

# THE ARREST news

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In this issue of *The Arrest News*, Shiparrested.com members from Kuwait and Singapore discuss various topics including a court's decision on wrongful arrest in Lebanon, arrest and release procedures, and priorities between maritime claims.

## **Best Soar Ltd v Praxis Energy Pte Ltd [2017] SGHC 158** by Kelly Yap, Oon & Bazul (Singapore)

Should the Singapore Court decide whether an arrest that took place in Lebanon was wrongful?

### **Background Facts**

Praxis, the Bunker Supplier, is a Singapore company that supplied bunkers to the "Silvia Ambition" (the "Vessel") in Singapore. As payment was not received for the bunkers, the Bunker Supplier arrested the Vessel in Beirut, Lebanon. It also filed a substantive action against Best Soar ("Owners") / Vessel in Beirut for the bunker claim.

The Owners filed an objection in the Lebanon Court, claiming that the arrest was wrongful and should be revoked, and sought an order that the Bunker Supplier provide security for damages ("Objection"). The Owners

also furnished security and the Vessel was later released.

The Owners subsequently commenced an action against the Bunker Supplier in the Singapore Court ("Singapore Proceedings") seeking a declaration that the Owners were not liable for the bunkers and that the arrest of the Vessel was wrongful; damages for wrongful arrest; an injunction to restrain the Bunker Supplier from pursuing its claim in Lebanon and any other jurisdiction; and the return of the security provided to release the Vessel.

We acted for the Bunker Supplier who applied to stay the Singapore Proceedings in favour of Lebanon on the ground of forum non conveniens or Case Management (partial stay pending the outcome in Lebanon). The

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Bunker Supplier's stay application before the Assistant Registrar ("AR") was successful and the Owners appealed to a High Court Judge-in Chambers ("Judge"). On appeal, the Judge affirmed the AR's decision. Dissatisfied, the Owners appealed to the Court of Appeal ("CA"), who also dismissed the appeal.

#### **The Judge's Written Grounds of Decision**

The two-stage test whether to grant a stay of proceedings on the ground of forum non conveniens is enunciated in *Spiliada Maritime Corporation v Cansulex* [1987] AC 460. In the first stage, the applicant must show that another forum is the distinctly more appropriate forum to hear the dispute. In the second stage, the respondent has to show that there are circumstances by reason of which justice requires that a stay should nonetheless be granted.

#### ***Stage 1 of the Spiliada Test***

As the alleged tort of wrongful arrest took place in Lebanon, this pointed to Lebanon as the natural forum. Further, since the Lebanese Court granted the arrest order under Lebanese law, and the Objection had to be resolved under Lebanese law, the Lebanese Court would be best placed to apply its own law.

Parallel proceedings in both Lebanon and Singapore would give rise to a duplication of resources and the risk of conflicting judgments. The latter, with regard to the correctness of the arrest, was worrying. It dovetailed with the consideration of international comity, which favoured Lebanon as the more appropriate forum for the Owners' claim for wrongful arrest.

For these reasons, the Judge found that the Bunker Supplier had succeeded in showing that Lebanon was the more appropriate forum.

#### ***Stage 2 of the Spiliada Test***

The Owners argued that there was no procedure for discovery of documents or cross-examination in Lebanon unlike in Singapore. This was rejected as it merely pointed to differences between the common law system in Singapore and the civil law system in Lebanon - it was not a denial of substantial justice.

The Owners submitted that it was seeking an injunction against the Bunker Supplier and it could only be granted by the Singapore Court since the Bunker Supplier was a Singapore company. The Judge also rejected this argument as this would always be the case whenever a Singapore company is involved.

#### ***Limited stay on the ground of Case Management***

The Judge held that he would, in any event, have granted a limited stay of the Singapore Proceedings pending the outcome of the action in Lebanon. The Singapore Court can make such an order when there is a multiplicity of proceedings so as to ensure the efficient and fair resolution of the dispute.

Given the advanced stage of the Lebanon Proceedings, the Judge said that a limited stay would ensure an efficient and fair resolution of the dispute; avoid the possibility of conflicting decisions; and promote international comity.

#### **The Court of Appeal's Oral Decision**

The CA unanimously dismissed the Owners' appeal when it was heard on 22 January 2018. Significantly, the CA said that the crux of the issue went **beyond** whether to stay the action based on forum non conveniens or Case Management. It was troubled that the essence of the Owners' claim and remedies sought in the Singapore Proceedings appeared to be aimed at preventing the Bunker Supplier from exercising its rights by arresting the Vessel in Lebanon.

