

THE ARREST news

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In this issue of *The Arrest News*, Shiparrested.com members from around the globe discuss various topics from remarkable judgments, new legislation, to a story of stranded crew members in Scotland.

An Appellate Tribunal in the United States clarified by a party by Julius Hines, K&L Gates (USA)

Interim Measures in Savannah

An appellate tribunal in the United States clarified a party's right to obtain interim measures of security under the international arbitration law of the State of Georgia.

SCL BASILISK AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609 (11th Cir. 2017), involved a charter dispute between the owners of the SCL BASILISK and several other parties. Among them were Agribusiness United Savannah Logistics LLC, which had originally chartered the vessel, and Sonada Agro Limited (UK) LLC, which was substituted as charterer for insurance-related reasons. The relevant charter was subject to arbitration before the London Maritime Arbitrators Association. The vessel was delayed at New Orleans after her cargo was attached in connection with

an unrelated claim. That delay gave rise to a demurrage claim in the approximate amount of U.S. \$670,000.

After commencing arbitration proceedings in London, owners sought to obtain security in the United States District Court for the Southern District of Georgia, based in Savannah. The usual maritime attachment, however, was not available because the charterer entities were all either based in Savannah or else registered in the State of Georgia. Instead, owners invoked a provision of the Georgia International Commercial Arbitration Code, a law adopted by the legislature of Georgia in 2012. Georgia's International Commercial Arbitration Code is patterned for the most part on the United Nations Commission on International Trade Law (UNCITRAL) model arbitration law. Owners relied specifically on section 9-9-30 of the Georgia Code of Laws, which

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states that “[b]efore or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement.” This language closely resembles Article 9 of the UNCITRAL model law.

Owners argued that section 9-9-30 vested broad discretion in courts to fashion remedies in aid of arbitration. Thus, instead of identifying particular assets for seizure under federal or state law, owners requested the District Court to order the Charterer interests to post security for the full amount of their claim. After a hearing in Savannah, the District Court declined to grant the requested relief, whereupon owners appealed to the United States Court of Appeals for the Eleventh Circuit, which includes the State of Georgia and the Port of Savannah.

The Eleventh Circuit affirmed the lower court's rejection of the relief sought by owners. Section 9-9-30, the Eleventh Circuit reasoned, did not authorize courts to create new interim measures in aid of arbitration. Instead, the purpose of 9-9-30, like the analogous provision of the UNCITRAL model law, was to confirm that interim measures from a court remained available despite the parties' agreement to submit their dispute to arbitration. It remained the obligation of the party seeking such measures to establish their availability under the law of the applicable jurisdiction.

SCL BASILISK is significant for what it does not do, namely turn the State of Georgia into a jurisdiction in which parties to arbitration can obtain full security simply by applying to the court for an order to that effect, rather than locating and seizing specific assets to secure the claim.



Julius 'Sam' Hines
Partner, K&L Gates
Charleston, South Carolina, USA
julius.hines@klgates.com
T: +1 843 579 5660

The Tale of the Malaviya 7

by Malcom Gunnyeon, Dentons (Scotland)

It is probably not very often that vessel arrests involve reports of the local community rallying round to support the ship's crew, but that is exactly what happened when the residents of Aberdeenshire came to the rescue of the crew of the Malaviya 7 following her arrest in Aberdeen Harbour. Thankfully, the tale of the Malaviya 7 is not a typical one.

The Malaviya 7, owned by India's GOL Offshore, was first detained in Aberdeen Harbour by the Maritime & Coastguard Agency in June 2016. The reason for the detention was the non-payment of crew wages. Although the vessel was released in August, she was detained once again by the MCA in October 2016, this time at the behest of the International Transport Workers' Federation, and again because of non-payment of the crew's wages, amongst other issues that had been identified by then.

In the absence of their wages, the crew of the Malaviya 7 were unable to return home, instead finding themselves stranded on board the vessel in Aberdeen and reliant on the support of the ITF and a series of local charities.

In late March 2017 the crew raised formal proceedings in Aberdeen Sheriff Court seeking payment of their wages, which by then exceeded US\$600,000. As part of that action the vessel was arrested. Despite a willingness on the part of GOL Offshore to find a buyer for the vessel and clear her debts, interested parties were scarce.

To compound matters further, on 5 May 2017 the High Court of Bombay admitted petitions seeking the winding up of GOL Offshore and, pending resolution of those petitions, appointed the Official Liquidator of India as provisional liquidator of GOL Offshore.

By this point there was significant local and national media interest in the arrest of the Malaviya 7, and in particular the story of her twenty-four crew, none of

whom had been home in over a year. Support for the crew came from a range of sources in the city and shire, perhaps the most unusual of which was Peterhead Football Club, who hosted the crew as guests of honour at their cup match with Annan Athletic. Balmoor Stadium is a far cry from the Emirates or Old Trafford, but based on the photographs that reached the local media, their trip to the match was a very welcome respite indeed for the crew.

