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Briefing note October 2016

Beware of foreign maritime liens: Australian court allows appeal in "Sam Hawk" v Reiter Petroleum Inc

On 28 September 2016, the Full Federal Court of Australia delivered its much anticipated decision in the appeal of *The Ship "Sam Hawk" v Reiter Petroleum Inc* [2016] FCAFC 26.

The Full Court unanimously overturned Justice McKerracher's landmark decision at first instance, which had recognised the application of US maritime lien rights in Australia. The Full Court's decision restricts circumstances in which Australian rules of private international law will recognise and enforce a foreign maritime lien. The foreign maritime lien must either correspond or be sufficiently analogous to maritime liens recognised by Australian law in order to form the basis for an arrest of a vessel in Australian waters. The effect of the Full Court's decision is to significantly undermine the ability of foreign claimants to enforce foreign maritime claims.

Key issues

- The first instance decision in *The Sam Hawk* has been overturned.
- Court's *in rem* jurisdiction can be enlivened by foreign maritime liens if such claims correspond or are sufficiently analogous to claims that are recognised as maritime liens under Australian law.
- The Full Court's decision restricts the scope of foreign creditors' rights to enforce foreign maritime claims in Australia.

Recent market conditions have seen a surge in vessel arrests around the world, with maritime claimants taking steps to maximise their recovery.

In light of these market conditions, maritime lawyers, shipowners, shippers and charterers had been eagerly awaiting the outcome of the appeal in *The Sam Hawk*, which affects the circumstances in which a vessel can be arrested in Australian waters as security for a foreign maritime claim.

Recap of facts

The "Sam Hawk" was time chartered to Egyptian Bulk Carriers, who entered into a bunker supply contract with Reiter Petroleum, a Canadian company, to stem the vessel in Turkey. The bunker supply contract was to be construed in accordance with Canadian law. The contract also purportedly granted Reiter Petroleum a right to assert a lien over the vessel, and US law was said to apply with respect of the existence of any maritime lien, regardless of the courts in which Reiter Petroleum instituted legal proceedings. The owners of the Sam Hawk were not privy to this agreement.

Egyptian Bulk Carriers did not pay for the bunkers, and the Sam Hawk was arrested in Western Australia by Reiter Petroleum on the basis of a

maritime lien which was said to arise under either Canadian or US law.

The owners of the Sam Hawk sought to have the arrest struck out.

Recap of Justice McKerracher's first instance decision

The *Admiralty Act 1988* (Cth) (**AA**) does not recognise a maritime lien for the supply of necessaries.

In Australia, the position, prior to this case, was that the existence of a maritime lien was a matter of procedure governed by the laws of Australia being the *lex fori* (or law of the forum): *Morlines Maritime Agency Ltd v The Ship 'Skulptor Vuchetich'* [1997] FCA 432. This mirrored the English approach in *Bankers Trust International v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221.

However, McKerracher J at first instance in *The Sam Hawk* held that Australian law had moved away from the decision in *The Halcyon Isle* in the distinction between substantive and procedural issues, referring to *John Pfeiffer v Rogerson* (2000) 203 CLR 503, which held that matters relating to a party's rights are matters of substance, not procedure. His Honour characterised maritime liens as substantive claims. As such, the grant of a maritime lien and right to arrest a vessel fell to be determined by the law of the contract, and not the law of the forum. His Honour found that Australian law may recognise and give effect to foreign maritime liens for the purpose of an arrest of a vessel.

The judge at first instance held that a claim for a maritime lien based on US or Canadian law under the bunker supply contract was prima facie valid for the purpose of an arrest of the vessel in Australia under the AA (the ultimate question of the validity of Rieter Petroleum's claim for a maritime lien under US and Canadian law was said to be a matter for the final hearing).

Appeal allowed

The Sam Hawk's owners appealed the first instance decision, arguing the *lex causae* (or cause for the law) was not US or Canadian law. They posited that the *lex causae* might be the law of Hong Kong (where the vessel was registered), or the law of Turkey (where the bunkers were supplied), or Australian law (the law of the forum where the vessel was arrested). It was further argued that even if US or Canadian law was the *lex causae,* and the maritime lien did arise by virtue of either of those laws, such a claim could not be characterised as a maritime lien under Australian law and hence could not form the basis of a ship arrest.

The Full Court overturned the first instance decision and set aside the vessel arrest. The majority accepted the Sam Hawk's owners' argument that *lex causae* (or cause for the law) was not US or Canadian law.

Allsop CJ and Edelman J, in a joint judgment, held that as the Sam Hawk's owners were not party to the bunker supply agreement, that agreement could not create a maritime lien in relation to that ship which binds her owners. On this basis, their Honours held that the laws of the US or Canada were irrelevant. As the laws of Turkey and Hong Kong were not proved, those laws were presumed to be the same as Australian law, which does not recognise a maritime lien in those circumstances. Further, their Honours held that the proprietary rights to a ship cannot be created by a transaction to which the shipowners were not a party.

