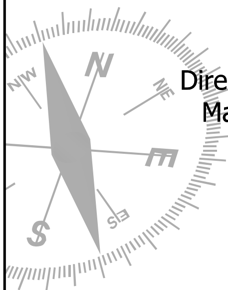
Arrest and Attachment, Reloaded



Professor Martin Davies
Director, Tulane Maritime Law Center, New Orleans
Maritime Law Association of Singapore Tea Talk
19 July 2011

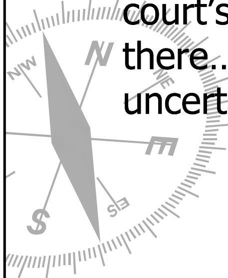
Outline

- What does a plaintiff have to show in order to obtain, and sustain, an arrest?
  - *The Vasiliy Golovnin* [2008] 4 SLR(R) 994; [2008] SGCA 39
  - *The Eagle Prestige* [2010] 3 SLR 294; [2010] SGHC 93
  - *The Catur Samudra* [2010] 2 SLR 518; [2010] SGHC 18
  - *The Bunga Melati 5* [2010] SGHC 193
- Reports of the death of Rule B attachment have been greatly exaggerated

2

Activity, but not complete clarity

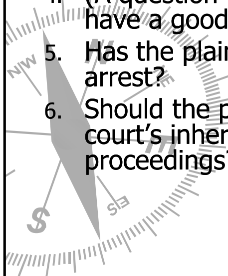
- *The Bunga Melati 5* @ para [18] per Teo Guan Siew AR:
  - 'With regard to the proper threshold that a claimant has to discharge to establish the court's subject matter jurisdiction under s 3(1), there…seems to be some degree of uncertainty."



3

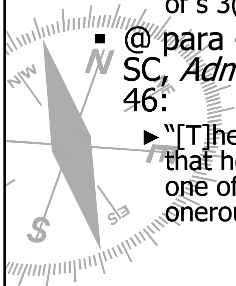
Five (six?) separate questions

1. Does the claim fall within the statutory list in the HC(AJ)A, s 3(1)?
2. Is the person named as relevant person (PNARP) properly regarded as the "relevant person" for purposes of the HC(AJ)A, s 4(4)? (First part of s 4(4))
3. Does the relevant person have the requisite connection with the wrongdoing and arrested ships for purposes of the HC(AJ), s 4(4)? (Second part of s 4(4))
4. (A question independent of statutory interpretation: does the plaintiff have a good arguable case?)
5. Has the plaintiff made full and frank disclosure when seeking the arrest?
6. Should the plaintiff's claim be struck out under O 18 r 19 or under the court's inherent jurisdiction in relation to frivolous or vexatious proceedings?



4

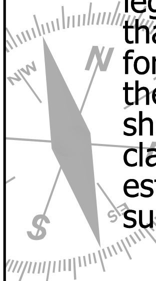
Question 1: is the claim within s 3(1)?



- *The Vasiliy Golovnin* @ para [47] per V K Rajah JA:
  - Quotes (with emphasis) from *The Jarguh Sawit* [1997] 3 SLR(R) 829 per M Karthigesu J:
    - "[T]he plaintiff need only show that he has a good arguable case that his cause of action falls within one of the categories of s 3(1)…"
  - @ para 49, quotes (with emphasis) from Toh Kian Sing SC, *Admiralty Law and Practice* (2nd ed, 2007) pp 45-46:
    - "[T]he plaintiff under the law of Singapore only has to show that he has a good arguable case that his claim comes within one of the limbs of section 3(1)…as opposed to the more onerous test of a balance of probabilities"

5

Good arguable case re s 3(1)?

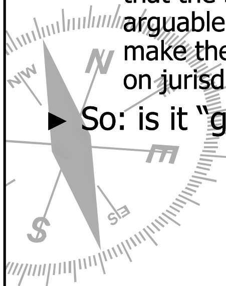


- *The Eagle Prestige* @ para 46 per Belinda Ang J:
  - "In practice, in order for the plaintiff to establish that he has a good arguable case within one of the categories of s 3(1), and using as an example s 3(1)(h), the plaintiff will have to set out the grounds comprising the factual foundation of the claim and the assertion of a legal right consequential upon those grounds. A claim that a breach of contract has occurred is thus a claim for relief founded on grounds where an essential part of the claim is a contract relating to the hire or use of a ship. Significantly, at that stage, the strength of the claim is not relevant as the plaintiff does not have to establish at the outset that he has a cause of action substantial at law."

