



THE WORLD LEADING SHIP ARREST INFORMATION PORTAL

Members

Publication n°2

In the international environment of maritime affairs and commercial business, world online information is of utmost value. On this premise NetManager Consulting company pioneered the development of a top maritime product with the aim to provide the most relevant information, online and freely accessible for the maritime market.

The www.shiparrested.com portal is a network of different services related to ship arrest matters and has become a reference tool for shipping professionals, providing its users with the essential needs of any company involved with arresting or releasing a ship anywhere in the world. This, as a result, comes with more arrests being carried out. As far as we think, arrest practice could increase much more provided the information and transparency on arrest rise.

Key players of this network are medium size law firms with excellent practise or leading multinational law offices. From all over the globe, they have joined this network and provide today top information ensuring that ship arrest/release practise and expertise are improving and increasing.

About this bulletin:

NetManager Consuting company is now very proud to present his second free edition of shiparrested.com members contributions featuring the latest procedures on how to arrest a ship in 18 new world jurisdictions.

In last Posidonia event, hundreds of our first Members' Publication were freely distributed containing others members' articles on how to arrest a ship in 21 jurisdictions.

Our first printed edition had been very well received into the London and Scandinavian P & I Clubs: one of the Director of the UK Defence Club wrote us: "Thank you very much for sending a copy of the "Members' Publication". I note with great interest that a second edition is planned for later this year"; another Manager of the ITIC asks: "We would be grateful if you could send us another copy of the printed edition of the Members' Publication". A postgraduate of the Cardiff University also e-mailed us: "I would like to congratulate you on your website which has proven very useful to me".

For further information, visit the world leading ship arrest information portal, [**www.shiparrested.com**](http://www.shiparrested.com).

SHIP ARREST IN BELGIUM

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Introduction

Belgium has an impressive tradition in maritime law. The 'Association Belge pour l'unification de Droit Maritime', founded in 1896, is the oldest association in the world in this field and was one of the founders of the C.M.I., Comité Maritime International. International Uniform law such as the Brussels Convention 1924 (Bills of Lading), the York-Antwerp Rules (General Average) and the Brussels Convention 1952 (Ship Arrest) highlight the influence of Belgium on Maritime law.

Belgium, and most specifically the port Antwerp, has a favourable reputation of being a convenient place to arrest ships. The fact that Antwerp is one of the biggest and busiest ports of the world, which is called by more than 16.000 ships a year, amongst them ships of almost all important shipping companies is not the only reason. Not only the applicable international rules and national legislation, but also a refined case law attract claimants from all over the world to enforce their claims or obtain security for them by arresting a ship in Belgium.

The arrest of a ship and the accomplishment of the required formalities are well-organised: a simple and short procedure, an experienced Antwerp Maritime bar, local representation of all P&I Clubs of the world, excellent shipping signalling services and, last but not least, several Judges of Seizure who are at the disposal of the parties at every moment 24 hours a day, 7 days a week for all urgent matters related to the arrest of a ship.

Legislation and nature of the claim

The Brussels Convention 1952 relating to the Arrest of Sea-Going Ships has been ratified in Belgium and incorporated into the Code of Civil Procedure. The national legislation has been adapted accordingly.

A sea-going ship, whatever the flag it is flying, can be arrested in Belgian territorial waters as a security for a maritime claim, as specified in littera a to q of art. 1468 of the Belgian Code on Civil Procedure, which are identical to the littera a to q of art. 1.1 of the Brussels Convention 1952.

It is generally accepted that the claimant only has to present an allegation of right or claim. As soon as the claimant proves that his maritime claim is 'sufficiently probable', i.e.

when the judge accepts 'prima facie' evidence presented to him on an ex parte basis, his request for authorisation to arrest a ship will be granted.

However, a claimant who has a claim which cannot be qualified as a maritime claim shall, in accordance with art. 2 of the Brussels Convention 1952, not be able to obtain an authorisation to arrest a ship.

Object of the arrest

a) The particular ship

The ship, in respect of which the maritime claim arose, can be arrested.

This ship can even be arrested in case the owner of the ship is not the debtor of the maritime claim. The owner of the ship shall, in order to have his ship released from the arrest, have to give security that guarantees the payment of the claim of the arrestor. In other words, the owner of the ship will have to guarantee the payment of the claim, even if a third person (such as the charterer or the issuer of the Bill of Lading) is the debtor towards the arresting party.

In case the ownership of the ship has been transferred to another company, after the claim arose, the ship can be arrested for the maritime claim mentioned under art. 1.1. litt o, p and q of the Brussels Convention 1952 (disputes as to the title or to an ownership of a ship, certain disputes between co-owners of a ship, mortgage or hypothecation of a ship); for other maritime claims case law and academic authority come to different conclusions. At present it seems that the predominant opinion gives no right to arrest a ship after change of ownership for other claims than the ones indicated above.

b) Sisterships

It is possible to arrest another ship, which is owned by the person who, at the time when the maritime claim arose, was the owner of the particular ship in respect of which the maritime claim arose. Ships will be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

If these conditions are not met with, it is not possible to arrest a ship that is owned by another company than the company owning that particular ship. When owners tried to make abuse of this rule by creating 'single ship companies', Belgian Courts, in order to protect the rights of claimants, occasionally authorised the arrest of a ship owned by another company than the debtor of the claim, as soon as it has sufficiently been established that the separate corporate personality is only an artificial screen that does not correspond to reality. Therefore, Belgian Courts can be persuaded to pierce the corporate veil.

Arrest proceedings

a) Authorisation

A request to obtain authorisation to arrest a sea-going ship has to be presented (*ex parte*) before the Judge of Seizures of the Court of First Instance which has jurisdiction for the port of call. It is a unilateral request, and the Judge of Seizures immediately grants (or rejects) authorisation. The request can be submitted at any moment of the day, even out of office hours and during the weekend or holidays.

The Belgian Code on Civil Procedure gives the Judge the possibility to declare that the arrest will only be valid if after a short period of time (e.g. 48 hours) a so-called 'counter guarantee' has been put up, to protect the shipowner against wrongful arrest. For more than fifteen years, no Belgian judgement granting authorisation under the condition of a countersecurity has been reported. In the 19 seventies and eighties, the judges systematically imposed such counterguarantee, but this practice was abandoned.

The judgement granting authorisation to arrest a ship is to be served by a Court Bailiff to the Captain of the ship and to the port authorities. The ships documents will be taken into custody. A ship may try to escape when it is arrested on the river Scheldt. But the bailiff can bring the ship to a stop with the help of police forces. A ship under arrest will not obtain the services of a pilot. More specifically in the port of Antwerp an arrested ship will not be able to leave the port since also the lockkeepers are informed.

b) Documents

In practice, no complete file of documents of evidence on the merits of the claim is needed to obtain an authorisation to arrest a ship. A claimant, requesting authorisation, only has to make his allegation of the existence of the maritime claim reasonably certain. Given the fact that at the time of the request the claim often just arose, the Judges of Seizure do grant authorisations for claims only scarcely documented.

It is advisable – but therefore not always necessary - to have a copy of the Bill of Lading, an invoice, a (general) protest and/or an interim report of a surveyor available.

It is not necessary to submit original documents, and the lawyer submitting the request represents the client without needing to present power of attorney.

In case the debtor or the shipowner opposes the authorisation to arrest in summary proceedings, it is highly recommend to have as much documentary evidence as possible to prove the alleged maritime claim.

Release from Arrest

The owner of a ship may demand immediate release of the ship upon issuing an acceptable Bank or P&I Club Letter of Guarantee, covering the amount of the claim plus 30% as a retainer for costs and interests.

The formalities to lift the arrest are minimal, and can be fulfilled within the hour.

The owner of a ship may also request for the withdrawal of the judgement, granting authorisation to arrest the ship. This request has to be filed before the same Judge of Seizure who granted the authorisation. This request is heard on a contradictory basis in summary proceedings.

Since the judges grant rather easily the request for arrest, they will be very severe against the arrestor if it appears during contradictory summary proceeding that the arrestor has obtained leave for arrest by misleading them.

Time bar

a) The arrest is valid during three years. The arrest can be renewed for a second period of three years.

b) The arrest of a ship does not impose upon the arrestor the necessity to start legal proceedings on the merits of the case; nor does Belgian law impose Belgian Jurisdiction for the claim on the merits after an arrest in Belgium.

Obviously, since an allegation of a maritime claim has to be shown, it is necessary to start legal proceedings on the merits before the competent court within the time bar limits related to the claim itself. If the claimant fails to do so, the arrestor will obtain the order to immediately lift the arrest or render the guarantee delivered to the arrestor to obtain the lifting of the arrest.

Liability for wrongful arrest

The arrestor bears the risk of arresting the ship. If he loses the contradictory summary proceedings or the case on the merits, his arrest may be considered wrongful and he will have to indemnify all costs and damages caused to the ship, as a result of such wrongful arrest.

Forum Arresti

Art. 7 of the Brussels Arrest Convention 1952 provides that the Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits in certain circumstances. This article has not been incorporated in the Belgian Code on Civil Procedure, but is applicable in Belgium as it is Belgian Private International Law as a result of the ratification of the Brussels Arrest Convention 1952. This implies that the Belgian Commercial Courts will

in principle not refuse jurisdiction.

In practice however, claimants rarely make use of the possibility of 'Arresto fundatur jurisdiction'.

Costs

The court costs and the Court Bailiffs costs and fees to arrest the ship and to lift the arrest afterwards can be estimated at approx. 1.000 to 1.500 Euro. These costs can be claimed against the debtor in the proceedings on the merits as legal proceeding costs.

Lawyer fees are based on an hourly rate, or on a lump sum fee agreed with the client.

SHIP ARREST IN CANADA

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Federal Court of Canada - Jurisdiction

The Federal Court of Canada is the admiralty court in Canada. Except for the Province of British Columbia, the Federal Court of Canada is the only Court which has jurisdiction in rem for arrest of a vessel and for salvage. The maritime jurisdiction is granted principally in section 22(2) of the Federal Court Act.

The Federal Court of Canada has nation-wide admiralty jurisdiction across the entire Country. In practical terms, this means that an action can be commenced at any registry of the Federal Court in any port, and arrest undertaken in any other port in Canada. The Federal Court Registry will fax documents to other registries for the marshal to undertake arrest of the vessel. The principal jurisdiction is contained in section 22(2) of the Federal Court Act as follows:

"S. 22(2)

(a) any claim as to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;

(b) any question arising between co-owners of a ship as to possession, employment or earnings of a ship;

(c) any claim in respect of a mortgage or hypothecation of, or charge on a ship or any part interest therein or any change in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

(d) any claim for damage sustained by, or for loss or a ship including, without restricting the generality of the foregoing damage to or loss of the cargo or equipment of or any property in or on being loaded on or off a ship;

(e) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

(f) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the

wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or the master or crew thereof for of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in embarkation, carriage or disembarkation or persons on, in or from the ship;

(g) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

(h) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

(i) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if such aircraft were a ship;

(j) any claim for towage in respect of a ship or of an aircraft while such aircraft is waterborne;

(k) any claim for pilotage in respect of a ship or of an aircraft while such aircraft is waterborne;

(l) any claim in respect of goods, materials or services wherever supplied to a ship for her operation or maintenance including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(m) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

(n) any claim by a master, officer or member of the crew or a ship for wages, money, property or other remuneration or benefits arising out of his employment;

(o) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements or by a shipper in respect of advances, made on account of a ship;

(p) any claim in respect of general average contribution;

(q) any claim arising out of or in connection with a contract of marine

insurance; and

(r) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith."

Sistership Arrest

Section 43(8) of the Federal Court Act was added to allow sistership arrest of vessels that are beneficially owned by the

person who was the owner of the ship that is the subject of the action. Section 43(8) states:

"43(8) The jurisdiction conferred on the Court by Section 22 may be exercised in rem against any ship that, at the time the action is brought, is beneficially owned by the person who was the owner of the ship that is the subject of the action."

Disbursement Cost

The disbursement cost of commencing a Federal Court action is CDN\$150.00 (US\$100.00). Marshall's fees, depending on the location of the vessel, are in the range of CDN\$500.00~ 800.00.

Procedure

Procedure for arrest is simple and straight forward. Arrest requires three documents:

1. A Federal Court Statement of Claim to commence the action. This document is rarely more than three or four pages in length.
2. An Affidavit to Lead Warrant, which can be sworn by the solicitor upon information and belief.
3. A Warrant for Arrest issued by the Court to the Marshall.

Power of Attorney

There is no requirement for a Power of Attorney to be provided for commencing arrest procedures.

Counter-security

In Canada, there is no requirement for the provision of counter-security by a party arresting a vessel.

Person in Possession

There is no requirement to put a person in the possession of a vessel at the time of making an arrest.

ARREST OF VESSELS IN CHILE

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Introduction

Arrest of ships is dealt with in Book III of the Chilean Commercial Code on Navigation and Maritime Commerce, which was entirely replaced by the Act No. 18.680 of 1988. The new Book III updated maritime law and incorporated various international conventions, including the so-called Hamburg Rules.

The former Book III did not contain any Arrest of Ships provisions, although the Code of Civil Procedure general precautionary remedies –a tool that is available for any civil or commercial creditor– were used to secure the prospective results of a maritime action, namely, the retention of the assets of the defendant.

After the 1988 amendments, Book III of the Commercial Code regulates maritime liens and arrest of ships on the basis of the revision both to the 1926 and 1967 Maritime Liens and Mortgages Convention, and the 1952 International Convention Relating to the Arrest of Sea Going Ships, as carried out by the Committee Maritime International in Lisbon, Portugal, in 1985.

Requirements to arrest a ship

JURISDICTION TO ARREST A SHIP

The arrest shall be requested to the Civil Court with venue where the vessel lies, or to the Civil Court with jurisdiction on the merits. An arbitrator (whether appointed by the parties or by a Civil Court) is entitled to issue a decree of arrest in respect of the claim subject matter of the litigation before him.

The objective of the arrest is to secure the exercise of the maritime privilege upon a vessel or to enforce a judicial decision that might result into an order of her auction. The arrest is a precautionary procedure aimed to retain the vessel to secure the payment of a prima facie maritime privilege; it is not a trial to discuss the maritime privilege on its merits. Hence, the arrest may be initiated (1) before, (2) together or (3) after the trial of the merits.

(a) In the event of a pre-trial arrest, once the vessel is arrested, the petitioner has 10 extendable days to inchoate the

proceeding in order to discuss the claim on its merits, by filing the lawsuit before the court / arbitrator with jurisdiction to hear it or by initiating the judicial proceeding in order to appoint the arbitrator. The latter is quite frequent, as the general rule in Chile is that Maritime Law disputes (including marine insurance) are subject to arbitration. If the parties fail to agree on the arbitrator, the competent court shall make the appointment. In this case, the duty to initiate litigation after the arrest will be discharged by filing a petition to the Court for the appointment of the arbitrator.

