).

Although the above principles demonstrate that English courts have attempted to dilute the restrictive requirement of possession, there are still difficulties with the conception of the shipowner's lien.

The possessory lien puts the onus on shipowners to take further steps to ensure that they can enforce their contractual right to freight. It therefore undermines the efficiency of maritime trade, as the cargo will not be able to be delivered to the consignee. This is particularly detrimental in circumstances where the cargo is of a perishable nature or is needed to be sold quickly to maintain its value. Although the shipowner will be able to land the cargo in a warehouse under its exclusive possession, they will not be able to be passed on to the consignee and value of the cargo will likely deteriorate.

3.3. Conclusion

Zeiler Floyd Zadkovich has extensive experience handling matters involving shipowner’s liens as well as traditional maritime liens under US law and on a global

level. After the British Steel collapse in England last year, we handled a good number of related insolvency claims, exercising liens and pursuing banks.

We have also recently published an article on shipowner's lien over cargo on the back of the litigation/ arbitration that we were involved in. The article was graciously published by the Tulane Maritime Law Journal.

4. DEMAND FOR ADEQUATE ASSURANCES

4.1. Introduction

In the US, a provision of the Uniform Commercial Code allows for plaintiffs to ask counterparties for adequate assurances when a party has reasonable grounds for insecurity regarding the future performance of a contract. This can be useful in establishing an anticipatory breach or setting up a demand for security/guarantees prior to exposing yourself under a contract to non-payment.

Adequate assurances are part of the second chapter of the Uniform Commercial Code (UCC) and enacted in almost all states in the US as part of their laws on contracts, e.g., NY UCC §2-609 (2012) in New York. UCC Chapter 2 applies to "transactions in goods" (§2-102).

A contract for sale under the UCC imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards (UCC 2-609 (2)). When the right to adequate assurances is invoked, the failure to provide within a reasonable time (not exceeding thirty days) such assurance of due performance is a repudiation of the contract. What assurances are owed is judged by what is adequate under the circumstances of the particular case (UCC 2-609 (4)).

Adequate assurances operate on a commercial reasonableness standard between merchants as to the reasons and information giving rise to insecurity, but also the assurances that can be required under the provision. It is this balance where tailored advice is a key part of success. Capable commercial lawyers will approach this with two main objectives. For one, setting up a demand for adequate security or

guarantees prior to exposing yourself to non-payment under a contract can alleviate the fallout of counterparty's financial or operational difficulties. Mitigation of risks while commercial relationships are maintained should be the priority.

Alternatively, establishing an anticipatory breach may be in the best interest of the Client, especially where the situation of the counterparty is dire and chances of a positive outcome minute.

4.2. Conclusion

This tool can be valuable where a party to a contract for the sale of goods obtains information or has reason to believe that its counterparty's position has deteriorated financially (or operationally) so that future performance is called in question.

The team at Zeiler Floyd Zadkovich has experience with adequate assurances and will be happy to help you with these. If you have any queries please get in touch.

5. S.1782 DISCOVERY PROCEEDINGS

5.1. **Introduction**

Under Title 28, Section 1782 of the US Code, a litigant to a legal proceeding outside the United States may apply to a US federal court to obtain evidence for use in the non-US proceeding.

The litigant files an "1782" application in federal court to start this discovery proceeding. 1782 is often very useful as a first step in an asset tracing claim to obtain discovery, testimony or documentary, for a foreign court or arbitral claim. Counsel can go after vital information such as banking records in New York or anywhere else in the US.

In essence, an applicant under Section 1782 needs to show only that it is an "interested person" in a foreign proceeding; the proceeding is before a foreign "tribunal;" and the person from whom evidence is sought is in the district of the court before which the application has been filed.

