

THE ARREST news

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In this issue of The Arrest News, contributors address the US third circuit upholding a contractual extension of maritime lien clauses, the procedure in England & Wales for the judicial sale of vessels arrested by the court, and a ship arrest in Spain based on legal fees

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Third Circuit Upholds Contractual Extension of Maritime Lien Clauses

By Gary Seitz, Gellert Scali Busenkell & Brown, LLC

Applying the age old principles that a maritime lien may attach to property substituted for the original object of the lien and the parties' general freedom to modify or extend existing liens by contract, the Third Circuit recently concluded that an importer's agreement with an NVOCC to apply those unwaived maritime liens toward the other goods of the importer in the possession of the NVOCC on the petition date is enforceable.

In the case, an importer buys furniture wholesale. The NVOCC provided the importer with non-vessel-operating common carrier transportation and logistics services. The importer signed an Application for Credit that granted a security interest in its property in the NVOCC's possession, custody or control or during transportation. As required by federal law, the NVOCC also publishes a tariff with the Federal Maritime Commission, which also provides for a Carrier's possessory maritime lien.

The importer companies filed voluntary Chapter 11 bankruptcy petitions. The NVOCC sought relief from the automatic stay, arguing that it was a secured

creditor with a possessory maritime lien on the importers' goods in its possession on the petition date. The NVOCC established debts owed totaling \$458,251 for freight and related charges due on containers of goods in its possession and \$994,705 for freight and related charges on goods for which the NVOCC had previously provided services (but had released the goods). The estimated value of the importers' goods in the NVOCC's possession was \$1,926,363.

The importer/debtor filed an adversary proceeding, seeking release of the goods. The bankruptcy court ruled in favor of the importer, citing 11 U.S.C. 542. The district court affirmed, holding that the NVOCC did not possess a valid maritime lien on the current goods for services provided to goods that were out of its possession. The Third Circuit reversed, noting the strong presumption that the NVOCC did not waive its maritime liens on the goods out of its possession, the clear documentation that the parties intended such liens to survive delivery, the familiar principle that a maritime lien may attach to property substituted for the original object of the lien, and the parties' general freedom to modify or extend existing liens by contract.

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The decision provides carriers with powerful ammunition to retain shipper collateral to support past due charges when the customer slides into bankruptcy.

The case is *In re: World Imports LTD*, 15-1498 (April 20, 2016 3rd Cir.)

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Gary concentrates his practice on transportation related business disputes, commercial transactions, including contracts, compliance, loan restructuring, financing, representing trustees, creditors', committees, debtors, and asset purchasers in insolvency proceedings.

Mr. Seitz has extensive experience in the handling of admiralty and maritime claims and litigation, marine financing and foreclosure and vessel arrests and attachments. He is licensed to practice in Pennsylvania, New Jersey and Delaware and has handled ship arrests and attachments in the courts of all three states.

The Ship is Arrested...What Happens Next? *The Procedure in England and Wales for the Judicial Sale of Vessels Arrested by the Court*

By Bruce Hailey, Salvus Law Ltd.

Whilst a ship arrest can be a quick and effective solution to an unpaid debt, increasingly in the current market it is simply the first step in the longer process of having the vessel sold judicially and the proceeds distributed to creditors.

In England and Wales a judicial sale can be achieved comparatively quickly, in less than 3 months from arrest.

An arresting party must apply to the court for an order for sale, and usually this is done in default of any reaction or defence from the owners. An application for sale would be made at the same time as seeking judgment on the claim. Such applications can be made at any time after the expiry of 14 days from the date of the arrest/service of the proceedings.

In cases where the owner defends the claim but fails to provide security, it is still possible to apply for the sale

of the vessel *pendente lite*. It would then be necessary to establish that the vessel is essentially a wasting asset, incurring costs (for example port dues and crew wages) and diminishing in value (often due to deterioration in its condition during a prolonged arrest without proper maintenance). The court is not resistant to such applications, and prefers not to see vessels under prolonged periods of arrest. Where a sale *pendente lite* is granted the proceeds of sale will lie in court until the underlying claims are determined.

The sale itself is by "sealed bids", submitted to the Court's appointed broker after a period of proactive marketing. The court's broker is very effective at achieving interest in the vessel and strong bids. Once the vessel is sold, the proceeds of sale are distributed in accordance with the settled order of priorities, discussed below. Often the distribution is agreed between the competing creditors, but should a dispute arise the Court will make a determination.

Subject to the court's overriding discretion to order something different the sale proceeds will be distributed with the following priorities:

1. Court's expenses for the arrest and sale;
2. Port dues during the period of arrest;
3. Legal costs of the party who undertook the process of arrest and sale;
4. Any salvage claim;
5. Crew wages;
6. Mortgage;
7. Other creditors.