6

Good arguable case re s 3(1)?

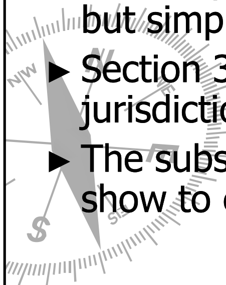
- *The Bunga Melati 5* @ para [16] per Teo Guan Siew AR:
  - "[T]here are very recent High Court decisions which would appear to adopt a similar view that the threshold for subject matter jurisdiction under s 3(1) is the more onerous one of a balance of probabilities. In *The Eagle Prestige...*although Belinda Ang J referred to the Court of Appeal's decision in *The Vasiliy Golovnin* that the standard of proof in the context of s 3(1) is the good arguable case yardstick, the learned judge however went on to make the observation (at [49]) that 'the proper standard of proof on jurisdiction is on a balance of probabilities'".
- So: is it "good arguable case" or "balance of probabilities"?



7

An alternative proposition re s 3(1)

- The plaintiff bears ***no*** burden of proof re s 3(1)
  - Ie, neither good arguable case nor balance of probabilities
- The question whether the claim falls within the statutory list in s 3(1) is not a fact question at all, but simply one of statutory interpretation
- Section 3(1) defines the court's subject-matter jurisdiction in relation to the admiralty jurisdiction
- The subsection that defines what the plaintiff must show to effect an arrest is s 4(4)



8

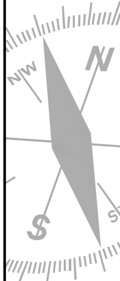
Statutory interpretation only

- Eg, *The Catur Samudra*: is a claim on a guarantee a "claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship" for purposes of HC(AJ)A s 3(1)(h)? (No)
- *The St Elefterio* [1957] P 179, 183-4 per Willmer J:
  - "In my judgment the words of section 1 (1) (h) of the Act of 1956 [like HC(AJ)A s 3(1)(h)]…are nevertheless wide enough to cover claims whether in contract or in tort arising out of any agreement relating to the carriage of goods in a ship.
  - However that may be, the main argument for the defendants turns on the construction of section 3 (4) [like HC(AJ)A s 4(4)], and I think before I proceed to state the argument it would be desirable to set out the terms of that subsection. … It is argued that, on the true construction of that subsection, before the plaintiffs can proceed in rem in respect, for instance, of a claim under section 1 (1) (h), they must show that the defendants, the owners of the ship proceeded against, are persons who would be liable on the claim in an action in personam."
- The supposed need to show the strength of the case related to s 3(4) [equivalent to s 4(4)], not whether the claim fell within the statutory list

9

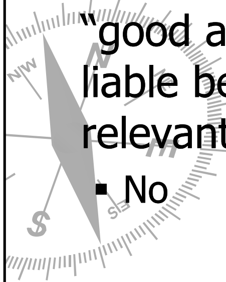
Statutory interpretation only

- *The Moschanthy* [1971] 1 Lloyd's Rep 37, 42 per Brandon J:
  - "[I]t seems to me that there was not, at the end of the day, any real dispute that the plaintiff's claim, both in contract and in detinue, came within s. 1(1)(h) of the Administration of Justice Act, 1956. That sub-sub-section confers on the High Court in England admiralty jurisdiction in respect of claims arising out of any agreement relating to the carriage of goods in a ship. It was held in *The St. Elefterio* that these words were wide enough to cover claims in tort as well as in contract, and that interpretation of the statute was not disputed before me."



10

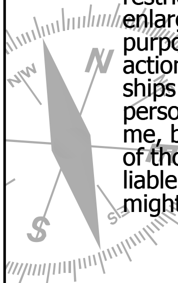
Question 2: is the PNARP properly regarded as the relevant person?