It is possible to arrest a ship and file thereafter the lawsuit in a court/arbitration located in a foreign jurisdiction, provided that the 10 extendable day's time limit is complied with. In Chile, the only requirement for an arrest to be granted is that the credit to secure is a maritime privilege in accordance to our Law. In fact, Chilean law clearly states that the goal of the arrest is to secure the exercise of the maritime privilege upon a vessel or to enforce a judicial decision that might result into an order of her auction, but is not required to litigate on the merits in Chile.

There are some cases where the arrest of a ship will vest jurisdiction on the merits to the court that issued the decree of arrest –the so-called forum arresti. It takes place in the carriage of goods by sea under bills of lading and in the salvage claims. In such cases, the court that has issued the order of arrest of the carrying vessel, or a sister ship, or the salvaged vessel, will be competent to hear the respective claims on the merits.

(b) Once the trial on the merits has begun, the arbitrator or court hearing the case is the only one who may order an arrest. If the trial shall be submitted to arbitration, the civil court with venue will be entitled to arrest a ship until the arbitration tribunal is appointed and installed.

(c) In accordance to Chilean rules of civil procedure, a court or arbitrator who has issued a judgement is entitled to order the arrest of the subject matter vessel, as a way to secure the enforcement of the judgement. It is also possible that the auction proceedings may be initiated before a different court that, under the general rules, has jurisdiction to carry out the auction proceedings. Such a court is also competent to order an arrest. Such would be the case of a judgement rendered by an arbitrator, who has power to order an arrest or another precautionary injunction, but has not faculties to pursue the auction proceedings, in which coercion is inherent and is regarded as proper of a public authority.

Foreign judgements, stemming both from courts or arbitrators, may be enforced in Chile through an exequatur proceeding, whereby the Supreme Courts, after checking the

accomplishment of certain formal requirements, authorizes its execution. If the foreign judgement which order the arrest is not a final judgement, the local court in charge of its enforcement will have the power to arrest the subject matter ship only when it entails a maritime privilege.

THE PRIVILEGED MARITIME CREDIT

The arrest of a vessel is the procedure to enforce a privileged maritime credit, which is the Continental Law version of a Maritime Lien. However, it should be noted that the privilege is extinguished after a brief period (normally 90 days) following the sale of the vessel. The privilege is a legal benefit which entitles a creditor to pursue the vessel/watercraft (the so called "droit de poursuite"), to arrest it, to make it to be sold through a judicial auction and to collect its credit in the respective order where his privilege ranks.

Chilean privileges attach the credit as an accessory. Hence, if the credit is assigned or extinguished, the privilege will, respectively, benefit the new creditor or will be terminated. The only exception to this rule is the judicial and non-judicial sale of the ship: both will extinguish the privilege without, necessarily, extinguish the credit too. Privileges are also extinguished after a year of their inception. Privileges are not subject to the Public Registration System, as opposite to the maritime mortgage, which shall be registered to have legal effect.

The privileged credits are gathered in two groups enumerated and ranked in articles 844 and 846. Article 844 rank the credits as follows:

- 1 - Judicial costs and disbursements incurred for the common benefit of the creditors for the conservation of the vessel or its auction;
- 2 - Wages and other benefits related to the labor contracts for the crewmen, including death and personal injuries indemnities that have arose out of accidents connected to the vessel exploitation;
- 3 - Ports, pilotage, waterways and signal duties;
- 4 - General average contributions, salvage rewards and disbursements/losses incurred to prevent/minimize the damages caused by pollution in the event that the special limitation fund established in the Navigation Act has not been constituted after the casualty, and
- 5 - Indemnities for losses or damages caused to other vessels, port premises, berths, waterways, cargo or baggage as a result of collisions and other accidents in the navigation, when the respective action is based on tort grounds, and the personal injuries inferred to the passengers and crewmen of those other vessels.

Privileges and rankings established in article 846 privileges

are as follows:

- 1 - Credits for the prices of sale, building, repair and outfitting of the vessel;
- 2 - Credits for the supply of products or materials necessary for the vessel exploitation or conservation;
- 3 - Credit arisen out of the contracts of passage, charter and carriage of goods, including indemnities for damages, shortages and losses in the cargo and baggage, and the credits for damages caused by pollution or spillage of hydrocarbon or other damaging substances;
- 4 - Credits for master, agents or other third parties' disbursements, performed on behalf of the owner for the exploitation of the vessel, including agents services, and
- 5 - Credit for hull or liability insurance premiums in respect of the vessel.

In between both classes of privileges, there are credits secured with maritime mortgages and pledges, which rank below the article 844 and above the article 846 privileges.

The privileges may be enforced upon the vessel/watercraft (including either while on construction, but only after it is afloat), the freights, charter hires and passages uncollected, that have been arisen in the voyage when the privilege was born. Privileges can also be exercised upon the payment to be received from the vessel's insurer. Article 844 privileges may furthermore be exercised upon indemnities owed to the vessel, including freights, general average contributions and salvage rewards, but only if they have been originated in the same voyage.

Procedure for arrest

After checking that it has jurisdiction to arrest, the requested court or arbitrator shall issue the decree of arrest if the plaintiff submits prima facie evidence of the existence of a privilege. In the absence of such evidence, the court shall require the petitioner to present a bond to cover the potential damages in case that the arrest is deemed to be entirely groundless or wrongful.

Once the Court has granted the arrest, the decree shall be notified to the Port Authority who shall enforce it by denying the dispatch of the vessel, even if she is ready to sail. If the vessel is outside the venue of the court that ordered the arrest, the decree shall be conveyed to the Headquarters of the Maritime Authority, which are located in the Port of Valparaiso. Communication by fax, telex or another expedite mean is permitted in urgent cases.

The vessel may be arrested in the port where she is anchored, moored or the port she has called ahead. If the Court has jurisdiction on the merits, the arrest may be ordered for any other port/place where the vessel arrives.

It is not required to serve the petition and the order of arrest upon the defendant, unless the arrest is ordered during a trial, in which case the decree of arrest shall be served on him within 10 extendable days after its issuance. If this is not complied with the arrest shall terminate.

If the arrest is requested before the trial begins, the higher standards of the evidence as to the existence of the privilege and other formalities are required. If the Court is not satisfied with the evidence, it may order the petitioner to provide a bond as a condition to issue an order of arrest.

The right to a due process of law is protected, as the owner, charterer, operator, manager and/or any other party who may have the capacity as the future defendant in the trial, may assume the following reactions after the arrest:

(a).- Present an appropriate guarantee in order release the vessel. The Court shall resolve any dispute relating to the kind and amount of the guarantees.

Such security will replace the vessel until the trial has terminated. If the court rules for the plaintiff, the judgement may be enforced on that guarantee, which will be deemed as the subject matter of the privilege.

(b).- Discuss the legality of the arrest, based on any grounds, including the lack of jurisdiction or venue of the court, the absence of a maritime privilege entitling to arrest, the insufficiency of the evidence presented as to the existence or amount of the credit, etc.

As stated before, the discussion on the merits shall be postponed for the trial, as the arrest is a precautionary procedure aimed to obtain security of the enforcement of a future judgement.

(c).- Discuss the kind or the amount of the guarantee requested by the petitioner. The arresting court or arbitrator has full jurisdiction to rule on this issue.

Arrest of sister ships and vessels under the same management and/or operation

Article 1234 of the Code of Commerce establishes the right to seek the arrest the involved ship (i.e., the vessel in which connection the maritime privilege arose), or any other vessel pertaining to the same ownership, or which is under the same administration, or is operated by the same person.

This sister ship provision was inspired in Article 3 (2) of the revised project for the International Convention of Arrest of Ships (the 1985 Lisbon Revision), that was then reproduced in Article 3 (2) of the 1997 Draft of the International Convention of Arrest of Ships (The 1997 draft), and finally became Article 3 (2) of the 1999 Arrest of Ships Convention.