Despite a last minute attempted intervention by one of the banks with an interest in the Malaviya 7, in mid-September 2017 the Sheriff at Aberdeen ordered that she be valued for sale at auction. At last progress was being made and the end was perhaps in sight for the crew. Following that decision by the Sheriff, and with the support of the ITF, half of the crew left Aberdeen to begin their journey home on 21 September 2017. The remainder of the crew agreed to stay behind to look after the vessel until she was sold.

The Malaviya 7 went under the hammer at auction on 17 October 2017, but was withdrawn from sale when only one bid, of only £300,000, was received. However, in early November 2017 it was announced that an offer to purchase the vessel had been accepted and final arrangements were being made for the rest of the crew to return home to their families.

The tale of the Malaviya 7 is an unusual one, and an example of a case where everything that could go wrong to complicate an arrestment and sale process, did go wrong. It is, of course, also an example, of which we can be proud, of the generosity of the maritime community in Scotland. Finally, it is a tale with a happy ending. Although the final sale price was not publicly disclosed, it is believed to have been enough to settle all of the wages owed to the crew, and the final four crew members left Aberdeen to make their journey home, albeit some 18 months late, on 23 November 2017.

As the crew finally left, their Chief Officer, Bamadev Swain, said:

"We have gone through such a difficult time, especially our family members back in India. Finally God has blessed us. We have endured so much. It was a new experience in life."



Malcom Gunnyeon

Partner, Dentons UKMEA

Aberdeen, Scotland

malcolm.gunnyeon@dentons.com

T: +44 33 0222 1774

Enforceability under Brazilian law of mortgages on foreign-flag vessels

by Marcus Gomes, Felsberg & Associados

In a remarkable judgment the Brazilian Superior Court of Justice has confirmed the enforceability of mortgages on foreign-flag vessels under Brazilian law

Since May 2015, OSX3 Leasing B.V.'s bondholders and Banco BTG Pactual S.A. – Cayman Branch have been disputing the validity and enforceability under Brazilian law of a Liberian mortgage on the FPSO OSX3 in operation in Brazil's offshore Tubarão Martelo field.

In brief, the mortgage was granted to the bondholders as collateral for a USD 500 million loan. Said mortgage has, however, been challenged based on the grounds that it has not been registered before the Brazilian Maritime Tribunal, as it would be deemed necessary in the case of Brazilian flag vessels. The 29th Civil Court of the Central Courthouse of the Estate of São Paulo ruled in favor of such challenge.

The bondholders, represented by their agent Nordic Trustee ASA, appealed to the State Court of Appeals of São Paulo. The State Court of Appeals, however, upheld the first instance's decision, sustaining that: (a) the FPSO OSX3 is in operation in Brazilian jurisdictional waters, being therefore subject to Brazilian law; and (b) the Republic of Liberia is not a signatory of neither the Brussels International Convention on Maritime Liens and Mortgages of 1926 nor the Bustamante Code2, later enacted in Brazil by Decree N. 351/35 and Decree

N. 18.871/29, respectively. The State Court of Appeals decided, therefore, that the Brazilian legislation, i.e. Federal Law N.7652/88, according to which the mortgage would only be valid and enforceable if registered in Brazil, should prevail.

The decisions rendered by the Courts of the State of São Paulo were, however, reversed by the Brazilian Superior Court of Justice in a trial hearing held on November 16, 2017. Upholding a new appeal filed by Nordic Trustee ASA, the Fourth Panel of the Superior Court of Justice recognized the validity and enforceability of the mortgage under discussion, basing its decision on the (i) universally accepted principle of maritime law according to which the law of the flag of the vessel must prevail; and (ii) compliance with the international treaties to which Brazil is a signatory.

In the opinion of judge rapporteur Hon. Luis Felipe Salomão, the mortgage under discussion must be considered valid and enforceable in view of the international treaties Brazil has long since committed itself to comply with, regardless of whether the Republic of Liberia is or is not a signatory of these international treaties. Furthermore, the court decision is reinforced by Article 94 of the United Nations Convention on the Law of the Sea, enacted in Brazil in the form of Decree N. 18.871/29.

The unprecedented judgment rendered by the Brazilian Superior Court of Justice regarding the dispute in question is considered to be a leading case on the enforceability of mortgages on foreign-flag vessels under Brazilian law. As such, it is extremely relevant for both the Brazilian oil and gas industry and the Brazilian navigation business community. It will greatly and decisively contribute to the establishment of a legally safer and economically feasible environment in Brazil.

Nordic Trustee ASA and OSX3 Leasing B.V.'s bondholders have been assisted by Felsberg Advogados litigation team, led by partner Marcus A. Matteucci Gomes.



Marcus Gomes

Felsberg & Associados
Sao Paulo, Brazil
marcusgomes@felsberg.com.br
T: +11 3141 9145

Avoiding Arrest in Collision and Salvage Claims

Security and Jurisdiction Agreements in England - The New ASG Forms
by Brian Taylor, Gateley LLP

The aim of this article is to briefly highlight some issues to be resolved under English law, arising out of a collision or a salvage incident and where arrest of the vessel should be avoided.