- The first part of s 4(4) refers to "the person who would be liable on the claim in an action in personam"
- Does the plaintiff have to show that it has a "good arguable case" that the PNARP is liable before it can be regarded as the relevant person? Balance of probabilities?
  - No

11

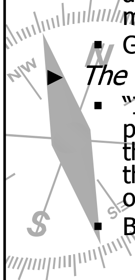
"Would be" not "is" or "might be"



- *The St Elefterio* @ 185-6 per Willmer J:
  - "The defendants' argument is founded on the proposition that section 3(4) of the Act of 1956 [equivalent to HC(AJ)A s 4(4)] introduces a new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that subsection unless he can prove - and prove at the outset - that he has a cause of action sustainable in law. In my judgment that proposition rests upon a misconception of the purpose and meaning of section 3 (4). As it appears to me, that subsection, so far from being a restrictive provision, is a subsection introduced for the purpose of enlarging the Admiralty jurisdiction of the court…In my judgment the purpose of the words… 'the person who would be liable on the claim in an action in personam' is to identify the person or persons whose ship or ships may be arrested…The words used, it will be observed, are 'the person who would be liable' not 'the person who is liable', and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds. This action might or might not succeed if it were brought in personam…"

12

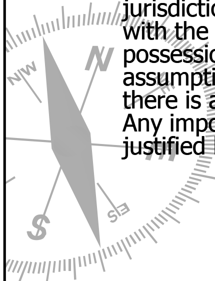
"Would be" not "is" or "might be"



- General statement in *The Valeriy Golovnin* @ para [50] per V K Rajah JA:
  - "Satisfying the requirements of s 3(1) of the HCAJA cannot be said to be the end all and be all when assessing the sustainability of an admiralty action. Invoking the admiralty jurisdiction may be in one sense a procedural step but it also plainly attracts substantive considerations. There are two requirements that claimants in every admiralty action must satisfy: first, the in rem jurisdiction must be established, through, inter alia, ss 3 and 4 of the HCAJA. Second, the claim must, if challenged, also meet the requirement of being a good arguable case on the merits."
  - Good arguable case re Question 2? Or as a separate requirement?
- *The Catur Samudra* @ paras 22-23 per Steven Chong JC:
  - "It is well settled and not in dispute that the burden of proof is on the plaintiff to satisfy all the jurisdictional requirements laid down in s 4(4) of the HCAJA in order to successfully invoke the admiralty jurisdiction against the Catur Samudra…It is also trite that the plaintiff must satisfy the burden of proof on a balance of probabilities"
  - Balance of probabilities re Question 2? Surely not

13

"Would be" not "is" or "might be"

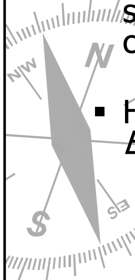


- *The Eagle Prestige* @ para [58] per Belinda Ang J: "If *The St Elefterio* is no longer good law in Singapore, the Court of Appeal in [*The Vasiliy Golovnin*] would have explicitly said so".
- *The Bunga Melati 5* @ para [38] per Teo Guan Siew AR:
  - "[M]y interpretation of s 4(4), both from a consideration of its legislative purpose as well as the associated case law and academic commentary, is that the provision is not about imposing a threshold test of merits which a plaintiff has to discharge before it is able to invoke the admiralty jurisdiction of the High Court. Section 4(4) is merely a provision concerned with the identification of the defendant as the owner, or person in possession or control of the vessel, at the time the claim arose, on the assumption that he would be liable. This is so even in the case where there is a dispute as to whether the defendant is the proper party to sue. Any imposition of a burden on the plaintiff to show merits cannot be justified based on s 4(4)."

14

An example

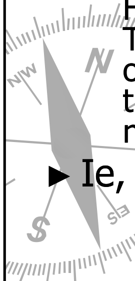
- *Owners of the MV Iran Amanat v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 (HCA)
  - Singaporean bunker suppliers arrested surrogate ship in Geelong, Victoria, alleging non-payment for bunkers
  - Shipowner (PNARP) moved to have arrest set aside on the basis that the ships to which the bunkers had been supplied were time chartered on terms that required the charterer to pay for bunkers
    - "This is not our bill to pay"
  - HCA refused to set aside the arrest, applying *The St Elefterio*
    - "It would be your bill to pay on the assumption that the action succeeds"



15

Iran Amanat

- 196 CLR 130, 138 para [19] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ:
  - "In some of the reported cases, the court has been dealing with two motions: one, a challenge to jurisdiction; the other, a claim to strike out proceedings on the ground that they were frivolous or vexatious. However, no motion of the second kind being before Tamberlin J, he was concerned only with the question of jurisdiction, a question which, in relation to whether the appellants were relevant persons, turned upon the nature of the claim, not its strength."
- Ie, don't confuse Question 2 with Question 6