Notably, the applying party does not need to be a litigant at the moment of filing as long as litigation in a foreign venue is reasonably expected. This is helpful where the party and counsel are taking swift action in a matter where a counterparty is in a

difficult financial position and the stakes are high, see Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

The US Supreme Court has solidified the usefulness of Section 1782 in Intel. In Intel, the court made clear that Section 1782 discovery may be sought by any "interested person," meaning a person that may not be a litigant but an interested party. Further, the court stressed that a "tribunal" within the meaning of the section is any tribunal that acts as a "first instance decisionmaker." This allows virtually any merit-based arbitration proceeding to fall under the provision – a vital factor in international commercial application. The court also largely did away with any requirement of "discoverability" before the non-US tribunal. This is of particular interest as discovery in the US is famously liberal and in the hands of the parties.

5.2. Conclusion

Section 1782 applications can be combined with a global response and is a valuable tool for the commercial party doing business internationally. Zeiler Floyd Zadkovich has handled a number of these actions in the past.

6. FREEZING INJUNCTIONS

6.1. Introduction – What is a Freezing Order?

Freezing orders are a type of interim injunction that puts significant restrictions on a parties' ability to dispose of, or deal with, their assets. There are two variations of the injunction, namely:

- Domestic freezing order – one issued within the jurisdiction of England and Wales; and,
- Worldwide freezing orders ("WFO") – applying outside of the United Kingdom.

The latter can only be issued with the courts permission, and these powers come from section 37 Senior Courts Act 1981 and the procedural rules found in the CPR Rule 25.1 and its corresponding Practise Direction 25A. This power was recognised in Derby & Co Ltd and others v Weldon and others (No 6) [1990] 3 All ER 263.

A WFO can freeze assets anywhere in the world, the terms of these will usually provide that the respondent must not dispose of or deal with his assets, wherever they are situated, subject to a cap that is equal to the value of the claim. The guidelines for how to enforce these were laid out in Dadourian Group v Simms [2006] EWCA 399.

The purpose of issuing a freezing order is to preserve the respondents assets until a full judgment can be given. Assets include "any asset which the Respondents have power, directly or indirectly, to dispose of or deal with as if it were his own" (JSC BTA v Abkyazov [2015] UKSC 64.), and can include bank accounts, shares, investments, land, and property.

Although the name of the order suggests full suspension of the respondents control over its assets, a standard freezing order will simply put a cap on what activities the respondent can carry out. Respondents will be allowed by the courts to use their assets in regards to living expenses, reasonable legal costs and dealing with or disposing of assets within the ordinary course of business. What this phrase entails exactly was discussed in Michael Wilson & Partners Ltd v John Foster Emmott [2015] EWCA Civ. 1028, where the Court of Appeal stated that in deciding whether something is in the ordinary course of business they would consider the business in question, not the payment, and that it did not necessarily equate to routine or recurring dealings.

6.2. General standards for obtaining a freezing order

Freezing orders are typically brought with no notice being giving to the respondent, which puts a duty of full and frank disclosure on the applicant, even if this acts to their detriment.

A freezing order is an equitable remedy and the courts have full discretion when granting a freezing order.

When deciding to grant a freezing order, the court will observe certain principles such as:

- The applicant must have a cause of action, that is, an underlying legal or equitable right;

  The applicant must have a good arguable case;

- The existence of assets need to be within the court's jurisdiction;

- The applicant must evidence a real risk of the respondents assets being dissipated;

- It must be just and convenient to grant the freezing order, bearing in mind the conduct of the applicant, the rights of any third parties who may be affected and whether such hardship should cause legitimate and disproportionate hardship for the respondent.

The conditions have been discussed in several cases, where the courts determined the levels to which they should be proven. In Ninemia v Tray Schiffahtsesellschaft mbH [1984] 1 All ER CA, the courts stated that the case law had repeatedly proven that the applicant is not required to show a better than 50% chance of success in their argument, only that the case is more than barely capable of a serious argument. This standard of proof is much higher than the burden required in other types of injunction.

In addition to the above points, it is also relevant for the applicant to understand that any delay in application could be used against them as evidence that there is no risk of the assets being dissipated. When a court grants a freezing order, if the respondent fails to comply, they will be in contempt of court and can face a fine, imprisonment or seizure of assets.

6.3. Freezing orders in support of arbitration proceedings

The power to grant these in support of arbitration falls under section 44 of the Arbitration Act 1996. In U&M Mining Zambia Ltd v Konkola Copper Mines plc [2014] EWHC 3250 (Comm), it was held that if the seat of arbitration is in England and Wales, the court may be prepared to grant a freezing order even when the respondent has no assets within the jurisdiction. The English courts will also have the power to grant these to assist with enforcement of an award (Eastern European Engineering Ltd v Vijay Constructions (Pty) Ltd [2018] EWHC 1539 (Comm)).

Advantages of freezing orders

Freezing orders provide many benefits for an applicant when it comes to enforcing judgments and awards. Although they do preserve assets for enforcement purposes they do not completely cut a respondent off from using all of its assets, and allow them to continue with their usual business, creating a happy medium for both parties involved.

They also act, in some cases, as a means for prompting early settlement resolving the underlying dispute.

6.4. Disadvantages of freezing orders

If it turns out that the freezing order should not have been granted, then the costs of complying and the court costs will be for the applicants account. This means that a party who brings an application for a freezing order must be certain that it is necessary.

6.5. Conclusion on freezing orders in the UK

Floyd Zadkovich has a huge breadth of experience with these types on injunctions, with great success. The option to get a freezing order in the UK is a great option for parties as they can gain both domestic and worldwide freezing orders, which would freeze a respondents assets allowing enforcement of awards to be much more effective.

7. FRAUDULENT CONVEYANCES

6.6. **Introduction**

During times of economic decline, companies may be tempted to hide assets when they know they could be exposed to liability. While we last saw this behaviour spike in 2008-2009, the changing financial climate could bring us another wave of fraudulent asset transfers.

This practice is characterised by a unilateral transfer of an asset to another entity or individual in order to avoid a creditor. This may be more commonly observed with closely held businesses, but is not in any way limited to them, with publicly traded companies regularly attempting the same.

Fortunately, the law in the US and UK offers remedies for creditors that seek to protect their chances of recovery.

6.7. Fraudulent Conveyances – USA

Generally, an asset transfer designed to avoid legitimate debts is void. In the United States, most states have enacted their version of the Uniform Fraudulent Transfer Act ("UFTA"). Another fraudulent transfer enforcement scheme can be found in the federal Bankruptcy Code, Title 11 of the US Code. Both schemes provide that a

transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer with "actual intention to hinder, delay or defraud" any creditor.

Though UFTA may vary slightly from state to state, the general rule is that if transferor has transferred an asset for actual or constructively fraudulent reasons, the transfer is voidable and creditor can recover against the asset.

US courts looks for non-exclusive indicators of such fraudulent behaviour, often called “badges of fraud. Badges of fraud include actions that a) Render a debtor insolvent because of the transfer; b) Show a lack or inadequacy of consideration; c) Evidence family, or insider relationship amongst parties; d) Show retention of possession, benefits or use of property in questions; e) Call into question the financial situation of the debtor at the time of transfer or after transfer; f) Evidence the general chronology of events to support a finding of fraud; g) Evidence a high level of secrecy of the transaction in question; and h) Shows deviation from the usual method or course of business.

In case this scenario comes up in the maritime context, it is worth noting that US maritime law recognises maritime fraudulent transfer and subject matter jurisdiction of federal courts will generally be found. The court will then look to state law (and the state’s version of UFTA) to see whether fraud has occurred. If a creditor was waiting for a vessel to arrive in a district where the creditor intends to attach that vessel to satisfy a judgement against the vessel owner and the owner transfers ownership of the vessel while en route to the country where attachment is prepared, US courts may void the sale under state law.

6.8. Measures in the UK

Section 423 of the Insolvency Act 1986 provides a cause of action for victims of transactions at an undervalue in the UK, as a transaction defrauding a creditor/s. Under this section it is not necessary to show a dishonest or fraudulent purpose.