Some of the standard forms of agreement have just been re-worded to reflect developments in the law, changes in the English Civil Procedure Rules and advances in technology.

The wordings mentioned below are taken from the recently re-launched and updated forms that are most commonly used. They are promoted by the Admiralty Solicitors Group (the "ASG") and although not universally adopted, relate to the most frequently arising issues, particularly those regarding the provision of security and jurisdiction. They are widely used and, when wordings have to be agreed at short notice, very useful.

Whilst arrest of the ship has the ultimate aim of obtaining security, admiralty matters are often fast moving, invoke emergency response planning, involve pollution and prudent seamanship to protect the ship, lives and the environment. The availability of standard agreements is therefore of considerable assistance.

Underlying this are the claims for damage to the ship or cargo and the salvage or towage services provided (along with others claims including the GA and the environment).

As to jurisdiction, London remains the major market for resolving these types of disputes and indeed all aspects of shipping disputes are commonly referred to the English Courts. Indeed, this is a quick way of resolving collision, salvage and towage disputes arising anywhere in the world, not only under the long established Lloyd's Open Form (LOF) salvage contract but under other contracts or at common law. London remains a well-established centre for maritime arbitration and arbitration before a Lloyd's appointed arbitrators.

The ASG standard wordings have now been revised to take into account legal experience, amendments to the English Civil Procedure Rules and significant advances in technology.

Security - Collision Undertaking (ASG1)

This is an undertaking where security is to be given by a P&I Club or the Hull and Machinery underwriters of a vessel involved in a collision. It is designed to be used in conjunction with the Collision Jurisdiction Agreement (ASG2). It is not really a flexible document and is simply an undertaking given on behalf of one of the ship owners to a third party or the other ship owner. It has been amended to avoid arrest or re-arrest. This reflects recent changes to the Civil Procedure Rules (Part 61.2) which allow the Court to order re-arrest to obtain further security under certain circumstances.

Jurisdiction – Collision Jurisdiction Agreement (ASG 2)

This allows a collision claim to be dealt with by the English High Court - the Admiralty Court. It can be adapted to the circumstances of each case and where security has already been provided (ASG1).

With this agreement it is very important to ensure that the names of the parties, as the registered owners of the ships, are absolutely correct. This is particularly important where the vessels may be demise chartered or ownership has changed hands since the collision.

Again, it has a clause that, if adopted, agrees to waive the right to re-arrest, recently envisaged under the CPR.

In addition it permits adoption of the "Fast Track Procedure for Exchange of Electronic Track Data". This reflects the increasing use of technology and the way in which claims are now handled. Digital or electronic recording of the track of a vessel is now recorded by a ship or shore-based Automatic Identification System (AIS) or Electronic Chart Display Information System (ECDIS) or a voyage data recorder - highly relevant to liability for the collision.

Finally on this, while the new ASG 2 reflects submission to the English High Court, there are circumstances where the costs of issuing multiple claims in the English Court would simply be too expensive in relation to the quantum of the claim or where the parties may just prefer confidentiality. Here, arbitration may be preferable and the form accommodates this possibility.

Jurisdiction – Collision - Submission to Arbitration Collisions (ASG 6)

Whilst it is more common for collision disputes to be dealt with by the court, there are circumstances where the parties may prefer a private resolution or where the size of the dispute means that the parties wish to avoid costs in the High Court, The ASG6 is modeled on the procedure for collision actions in the Admiralty Court but permits an arbitrator to settle the matter on the basis of written submissions. It also provides for a sole arbitrator with sufficient experience, being a QC from the Admiralty bar or a retired judge of the Admiralty Court. He has the power to appoint an assessor to avoid the need for expert evidence.

The previous lengthy provisions relating to the appointment of an appeal arbitrator have been removed.

This is now a streamlined form designed to encourage arbitration, particularly in smaller collision cases.

Jurisdiction – Salvage Services – Submission to Arbitration (ASG 3)

This agreement permits the parties to bring their disputes over the provision of salvage services, to arbitration and where they do not wish matters to be

arbitration and where they do not wish matters to be referred to the Court under the LOF.

Unlike the LOF, by entering into the Agreement the parties do not admit that the services rendered were in the nature of salvage. They also agree to permit an arbitrator to make his award in a currency specified, removing the need for argument involving complicated questions of law.

Finally in order to avoid delay, the award must be collected within 48 hours of publication.

Security – Salvage Undertaking (ASG 4)

This is similar to the ASG 1 but in respect of salvage. Again, it will usually be given by a Hull and Machinery broker or the underwriters of the salvaged vessel and is intended to be used where a LOF (containing its own security provisions) is not in place.

It has been extended to provide for agreement that the beneficiary agrees to refrain from not only arresting, but for re-arresting.

Mediation Agreement (ASG8)

This is a new agreement for the ASG. It reflects the increasing desire for mediation and that in Admiralty matters the parties may wish to resolve their disputes by way of a negotiated settlement early on. It is certainly not a compulsory procedure. The issues can be referred to the ASG, who are well placed to assist with the appointment of a mediator. Like all mediation it is non-binding until a settlement agreement is signed by all the parties.