The CA recognised that it is common for ships to be arrested all over the world if the laws of that country allow it - it is a risk that shipowners take. Since the Bunker Supplier had the right to arrest the Vessel in Lebanon and possesses certain rights in or flowing from the arrest, it was wrong of the Owners to sue in Singapore to prevent the Bunker Supplier from exercising those rights in Lebanon. The CA found that the Owners had no basis to ask for such a relief and, on this ground alone, the Appeal must fail.

The CA also found that the Lebanese Court was unquestionably the appropriate forum to determine the

issues arising from the arrest in Lebanon, for which the proceedings were already well underway in Lebanon.

### **Conclusion**

What we can take away from this decision is that the Singapore Courts acknowledge that a ship can be arrested anywhere in the world to obtain security for a claim so long as the laws of that country permit such an arrest. This includes jurisdictions which recognise an unpaid bunker claim as a maritime lien against the ship.



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## **How to arrest and release vessels from arrest in Kuwait**

by Ahmed Rezeik & Omar Omar, Al Tamimi & Co.

Frankly speaking, Kuwait is not considered a friendly jurisdiction to arrest vessels due to factors such as the limited number of ports and its small size. Whilst it is legally possible to obtain an arrest, it is relatively difficult when compared to other jurisdictions such as the UAE. However, despite this difficulty, the Kuwaiti legislature has regulated arrest in Kuwait and organized the means for precautionary arrest and executive arrest, as well as the lifting of arrest of vessels in the Kuwaiti Maritime Trade Law no 28 for the year 1980 ("Maritime Law"). By doing so, there are now special rules for the implementation of vessel arrest, which is not totally different from rules implementing arrest on a property. Notwithstanding, it is distinct from the general rules for arresting the Movable due to the special nature of vessels and their magnitude of value; including the requirements which surround the sale of a vessel with some of the safeguards that ensure access to the right price.

In this article we will describe the legal procedures and provisions of Kuwaiti laws to place a precautionary arrest and how to lift the arrest, as well as the current practice.

### **What are the procedures to place a precautionary arrest on a vessel?**

The Kuwaiti Maritime Trade law no. 28 for the year 1980 as well as the Kuwaiti Civil & Commercial Pleadings Law no. 38 for the year 1980 provides the procedures for the precautionary arresting and releasing of vessels in Kuwait as following:

#### **1. The required conditions to arrest a vessel:**

The Kuwait Maritime Trade Law requires certain particular debts to arrest a vessel which is stipulated in Articles 73, 74 & 75

Precautionary arrest may be made on the ship by an order of the judge pro tempore of the Court of First Instance, and this arrest shall only be made for fulfillment of a marine debt.

Marine debt means the allegation of a right originating from one of the following reasons:

1. Damages caused by the vessel due to collision or other reasons.
2. Loss of life or physical injuries caused by the vessel or arising from the utilization thereof.
3. Expenses of salvage.
4. Contracts of utilization or charter of the vessel under charter party or;
5. Contracts concerning the transportation of goods under charter party, bill of lading or;
6. Shortage of or damage to goods and luggage transported by the vessel.
7. Common losses.
8. Towage of the ship.
9. Pilotage.
10. Supply of products or appliances required for the utilization of the vessel or maintenance of the supplied items
11. Building, repair or outfitting the vessel and expenses while in dock.

12. Remuneration of Master, officers and crew members.
13. Amounts spent by the shipmaster, shippers, charterers or agents to the account of the vessel or its Owner's account.
14. Dispute in respect of property of the vessel.
15. Dispute in respect of the common property of a vessel, possession, utilization thereof; or of the rights of common proprietors in the amounts resulting from the utilisation of the vessel.
16. Marine mortgage.

Anyone who has a right arising under one of the debts mentioned above shall have the right to arrest the vessel subject to the debt or any other vessel owned by the debtor (sister ships) if such vessel was owned by him at the time of debt initiation.

However, an arrest may not be made on a vessel other than the vessel subject the debt, if the debt is one of those provided for in the last three items of the above marine debts.

Furthermore, if the debtor who charters the vessel undertakes the marine management thereof, and is solely responsible for a marine debt relating thereto, the creditor may arrest this vessel or any other vessel owned by the charterer; and an arrest may not be made on any other vessel owned by the Owner by virtue of this marine debt.

Provisions of this Article shall be applicable on all cases, when a person, other than the ship Owner, is bound by a marine debt.

## **2. The procedure to arrest a vessel in Kuwait:**

According to Kuwaiti Civil & Commercial Pleadings Law, arresting a vessel should be done by applying to the competent court by presenting an application including the name of the claimant and the defendant and any third party and their domiciles.