Similarly, Kenny and Besanko JJ held that, as pleaded, the bunker supply contract was not a basis for identifying the *lex causae* as either the law of the US or Canada. As the Sam Hawk's owners were not privy to that agreement, there was no foundation to give effect to the contractual choice of law provision.

In overturning McKerracher J's first instance decision, the majority of the Full Court restricted the circumstances in which Australian courts will now recognise a foreign maritime lien. Such a claim must now:

1. arise pursuant to the proper law of the contract. The court left open the question of whether the law of the contract would be the parties' choice of law (in the event the relevant parties are also party to the contract), the *lex situs*, the law of the flag or registration of the vessel or the *lex fori*; and
2. correspond or be sufficiently analogous to claims that are recognised as maritime liens under Australian law. Even if US or Canadian law was the proper law of the contract, the US or Canadian law maritime lien that could be said to arise did not correspond and was not sufficiently analogous to claims that are recognised as maritime liens under Australian law.

Rares J also allowed the appeal and set aside the arrest. However, his Honour disagreed with the majority's conclusion that the *lex fori* is the proper law for recognition of a maritime lien. In doing so, his Honour was not inclined to follow the majority in *The Halcyon Isle*, but rather agreed

with the dissenting reasons of Lords Salmon and Scarman in that case and their conclusion that the *lex loci contractus* (law of the place where the contract is made) determines whether as a matter of substance a maritime claim exists, but the *lex fori* determines its priority. Rares J stated that potential difficulties in applying the forum's rules for determining priorities should not dictate whether Australian law should remain open to recognising and enforcing maritime liens that arise under a *lex causae* but that would also not arise under Australia's laws.

Rares J reasoned that if the law of the place where the dealing, transaction or event occurred gave the creditor a 'privilege' or claim over a ship, as security, which would be enforceable under the *lex loci*, that right is capable of recognition and enforcement in Australia as a maritime lien. His Honour said that if the recognition of a foreign maritime lien would alter the order of priorities for parties in a similar factual scenario where no maritime lien can arise under Australian law; such circumstances would not necessarily result in an injustice between those parties. Rather, that result would merely recognise that the two legal systems under which the parties acquired their rights attach different incidents to particular aspects of their legal relations.

In the circumstances of the case, Rares J held that the *lex causae* would not result in an enforceable maritime lien as nothing occurred in the jurisdiction of the US which would cause a lien to attach; neither the Sam Hawk nor its owners did, or were affected by anything to cause a lien to attach, and the *lex causae* affecting the ship (as opposed to the contractual relationship between Reiter Petroleum and Egyptian Bulk Carriers) had nothing to do with the laws or jurisdiction of the US. Rares J decision did not address whether an enforceable maritime lien had, in the circumstances, arisen under Canadian law.

Implications for maritime trade in Australia

The majority of the Full Federal Court agreed with McKerracher J that the law in Australia is that priority rules are a matter of substance, rather than procedure. However, the majority held that this did not affect the force of the majority's decision in *The Halcyon Isle*, as it was conceded in that case, and in this appeal, that the law of the forum determines the order of priorities in any event; the fact that the majority classified the priority rules as a procedure instead of substance was immaterial. The majority stated that before the court can put a foreign law right in its place according to the priority rules of the law of the forum, it must ascertain the nature of that foreign law right and, having done so, determine if it is the same, or analogous to, a right in the law of the forum and its place in the priority rules. The majority of the Full Court said that this two stage approach is consistent with the approach of the majority in *The Halcyon Isle.* Thus it can be said, that *The Halcyon Isle* still represents the law in Australia.

Conclusion

The impact of the Full Court's decision in *The Sam Hawk* is that the court will not recognise a foreign maritime lien as a basis for an arrest, unless that claim is capable of being characterised as a maritime lien that is recognised by Australian law under s15(2) of the AA, which sets out four categories of lien, being: (a) salvage; (b) damage done by a ship; (c) wages of the master, or of a member of the crew, of a ship; or (d) master's disbursements. In effect, this decision restricts the scope of foreign creditors' rights to enforce foreign maritime claims in Australia.

Contacts

Pat Saraceni
Director of Litigation and Dispute Resolution
T: +61 8 9262 5524
E: pat.sarceni@cliffordchance.com

Kate Sherrard
Partner
T: +65 6661 2023
E: kate.sherrard@cliffordchance.com

Nicholas Summers
Associate
T: +61 8 9262 5538
E: nicholas.summers@cliffordchance.com

Gervais Green
Partner
T: +65 6410 2252
E: gervais.green@cliffordchance.com

Alastair Macaulay
Consultant
T: +852 2825 8988
E: alastair.macaulay@cliffordchance.com

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia