

The Maritime Law Association of the United States  
Committee on Practice and Procedure

PRACTICE AND PROCEDURE NEWSLETTER #1

ARREST (RULE C):

The Merchants National Bank of Mobile, et al v. Dredge General G. L. Gillespie, 663 F.2d 1338, (11th Cir. 1981) (Decision by John R. Brown). The General Gillespie decision presents an authoritative analysis of the background and development of the present rules providing for the arrest and sale of a vessel, in rem (Rules C and E). The case arose out of the foreclosure of a number of preferred ship mortgages on several vessels. The vessel owner interests attacked the arrest claiming a lack of constitutional due process, specifically, pre-seizure judicial involvement and a pre-seizure hearing. The Eleventh Circuit (former Fifth) has held that Rules C and E are constitutional. The Court specifically noted the decision of the Fourth Circuit in Amstar Corp. v. SS ALEXANDROS T, 664 F.2d 904 (4th Cir. 1981) with which it agreed. The decision of the Court can best be summed up in the following quotation:

"The claimants argue that the Admiralty Rules are constitutionally deficient because they do not provide for the participation in the seizure by a judge or magistrate. The argument for notice and hearing before seizure, however, falters at two crucial points. First, the inherent risks of deterioration, attachment of additional liens, destruction, alienation, and conveyance to third parties which are present in the maritime context require that a vessel be subject to immediate seizure to be held in custody to protect and enforce a valid maritime lien. Seizure of a vessel pursuant to a valid lien has been necessary for centuries due to the wandering nature of a ship in commerce. Second, it is questionable whether a judge or magistrate on a pre-arrest basis could fairly consider complicated transactions bearing on the ultimate enforcement of the asserted maritime lien. A denial of the seizure might effectively dispose of the claim on the merits without trial. The lienor would then be denied due process under the Fifth Amendment." 1982 AMC, at 9-10 (emphasis in original).

The court specifically noted that the interim seizure of a vessel in the foreclosure of a preferred ship mortgage was contemplated by the Ship Mortgage Act of 1920, 46 USC §911 et seq.

ARREST (RULE C):

Amstar Corporation v. SS ALEXANDROS T, 664 F.2d. 904, 1981 A.M.C. 2697, (4th Cir. 1981). The Fourth Circuit has held that, because of significant differences between admiralty and common law, the constitutionality of admiralty arrest procedures is to be determined by reference to substantive maritime law, not with regard to common law principles governing creditors' rights. The Court's decision does not deal with the constitutionality of Rule B, but rather only of Rule C Arrest Claims, as implemented by Rule E. The Court specifically held that neither pre-arrest notice nor pre-arrest hearing are needed to afford the shipowner constitutional due process. When Rule C is read in conjunction with Rule 12 of the Rules of Civil Procedure, which provides for a pre-trial hearing of a 12(b) motion to dismiss, due process is satisfied. The Court stated that if a shipowner's request for a prompt hearing on his motion to release the vessel was denied, it would demonstrate that Rule C was unconstitutionally applied, not that it was unconstitutional on its face.

ARREST (RULE C):

Alyeska Pipeline Service Company, et al v. The BAY RIDGE, 509 F.Supp. 1115 1981 AMC 1086 (D.Alaska, 1981). The District Court, Judge James M. Fitzgerald, held that Rule C does not satisfy the Supreme Court's due process requirements. The case arose out of an oil spill from the vessel BAY RIDGE while she was docked at Valdez. Alyeska Pipeline and the vessel each blamed the other for negligence causing the spill. Alyeska cleaned up the spill and filed suit for the recovery of its costs, arresting the vessel. The Court held that an oil spill constituted a maritime tort which gave rise to a maritime lien. The Court rejected any distinction between a lien on behalf of governmental parties and on behalf of private parties. However, the Court found that Rule C failed to provide the minimum due process protection required by the Supreme Court's quartet of cases (Fuentes, Sniadach, Mitchell, North Georgia Finishing) in that the rule does not provide for judicial supervision, or the requirement for prompt post-seizure judicial hearing and opportunity to obtain release of the seized property posting of adequate security. The arrest of the vessel BAY RIDGE was vacated and the complaint dismissed.

NOTE: Since the decision in the BAY RIDGE case, the District Court for the District of Alaska has adopted Local Admiralty Rule 4 providing for specific allegations, pre-seizure judicial scrutiny of the complaint, posting of security for costs, a

pre-arrest hearing, and a mandatory post-arrest hearing.

