

■ The first column of our newly-introduced, monthly legal page considers Rule B applications

# The Busy "B"

As a result of the international economic crisis, the shipping sector has seen a flurry of disputes evolving from cancelled charters, non-payment of charter hire, early re-deliveries and many more such types of disputes causing Ship Owner – Charterer relationship breakdowns. So what are shipowners and disponent owners doing in order to assist in recovering their dues? The fashionable answer appears to be Rule B applications, but the question is for how long?

## What is Rule B?

Although the system of Rule B has been around for many centuries in the US it was not in widespread use until roughly the last decade. Rule B of the US Federal Rules of Civil Procedure is a system designed to allow a Plaintiff to attach (freeze) the Defendant's tangible or intangible property, thus providing security. Although Rule B can be utilised to attach many forms of property it is most often used for Electronic Funds Transfers (EFT's) passing through intermediary banks en-route to a beneficiary or from a remitting party who will usually have nothing to do with the main dispute. US Dollar transfers are cleared through New York, therefore, there is a higher chance of attachment in this district, which has caused a plethora of Rule B applications to be filed within the New York District causing havoc in both the courts and the banking system.

## How does it work?

Basically Rule B can be used by anyone, including shipowners, shipmanagers and any suppliers that are owed funds, which at present appear to be the majority of applicants to Rule B. In order to proceed with a Rule B application the Plaintiff must file a verified complaint with the court showing that he has a claim against the Defendant which is of a maritime nature and that the Defendant is not present within the district in which the application is being made. If the Judge is satisfied with the application, the order of attachment will be issued and it will be served on the number of banks, daily, in that district in which the application has been filed. Once service is complete the Defendant will be placed on an electronic list and once any US Dollar funds pass through that bank they will be attached pursuant to the order of the court.

There is no requirement for counter-security to be placed by the Plaintiff in Rule B applications, therefore, Rule B has to a vast extent also replaced other means of securing a claim pending the outcome of arbitration proceedings. Rule B is relatively inexpensive (if funds are attached at an early stage) but costs can mount up given that daily service must be effected on all the banks in the district to which an application has been made. However, if the application is challenged the case can be relatively expensive to run in the US and then there may be a risk

of counter-security having to be put up in the event the Defendant applies for same.

There are various methods for attached property to be released and for the order to be vacated. Firstly, the Defendant can file a bond (security) which will cover the Plaintiff's claim, once filed the funds can be freely transferred again. The Defendant can proceed to defend the application to vacate the attachment in order to have the funds released and may also counter-claim against the Plaintiff that the attachment was made in bad faith.

Over the past few months, as anyone and everyone who has a maritime claim turns to the US courts, the increase in applications has caused the US courts to clog up with Rule B applications. Furthermore, the whole flurry of applications is causing mayhem to the banking system in the US which has also caused lobbying by the banks against the procedure which is costing them a fortune to monitor and comply with. However, this build up of work and pressure on the system is now starting to see a knock on effect. Judges are starting to become more stringent in their approach to such applications and have started to apply pre-conditions to attachment orders being filed and many orders are issued conditionally often ruling that the commencement of arbitration proceedings is a requirement or must be commenced within a specific period. As there are no clear guidelines in place the Judges are free to rule at their discretion resulting in conflicting varied judgments in many instances.

## How to avoid attachment

One of the requirements for the filing of a Rule B application is that the Defendant must not be present within the district. In order not to be liable to attachment why not be present! Given the fear of attachment, more companies are registering their presence in New York.

All that is required is to do business with the New York Division of Corporation and appoint a registered agent in New York for service. The Second Circuit Court of Appeal case STX Panocean (UK) Co. Ltd V Glory Wealth Shipping Pte Ltd and Glory Wealth Shipping Services Ltd of BVI issued on 19th March 2009, has now confirmed that registration is sufficient to be found in the district in order to avoid any Rule B attachment. This is an easy and inexpensive procedure.

## The future of Rule B

Given the recent decision of STX Panocean (UK) Co. Ltd V Glory Wealth Shipping Pte Ltd and Glory Wealth Shipping Services Ltd of BVI which will cause a block to Rule B applications for Defendants registered in the district and the non-uniformity of the recent decisions of the US judges we should expect to see less Rule B applications being filed by claimants. However, as corporations rush to register themselves within the New York district in order to evade Rule B attachment, one must remember

that once a corporation is present in New York for jurisdictional purposes it can be subject to lawsuits in New York for any type of claim. There can also be tax implications which need to be considered. In such circumstances one must evaluate the position and circumstances surrounding the corporations activities. Will this be an end of an era for Rule "B" and an opening for a flood of litigation in the US, time will only tell.

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