The court will not sell a vessel with a crew on board. A crew with unpaid wages will often be unwilling to depart the vessel with the promise of their wages to follow on. It may therefore be necessary in some cases for the party seeking to sell the vessel to pay the crew wages and their repatriation costs, to ensure the crew will depart the vessel prior to sale. Any party who does that, with the permission of the court, will then be able to recover that money with the same priority as the crew would have had for their own claim. Crew wages can be very high, and their payment may simply be beyond the means of some arrestors. It may be possible to negotiate the crew's departure, but this is something that is best addressed before an application for sale is made.

Clearly it is therefore important to establish the vessel's likely value before a decision as to seeking its sale can be made.

Anyone embarking upon the process of sale will want to know that the vessel will sell for sufficient to cover items 1 to 5, otherwise they risk spending money on legal fees and crew wages that they might not recover due to inadequate proceeds of sale.

Significant pre-arrest port dues can also serve to complicate the position. It is unclear whether pre-arrest port dues have a priority. The writer's view is that they do not, but this is controversial and not presently determined by the Courts.

In the current market it is not uncommon for a loan secured by a mortgage to far exceed the vessel's value, meaning that the recovery of a claim ranked lower than the mortgage is unlikely. However, if the likely selling value will exceed the total of items 1-5 then an arrestor can at least be assured that the process of selling the vessel will not leave them further out of pocket, even if ultimately the claim they originally pursued will not be paid. This is because the costs incurred in the sale process would be recoverable from the proceeds of sale, prior to the mortgagee staking its claim.

It may be seen that the English legal system is well equipped to see vessels sold quickly, and allows the arrestor who produces the proceeds of sale to recover its legal costs, even if those proceeds are not adequate to cover the claim itself.

The same system applies in Gibraltar, and is very closely followed in Singapore, Hong Kong and Malaysia. There are strong similarities in many common-law jurisdictions.

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Bruce is an English solicitor with 25 years experience of ship arrests in England and Wales and around the world. His daily work includes advising international clients on their collection strategies.

Ship Arrest Based on Legal Fees

Spanish Court Decides in Favour of a Ship Arrest to Secure a Claim for Unpaid Legal Services

By Felipe Arizon, Arizon Abogados

Introduction

A recreational vessel has been arrested at the port of Algeciras in Spain while it was being refitted at a local shipyard. The vessel was registered in Barbados at the moment the arresting procedures were issued, although in the middle of transferring registration procedures to Gibraltar, and the registered owner was a private company from Guernsey – Channel Islands.

The claim was based on a credit originated by legal services provided by the arresting party to the owner of the arrested vessel. The creditor had advised the owner of the yacht on the formalities to obtain a charter licence and operate the vessel in Greece.

The claimant relied substantially on the provisions of the 1999 International Convention on the Arrest of Ships (Geneva 1999) and the new 2014 Spanish Shipping Act.

The two main concerns of the claimant when deciding whether to arrest this vessel were:

1. Can a less than 24m length yacht be arrested under the 1999 Ship Arrest Convention?
2. Is a claim for legal fees a maritime claim?

The Notion of a Ship

The 1999 Ship Arrest Convention does not contain any definition of “ship”, or any restriction as to its applicability to certain types of ships.

The best view is that any ship can be arrested under the said Convention, regardless of its tonnage, use, etc., as long as the same is registered¹.

The 2014 Spanish Shipping Act has also shed some light in this regard since art. 470 of the said act expressly states that the 1999 Ship Arrest Convention also applies to crafts, which are defined as “any vehicle without full deck and under twenty four metres length”.

Definition of Maritime Claim

The claimant argued that its claim for legal fees was a maritime claim under art. 1(1)(l), i.e. a claim arising out

¹Vid. Berlingieri F., *Berlingieri on Arrest of Ships. A commentary on the 1952 and 1999 Arrest Conventions*, 2000 (3rd ed.)

of “services rendered to the ship for its operation, management, preservation or maintenance”.

Traditionally this provision has been used to secure claims arising out in connection with ship’s “necessaries”; e.g. bunkers, stores, food, drink and other consumables for the use of the officers and crew, spare parts, or even containers. But, can this provision cover other services, like financial or legal ones, where the same are intended for the operation of the ship?

In this case the Spanish Court of Cadiz agreed with the maritime nature of the claim and granted the arrest warrant; the arrest not being disputed by the owner, that settled the claimant’s invoice.

Nonetheless, it must be noted that the claimant acted in these proceedings under the certainty that even if the court did not consider that its claim was a maritime one, the arrest should be placed anyway since art. 473 of the 2014 Spanish Shipping Act allows the arrest of vessels flying the flag of a non-contracting State for any type of claim, whether maritime or not. In the case neither Barbados nor UK were parties to the 1999 Ship Arrest Convention. Felipe Arizon was instructed by the arresting party.

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