It is and therefore a quick and economic and method of resolving Admiralty disputes at any stage of proceedings.

Cargo undertakings - Security and Jurisdiction – ASG Cargo undertaking – (ASG 9A,B & C)

These are probably the most common undertakings and provide security to cargo interests. The forms envisage jurisdiction in (A) the English High Court, or (B) London Arbitration, or (C) a competent court or tribunal.

There are some important modifications to these forms. The first is that while the undertakings are addressed to the party entitled to sue in respect of the cargo claim, they also provide for additional parties to be added, subject to the P&I Club's agreement. This prevents a situation arising where a new party may have the right to arrest or seek additional security.

In addition, if the undertaking is given by a P&I Club, it will not be in the position to warrant for itself that the vessel is not demised chartered or is owned by the named ship owners. The Club can only warrant that it has been informed that this is the case. This warranty can then be dealt with by a separate side letter, provided from the ship owners (ASG 9D).

A further serious issue has arisen where the P&I Club has provided security and has then not been notified of proceedings by the Owner. The Owner does not then participate and the beneficiary under the undertaking proceeds to judgment against the Owner. There is no obligation to involve the Club and but it then seeks to enforce against the Club's undertaking (the owner being insolvent or absent). Again, this can be dealt with by a side letter providing for such a notice provision.

There is a provision for interest and costs and the form incorporates a scenario where the provider (the Club) may prefer certainty by undertaking a specific sum inclusive of interest and costs. (the alternative being "plus" interest and costs). However, if the Club prefers certainty a reasonable sum will need to be added to the principal. There is no specific formula for doing this

The right to seek adjustment to the security amount is preserved, but only providing this is reasonable.

In conclusion, the arrest of a ship to secure a claim in an admiralty matter remains avoidable and security can be put in place quickly and at an early stage.

Brian Taylor

Gateley LLP, London UK
brian.taylor@gateleyplc.com
T: +44 (0) 207 653 1711



Panama Update by Patton, Moreno & Asvat

Panama Ship Registry, declared “non pernicious” by the OECD

During the session of the 47th Forum on Pernicious Tax Practices held in France by the Organization for Economic Cooperation and Development (OECD), this past month of September, the Panama Ship Registry was declared “Non Pernicious”.

The term “Non Pernicious” refers to “absence of risks”, and “non damaging” to tax basis in other countries.

Panama’s Minister of Maritime Affairs, Jorge Barakat, stated that “the OECD’s decision shows that the Panama International Ship Registry not only complies with international agreements regarding maritime affairs; but that it also respects tax regulatory frameworks at the international level, thus confirming its status of registry par excellence and as the number one globally”.

The 24/7 service from the General Bureau for Public Registry of Ship Ownership becomes official

Patton, Moreno & Asvat, as an active member of the maritime community, celebrated that for the first time in the 100 years of history of ship registry it is possible to inscribe deeds for the permanent registry of titles and mortgages, assignments, amendments and cancellations uninterruptedly 24 hours a day starting September 27, 2017. During a statement to the media, our partner, Belisario Porras pointed out that “this action further elevates the competitiveness of the Panamanian registry vis a vis our competitors.”

Likewise, Patton Moreno & Asvat, leading firm in maritime services, was the first to present the first deed under the new schedule.

New One-Stop Scheme for Maritime Affairs

As of September 21, the Panama One-Stop Window for Maritime Affairs started operating for ships. It is a joint initiative between the Panama Canal Authority (ACP) and the Panama Maritime Authority (AMP), with the support of other national entities, the purpose of which is

to provide maritime clients with a more efficient system, improving the processes for reception, staying, and departure.

During this first delivery, the processes for all related entities were homologated, for ships that transit the Panama Canal and use the port terminals of PSA, PATSA, Hutchinson Port-Cristobal, and Hutchinson Port-Balboa, thus covering 80% of international shipping vessels that visit Panamanian ports. The remaining ports in the country maintain their current process until the other phases of the One-Stop Scheme are delivered.

Panama Ship Registry inaugurates offices in London, Dubai, and Manila.

With the goal of “diversifying the Panamanian maritime registry business” such as cruise ships, yachts, and vessels dedicated to the transport of liquefied natural gas, the Panama Maritime Authority (AMP), announced the opening of technical Segumar offices in London, Manila, and Dubai.

With these new offices, that makes 9 established offices (London, Manila, Dubai, Panama, Miami, Istanbul, Busan, Seoul, and Tokyo), reinforcing our presence in Europe and Asia. AMP highlighted that as well as the Segumar offices, the network of services provided by the Panama Ship Registry “is composed of 60 consulates dedicated to merchant marine services, including ship registry, and all other aspects related to these matters, (change of ownership, change of tonnage, cancellations, etc.), for which it has more than 200 Flag inspectors around the world.”

According to official statistics, during 2016 Panama’s merchant marine gathered 18% of the world fleet, and registered a total of 8.094 vessels, and 226,6 million tons.