ARREST (RULE C):

Kodiak Fishing Company v. M/V PACIFIC PRIDE, U.S. District Court, Western District of Washington, Civil No. C-82-129B (Judge Beeks). Judge Beeks, in an order dated February 16, 1982, has specifically stated that the constitutionality standards, by which he judged Rule B in Grand Bahama Petroleum Company v. Canadian Transport, 450 F.Supp. 447 (W.D.Wash. 1978) do not apply to a Rule C in rem arrest. The Judge stated that he is "in complete agreement" with the opinion of Judge Brown in Merchants National Bank v. Dredge General G. L. Gillespie and with the decision of the Fourth Circuit in Amstar Corp. v. SS ALEXANDROS T.

ARREST (Rule C):

Florida v. Treasure Salvors, 621 F.2d 1340, 1981 A.M.C. 1529 (5th Cir. 1980). The Res of the vessel (a wreck) was arrested in international waters some 40 miles off the Florida coast. For all practical purposes the wreck was in custodia legis. Consequently, the Court was empowered to issue ancillary process, under Supplemental Admiralty Rule C(5) to reach appertenant property of the race within the State of Florida although not within the District.

ATTACHMENT (RULE B):

Labanca v. Geraldo Ostermuncher, 664 F.2d 65, 1982 A.M.C. 205 (11th Cir. 1981). Plaintiff was injured in an accident involving a motorboat operated by defendant. Plaintiff instituted action under Rule B attaching defendant's funds in a Florida bank. On motion by defendant, the District Court quashed the service of process of maritime attachment holding that the defendant could be "found within the district" for the purpose of service of process. In reaching this result, the District Court held that the minimum contacts necessary to obtain personal jurisdiction equated with the concept of "within the district" for the purpose of Rule B(1).

Plaintiff served process on the Secretary of State of Florida under a long-arm statute. The District Court determined that since the Secretary of State of Florida was statutorily appointed the agent for receipt of service of process, the defendant was "found within the district" and attachment was inappropriate. The Circuit Court, reversing, held that the defendant was not found within the district since the Secretary of State was in the Northern District of Florida while the cause of action arose within the Middle District of Florida. The Court noted that the ruling might give rise to problems in single

district states but noted that the distinction was intended by Congress and was consistent with traditional admiralty practice. The Court also noted that the process of maritime attachment was created to secure the defendant's appearance and to assure satisfaction in case the plaintiff was successful. In this case, absent the attached funds, there was little chance of satisfaction of a judgment.

ATTACHMENT (RULE B):

Filia Compania Naviera, S.A. v. Petroship, S.A., (S.D.N.Y. No. 81 Civ. 7515 RWS) dated March 18, 1982. In this case the plaintiff attached, under Rule B, defendant's assets in hands of the third party. An arbitration proceeding had already been commenced in London under the arbitration clause of the charter party. Defendant moved to have the case dismissed on the grounds that (1) choice of law provision of the charter party bars application of Rule B, (2) English law bars prejudgment attachment, (3) the United States Convention on the Recognition and Enforcement of Arbitration Awards bars the remedy of attachment, and (4) the attachment fails to meet constitutional requirements. The Court rejected each of the contentions and stayed the action pending the outcome of the arbitration on the merits of the dispute while permitting discovery to go forward on the existence of further assets of the defendant in the hands of the garnishee. The Court held that the forum selection cause of the charter party did not affect, in any way, the jurisdiction of the Court in Admiralty. Since there was a facially valid Rule B attachment, there was no procedural problem in staying the prosecution pending resolution of the arbitration in London with the Court retaining jurisdiction to enter its decree upon the final award. Although the English law bars prejudgment attachment, under the application of normal choice of law principles procedural matters are decided on the basis of the law of the forum. Rule B attachment is primarily procedural, although the attachment does provide subject matter jurisdiction. The Court found that the Rule B attachment was not inconsistent with the provisions of the Arbitration Convention (9 U.S.C. §201-208). Further, the Court held that there were minimum contacts between the defendant and New York to justify in personam jurisdiction.

ATTACHMENT (RULE B):

K/S DITLEV Chartering A/S v. Egeria S.P.A. deNavigazione, Civil Action No. 82-171-N (E.D.Va. 1982). Plaintiff attached the vessel to secure its claim against defendant. The defendant moved to quash service of process since it was (1) found within the district within the meaning of Rule B(1) and (2) that it had no equity in the vessel with which to secure the plaintiff's claim. The Court held that despite the fact that the vessel had called in

the district four times, the defendant was not doing business within the District of Virginia for purposes of personal jurisdiction. Consequently, the defendant was not "found within the district". Due to the presence of the vessel within the district, however, the defendant was within the district for purpose of the attachment of its property and service of process.