As written, the provision encompasses three situations: the

vessels that are owned by the same person; the vessels that are being administrated by the same person and the vessels that are being operated by the same person.

(a).- Vessels under the same ownership. This first situation deals with the so-called sister ship arrest, i.e., a vessel that belongs to the same owner of the involved vessel. This is the genuine sister ship arrest, where two or more vessels belong and are owned by the same person. When the vessel is registered in Chile, it can be evidenced by a copy of the vessel's register, as the person on whose name the vessel is registered is presumed to be the owner. Furthermore, pursuant to article 12 of the Chilean Navigation Act, to register a vessel, the solicitor has to show evidence of its ownership. Chilean maritime register system is strict as to condition the registration of a vessel and the use of our national flag to her ownership by a Chilean individual or company. Therefore, the Law is designed to prevent that vessels are to be registered on the name of other persons than her legal owner.

If the vessel is registered overseas, ownership may be evidenced by a copy of the registration, although it may be also proved by other means, e.g. copy of a register of ships published by a classification society, a charter party, a hull insurance policy, etc. A bill of lading will be prima facie evidence of ownership, shifting to the opposing party the burden of rebutting it.

(b).- Vessels under the same administration. In this second case, the connecting criterion to arrest a second vessel is the "common administration link". To administrate or manage, derives from the Latin word *administrare*, made of the reunion of *ad* (to) and *ministrare* (to serve), meaning "to serve to". The "common administration" provision -also referred to in collision and salvage Chilean provisions when there is a collision or salvage services between two or more vessels under the same administration-, would cover any situation where two or more vessels are being used or exploited by a same individual or corporation, whichever might be the title or link that allows to make business with the ship, e.g., ownership, a charter party, (with or without demise), a sub-charter, a tonnage agreement, a slot charter and other contractual forms that would imply a transfer in the vessel exploitation. To determine if there is a "common administration" the decision maker will examine in detail if there are typical acts and contracts of vessel management, such as booking space for cargo, issuing bills of lading, contracting crew, appointing agents, offering towage or salvage services, etc.

(c).- Vessels under the same operation. The operator has been defined in the Book III. Article 882, paragraph 3 provides: "Operator is the person who, without owning a vessel, acting as an agent of her owner, executes at its own

name or on behalf its principal the carriage of goods by sea contract or other contracts necessary for the vessel exploitation, bearing the respective liabilities”.

Despite the fact that the word operator was present in our law before its definition was passed, its drafters dealt in several occasions with this issue before arriving to the current definition. During the deliberations, it was stated, for the record, that the operator may not only carry out contracts for the commercial exploitation of the vessel, like charter parties and contracts of carriage of goods by sea, but he may also be in charge of her navigation and management. In other words, an operator may perform all the functions of an owner and therefore it would be proper to say he administers the vessel too.

It seems that the only difference between the operator and the administrator is that the relationship between the former and the owner is restricted by article 882 to an agency contract. Instead, in the latter there may be a charter, a lease, a sub-charter, a loan, etc.

The operator is also present in the single ships companies scheme, as the person who is in charge to manage/exploit a fleet integrated by vessels, which belong to different companies. In this basic scheme it may happen that one “mother” Shareholding Company owns the fronting Management/operating Company and each of the single ship companies, which has the real financial and strategic control of the fleet.

In the situations referred to above, there is no requirement that the owner of the vessel under the same administration or operation be the debtor of the privileged credit.

The ship yard right to withhold a ship

A shipbuilding or repairing yard is entitled to withhold the vessel under construction or repair in order to secure the corresponding payment.

Retention of the ship shall be granted by a civil court, in a proceeding subject to the arrest of ship's rules, with the difference that the retained vessel will remain under the custody of the Yard, without prejudice to the duties and responsibilities of its captain.

Although the retention does not give rise to a possessory lien, it will rank above any hypotheca, mortgage or encumbrance subsequent to its the register in the Mortgages and Encumbrances Register of the Maritime Authority.

Effects of the arrest

Once it is arrested, the ship is not allowed to break ground and therefore will receive no clearance from the Port Authority to sail. It is bound to remain anchored or in the

place designated by the Port Authority, although the vessel remains under the custody of her captain and to the owners risk. If the captain sails, his license shall be cancelled as a sanction, and if the vessel has a foreign flag, the owner shall be fined. Costs of seizing the arrested ship, increased by 50%, shall be borne by the owner.

An arrested ship is not subject to transfer in her ownership. Such a transfer shall be considered as null and void.

Finally, the petitioner may become responsible for the damages caused by an entirely groundless or wrongful arrest. This liability would be governed by tort rules, unless there exists a previous contract between the petitioner and the owner, manager or operator of the vessel who has sustained the damage.

The claim for wrongful arrest, including the existence of damages, the causal relationship and the alleged lack of any ground to arrest the vessel is a matter to be litigated in a different trial.

ARREST OF VESSELS IN DENMARK

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I. Introduction

The rules about arrest should partly be found in the Danish Merchant Shipping Act (DMSA) partly in the Danish Administration of Justice Act. (DAJA)

Arrest according to the DMSA should be understood so that "the present vessel is retained". By this act you prevent that the vessel proceeds to another port and the vessel may thus be kept where it is, which typically is the place chosen by the applicant (i.e. the creditor filing petition about arrest).

The legal effects of an arrest according to the DAJA is that the debtor is prevented from disposing of the arrested asset in defiance with the right of the creditor who has attached the debtor's property. By this the vessel is not retained, which is why arrest according to the DAJA rarely is of interest. However it should be noticed that the DAJA allows arrest of cargo, freight, containers or bunkers.

Further the DAJA may be used even though it is not a maritime claim which is dealt with - in return there are some supplementary conditions which must be fulfilled, cf. below.

Regarding the practical procedure the DMSA is complementary to the DAJA.

II. Arrest according to the Danish Merchant Shipping Act

The claims which may be used in connection with arrest - and by that detention of the vessel - according to the DMSA, s. 91 are:

Section 91. By maritime claims is understood the claims in this Act, which are due to one or more of the below reasons:

- 1 - damage on assets caused by a vessel due to collision or in another way,
- 2 - damage on a person caused by a vessel or arisen in connection with the operation of the vessel
- 3 - salvage,
- 4 - agreement by charter party or in other ways regarding the use or rental of a vessel,

5 - agreement by charter party or in other ways regarding transport of goods by a vessel,

6 - loss or damage on goods, including luggage transported by a vessel,

7 - common average,

8 - bottomry,

9 - towage,

10 - port, canal, and other waterway fees and piloting,

11 - delivery of goods or equipment to a vessel, no matter the place of delivery, for its use or maintenance,

12 - building and repair of or delivery of equipment for a vessel and costs and fees in connection with going into dock,

13 - berth to shipmasters and other members of the crew,

14 - shipmaster's expenses, including expenses on behalf of the consignors, charterers or agents on the account of the vessel or the owner,

15 - disputes about the title to a vessel,

16 - disputes between joint owners of a vessel regarding the title, possession, use, or income from the vessel, or

17 - maritime lien on the vessel.

Basically a vessel can be arrested if there is a claim.

Regarding the claims listed in point 1-14 other vessels belonging to the owner of the vessel in which there is a claim may also be arrested ("Sister vessels").

According to the Danish law it is however a condition that execution can be levied regarding the claim in the vessel, meaning that it is a condition that the owner of the vessel is liable for the claim in question or that security exists in the vessel.

(S. 93,4: No matter the provisions in subsection 1 and 2 a vessel is not subject to arrested, if execution may not be levied regarding the claim.

This is opposite to what applies in many other countries, as the arrest convention, which also is the basis for the DMSA, makes it possible to arrest a vessel in question no matter who owns the vessel.

However it is possible - with reference to the listed claims in point 1-14 - eventually to arrest another vessel owned by the one who is liable for the claim.

A number of maritime claims are thus subject to status of maritime lien and thus have priority over other charges in the vessel, which are

§ 51. The following claims are secured by maritime lien in a vessel:

- 1 - wages and other compensation for the ship's master and others,

2 - members of the crew in connection with their duty on board,

3 - port, canal, and other by water fees and pilot fees,

4 - compensation for damages on persons arisen in direct connection with the operation of the vessel,

5 - compensation for damages on property arisen in direct connection with the operation of the vessel, if the claim cannot be based on agreement.

Salvage, compensation for removal of wreck, and contribution to common loss.

As disbursements however cannot be levied based on maritime lien alone, and as precisely arrest breaks the 1-year period of limitation which is valid in connection with the maritime lien, it is also regarding these claims relevant to arrest and thus retain the vessel until one has the necessary basis (typically a judgement) to levy execution of the vessel in order to carry through a forced sale, cf. below.

III. Arrest according to the Danish Administration of Justice Act

Arrest according to the DAJA can be levied as security for all money claims.

It is a condition that executions cannot be made for the claim (if so, one has to do it at once in stead).

Further a special reason for arrest must be present, i.e. there must be actual circumstances indicating it to be obvious that the possibility to achieve cover is considerably reduced if the vessel is not arrested. (It might be that a debtor is on his way out of the country with all his assets).

The applicant must be able to verify that such reason for arrest exists.

In return no further documentation is asked that the claim exists, as arrest is excluded if the claim presumably does not exist. (The applicant however of course risks a liability to pay damages if it later shows that the claim did not exist).

IV. Procedure

The competent authority is the Sheriff's Court to which a written motion about arrest is submitted.

The motion must contain information about the correct circumstances claimed, and about the information which is necessary for the further handling of the case. The motion also must be accompanied by the claimed documents.

Relevant information specifically is information about the parties of the case, identification of the vessel with a transcript from the register of ships and some documentation for the claim such as invoices.

As the motion must be submitted to the Sheriff's Court in the

judicial district where the vessel is present it is also essential to know where the vessel actually is, or where and when it is expected to arrive.

If we are dealing with an arrest according to the DAJA the actual circumstances justifying the arrest also must be mentioned. The Sheriff's Court can - and typically will - claim that security is provided "for damage and inconvenience inflicted on the debtor upon arrest" and the vessel will not be arrested until security is provided.

The security typically is provided as a bank guarantee. Regarding arrest according to the DMSA there as a starting point cannot be claimed a larger security than an amount equal to 5 days loss of wage for the vessel.

Normally the debtor will be summoned to arrest proceedings which typically takes place on board the vessel.

If the Sheriff's Court find that the conditions for arresting the vessel is fulfilled the Sheriff's Court makes an order this regarding, and when the vessel has been arrested according to the DMSA the necessary precautions are made in order that the vessel does not leave the port.

If the debtor is not present on board the vessel, the Sheriff later will arrange that the debtor is informed about the arrest.

Arrest can be made for an amount which further than covering the claim, which is arrested for also includes evaluated costs in connection with the later confirmatory action and execution and interest until the time at which execution is expected to be carried through.

Arrest may be stayed if the debtor provides security for claim, interest and costs. The Sheriff's Court decides if the provided security is satisfactory. In the same way the debtor later is able to provide security and claim the arrest nullified.

V. Follow-up of the arrest

An arrest only is a preliminary remedy and accordingly it must be followed up by a confirmatory action during which partly must be clarified if the claim exists, partly if the arrest is legally performed and pursued.

If the arrest is legal always must be decided according to Danish law and by a Danish Court, whereas the question about the claim eventually may be decided elsewhere and according to foreign law.

If venue is not decided to be anywhere else, the quasi-in-rem jurisdiction automatically is Denmark.

The confirmatory action must be submitted even though arrest is prevented by security unless the debtor declines.

If there is not obtained an amicable agreement with the debtor and the forced sale thus must be carried through in order to obtain payment in full regarding the claim via the

realisation value of the vessel, the arrest must be followed up by an execution.

It is important to be aware that the time limit for filing the following legal action is 8 days counting from the day of the arrest.

VI. Sale/forced sale

Forced sale is carried through by the Sheriff's Court.

It is however the applicant/his attorney who draws up the conditions for sale etc.

Claims are satisfied in this order:

- forced sale costs
- claims awarded maritime lien, cf. s. 51 - the priority between the parties as a starting point

Claims subject to maritime lien, cf. s. 51

The priority between the parties basically is decided by the ruling of s. 51, s.s. 1, cf. above, however so to understand that regarding the in s.s. 5 mentioned claims prevail over previously accrued rights.

- registered mortgages (cf. below regarding securities in foreign vessels)
- other rights over the vessel

After the forced sale the rights over the vessel terminate, including maritime lien and other secured rights which cannot be fulfilled through forced sale.

Securities in a foreign vessel is acknowledged, cf. DMSA s. 74, which is valid in this country if

- 1 - the pledge is accrued and registered in compliance with the statute of the country in which the vessel is registered,
- 2 - the register and the documents to be kept are available to the public and transcripts from the register and copies of the documents mentioned can be provided from the register
- 3 - the register or the documents mentioned contain the below information
 - a) the name and address of the pledgee or if the pledge has been issued for bearer,
 - b) the size of the amount which the pledge secures, and
 - c) date and other conditions which according to the legislation of the registration country are decisive for the priority of the pledge compared to other registered pledges.

VII. Compensation

If it later shows that the claim, for which arrest has been made, does not exist the arresting party must pay compensation for damage and injury. This also applies when the

arrest is extinguished or abolished due to subsequent circumstances if it must be assumed that the claim actually did not exist.

If arrest is made for a large amount compensation for eventual loss also must be paid.

If the arrest is illegal of other reasons, the creditor must pay compensation for loss and injury if he should have avoided arresting the vessel.

That the arrest has been avoided providing security does not keep the creditor from his liability to pay damages if the conditions are not present.

VIII. Costs

A court fee must be paid as well by calling for the arrest, as by submitting the writ of summons in the confirmatory action, as by submitting the request for execution and as by submitting of the request for forced sale.

As per now (November 2002) the fees are as follows:

Request for arrest

A basic fee of DKK 300 (about USD 40) must be paid and if the claim exceeds DKK 3,000 further 0.5% of the amount exceeding DKK 3,000 must be paid.

If the enforcement proceedings - which typically is the case - does not take place at the Sheriff's Office an extra fee of DKK 400 must be paid.

Writ of summons

If the case only deals with affirmation of the arrest a fee of DKK 500 must be paid.

If the case further deals with the claim DKK 500 must be paid and if the claim exceeds DKK 6,000 further 1% of the exceeding amount must be paid.

Execution

As by arrest: basic fee of DKK 300 plus an addition equal to 0.5% of the amount exceeding DKK 3,000 and an eventual addition for dealing with the enforcement proceedings outside the Sheriff's Office.

Request for forced sale

Submitting the request for forced sale DKK 800 must be paid.

By carry through the forced sale further 0.5% of the auction bid plus auction costs must be paid. The final costs are paid by the buyer.

Further one has to add the expenses for a lawyer - typically between USD 200-250 per hour and eventual costs in connection with providing information, transport etc.

Specifically regarding the request for forced sale a number of costs, i.a. for advertising, working out the conditions for the auction, particular of sales, conveyance etc.

Regarding the auction costs it is essential to notice that if complete coverage is not achieved reduction may take place by reducing the applicant fee. If this is not possible to sell the vessel, the applicant must pay all costs himself.

Generally it is a fact that the cost in a certain amount must be paid by the debtor, but at first they are paid by the applicant.

IX. Conclusion

Arresting the vessel in itself is a fairly simple procedure.

However it requires a certain time to prepare the case and specifically it takes time to provide security, which is why it is essential to react quickly once you know that the vessel is on its way to port.

If arrest is not enough to solve the situation with the debtor you however have to be prepared that there is a pretty long way to go with a lot of costs ahead before the vessel can be sold on a forced sale.

ARREST OF VESSELS IN EGYPT

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The applicable law:

A ship arrest in Egypt might be applied for under two different legal regimes;

- the 1952 Brussel's Convention on unification of certain rules on arrests of sea-going vessels, which has to be interpreted in connection with the Egyptian maritime law no 8/1990 Articles (59-66).
- the party pursuing arrest needs only to allege one of the credits listed under article 1 of the said Convention,

Procedure and documents:

An application must be made to the relevant court requesting the arrest of the vessel and showing, the evidence that the debt is due and that such debt is a "maritime debt" (see Article 1 of the said Convention) has not been paid together with the following documents:

- a - A notarized and legalized Power of Attorney ("POA"), including subsequent consularisation from the Egyptian Embassy where the POA originated, is required if it was signed in a foreign jurisdiction. Such POA may be granted in favor of one or more local advocates.
- b - All the relevant documents proving the debt together with an Arabic translation of each document by an authorized legal translator.
- c - Evidence of the fact that the vessel is a sister vessel to that upon which the debt arose if an arrest is requested against a sister vessel.
- d - Payment of the appropriate court fees.

The arrest application supported by the relevant documents will then be put before the duty judge on the day in question, who will award or refuse an order for the arrest of the vessel.

Normally the arrest of the vessel will be granted or refused in maximum 3 days and can be enforced on the vessel on the same day the order was awarded.

Normally, in ALL Egyptian ports, a court bailiff from the court will serve notice for arrest on the Port Authority, to the Marine Police, and to the marine inspection advising them of the order to arrest the vessel and detain the vessel from leaving the port.

Counter Security:

There is no Counter security required From the plaintiff whether the plaintiff is an Egyptian or foreigner.

Arrest a sister ship:

The fact that the plaintiff may arrest a sister ship owned by the ship owner who has incurred the debt, provided that the two ships were owned by the same party at the time when the debt arose.

The plaintiff, however, is often requested by the Egyptian Courts to prove that both ships are owned by the same entity to obtain a order for arrest. A confirmation from Lloyds Register of Shipping is generally considered accepted evidence for this purpose.

If the ship was under a demise charter, the plaintiff may arrest the same ship operated by the charterer or any other ship owned by the charterer(Article 62 of the Egyptian Maritime Code). However, evidence of such link must be filed in court at the time of the arrest application.

Release procedure

It is advisable on most occasions that the owner of a vessel prepare a bank guarantee, (p&I clup letter of undertaking unacceptable) security to the court to guarantee the claim in order to secure the immediate release of the vessel (see Article 63 of the Egyptian Maritime Code).

Costs of arrest

A/The court fee: to issue a writ around us \$ 30 and no bailiff s fee for serving the writ on bord: - the plaintiff to pay transportation and launch hire.

- No expenses for maintaining the ship under arrest

B/ Normally, the court will not make any order or request security for the port charges or the crew wages. Such charges will accumulate against the vessel and the owner will be liable for the same during the time period of the arrest and the main action proceedings.

The port authority and the crew may then, in priority to other creditors under Articles 29 (b) and (c) of the Egyptian Maritime Code,

C/ Lawyers Fees will depend on numerous factors for example time spent, complexity of the case documents to perused and so on. Estimates can usually be given to lawyers for specific cases.

ARREST OF SHIPS IN GREECE

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General

The Greek legal system provides basically for two types of seizure of the assets of a debtor, serving two different purposes, i.e. the provisional seizure, aiming to secure/safeguard a claim (saisie-conservatoire) and the executory seizure, being one of the initial stages of the procedure for the enforcement of a title, leading to the public sale of the seized assets (saisie-execution).

Provisional Seizure

The provisional seizure of the assets of a debtor is listed among the measures provided for by Greek Law as remedies available to any creditor aiming to protect his claim or claims against the debtor. As a general rule, all kinds of assets, including vessels, are subject to such seizure.

For the purposes of the present note the provisional seizure of vessels shall be hereafter referred to as "arrest".

As regards vessels, Greece has ratified the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (10.05.1952) which was implemented in Greece by Legislative Decree 4570/1966(the "Convention").

Legal Regime

Arrest of ships is subject to the regime of the Convention where the latter is applicable i.e. to vessels flying the flag of another contracting State calling at a Greek port and for maritime claims only as the latter are defined by the Convention, otherwise, the general provisions of domestic law shall apply.- In both cases the procedure to follow is identical.

Procedure

An arrest may be ordered by Court judgement only, issued following summary proceedings initiated by the filing of the Claimants' Petition with a competent Court consisting of a single Judge. In circumstances of urgency, ex parte proceedings may be conducted.

Jurisdiction: Competent to decide on an arrest Petition are, concurrently, the Courts having jurisdiction over the Respondents' domicile/seat, the port of Registry of the vessel and the port where the vessel called. Likewise competent is the Court in which the action on the merits is pending and in any event the Court which is the nearest to the place where the arrest shall be effected. The Court of Piraeus (Maritime Section) has jurisdiction to decide on any arrest within the major Athens/Piraeus area.-

Jurisdiction of the above Courts to decide on arrests is not affected by the jurisdiction any other Court or arbitrators may have for the action on the merits.

Requirements: An arrest judgment may be given provided that Petitioners would be able to show to the satisfaction of the Court, a prima facie founded and valid claim against the vessels' owners and the occurrence of a situation of urgency or of imminent danger justifying the necessity for granting the requested arrest.

Nature of claims: Arrest can be sought for claims of any type and nature, be it conditional or subject to time terms, but where the Convention applies, an arrest cannot be ordered for claims other than maritime as defined in Art.1.1 of the Convention.

Petitioners: Any party alleging to have a claim against the owners of a specific vessel may apply for her arrest as Petitioner.

Respondents: Actions in rem against the vessel only are not provided for by greek law. Therefore, the Petition should be filed anyway against her registered owners, even in case the main liability for the claim lies on third parties such as the vessel's operators and possibly other parties having control over the vessel.

Petition: The identity of both Petitioner and Respondents, a full description of the specific vessel, factual allegations sufficient to comply with the aforestated requirements and a request for the vessel's arrest for a specific amount should be set out into the Petition. The amount is usually that of the claim, plus about 30% thereof for future interest and costs.

Interim Restraining Order: As a matter of standard practice the Petition would also contain a request for an Interim Order for the temporary prohibition of the vessel's sailing and/or (for a greek flag vessel) of any change to her legal status, valid until the hearing date and subject to extension, on Petitioner's request, until the issuance of the judgment on the arrest Petition. Such request is examined by the Judge on duty upon the filing of the Petition, following notification to Respondents or to their local representatives. Provided that the above requirements are prima facie met, such Interim Order will be given in accordance with either or both above requests.

Hearing: The Petition will be heard at a date which will be set by the Court upon its filing. Care of Petitioners, the Respondents should be notified accordingly and summoned to appear at the hearing. The hearing is conducted orally and the parties may file Submissions along with supporting documents, translated into greek and examine witnesses.

Judgment: On conclusion of the hearing, the Court in principle would reserve its judgment which will be normally issued in the next two weeks. In the meantime the vessel will remain temporarily arrested by virtue of the Interim Order above.

Enforcement: An Interim Order or an arrest Judgment become effective as from their notification, by way of service of an official copy thereof upon Respondents as well as upon the competent Port Authorities for entry into the appropriate Books kept by them. The main effect of the enforcement is the prevention of the vessel's sailing. Furthermore and to the extent greek law would apply, any disposal of the arrested vessel is forbidden and if effected in breach of such prohibition, will be nul and void towards the arrestor and for the amount for which the arrest was ordered; disposal is likewise nul and void towards third parties as well, if effected after the entry of the arrest Order or Judgment into the Arrest Book of the Port of the ship's Registry.

As regards Greek flag vessels their arrest can be sought and ordered even if they are not physically present within the jurisdiction of the Court with which the Petition is filed. The respective arrest judgment, being served as aforementioned, will cause the legal prohibition of any disposal of the vessel; the vessel's physical arrest may be then effected at any time within the jurisdiction of any Greek Court by virtue of the same judgment.

Furthermore and insofar as Greek law is applicable, in case the ownership of the vessel has been transferred by the original debtor, arrest of the same vessel may be sought and possibly ordered against her new owner.

Provisional Validity: An arrest effected as aforestated is provisionally valid i.e. until a final judgment on the merits is issued against the arrestor or a like judgment, issued in the arrestor's favour, has been enforced.

Action on the Merits

Unless an action on the merits of the claim has been already brought, the arresting party should bring such action in the competent Court within such time as ordered by the Court, otherwise within 30 days from the service of the arrest judgment on Respondents, failing which the arrest is lifted ipso jure.

Jurisdiction of a Greek Court to decide on the subject merits is not created by the arrest itself. However and unless otherwise provided for by international conventions ratified by Greece, the presence of a vessel within the jurisdiction of a Greek Court, not competent in principle to decide on the merits, would create jurisdiction of this Court to so decide (*forum rei sitae*), for as long as the vessel is still within its jurisdiction. The jurisdiction so founded may, however, be affected by certain jurisdiction clauses or arbitration agreements.

Counter Security

The Court has the power to order Petitioners to provide counter security by way of Bank guarantee; however in practice such counter security is rarely ordered, although frequently demanded by Respondents.

Release from Arrest

Release would be obtained at any time provided that Respondents have deposited with the Court a guarantee of a First Class Bank in Greece in favour of the arresting party and for such amount as fixed by the Court. Guarantee in any other form such as P&I letters of undertaking is not accepted; however if the parties agreed to such other form they may cause the vessel's release following the procedure for the vacation of the arrest judgment.

Vacation of the arrest judgment by virtue of a Court Order would entail the release from the arrest. Such vacation is mandatory when a final judgment on the merits has been issued against the arrestor or a like judgment, issued in the arrestor's favour, has been enforced. Vacation will be likewise ordered if an agreement for the settlement of the claim has been reached, as well as when 30 days from the termination of the proceedings on the merits have lapsed. Furthermore, vacation may be also sought and ordered when a change in the circumstances, justifying such vacation, has intervened.

Wrongful Arrest

Following substantive proceedings against an arresting party, the latter may be held liable for damages resulting from an arrest or a guarantee lodged, only if Claimants would be able to prove to the satisfaction of the Court that the arresting party knew, or by gross negligence ignored, that its claim secured as above, did not exist. Furthermore such liability is conditional to a final and irrevocable judgment whereby the action of the arresting party on the merits of its claim is dismissed for it being unfounded.- In view of such requirements it is not an easy task for Claimants to

succeed in his action for damages caused by a wrongful arrest.

Costs

Court and related costs are in the region of Euro 150-200 including Bailiff's charges for the required notifications.

The respective lawyer's charges depend much on the urgency factor, the complexity of the issues involved, the work done and the time spent in initiating and conducting the arrest proceedings.

Also an arresting party may be summoned by the Port Authorities to appoint watchman (custodians) on board the arrested vessel, in which case this party would have to bear the respective costs which are quite substantial.

WHY IT IS EASY TO ARREST SHIPS IN HONG KONG

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Hong Kong law is very similar (but not identical) to English law upon which it is closely modeled.

A ship, or one of her sister ships, may be arrested where:

- i. Claimant's cause of action carries with it a right of arrest; and
- ii. An in rem writ has been issued; and
- iii. The ship, or one of her sister ships, is available in Hong Kong; and
- iv. No caveat against arrest has been entered.

The claimant's solicitor will apply to issue a warrant of arrest, supported by an affidavit 'to lead warrant'.

The warrant once issued is filed with the bailiff, together with request to execute the warrant and an undertaking to pay the costs of arrest.

The affidavit consists of a written statement of facts and information and belief, with the sources and grounds thereof and made under oath. It constitutes the only evidential requirement for arrest.

There are no specific requirements in the form of claim documents, apart from such minimum copy documents to be exhibited to the affidavit to establish a prima facie right to arrest. The affidavit must state certain specified details such as the nature of the claim, details of the parties and the ship.

The purpose of an action in rem is to obtain **security** in respect of a judgment of the court in that action and the court should not exercise its **jurisdiction** to arrest ships or to keep ships under arrest for other purposes. However, it is possible to invoke the exercise of the court jurisdiction to secure claims in arbitration where the law of the place go-

verning the arbitration permits this.

Arrest purely to force the party on the receiving end to agree a foreign **jurisdiction** is ultra vires, or outside, the purpose of an action in rem.

Additionally, where a plaintiff has already commenced action in a foreign jurisdiction for the claim, any duplicate action in rem commenced locally will be considered vexatious and be liable to be set aside.

The court will not insist on hearing an entire action commenced by the issuance of a writ followed by an arrest. It remains open to the parties to agree an alternative jurisdiction (indeed this frequently does happen in cases of collisions in international waters).

Normally an agreed form of contractual **security** (usually a P&I Club letter of undertaking) is provided without the need for application to court. Alternatively, a bail bond can be provided to the satisfaction of the court. The adequacy of security in support of a bail bond is a subject of court discretion and the court will usually order bank or corporate sureties or the defendant to pay cash into court in lieu.

No **counter security** is required from a claimant. Where the plaintiff is foreign, the defendant can apply to the court for an order to compel the plaintiff to give security for the defendant's litigation costs, subject to the discretion of the court.

Court fees only amount to about equivalent to US\$300.

Solicitors' fees depend on numerous factors such as the time spent, complexity of the case, documents to be perused. Estimates can usually be given by solicitors for specific cases.

Bailiff's expenses for maintaining the vessel under arrest include watchman's fees, launch hire, provision of crew, victualling, bunkers etc., if required. These can be expected to be around HK\$3,500 per day, depending upon the particular circumstances, including the size of vessel arrested. They are recovered as a high priority claim ahead of maritime lien and mortgage claims.

To **release**, the following need to be filed:

- i. Release together with Praecipe; and
- ii. Solicitor's undertaking to pay bailiff's fee.

It is also a prerequisite that the agreement of the plaintiff and all caveators be obtained. The bailiff then releases the vessel. A release can usually be obtained promptly, subject to the requirements being satisfied (especially, of course, the provision of satisfactory security).

Claim documents will normally need to be in English or Chinese (the official language of the court).

No power of attorney from the claimant is necessary, although written instructions are invariably insisted upon.

Arrest documents can normally be issued within a matter of hours. These may, subject to certain difficulties, be issued and executed on **emergency application** to a duty judge out of normal hours. This can usually be achieved on the basis of the claimant's solicitors undertaking to issue a writ and swear an affidavit in support of the warrant at the first available opportunity when the court has re-opened.

