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DATE 22 January 2014
SUBJECT Recent Legal Developments
YOUR REFERENCE --
OUR REFERENCE HERO

Dear John,

As per your request we take this opportunity to advise you of a recent legal development in the Netherlands which may be of interest to members of your Committee.

A. Topic

Ship mortgage foreclosure in the Netherlands and the application of the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships of 10 May 1952 ("Arrest Convention") in respect to Vessels flying the flag of a non-contracting state.

B. Case Name and Citation

The Den Haag Appeal Court in *HSH Nordbank A.G. (Germany) v. Hero Shipping Ltd. (Malta)*, decision of 19 November 2013 ("Appeal judgment");
Rotterdam Court in *HSH Nordbank A.G. (Germany) v. Hero Shipping Ltd. (Malta)*, decision of 30 September 2013 ("First instance judgment");

C. Statutes and Treaties Affected

Article 7 and 8 of the Arrest Convention.

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D. Factual Summary

On 6 June 2008 HSH, a German Bank, concluded a loan agreement whereby HSH agreed to lend to Hero, a Maltese ship-owner, an amount of USD 107,800.000 for the purpose of purchasing two Suezmax vessels, the HERO and the ROYAL. The HERO and the ROYAL were encumbered by a right of mortgage to secure the (re)payment of the loan. The loan agreement contained a jurisdiction clause in favor of the courts of England. It also contained an alternative jurisdiction clause on the basis of which HSH could commence proceedings against Hero in any other court of competent jurisdiction.

Hero failed to effect payment of an installment arising from the loan agreement. On 22 August 2013 HSH obtained leave from the Rotterdam Court to attach the HERO to secure its claim of USD 53,680.000 resulting from unpaid instalments. The HERO which is registered in Malta, was subsequently attached by HSH.

HSH subsequently started summary proceedings at the Rotterdam Court to obtain judgment against Hero in the amount of USD 49,419.870,83 to be able to auction the vessel. Hero disputed jurisdiction of the Rotterdam Court in summary proceedings.

E. Summary of Legal Issues

Main issue was whether the Rotterdam Court could accept jurisdiction.

HSH argued, amongst others, that the jurisdiction was to be accepted on the basis of Article 7 sub f Arrest Convention, which provides that the courts in the country in which the vessel is attached have jurisdiction to determine a case on its merits if the claim is based upon a mortgage or hypothecation of the vessel. HSH stated that the loan was secured by a right of mortgage and as such article 7 sub f Arrest Convention applies.

HSH argued that the Arrest Convention was applicable to the HERO despite the fact that she was flying the flag of Malta, being a non-contracting state to the Arrest Convention. HSH referred to a judgment issued by the Rotterdam Court of 14 March 2012 in *UK143 / KALIAKRA (Schip & Schade 2012/86)* in which the application of the jurisdiction provision in relation to collision claims in Article 7 sub d Arrest Convention on non-Convention vessel had already been accepted.

Hero argued that the Arrest Convention is not applicable to such non-Convention vessels. The Arrest Convention states in article 2 and article 8 sub 1 that the Arrest Convention is only applicable to vessels of contracting states. It argued that the provision which deals with vessels from non-contracting states, article 8 sub 2, does not declare the entire Convention applicable to such vessels, merely refers to the law of the Contracting State to determine whether such vessels may be arrested and for which claims.

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F. Holding

The Rotterdam Court in first instance declined jurisdiction on the basis of article 7 sub f Arrest Convention. The court rejected the application of the provision due to formal reasons as HSH failed to substantiate that its claim was secured by a right of mortgage.

The Den Haag Appeal Court quashed the judgment in first instance and in its reasoning the issue of extraterritorial application of the Arrest Convention was discussed at length. It held that the Arrest Convention and article 7 sub f are indeed also applicable to vessels flying the flag of a non-contracting state.

The Den Haag Appeal Court agreed with the reasoning of the Rotterdam Court in *UK143 / KALIAKRA*. It held that from the text of the Arrest Convention it follows that it is also applicable to the attachment of non-contracting vessels. It was mentioned that such interpretation would also follow the views taken in most other contracting states. Reference was also made to the *travaux préparatoires* from which it follows that it was intended that the Convention would be applicable to non-contracting vessels, albeit that the limitation provided in Article 2 of the Arrest Convention would only benefit the vessels flying the flag of a contracting state.

The Den Haag Appeal Court further held that the opposite view would make recovery of claims against non-Convention ships more difficult as it would force a creditor of a non-Convention vessel to proceed on the merits in another jurisdiction, most likely the domicile the ship owner. That would in essence create an advantage for ship owners with vessels flying the flag of a non-Convention State, and that was clearly not intended when the Convention was drafted.

G. Comments

The Netherlands is generally regarded as an "arrest paradise". The Appeal Court ruling in HERO now also gives mortgage banks even easier access to the favorable auction system in The Netherlands, regardless of the flag of the vessel.

Best regards,

AKD
Haco van der Houven van Oordt