In order for a claim to succeed under Section 423, two requirements must be met, namely:

- 1. The Claimant must show that a person (inc. company or individual) has entered into a transaction at an undervalue. This can include gifts, or a transaction where consideration given was a lot less that it was received for;

- 2. The Claimant must show that the transaction entered into was for the purpose of putting the assets beyond the reach of creditors or future creditors or otherwise prejudices their interests. The purpose does not need to be the sole purpose it is enough for it to be that the

purpose was at least one of the substantial purposes for the transaction.

It is not necessary for the creditor to be in the picture at the time under this Act. Also, unlike other provisions under this Act there are no time limits on when the claim needs to be brought. The relief provided by a successful claim would be an order restoring the position to what it would have been but for the transaction. The court's powers are discretionary and wide, and can include orders against any third party that has received a benefit as a result of the transaction.

6.9. Conclusion

Regardless of the state or country's laws which might be employed to support a creditors position, attacks on the validity of transfers which effectively insulate an entity for judgment or award enforcement are an important tool to maximize the creditor's chances of success. We've extensively litigated these various concepts over the years. They can be powerful to say the least. The key is being alert to what an adversary is doing with its funds and assets – and then questioning whether the conduct is permissible.

Zeiler Floyd Zadkovich have experience in these types of transactions in both the US and UK.

8. BANKRUPTCY PROCEEDINGS

6.10. **Introduction**

Bankruptcy proceedings and in particular its intersection with the maritime law have beena fixture in our practice in the past years. What protections can a creditor rely on when a counterparty is insolvent? This is a central consideration in protecting a party's exposure in what is at best a timid market and may be a full-blown financial crisis.

6.11. Bankruptcy Proceedings in the USA

The US scheme also covers the recognition of foreign bankruptcy proceedings and knowing the areas of law and issues where to stand your ground is key to maximising a creditor's chances of prevailing and finding some measure of recovery in the collective proceeding that is bankruptcy.

The United States approach to bankruptcy is a vast topic. The Bankruptcy Code can be found in Title 11 of the US Code. Cutting it down to the most important aspects, it provides for liquidation, Chapter 7, reorganisation, Chapter 11, and international enforcement and recognition under Chapter 15. The latter is particularly important as it pertains to cross-border recognition of bankruptcy proceedings with high relevancy for international companies as creditors chase assets in the jurisdictions where the counterparty does business.

Who qualifies to be a debtor in the US? Generally, a party that is or is near to insolvent, (see 11 USC s. 109 a). Anyone who is resident of, or domiciled in, or who has business operations, or property in the US can be debtor under Title 11. This underscores the broad scope of the law and indicates that a number of business could qualify to seek the protections of the US Bankruptcy Code.

One key provision is Section 362. Section 362 covers the automatic stay that sets in upon the filing of a petition for bankruptcy in the US. This results in an automatic stay of all proceedings pending, prohibiting commencement or continuation against a debtor or a debtor's property to preserve all still existing assets for the collective proceeding under the Bankruptcy Code.

For creditors seeking cross-border assets, sections 547 and 548 are of central importance as well. Section 547 lays out certain preference transactions that may be used to rob creditors of their opportunity to satisfy their claims. This concerns a situation where another creditor is paid a sum on an antecedent debt (a debt established prior to filing of bankruptcy proceeding) that in essence puts the creditor in a better position than it would be ordinarily if the bankruptcy proceeding would commence and be allowed to run its course. This may be that a company nearing default elects to satisfy claims of a related entity as it files for bankruptcy protection. Normally, there is a three-month look-back period for most transactions, but if an insider is involved, then a one-year look-back period is applied. This allows disadvantaged creditors from minimizing the impact of last-minute dealings between the debtor and entities close to it or in its sphere of influence.

Section 548 concerns fraudulent transfers. Both under state law, often under UFTA, and under the US Bankruptcy Code, the law disallows fraudulent transfers of assets to save them from liquidation in the bankruptcy proceeding. Section 548 voids fraudulent transfers of property and assets.

Finally, Chapter 15 of the bankruptcy code allows for the cooperation between United States courts, foreign courts, and other authorities involved in cross-border insolvency cases. These are of particular relevancy to maritime and commercial parties since creditors and debtors often operate in a myriad of countries and are

seldomly incorporated in the US. During certain bankruptcy proceedings in foreign countries, a business or individual may have a connection to assets located in more than one country. Cross-border insolvency focuses on the choice of law rules, jurisdiction rules, and the enforcement of judgment rules.

During the last global financial crisis in 2008, cross-border insolvencies hit the maritime and commodities trading industries hard. Chapter 15 is the US version of the UNCITRAL Model Law On Cross-border Insolvency and provides mechanism for US bankruptcy courts to provide and extend recognition to foreign bankruptcy proceedings with the goal of asset protection on a global level. Naturally, that is of central importance to the creditor chasing assets for recovery.

Filing a mere petition under Chapter 15 will not give rise to an automatic stay. However, they are generally coupled with a motion to grant a "gap period" injunction. This is supposed to allow a court to decide on recognition. It is often difficult to successfully oppose a motion for gap period. Often granted, the motion seeks a gap period injunction during which a temporary stay protects the assets of the debtor. During this time a court makes a decision on whether to recognize the foreign proceeding. When recognition is granted, only then is a statutory stay granted. The stay is mandatory only if the underlying foreign bankruptcy is pending where the foreign debtor has its "COMI," its Center Of Main Interest. The COMI is best described as the country where any given corporation is registered.

If a stay of creditor actions granted under Chapter 15, it only applies to the territorial jurisdiction of the United States. Note that Section 362 and the automatic stay associated with bankruptcy proceedings brought in the United States is broader in scope covering the entire globe. When COMI is not found where the bankruptcy proceeding was initiated the proceeding is treated only as a foreign, non-main proceeding and it is in the discretion of the court whether to stay creditor actions. It should be noted that, ordinarily, such a stay is still granted.

We want to emphasize that this is not a mere rubber stamp exercise for the court deciding the Chapter 15 petition. It is worth fighting over recognition and good results have been obtained before, and often we obtain good results using those processes. For example a creditor may be successful in terminating recognition where foreign proceeding is not truly a collective proceeding.

6.12. Bankruptcy in the UK

The Insolvency Act 1986 deals with 'bankruptcy' in the UK. In the UK the term insolvency is used when businesses or individuals have insufficient assets to cover their debts, or are unable to pay their debts.

Unlike in the US where the term bankruptcy describes corporate insolvency procedures, the term bankruptcy in England and Wales used to describe a formal procedure in which individuals (not companies) are declared by the court as insolvent.

In the England and Wales a company facing financial difficulties has five statutory procedures, under the Insolvency Act 1986 and Companies Act 2006, that it may be subject to, including: Administration; Company Voluntary Arrangement; Scheme of Arrangement; Receivership; and Liquidation (winding up).

There is also the option, where a company enters into a certain type of transaction within specified periods leading up to its insolvency, to apply to have the position restored to the position that it would have been in if the transaction had not occurred. These include action where there has been a transaction at an undervalue and a transaction that defrauds creditors.

6.13. Conclusion

Having skilled counsel provide timely and dynamic advice as counterparty risk increases or defaults become apparent can be of immense benefit to creditors. Zeiler Floyd Zadkovich has been very active in this area.

We have experience in both the UK and US in all areas of bankruptcy and are well versed in the nuances of each country's regimes. We have been involved in high profile bankruptcies and are happy to discuss the cross-section between maritime law and bankruptcy. Be in touch, we would be pleased to discuss.

9. ARBITRAL FORUM MEASURES

6.14. **Introduction**

When a creditor looks to enforce its claims, there may be a need to take action before an arbitral award or court decision is handed down on the merits of a dispute. The necessity to do so often arises where uncertainty over counterparty risk is growing and expectations are that on the backhand of litigation, when a claim is enforced based on an award, a debtor will be without assets or otherwise unable to pay.

Provisional relief, sometimes known as interim measures, can help overcome this problem. Part of these interim measures can be obtained in an arbitration proceeding itself. Arbitral forum rules and arbitral statutes can help in obtaining interim

measures such as emergency arbitrator appointments, orders for discovery, and orders for security. Although there may be reason to doubt enforceability of some of these measures in the absence of consent, there are arbitral rules that have been construed to allow for such interim measures and Floyd Zadkovich has had success invoking such protections.

6.15. Measures in the USA

More importantly, provisional relief by courts in aid of arbitration may be available. The New York CPLR (Civil Practice Law and Rules) provide for a host of interim measures to secure a party's position at the outset of litigation or arbitration, see NY CPLR 7502(c). This can take different shapes, but New York has what should be considered a creditor-friendly scheme in place. The provision applies whether the arbitration is pending in New York or a different jurisdiction.

Additionally, the provision applies whether the arbitration falls under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or not. Most importantly, it sets the express basis for when such relief may be granted. New York's procedure is uses a fairly low burden, requiring only a showing that an eventual award might be rendered ineffectual without provisional relief.

That relief can take the shape of a preliminary injunction or attachment. This enables a party to secure claims that they intend to pursue in arbitration. The arbitration need not be filed at the time the provisional relief is sought. NY CPLR 7502(c) points out that if an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire, but the court may reduce or expand this period of time for good cause shown. This grants leeway and flexibility to a creditor pursuing its claims.

Importantly, remedies include attachment as well as preliminary injunctions. Many international businesses and individuals have property in New York, whether tangible or intangible, that can become subject of attachment through the mechanic pointed out above. Regarding the preliminary injunction, it must be noted that the prevailing view is that the common law elements of preliminary injunctions have to be shown to be successful in invoking it under this provision.

These are valuable tools to keep in mind, particularly when a creditor cannot employ some of the maritime remedies available, such as Rule B attachment – say if the claim is non-maritime, such as for a commercial product/commodity sales contract, and it contains an arbitration clause.

6.16. Measures in the UK

In the UK, to deal with these risks, the arbitral tribunals have powers to order interim measures of protection to preserve any assets that may be at risk of being dissipated. These measures help to ensure that the award given at the end of the arbitration can be satisfied, or even that evidence that will be needed during arbitration is not destroyed.

The Arbitration Act 1996, deals with these issues in the UK. Section 44 of the Act confers on the English courts powers, in relation to arbitrations, which they can use in order to perform these protective measures. Further Sections 41 and 42 confer powers on the arbitral tribunal themselves to take certain interlocutory measures.

6.17. Conclusion

Here at Zeiler Floyd Zadkovich, we are always looking to find creative solutions for our Client's issues. We combine maritime and non-maritime proceedings for optimal outcomes.

We have a wide breadth of knowledge in arbitral forums worldwide. Zeiler Floyd Zadkovich also has experience in LMAA and ICAA arbitrations.

10. EARLY CONTRACT AND CHARTERPARTY REVIEW

Introduction

Often there are contractual levers, which can be pulled to secure your position or mitigate against the risk of non-payment by charterers or any counterparties for that matter. Of course it is often that these situations arise before legal attention can be given to the Charterparty or Contract; however, being on top of your contracts can be highly beneficial to avoiding legal issues.

At Zeiler Floyd Zadkovich we firmly recommend a proactive approach during particularly challenging times, such as the existence of a pandemic. The more that a party is aware of possible problems arising under their contracts the quicker we can be there to review and find solutions to these problems, as well as assessing the asset position of counterparties.

Zeiler Floyd Zadkovich has been involved in a number of charterparty and contract reviews, and our partners have vast experience in these situations. Most of the situations that we have dealt with have not led to disputes because there are early

steps that can be taken under the contract or even without prejudice in parallel to the contractual position, to shore up positions and obtain assurances.

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