16

Question 3: Connection between relevant person and ship(s)

- Does the relevant person have the requisite connection with the wrongdoing and arrested ships for purposes of the HC(AJ), s 4(4)? (Second part of s 4(4))
- *This* must be established on the balance of probabilities to the extent possible at this preliminary stage
  - *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 (HCA)
  - Compare *The Iran Amanat*

17

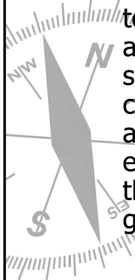
Balance of probabilities

- *The Eagle Prestige* @ para [49] per Belinda Ang J:
  - "[W]here, for instance, the nature of the claim requires, for example, the establishment of factual preconditions in s 3(1) or contemplates a s 4(4) ownership question, the in rem plaintiff was obliged to prove the existence of the particular jurisdictional fact and to show jurisdiction on a balance of probabilities"
  - I respectfully disagree re the former, agree re the latter
- *The Bunga Melati 5* @ para 25 per Teo Guan Siew AR
  - "[W]hat needs to be proved on a balance of probabilities are the particular jurisdictional facts stipulated under s 4(4), such as the ownership of the offending ship and of the sister ship, as well as whether there was "possession or control" of the offending ship at the material time. These factual questions are obviously different from the issue of whether there is in personam liability, an issue pertaining to the merits of the claim"
- Eg, *The Catur Samudra*: establishing possession of control of the "wrongdoing" ship on the balance of probabilities

18

Question 4: Good arguable case encore?

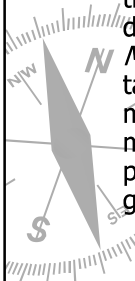
- Is there an independent, free-standing requirement that the plaintiff show a good arguable case before being allowed to arrest?
- *The Vasiliy Golovnin* apparently suggested so; para [50] per V K Rajah JA:
  - "Satisfying the requirements of s 3(1) of the HCAJA cannot be said to be the end all and be all when assessing the sustainability of an admiralty action. Invoking the admiralty jurisdiction may be in one sense a procedural step but it also plainly attracts substantive considerations. There are two requirements that claimants in every admiralty action must satisfy: first, the in rem jurisdiction must be established, through, inter alia, ss 3 and 4 of the HCAJA. Second, the claim must, if challenged, also meet the requirement of being a good arguable case on the merits."



19

An independent, free-standing requirement?

- *The Vasiliy Golovnin* was so interpreted in *The Bunga Melati 5* @ para [49] per Teo Guan Siew AR:
  - "[T]he issue of whether the plaintiff's claim fell within s 3(1) of the Act did not arise. In relation to s 4(4), it was not disputed that the defendant, the person who *would be* liable in *personam* if the action succeeds, was the owner of the offending ships at the time the cause of action arose. It was also common ground that the defendant was the beneficial owner of the sister ship, *The Bunga Melati 5*, at the time this action was brought. To reiterate, the view taken here is that s 4(4) does not impose a threshold condition of merits. It however remains necessary to go further to examine the merits of the plaintiff's claim, as following *The Vasiliy Golovnin*, the plaintiff must establish its claim on the merits to the standard of a good arguable case."



20

An independent, free-standing requirement?

- The need to establish a "good arguable case" is a free-standing requirement in order to obtain a Mareva or Anton Piller order
  - Eg, *Meespierson NV v Industrial and Commercial Bank of Vietnam* [1998] 1 SLR(R) 287; *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng* [2009] 4 SLR(R) 365 (Mareva order)
  - Eg, *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 1 SLR(R) 1152; [1999] SGCA 28 @ para [5] (Anton Piller)
- These are judge-made remedies with judge-made requirements
- There are undoubtedly similarities between an arrest and these two procedures:
  - *The Vasiliy Golovnin* @ para [51]: "Maritime arrests can, when improperly executed, sometimes be as destructive as Anton Piller orders and even as potentially ruinous as Mareva injunctions, the two nuclear weapons of civil litigation."
- *But* maritime arrests are different from Mareva and Anton Piller because the requirements are established by statute
- The HC(AJ)A statutory formulae make no mention of "good arguable case"
- With respect, what basis is there for engrafting an extra requirement onto those established by Parliament?