This application shall be of two similar copies accompanied with the relevant documentary evidence which is sufficient to support a *prima facie* claim giving

rise to a right to arrest. Also, the application should be based on one of the following:

1. An official or ordinary document showing the debt due to him, not being subject to a condition,
2. Or, any other written evidence declaring the debt,
3. Or, official document such as a judgment.

The judge shall issue his order in writing on one of the application copies on the day following its submission at the latest. He is not obliged to mention the reasons on which the matter is based.

The Clerks Department shall deliver to the applicant the second copy of his petition, written thereon the copy of the order, on the day following its issuance at the latest, bearing in mind that the order issued in respect of a petition shall be considered as non-existent, if it is not submitted for execution within thirty days from the date of its issuance; although such nullity shall not preclude the issuance of a new order.

A copy of the arrest order shall be delivered to the Master of the vessel as well as the official authorities in the port and to the registration office after the court ensures that the vessel is owned by the debtor.

The applicant must, within eight days at the most from the date of the imposition of the arrest, bring a claim before the competent court for the confirmation of his right and the validity of the arrest. In cases in which the applicant fails to file the case within the time limit, the arrest shall be considered as non-existent.

The applicant whose claim is rejected by the order, and the person against whom the order is issued, shall have the right to challenge (grievance) to the competent Court.

The litigant, against whom the order is issued, instead of complaining to the competent Court, shall have the right to challenge this order to the same Judge, and this shall not be precluded by the original case being before the Court.

The Complaint shall be performed in accordance with the usual procedures of bringing the case; and may be brought in pursuance to the original case according to the procedures adopted in bringing the contingent claims. The complaint must be justified, otherwise it shall be void.

The grievance shall be judged either by confirmation, amendment or cancellation of the order, and this judgment shall be subject to appeal, in accordance with the approved methods of appeals of judgments.

It should be noted that there is no specific time frame for the duration of the proceedings taken to arrest a vessel, and the court's decision may be issued on the same day or within the next three days if all the necessary documents of the arrest are available.

Finally, we should mention that there is no need for counter security to be posted with the application of arrest.

#### **What are the procedures for lifting a vessel arrest?**

The Kuwaiti legislature has set out a mechanism for the precautionary arrest of vessels, in the Kuwaiti Maritime Trade Law. However, the latter doesn't mention the required procedures to release the arrested vessel, except through Article 76 which stipulates for the necessity to provide a guarantee or any other warranty sufficient to cover the debt as will be seen later.

The Kuwaiti Civil & Commercial Pleadings Law No. 38 of 1980 provides the procedures for lifting the arrest and for the release of vessels in Kuwait, as follows:

Lifting of arrests may not be ordered, if the arrest is ordered due to the marine debts mentioned in items 14 and 15 of the second paragraph of Article 73, which are "*the dispute in respect of the common property of a vessel, possession, utilization thereof; or of the rights of common proprietors in the amounts resulting from the utilization of the vessel, as well as the Marine mortgage*"

In this case, the presiding judge may permit the vessel Owner to utilize the vessel, if said Owner offers a sufficient guarantee, or the presiding Judge may

arrange for the management of the vessel during arrest period in the way he determines.

Article 218 from Civil & Commercial Pleadings Law states that whatever the procedure may be, an amount of money equivalent to such debts may be deposited with the treasury of the Execution Department, which shall be allocated only to the satisfaction thereof. This deposit shall allow the lifting of the arrest on the vessel and the transfer of the deposited amount.

In this regard, the arrestee may request the Judge, whatever the stage of the procedure may be, to estimate an amount or the equivalent thereof to be deposited with the treasury of the Execution department for payment to the debt of the arrestor. This deposit shall allow for the lifting of the arrest on the vessel and the transfer of the deposited amount; which shall be allocated to the satisfaction of the requirement of the arrestor, when it is decided to confirm the arrest.

The arrestee may also present an application to release the precautionary arrest placed on the vessel before the competent judge (the president of the First Instance Court) providing an unconditional bank letter of guarantee with no time restrictions is provided. The guarantee is to be issued by a Kuwait first class bank covering the value against which the vessel is arrested. The Judge would issue his decision after going through the application and the letter of guarantee.

In the case the letter of guarantee fulfills the necessary requirements; the judge would issue his decision to deposit the guarantee in the court's treasury, pending a decision to be made on the subject of the claim whether amicably or judicially, and to lift the arrest placed on the vessel. Upon issuance of such a decision to lift the arrest, the arrestee would obtain the executor form from the relevant judgment ordering the lifting of the arrest and deliver it to the Court Bailiffs to undertake the necessary formalities for the lifting of the arrest. The Court Bailiff would proceed to the Marine Inspection Department, and issue minutes of lifting the arrest. The latter department would notify the remaining competent

authorities of the lifting of the arrest and the absence of objection against the sailing of the vessel.