Patton, Moreno & Asvat International Lawyers

Panama City, Panama
info@pmalawyers.com
T: +507 306 9600

The Warrant of Arrest of Sea Vessels

A precautionary act to implement the Arrest Conventions into Maltese Courts jurisdiction

by Nielsen Ávila Roveló & Dr. Jean Pie Gauci-Maistre, Gauci-Maistre Xynou

When it comes to the application of the Arrest Conventions, it is important to take note that Malta is not a signatory to any of them. However, that does not mean that the arrest of vessels is not regulated, in fact, the legal framework is found in Articles 742B-742D of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta (hereinafter referred to as the "COCP").

This therefore begs the question, if none of these Conventions are part of the Maltese legislation, what are the grounds on which a vessel can be arrested? The above mentioned articles contain all maritime claims recognized under the Conventions. This means that a creditor may seek to arrest a ship by an action in rem or in personam. A precautionary warrant of arrest may be issued against any sea-going vessel having a length exceeding 10 meters in order to secure a claim that has not yet been decided and the executive warrant of arrest is to be issued to enforce a judgment already obtained and favourable to creditors.

The COCP, through the warrant of arrest, secures the rights of the creditors in respect of a debt or claim whether in personam or in rem, since such debt or claim can be frustrated by the departure of the vessel. It is important to mention that no other warrant can be issued against a vessel unless it is a warrant of arrest for the purpose of the physical detention of the ship within the jurisdictional limits of the Maltese courts in security of a maritime claim.

When it comes to the effect of the warrant of arrest, it is nothing more than for the seizure or impediment of departure of the vessel from the debtor and also to attach the same in the hands of the authority where the vessel is, and also to order the authorities to not release

the vessel or allow the debtor to divest himself in any way from the vessel in whole or in part or to give or surrender to any person any rights on the same. In the case of Malta, Transport Malta is deemed by law to be the authority with the power and control to have a ship arrested as soon as it enters Maltese territorial waters.

It is in this respect that one must mention two cases by which the vessel has been found not to be in Maltese territorial waters and thus became the subject to wrongful arrest of a ship. In one of these cases the Maltese Court, on May 20th 2015, issued a warrant of arrest against the M/V "Blue Rose". It is important to mention that in Malta the precautionary warrant of arrest is sued out by an application to be filed in the prescribed form, which includes the Court Decree giving necessary orders, under pain of nullity clearly stating the particulars enabling the identification of the ship, name of the Authority under whose power or control the ship may be and the place where the ship is to be found, which in this case should be in Maltese territorial waters.

In the case of the M/V "Blue Rose" the arresting party filed a sworn application which stated that the vessel was within Maltese territorial waters. The sworn application went on to state that the claim could be prejudiced with the departure of the vessel. The warrant was served on Transport Malta who, knowing full-well that Maltese Courts do not have jurisdiction and cannot grant warrants of arrest outside their 12 nautical miles of territorial sea, immediately brought this to the Judge's attention by means of a note filed before the Court. The judge revoked "contrario imperio" the warrant of arrest declaring the warrant of arrest null and the arrest of the vessel illegal.

Something similar was said to have occurred in the case of the MV "Madara" in 2014. Often referred to as the vessel that absconded from an arrest, it is argued that the difference of this arrest was that a warrant was never served to begin with.

So what happens once the arrest has been done? The Court may order the vessel to be shifted from a port or

harbor to any other anchorage within territorial waters on application of Transport Malta, if the following are satisfied: 1. the cargo, length or draft of the ship; and 2. other circumstances concerning safety, pollution, navigation or port operations. In these cases it is advisable that the vessel should leave the port without delay. The Court may also rescind a warrant of arrest and order the ship to leave Malta and its territorial waters without delay for the same reasons.

As part of this process, the Court may order the sale of an arrested ship pendente lite if it appears to the Courts, upon the application of a creditor that the debtor is insolvent, or unlikely to continue trading and maintaining the asset. Notwithstanding, the issue and execution of a precautionary warrant of arrest, a ship is removed from the jurisdiction of the Court in breach of the warrant of arrest, the owner, bareboat charterer or other person being in possession of the vessel shall be jointly and severally liable to a penalty of 116,470 Euro in favour of the party applying for the warrant.

Last but not least, vessels may also be arrested in Malta pursuant to the provisions of Article 31 of Council Regulation (EC) No. 44/2001, dealing with protective measures, in cases where the courts of another Member State have jurisdiction as to the substance of the matter. Therefore, in Malta for a ship to be arrested it is always by virtue of the warrant of arrest.



Nielsen Ávila Rovelo
nrovelo@gmxlaw.com



Gauci-Maistre Xynou
Valleta, Malta
+356 21247785

Dr. Jean Pie Gauci-Maistre
jpgm@gmxlaw.com

Arrest of Maritime Properties in India

by Gautam Bhatikar, Kochhar & Co.

Up until the year 1992, the admiralty jurisdiction to arrest ships in India was restricted to the Admiralty Courts Act 1840 and 1861. The general perception was that the jurisdiction of courts was atrophied by the aforesaid acts. Arrest of sister ships was a concept unknown to Indian law until 1992.