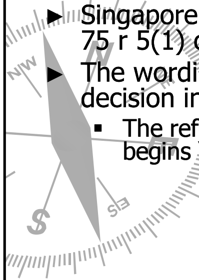
21

Question 5: Full and frank disclosure

- *The Varna* [1993] 2 Lloyd's Rep 253
  - CA required plaintiff to make full and frank disclosure in *ex parte* application before permitting arrest
  - Later reversed itself, saying there was no such requirement after the amendments that had been made to the RSC in 1986
  - Two reasons:
    1. As amended, RSC O 75 r 5(1) expressly bestowed the power to issue the warrant of arrest on the plaintiff; no longer a discretionary remedy
    2. The newly-added RSC O 75 r 5(6) began: "A warrant of arrest may not be issued as of right…"

22

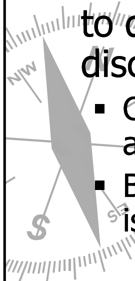
Full and frank disclosure



- Before 1986, RSC O 75 r 5(1) had read "After a writ has been issued in an action in rem a warrant…for the arrest of the property against which the action…is brought may, subject to the provisions of this Rule, be issued at the instance of the plaintiff…"
- After 1986 it read: "In an action in rem the plaintiff…may after the issue of the writ in the action and subject to the provisions of this rule, issue a warrant…for the arrest of the property against which the action is brought…"
- Singapore's ROC O 70 r 4 is in identical terms to the version of RSC O 75 r 5(1) considered in *The Varna*
- The wording of RSC O 75 r 5(1) was the principal reason for the decision in *The Varna*
  - The reference to RSC O 75 r 5(6), which has no counterpart in Singapore, begins "In addition…" (@ 257 per Scott LJ)

23

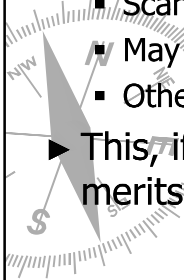
Full and frank disclosure



- Nevertheless, the requirement to make full and frank disclosure is firmly established in Singapore
  - *The Vasiliy Golovnin* among others
- Interestingly, the UK's CPR 61.5 no longer uses the formula that persuaded the court in *The Varna* to dispense with the requirement for full and frank disclosure
  - CPR 61.5(1) now once again says that a claimant "may apply" for arrest
  - But CPR 61.5(4) still refers to an arrest warrant being issued "as of right"

24

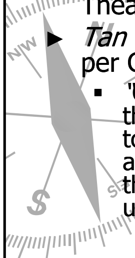
Question 6: Striking out the plaintiff's claim



- Striking out the plaintiff's claim under O 18 r 19 is an *exercise* of the court's jurisdiction
- Grounds are contained in O 18 r 19(1)
  - No reasonable cause of action
  - Scandalous, frivolous or vexatious
  - May prejudice, embarrass or delay fair trial
  - Otherwise and abuse of court's process
- This, if anywhere, is where an investigation of the merits of the plaintiff's case belongs

25

Striking out the plaintiff's claim



- *The Eagle Prestige* @ para [21] per Belinda Ang J:
  - "Notably…there was no separate application…to strike out the writ in rem and action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). At the risk of stating the obvious, if a claim is made without foundation, the defendant can always challenge jurisdiction under O 12 r 7 of the ROC as well as strike out the writ in rem and action under O 18 r 19."
- The power to strike out under ROC O 18 r 19 is confined to "plain and obvious cases" (*The Osprey* [1999] 3 SLR(R) 1099 @ para [6] per L P Thean JA for the CA)
- *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at para [31] per G P Selvam JC (quoted with approval in *The Osprey*):
  - "Courts are reluctant to strike out a claim summarily under O 18 r 19 of the RSC or the inherent jurisdiction. This is anchored on the judicial policy to afford a litigant the right to institute a bona fide claim before the courts and to prosecute it in the usual way. Whenever possible, the courts will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable…"

26

Summary (of my views)

1. Plaintiff should bear no burden of proof re whether its claim falls within HC(AJ)A, s 3(1) – this is a matter of statutory interpretation only.
   - No need for "good arguable case"
2. Plaintiff should bear no burden of proof re identifying the PNARP as the relevant person under s 4(4)
   - No need for "good arguable case"
   - If one assumes the facts as pleaded by the plaintiff to be correct, is the PNARP the person who would be liable in personam?
3. Plaintiff must show on the balance of probabilities that the relevant person has the requisite connection with the wrongdoing and arrested ships for purposes of the s 4(4)
4. Plaintiff should not have to satisfy an independent non-statutory requirement of showing that it has a good arguable case
5. Plaintiff must make full and frank disclosure despite the fact that ROC O 70 r 4 uses mandatory not discretionary language
   - Too well established to change in Singapore?
6. The only place where the merits of the case should be considered is in an application to strike out the plaintiff's claim under O 18 r 19 or under the court's inherent jurisdiction