The Court's reasoning is somewhat strange. It would appear that if the defendant is not present within the jurisdiction for purposes of obtaining in personam jurisdiction, then, under International Shoe v. Washington, there can be no jurisdiction at all. The decision of the Eleventh Circuit in LaBanca v. Ostermuncher (see above) appears to require that there be sufficient contacts to permit jurisdiction in the first place, however, that "found within the district" requires something more than this.

The second basis on which defendant sought to have the attachment quashed was that Rule E(5)(a) provides that the principal sum of a bond, posted to cover plaintiff's claims, "shall in no event exceed (i) twice the amount of plaintiff's claim or (ii) the value of the property on due appraisal whichever is smaller." The vessel was worth between \$4.5 and \$6 million. Mortgages on the vessel, however, exceeded \$33 million. Relying on Rule E(5)(a), the defendant contended that the vessel had no value to it, and consequently, no bond could be posted. The Court had accepted this reasoning in an earlier case, however, rejected the prior decisions and held that, for the purposes of Rule E(5)(a), the value of the vessel was its value disregarding mortgages. Otherwise, the court held, vessel owners would be inclined to mortgage their vessels beyond their fair market value to avoid attachment.

ATTACHMENT (Rule B):

Apex Oil Company v. Hector Maritime Inc. and The SS MIDAS TOUCH, 659 F.2d 1057, 1981 A.M.C. 2972 (2d Cir. 1981). The parties were engaged in an arbitration. The arbitrators awarded the vessel owner \$191,000 in freight charges. The Court granted charterer's motion for leave to deposit the money with the clerk of the court and to attach it as security for the payment of its arbitration counterclaim, on which the arbitrators had not yet ruled. The District Court's order was appealed to the Second Circuit and affirmed.

ATTACHMENT (Rule B)/FOREIGN SOVEREIGN IMMUNITIES ACT:

Birch Shipping Corp. v. Embassy of the United Republic of Tanzania, 507 F.Supp. 311, 1981 A.M.C. 2666 (D.D.C., 1980). The parties arbitrated a dispute in New York. The arbitration

agreement provided that a court of competent jurisdiction could enter judgment on an award. The dispute was arbitrated and an award made in favor of plaintiff. Judgment was entered in the U.S. District Court for the Southern District of New York to confirm the arbitration award, and transferred to the U.S. District Court for the District of Columbia. Plaintiff attached the Tanzanian Embassy's checking account under Section 1610(a) of the Foreign Sovereign Immunities Act. The Court held that the account was used for "commercial activity" as well as for "public purposes" and, therefore, was subject to attachment.

ATTACHMENT (Rule B):

Rusland Shipping Corp. v. Coscol Petroleum Corp., 635 F.2d 648, 1981 A.M.C. 32 (7th Cir. 1980). The District Court held that Admiralty Rule B (attachment) denied constitutionally required due process and, therefore, was unconstitutional. The Seventh Circuit vacated and remanded, holding that a court should not decide an issue on a constitutional basis if there were alternative grounds on which the issue could be resolved. The Northern District of Illinois Local Admiralty Rules provided for the summary release from arrest or attachment upon evidence showing any "improper practice or manifest want of equity on the part of the plaintiff". On remand, the District Court was to consider whether or not the Rule B attachment could be vacated under the local rule.

SALE OF VESSEL (Rule E):

Coast Engine Inc. v. Sea Harvester Inc., 641 F.2d 723, 1981 A.M.C. 1355 (9th Cir. 1981). State procedures have no effect on an in rem sale of a vessel. 28 U.S.C. §1921 governs the computation of the Marshal's commission in the sale of a vessel in rem. State law has no effect in this area.

SALE OF VESSEL (Rule E):

United States of America v. Pacific Far East Line, 1981 A.M.C. 1276 (N.D.Cal. 1979). The bankruptcy judge, sitting as a special master in admiralty, awarded the Marshal \$607,890 commission on the sale of three vessels for a total of \$40,525,000. The commission was computed in accordance with 28 U.S.C. §1921. The Court held that the fact that the Marshal had not had to arrest the vessels, which were already within the jurisdiction of the Bankruptcy Court, was irrelevant. The commission is justified by the fact that the Marshal's Sale transfers the vessel clear of liens thus bringing a higher price.

Limitation of Liability (Rule F):

In re Complaint of Kingston Shipping Company and Apex Marine as owners of the SS CAPRICORN, 1982 AMC 134 (MD Fla. 1981). This action arises out of the SS CAPRICORN's collision with the Sunshine Skyway Bridge in Tampa. Upon review of Supplemental Rule F(1) and 46 USC §185, the court held that the vessel owner would be required to deposit the value of the vessel in cash into the registry of the court and that the clerk would invest the fund to obtain the greatest amount of interest available, adhering to federal regulations and prudent banking principles.

The court held that the 6% rate of interest on a bond, as security, was inadequate and inequitable considering investment returns in the area of 20% available at this time.

BANKRUPTCY:

In Re Sterling Navigation Company Limited, 1982 AMC 199 (S.D.N.Y. 1981). Sterling Navigation Company (Sterling) filed a petition under Chapter 11 of the Bankruptcy Act and was adjudicated a bankrupt. Sterling was the charterer of the MS REGAL SWORD. The charter party provided for the shipowner's customary lien upon sub-freights for the payment of charter hire. The sub-freights were held by the Bankruptcy Court. The vessel owner entered its appearance and asserted its lien on the funds. The trustee contested the lien claiming that the owner had failed to file as required by Article 9 of the Uniform Commercial Code.

The court held that the charter party lien on sub-freights was subject to the filing requirements of Article 9 of the Uniform Commercial Code. Despite the fact that the Code provides for a variety of different filing requirements in different states, these differences would not do violence to the requirement of uniformity in admiralty law. Consequently, the maritime lien was disallowed due to the failure to file the charter party.

BANKRUPTCY:

Marathon Pipeline Company v. Northern Pipeline Construction Company, 12B. (Bankruptcy) R. (Reporter) 946, 49 L.W. 1173 (D.Minn. 1981). The District Court held that the Bankruptcy Code was unconstitutional in that Congress had provided that the bankruptcy courts shall exercise all jurisdiction conferred on the District Courts. The delegation to bankruptcy judges of powers otherwise relegated exclusively to Constitutional Article III judges was impermissible.

FOREIGN SOVEREIGN IMMUNITIES ACT/JURY TRIAL:

Houston v. Murmansk Shipping Company, 33 F.R.Serv 2d 309 (4th Cir. 1982). The District Court tried this personal injury action prior to the Fourth Circuit's ruling in Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981) which held that the FSIA compels a nonjury trial. The Court empaneled an advisory jury and tried the case to that jury. However, in addition to the jury's verdict, the Court made its own separate findings of fact and conclusions of law. The jury returned a verdict for defendant. The judge, however, in his opinion, stated he would have found for the plaintiff. Judgment was entered on the advisory jury's verdict. Plaintiff appealed. The Fourth Circuit held that there is a substantive difference between a jury and a nonjury trial. Counsel and the Court conduct a nonjury trial differently than a jury trial. Consequently, the defendant did not have the benefit of a true nonjury trial. Therefore, the Court's findings of fact and conclusions of law could not be used to supplant the impermissible jury verdict. A completely new trial was ordered. In view of the fact that the trial court had already rendered one verdict, the Circuit Court took the unusual step of remanding the case for reassignment to a different judge and a nonjury trial.

FOREIGN SOVEREIGN IMMUNITIES ACT:

Velidor v. L.P.G. BENGHAZI, 653 F.2d 812, 1981 A.M.C. 2427 (3d Cir. 1981). Plaintiff Yugoslav seamen arrested a vessel owned by an Algerian government corporation in a wage dispute. Process was served on the master. When the status of the vessel owner became clear, the District Court vacated the arrest warrant. However, since the seaman had relied on Lloyd's Register, which did not indicate that the vessel was owned by a foreign sovereign, they did not lose their in personam wage claim against the shipowner. The Court also held that service of in personam process on the master, as the owner's agent for conducting ship's business, satisfied the service requirements of Section 1608(b) of the Act.

FOREIGN SOVEREIGN IMMUNITIES ACT:

Oceanic Marine Supply, Inc. v. M/T EL AGAMI, 1981 A.M.C. 2636 (S.D.Tex. 1980). Plaintiff arrested the vessel, owned by defendant Egyptian Navigation Company, an instrumentality of a foreign state under the FSIA. The arrest was wrongful and the warrant for arrest was vacated. However, the Court held that plaintiff did not lose its in personam claim since it had consulted Lloyd's Register of Shipowners, Lloyd's Registry of Vessels, and the 1979 Directory of Shipowners, Shipbuilders and Marine Engineers, none of which disclosed that the government of



Egypt held a majority interest in Egyptian Navigation Company. The Court relied on legislative history of the Act which provides that reliance upon a standard registry of ships, which does not reveal a foreign state's interest in the vessel, is prima facie evidence of the party's unawareness that a vessel of a foreign state was involved.

#### FORUM NON-CONVENIENS:

Piper Aircraft Company v. Gaynell Reyno, \_\_\_ US \_\_\_, 1982 AMC 214 (1981). The Supreme Court reversed the Third Circuit's decision in Reyno v. Piper Aircraft, 630 F.2d 149 (3d Cir. 1980). Defendants moved to dismiss the case, which arose from the crash of a Piper aircraft in Scotland, on the basis of forum non-conveniens under the doctrine of Gulf Oil v. Gilbert, 330 U.S. 501 (1947). The District Court granted the motion and dismissed the case finding that the matter should be pursued in Scotland. Plaintiffs appealed to the Third Circuit which reversed the District Court. The Supreme Court reversal again, stating:

"The Court of Appeals based its decision at least in part on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not abuse its discretion, we reverse."  
1982 A.M.C. at 215.

The Supreme Court's opinion does not specifically address the issues raised in the recent NORDIC REGENT decisions from the Second Circuit. Whether the extensive discussion in Piper, supra, would apply to the factual situation in NORDIC REGENT is an open question.

#### JURISDICTION:

Isaura Salazar Narvaez deGomez, v. SedCo. Inc., 1982 A.M.C. 252 (S.D. Tex. 1981). Plaintiff's Mexican decedent was killed aboard a US flag drilling barge which was bareboat chartered to a Mexican corporation, working 57 miles off the Mexican coast. The Mexican corporation had sufficient business contacts to permit service under Texas long-arm statute, however, its contacts with the jurisdiction were insufficient to meet the test of constitutional due process. Additionally, the Court held, that under the doctrine of Forum Non-Conveniens the matter should be dismissed, since the barge was under bareboat charter to a Mexican

corporation which had its base of operations in Mexico in which there was an adequate forum for the case.

#### JURISDICTION:

DeJames v. Magnificence Carriers, 654 F.2d 280, 1981 A.M.C. 2105 (3d Cir. 1981). The Court held that the 1969 Convention for Service Abroad of Judicial and Extra-Judicial Documents was not intended to increase the authority of Federal Courts to obtain personal jurisdiction over a non-resident defendant not found within the district. Consequently, service must be made under either federal or state law as provided by FRCP 4(e) and (i). The Court held that the inquiry must be focused on the contacts of the non-resident defendant with the State of New Jersey, rather than with the United States as a whole, to determine whether or not personal jurisdiction could be obtained.

#### TAXATION OF COSTS:

Roberts v. KYRIAKOULA D. LEMOS, 651 F.2d 201, 1981 A.M.C. 2718 (3d Cir. 1981). The defendant shipowner was ordered by the District Court to produce a witness for deposition in the United States. The defendant also retained the services of an expert witness who testified at trial. Defendant prevailed at trial. The Third Circuit reversed the District Court's refusal to include as taxable costs the expenses involved in bringing the witness to the United States for deposition, pursuant to the Court's order. The Court of Appeals held that the taxation of an expert witness's fee as taxable costs was within the Court's discretion, however, it reversed the District Court's denial of the inclusion of that cost since there was no explanation by the District Court for the denial. The matter was remanded to the District Court for reconsideration.

#### WRONGFUL ARREST/ATTACHMENT:

Ocean Ship Supply Limited v. MV LEAH and Leon Finance Company, Civil Action 80-2188-1 (D.S.C., 1982) Ocean Ship Supply Limited claimed a maritime lien on the MV LEAH for supplies sold to that vessel and her former owners. Plaintiff threatened the arrest of the vessel in Charleston unless the invoice for supplies was paid. The present owners informed plaintiff that the former owners were responsible for the bill and requested time to contact the former owners in order to secure payment of the invoice. Plaintiff refused. The owners then offered to post a cash bond in lieu of arrest, however, owners refused. The vessel was arrested. The supplier was a Canadian corporation. The supplies were sold to the vessel and owners in Canada. Under Canadian law no lien arises under these circumstances. Defendant entered its appear-

ance with the court and posted security to secure the release of the vessel, however, she lost two days which resulted in missing a drydock appointment and subsequently a charter. The court granted summary judgment for the defendant on the issue of whether plaintiff had a maritime lien. The defendant counterclaimed for wrongful arrest. After a hearing, the court entered judgment in favor of the defendant against plaintiff for wrongful arrest awarding attorneys' fees, the additional wharfage, demurrage, prejudgment and postjudgment interest. A claim for loss of profits on the lost charter was denied as being unforeseeable.

Committee on Practice and Procedure  
April 30, 1982  
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