The Supreme Court of India in a bold and robust decision in *mv. Elizabeth v Harwan Investment and Trading Pvt. Ltd.*¹ proceeded to interpret the law to empower the Admiralty Courts to exercise jurisdiction relying upon the principles of International conventions.

Relying upon the judgment above of the Supreme Court of India, the Bombay High Court in *mv. Mariner IV v Videsh Sanchar Nigam Limited*² held that the Brussels Convention could be relied upon to arrest a sister ship. In *Liverpool & London S. P&I Asson. v mv. Sea Success I & Anr*³ it was held that principles of the 1999 Convention on arrest of ships could be applied by the Indian Admiralty Courts. Where the parliament has failed to enact laws, the Supreme Court of India has expanded the admiralty jurisdiction of Indian Courts.

It is only recently that the Parliament has promulgated the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017⁴. However, the said Act is not yet in force.

These maritime properties are:

- (i) Vessel;
- (ii) Bunkers;
- (iii) Freight and
- (iv) Cargo

¹ AIR 1993 SC 1014

² 1998 (1) Mah. L.J 751

³ 2004 (9) SCC 512

⁴ The said Act has received presidential assent on 9th August, 2017. However, the Central Government has not yet notified the date on which it comes into effect. Therefore, the Act has not yet come into effect.

(i) Vessel:

Historically, Admiralty Jurisdiction was assumed with arrest of a vessel that was within the jurisdiction of the Court passing the arrest order. Ship arrest is a means of obtaining security for the satisfaction of any judgment obtained in an action *in rem*, and as such is a powerful weapon in the hands of the plaintiff and often is the reason for commencing proceedings in the Admiralty Court as opposed to any commercial court.

A ship may be arrested (i) *to acquire jurisdiction*; or (ii) *to obtain security for satisfaction of the claim*; or (iii) *in execution of a decree*⁵. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The Bombay High Court, however, in the Judgment of *Navbharat International Ltd. v Cargo on Board mv. Amitees & Ors.*⁶ interpreting Rule 941 of the Bombay High Court (O.S.) Rules held that an undertaking given by the Plaintiff at the time of filing an Admiralty Suit is like giving a “blank-cheque” to the Court. Such an undertaking is an unconditional, unqualified and irrevocable undertaking. Once a Court holds that an arrest is wrongful or obtained without jurisdiction, the undertaking triggers. The next step for the Court is to determine the quantum of damages to be awarded as compensation. However, this Judgment is passed whilst interpreting Rule 941.

Any other Admiralty Court in India can take a different view depending on the nature of undertaking given. A Court may also follow the English law granting compensation only if a party satisfies that arrest was obtained maliciously or in bad faith. The claimant is liable to damages for wrongful arrest.

This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in several countries including the United States and Japan. The reason for the Rule is that a wrongful arrest can cause irreparable loss and damages to the ship-

owner, and should be compensated by the arresting party.⁷ However, there is no rule or law in India which contemplates furnishing security as a pre-condition for grant of arrest. Though a Court may in a particular matter, depending upon the facts and circumstances of the case, direct the Plaintiff to furnish counter-security in order to grant the order of arrest.

India follows both the International Convention relating to the Arrest of Seagoing Ships, Brussels and the International Convention on Arrest of Ships, 1999, Geneva. Both the arrest conventions are still applied by the Indian admiralty courts as part of their common law of the sea. Thus, in the absence of any Indian statute defining a maritime claim, Indian High Courts, having admiralty jurisdiction, can adjudicate such claims as per the International common law/maritime law and as per the principles incorporated in the various conventions. However, existence of a maritime claim is an always required pre-condition for granting the order of arrest by an Admiralty Court.

Thus, following the arrest conventions (*supra*) and the existing Indian Statutes, arrest of a vessel in Admiralty jurisdiction is permissible depending upon the nature of claim, the cause of action, and the existence of a maritime claim.

(ii) Bunkers:

Bunker is the colloquial nomenclature used for fuel in the vessel tanks. A “bunker” on board a ship is the fuel storage compartment on board⁸ the ship. Thus if arrest of bunker on board the vessel is granted, it is virtually equivalent to the detention of the Ship, until the bunkers are offloaded into shore tanks or tanker lorries.

⁵J.S. Ocean Liner LLC, Bur Dubai (U,A,E) vs. M.V. Golden Progress

⁶ NOTICE OF MOTION NO. 2853 OF 2010 in Admiralty Suit No. 19 of 2010 (Justice K.R. Shriram J) Order dated 19 March 2014.