27

Rule B attachment

- Rule B allows attachment (not arrest) of *any* of the *in personam* defendant's property
  - Not confined to ships
- Requirements for Rule B attachment
  - Maritime claim
  - Defendant "not found within the district"
  - "Tangible or intangible property" of the defendant in the hands of garnishees within the district
- If all three requirements are satisfied, property can be attached up to the value of the claim
  - No "one claim one ship" rule
  - Can keep attaching until you get full security

28

28

Maritime claim

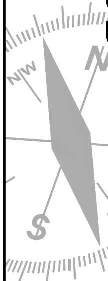
- No statutory list, unlike UK and Singapore
  - Century-plus of case law about what is a maritime contract, what a maritime tort, etc
- With some exceptions – eg, ship sale contracts – easily as broad or broader than the UK-derived systems' statutory list
  - Eg, includes marine insurance contracts, too

29

29

"Not found within the district"

- Two-part test (*Seawind Cia, SA v Crescent Line Inc,* 320 F 2d 580 (2d Cir. 1963)
  - Can the defendant be found within the district in terms of jurisdiction;
  - Can it be found for service of process?
- Foreign corporations can be subject to the jurisdiction of US courts even if they have no place of business in the USA
  - "Doing business" basis of jurisdiction
  - "Minimum contacts" test: "purposefully engaged" in activities in the district
  - For federal claims (including maritime claims), "minimum contacts" with the USA as a whole are sufficient even if there are not enough with any one jurisdiction (FRCP 4(k)(2))

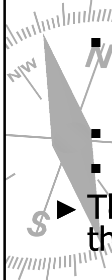


30

30

Property within the district

- *Any* property, including debts
- Until recently, included electronic funds transfers of US dollars passing (briefly) through US banks
  - Cottage industry for New York maritime lawyers from 2002 to 2009
  - EFT was in the New York bank's computer for a split second – property in the jurisdiction
  - *In personam* defendant was not "found within" the Southern District of New York – most claims had nothing whatever to do with the USA
  - Maritime claim
  - All three requirements satisfied
- The death of the EFT Rule B attachment does *not* mean that Rule B has gone away altogether

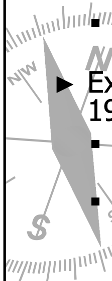


31

31

Garnishing debts under Rule B

- If X owes the defendant $1 million, the plaintiff can "attach" that debt under Rule B (actually, garnish) by serving X with notice
  - "Don't pay the defendant that $1 million, pay me, because the defendant owes me more than $1 million"
- Where is the debt?
  - Remember it must be "in the district"
  - Wherever the debtor can be found and is subject to the court's jurisdiction
- Example: *Day v Temple Drilling Co*, 613 F Supp 194 (SD Miss 1985)
  - Plaintiff garnished debts owed to the defendant by Gulf, Shell and Chevron
  - Debts were "in the district" because Gulf, Shell and Chevron were in the district (they are everywhere in the US!)

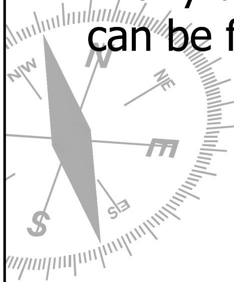


32

32

Garnishing debts under Rule B

- A bank account is a debt owed to the customer by the bank
- Bank accounts are attachable under Rule B in any district where the bank in question can be found

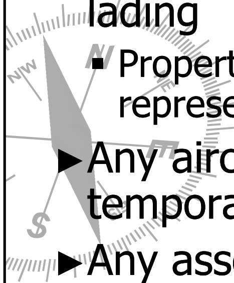


33

33

Any property

- Certainly would include ships owned by the defendant, whether or not they have anything to do with the plaintiff's claim
- Has included such things as order bills of lading
  - Property having the value of the cargo it represents
- Any aircraft touching down however temporarily
- Any assets of any kind (except EFTs!)



34

34