It has to be noted that the Courts in Kuwait have the discretionary power to decide whether or not the guarantee offered by the debtor is sufficient to secure the debt. The Kuwaiti courts will usually only accept a bank letter of guarantee from a Kuwait first class bank as a sufficient security to fulfill such kind of debts and they rarely accept any other kind of guarantee. They do not usually accept P&I Club letters of undertaking as acceptable security to release the arrest. We discuss this further below.

Furthermore, if the Owners need to release the vessel from the arrest without presentation of a bank letter of guarantee from one of the local authorized Kuwaiti banks before the court's treasury - in case the arrest placed on the vessel be considered an undoubtedly wrongful arrest whether due to procedural or subjective reasons (as in case the debt has already been paid or any other reasons) - the arrestee may file an Urgent Case before the Judge of Execution, thereby seeking that the arrest placed on the vessel to be considered as null and void. The judgment rendered by the judge in such a case is promptly executable by the power of law, without bail and without awaiting that a final judgment be issued by the court of appeal (in case the arrestor files an appeal against the said judgment).

On the other hand, the arrestor has the right to challenge the lifting of the arrest in view of the insufficiency of the guarantee deposited. In case the arrestor considers that the guarantee deposited by the arrestee pursuant to a court order against the lifting the arrest placed on the vessel is inadequate security whether in view of its quantum or its terms in case it contains unacceptable conditions - he may file an obstruction against enforcement of the court order allowing the lifting of the arrest.

Accordingly, the Court Order allowing the lifting of the arrest shall not be enforced pending a decision upon the obstruction action filed. However, in order that such

effect takes place, the obstruction action should be filed before the Court of Execution before actually executing the order for lifting the arrest. Upon filing the obstruction action, a hearing would be scheduled as soon as possible before the Judge of Execution. Upon conclusion of the pleadings, the judge may issue its judgment either suspending execution of the order for lifting the arrest (i.e. the arrest remains enforced on the vessel) or rejecting the obstruction action and proceeding with the execution of the order for lifting the arrest and in such a case, the vessel would be able to sail.

It should be noted that there is no specific time frame for the proceedings taken to lift the arrest of a vessel, and the Court's decision may be issued on the same day or within the next three days if all the necessary documents for the arrest are available.

Finally, we should mention that it is usually recommended to deposit the required bank letter of Guarantee to the court treasury of the Execution Department due to the time taken to release the vessel from arrest without presentation of a bank letter of guarantee which could interrupt the Owner's business.

This article was intended to provide you with a brief overview of the procedures of placing and lifting arrest on vessels in Kuwait.



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## Priorities between Maritime Claimants - Singapore High Court Denies Leapfrogging of Claims

by K. Murali Pany & Ng Lip Kai, JTJB LLP (Singapore)

Piraeus Bank, one of the largest banks in Greece, commenced two mortgagee actions in Singapore and effected a double arrest on the vessels "Posidon" and "Pegasus", flowing from the ship-owners' default of a loan agreement. The vessels were subsequently sold pursuant to a judicial sale.

Subsequently, World Fuel Services, who had (via various companies) supplied bunkers to the vessels on credit, intervened in both actions.

World Fuel Services claimed that the usual order of priorities, in terms of entitlement to the vessels' sale proceeds, should be altered so as to elevate their claim for unpaid bunkers above the Bank's claim as mortgagees (the Bank would ordinarily enjoy a higher priority). A number of different grounds were asserted by World Fuel Services in support of their claim.

In a landmark Singapore High Court decision, Justice Belinda Ang in a written Judgment (The "Posidon" [2017] SGHC 138), held that the Court did have the power to alter priorities between maritime claimants provided that exceptional circumstances were shown.

This is the first local decision on the point as prior local cases had only ruled that the Court had the power to allow certain claims to be treated as Sheriff's expenses and thereby enjoy a higher priority.

Nonetheless, applying the above principle, Justice Belinda Ang declined to alter priorities as World Fuel Services were unable to show exceptional circumstances. Justice Belinda Ang found that World Fuel Services had not even raised a *prima facie* case to support their claim for an alteration of priorities and further, that the extension of credit by World Fuel Services to the ship-owners was a business risk assumed in the course of business.

World Fuel Services appealed against this decision to the Singapore Court of Appeal. The appeal was heard in January 2018. The Court of Appeal upheld Justice Belinda Ang's decision and dismissed the appeal.

**Piraeus Bank was represented by K Murali Pany and Ng Lip Kai of Joseph Tan Jude Benny LLP**



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