⁷ Arrest of Ships by Hill, Soehring, Hosoi and Helmer, 1985

⁸ Bombay High Court in *Mansel Ltd. v. Bunkers on Board-* (2017) SCCOnline Bom 653

To date there is no law in India (unlike in South Africa and Norway) which expressly permits arrest of bunkers. However, in a few matters, the Bombay High Court had granted *ex-parte* orders of arrest of Bunkers. It was argued by the Plaintiff before the Bombay High Court that bunkers can be arrested in Admiralty Jurisdiction as there is no prohibition under any statute in arresting bunkers. It was also argued that if Section 33 of the Admiralty Courts 1861 permits withholding and release of any "property" under arrest, the logical concomitant would be that the Admiralty Court would have the power to arrest bunkers. Parties also relied upon High Court Rules and the Letters Patent 1823 and 1865 Clause 53 and Clause 31 respectively to argue that the word bunkers fell within the realm of the word "property".

Thus, the controversy on permissibility of arrest continued until the same was put to rest by a Single Judge of the Bombay High Court in *Peninsula Petroleum Ltd. v Bunkers on board the vessel M.V. Geowave Commander & Ors.*⁹ The Bombay High Court held that reliance on the Letters Patent and the Original Side Rules of the High Court do not contemplate arrest of bunkers independently in absence of claim against the vessel. Therefore, unless a ship is liable, Admiralty Jurisdiction of the Court cannot be invoked to arrest bunkers. The Bombay High Court also held that whilst cargo and freight are considered as maritime properties, bunkers are not. The view of the Single Judge was upheld by the Division Bench of the Bombay High Court in *Mansel Ltd. v Bunkers on Board the ship mv. Giovanna Luliano & Ors.*¹⁰ A Division Bench approved the English decision in the *Beldis*¹¹ case which held that "*The Complete absence of any reported case in the last 100 years, in which the present attempt to arrest a ship or property unconnected with the cause of action has ever been made before, is indeed, of itself almost conclusive that the procedure in rem was not regards in the Admiralty Courts extending to such ships or other property, and from this fact too I draw the*

inference that it had ceased to be permissible."¹² This decision of the Bombay High Court has been challenged in the Supreme Court of India. The Supreme Court has in the said matter issued notices and the matter is scheduled to come up for hearing in January 2018. However, the Bombay High Court Judgment has not yet been stayed.

To date, there is no other reported decision of any other High Court in India or the Supreme Court where a contrary view has been laid down. Therefore, presently, bunkers in India cannot be arrested in Admiralty Jurisdiction.

(iii) Freight:

There are a very limited number of decisions in India concerning the arrest of freight. However, the Bombay High Court was faced with a situation where bunkers on board a vessel along with the freight due for transportation of cargo laden were arrested by an *ex-parte* order of arrest. The owners on appearing challenged the jurisdiction of the Bombay High Court to arrest freight in Admiralty jurisdiction. It was argued by the Plaintiff that freight becomes due immediately on loading the cargo on board the vessel and since loading operations were completed, the Plaintiff was entitled to arrest the freight which was due but had not been paid for. The Plaintiff relied upon Rule 946(4) of the Bombay High Court (Original Side) Rules, 1980¹³ and argued that there was no embargo under any statutes which prohibits arrest of Freight in Admiralty Jurisdiction. The Plaintiff relied upon the term "property" used in Admiralty jurisdiction and also relied upon the Letters Patent of 1823 and 1865 to bolster their stand.

⁹ (2015) 3 Bom CR 693

¹⁰ 2017 SCC Online Bom 653

¹¹ (1935) 53 Lloyds Law Report 255 @ Page 275

¹² Page 277

¹³ Rule 946(4) reads as thus "Where the property is freight, service shall be effected by serving on the cargo in respect of which the freight is payable or on the ship in which the cargo was carried, in the manner hereinabove prescribed in this rule for service on a cargo or on a ship. "

The Bombay High Court in *Rushab Shipping International LLC v Bunkers on Board the ship mv. African Eagle*¹⁴ rejected the contention of the Plaintiff and held that in absence of any privity against the vessel, a Plaintiff cannot proceed in Admiralty Jurisdiction against the freight. The Bombay High Court followed the English Judgments in *The Victor*¹⁵, *The Flora*¹⁶, *The Castlegate*¹⁷ and *The Kaleten*¹⁸ and held that the cargo cannot be arrested in Admiralty Jurisdiction unless there is a cause of action against the vessel and existence of a maritime claim is a *sine qua non* for the purposes of invoking Admiralty Jurisdiction. The Bombay High Court also held that in absence of any statute mere reliance on the Original Side Rules and the Letters Patent is not sufficient to proceed against freight in Admiralty Jurisdiction.

This Judgment has been followed subsequently as a binding precedent in various other Judgments. No other High Court or the Supreme Court has taken a contrary decision. Thus, it can be safely said that a mere arrest of freight is impermissible in Admiralty jurisdiction in India.

(iv) Cargo:

There have been a few occasions where Cargo was arrested under its Admiralty Jurisdiction by the Bombay High Court. Most of the cases where cargo had been arrested ended up in an out of court settlement.

The Division Bench of the Bombay High Court¹⁹ came across a peculiar situation where cargo on board the ship was arrested for a claim under a contract for sale-purchase of cargo. The claim was contested on the ground that the claim is *in personam* and an action *in rem* cannot be obtained. The Plaintiff attempted to sustain arrest by also relying upon the American concept of a contract having "maritime flavour" or "maritime element". The Division Bench clarified that unless there exists a maritime claim, Admiralty jurisdiction cannot be invoked. The Division Bench also held that a claim against cargo without a cause of

action against a ship is impermissible in Admiralty Jurisdiction.

Though the Division Bench Judgment ruled that a claim against cargo in Admiralty Jurisdiction cannot be invoked without a cause of action against the vessel, the Division Bench had not been called upon to decide whether a cargo arrest is permissible in Admiralty jurisdiction or not. Therefore, the Bombay High Court on several occasions continued to pass ex-parte orders of arrest of cargo.

The issue of whether Cargo can be arrested in Admiralty Jurisdiction was finally decided by the Bombay High Court, only recently, in *Pacific Gulf Shipping (Singapore) Pte. Ltd. v S.R.K. Chemicals Ltd. & Anr.*²⁰ In the said matter, the Bombay High Court had initially granted an *ex-parte* arrest to secure the Plaintiff's claim in a nature of demurrage against the cargo owner. The cargo owner contested the Jurisdiction of the Admiralty Court in proceeding against the cargo. The Plaintiff relied upon American and Australian laws requesting the Bombay High Court to import principles of the same as a part of Indian law. The Bombay High Court tracing the history of Admiralty law in India and following the English Judgment in *The Leo*²¹ held that the cargo cannot be arrested. The Bombay High Court refused to import the American law holding that statutory law of another country cannot be imported as a statutory law of India. One cannot import foreign laws like the arrest conventions unless the same are part of Private International law recognized in India. The Bombay High Court also held that an Admiralty Court cannot arrest cargo in admiralty Jurisdiction which are unconnected with the ship and

14 2013 (3) Bom C.R. 380

15 *The Victor*, 1860 (Lush 72)

16 *The Flora*, (1866) A & ELR 45

17 [1893] A.C.38

18 *The Kaleten*, 1914 T.L.R. 30

19 *Best Food International Pvt. Ltd. V. Navbharat*

International Ltd. & Ors. - (2011) Supp. Bom C.R. 283

20 Notice of Motion (L) No. 74 of 2017 in Commercial

Admiralty Suit (L) No.51 of 2017. Order dated 1st September

2017 (Coram: S.C. Gupta J)

21 *The "Leo"* 198 Lush. 445

that the Court in absence of express legislation cannot permit such an arrest. The Bombay High Court has accordingly held that arrest of cargo in Admiralty Jurisdiction is not permissible.

Apart from the aforementioned two views of the Bombay High Court it would not be out of place to mention another Judgment of the Bombay High Court in *Peninsula Petroleum Ltd. v mv. Geowave Commander*²². This was a matter where the Court was concerned with a bunker arrest where the Jurisdiction of the Admiralty Court was under question. One of the arguments advanced was that the word "property" in High Court Rules and Letters Patent confer the High Court with plenary power to arrest bunkers and other maritime properties. The Bombay High Court whilst ruling on bunkers held that cargo can be arrested only to recover the freight payable to the ship owner. However, such an arrest can only be for the cargo on which freight is *in presenti* due. The Court further clarified that such an arrest can be sans any claim against the vessel. This Judgment was considered and followed by the Single Judge in the *Pacific Gulf Shipping (Singapore) Pte. Ltd.'s case*.

On a careful examination of the aforesaid Judgments and the provisions of the existing law, it is clear that except for vessels, no other maritime properties can be independently arrested under Admiralty jurisdiction in India. Though none of the Admiralty Courts in India have ever faced a situation where either of the maritime properties were arrested (except a ship) for a claim against the ship. In such a situation, the Admiralty Courts will have to consider a grant of arrest keeping in mind the above principles.

Interestingly, the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 contemplates arrest of any of the maritime properties save and except the ship. Once the said act is in force, it seems difficult that Admiralty Courts may grant arrest of such maritime properties.

²² supra

Gautam Bhatikar
Kochhar & Co. Advocates
Mumbai, India
+91 22-6112 0700-02
gautam@mumbai.kochhar.com



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Abraham Stern F.

asf@sferalegal.com

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Limassol, Cyprus

T: +357 2559 0600

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www.lloydslaw.com

Contact: Mr. Andreas Georghadjis

Lithuania



Glimstedt Bernotas & Partners

Vilnius, Lithuania

T: +370 5 269 07 00

F: +370 5 269 07 01

vilnius@glimstedt.lt

www.glimstedt.lt

Contact: Mr. Justinas Poderis

Malaysia



TS Oon & Partners

Kuala Lumpur, Malaysia

T: +60 3 2283 6200

F: +60 3 2283 3190

thianseng@oonpartners.com

Contact: Mr. Oon Thian Seng

South Africa



DJ Dickinson & Associates

Durban, South Africa

T: +27 31 303 63 76

F: +27 31 303 90 36

dickyd@yebo.co.za

www.maritimelawsa.com

Contact: Mr. Dave Dickinson

Ukraine



Bolsun. Assistance to crew members

Kherson, Ukraine

T: +38 (099) 921-81-75

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