Where it is desired to arrest a foreign ship which belongs to a port of a state having a consulate in Hong Kong for possession of the ship or for outstanding crew wages, notice of action must be sent to the consul and a copy of the notice annexed to the affidavit to lead warrant of arrest.

MARITIME LIENS AND ARREST OF VESSELS UNDER ICELANDIC LAW

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ATTACHEMENT OF ASSETS

The general nature of an attachment is that assets of the debtor, e.g. real estate or other property or rights of financial value, are taken from the debtor's control. Through the attachment, the creditor gains a limited proprietary right over the assets of the debtor, who may not dispose of the assets in any manner contrary to the rights of the creditor. An attachment can form the basis for a forced sale of the assets at a public auction. In such a case, the price obtained at the forced sale will be used to satisfy the claims of the creditor.

An attachment made under conditions where the debtor has no assets in his possession is known as an unsuccessful attachment (*árangurslaust fjárnám*). An unsuccessful attachment can, within three months from its date, form a basis for the creditor to request liquidation of the debtor's estate in bankruptcy proceedings.

ARREST IN GENERAL

An arrest is not to be literally understood as we are dealing with assets, not people. The main purpose of arrest is to insure the holder of a claim harmless against any impending risk of the debtor eliminating, selling, mortgaging or disposing by other means of his assets while court proceedings are in progress so that no assets would be available for enforcement procedure following judgment.

The legal effect of arrest is that the person against whom the order is enforced or other owners of the property in question are barred from disposing of it by an agreement, in breach of the rights of the applicant for the arrest. As the circumstances may require, the applicant needs to secure his rights, e.g. over a vessel, by public registration so that third party in good faith cannot obtain superior rights to the property. In addition, the Magistrate can, at the request of the applicant, remove property from the possession of the

person against whom the arrest is directed, or other custodian and maintain the property himself at the cost of the applicant. The Magistrate may also entrust the property to a third party if the interests of the applicant are otherwise considered to be at grave risk, provided that there are no third-party rights to preclude such measures. In such an event, the Magistrate shall require from the applicant a security for the taking of possession against damage or loss of use of the defendant and the cost of the custody of the property.

ARREST OF VESSELS

Under Icelandic law the arrest of vessels is regulated by Act no. 31/1990 on general arrest of properties. There are no special rules for arrest of vessels and Iceland is not a party to any international arrest convention.

Only property belonging to the defendant can be arrested to secure payment of a claim against such defendant. If, however, the claim in question is secured by a maritime lien over the vessel, such vessel may be arrested despite the ownership. Accordingly, claims which are secured by a maritime lien over the vessel under Art. 197 of the Icelandic Maritime Act no. 34/1985 are the only types of claims which may be pursued "in rem" by way of an arrest irrespective of the identity of the owner of the vessel. These claims are more or less the same claims as are stipulated in the Brussels Convention on Maritime Liens from 1967.

According to Art. 197 of the Icelandic Maritime Act no. 34/1985 the following claims relating to a particular vessel enjoy a maritime lien over the vessel:

- 1 - Wages or other emolument due to the Master, Crew and other persons employed on board.
- 2 - Claims for damages due to loss of life or personal injury in so far as such claims have arisen in direct connection with the use of the vessel.
- 3 - Claims for damages due to damage properties in so far as the claim has arisen in direct connection with the use of the vessel and provided that such claim is not based on contract.
- 4 - Salvage, compensation for removal of wrecks and general average contributions.
- 5 - Ship charges.

According to parliamentary comments on this Article item 5 refers to claims for port, canal and waterway dues and pilotage.

Following is a brief outline of the formalities involved in an arrest in Iceland:

1 - As a general principle an arrest may be instituted in Iceland if the vessel is situated in Iceland at the time of the arrest.

2 - The arrest application must be submitted to the relevant Magistrate's Office. It must contain detailed information as to the facts, which are necessary to enable the Magistrate to consider the matter, and it must be supported by the documents on which the claimant relies in order to prove that the claim exists.

3 - Before the arrest can be imposed the claimant must provide security for any damage or loss which may be the result of a possible unlawful arrest. It is for the Magistrate to evaluate the amount of the security, which can be considerable.

4 - As a general rule the Magistrate will require the claimant to be represented at a formal hearing of the arrest application. Attendance on behalf of the claimant is required when the arrest application is heard at the relevant Magistrate's office or at other place decided by the Magistrate. However, it is not a legal requirement to be represented by a lawyer.

5 - Usually the defendant will be notified of the arrest application and of the hearing. However, if the Magistrate is satisfied that the purpose of the arrest might be lost because of such hearing he may refrain from notifying the defendant of the application for the arrest and of the hearing thereof.

6 - After the arrest has been executed the claimant must commence legal proceedings before Icelandic District Courts both to confirm the arrest and on the merits of the claim if such proceedings have not been commenced, within one week of the arrest. The decision of the District Courts may be appealed to the Supreme Court.

7 - Icelandic courts will always have jurisdiction over the confirmation of the arrest. However, as regards jurisdiction to hear the merits of the case if a foreign jurisdiction applies to the claim the claimant must commence legal proceedings before Icelandic District Courts concerning the confirmation of the arrest within three weeks and within the same period of time the claimant must also commence legal proceedings before the relevant foreign venue on the merits of the claim. Otherwise the defendant may request the arrest to be set aside.

Usually a security has to be submitted before the arrest. It is up to the Magistrate handling the arrest application whether a security is needed or not and the form and amount of the security if required. Accordingly the amount

of the security may differ between the relevant Magistrates districts.

The following provision applies to the determination of the amount of the security:

“When determining the amount of a guarantee the Sherriff shall mainly take into account to what an extent the arrest affects the functions of the defendant in terms of doing him harm, whether it is likely that the arrest or request for the arrest will harm his credit status or his business interests and whether he has a chance to make remarks about the validity of the claimant’s claim and the arrest. The cost, that the defendant might later have to endure through court procedures due to the arrest, should also be taken into account.”

The Magistrate can, by demand of claimant, arrest the vessel without security if one of the following conditions is fulfilled:

- 1 - that the arrest is demanded pursuant to a debenture, a draft or a cheque and the defendant does not protest the claim.
- 2 - that the defendant waives his right for a security in front of the Sherrif.
- 3 - that the defendant acknowledge the claim as being valid in front of the Sherriff or court and that conditions for an arrest are prevailing.
- 4 - that a judgement has been rendered regarding the claimant’s claim, but the enforcement period has not yet come to an end.
- 5 - that the claimant’s claim is in other terms so that the Sherrif considers both it and the arrest undoubtedly valid given the conditions prevailing.

If a security is required it should be in the form of money, or else in a comparable form. A bank guarantee from an Icelandic bank is required. If the claim is lost, infor court, the shipowner has a right to claim all damages and losses resulting from the arrest of the vessel.

FORCED SALE OF A VESSEL

Icelandic law would permit a contract provision, which stipulates that, the claimant can sell the vessel at market value and apply it to counterparty’s obligation. However it is advisable to have the provision detailed, e.g. list how the market value would be determined.

In the absence of such a contract provision the situation

would governed by the Act on Forced Sale no. 19/1991. Chapter 12 of the Act concerns forced sale of securities, claims, etc. Prior to submitting a request to the Magistrate the petitioner must write a formal letter urging payment from respondent with at least 15 days notice. And in that demand it must be made clear that non-compliance will be met with a request for a forced sale, cf. article 9 on the aforementioned Act.

SHIP ARREST JURISDICTION AND PRACTICE IN ISRAEL

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The Sources of the Court's Arrest Jurisdiction.

1. The Jurisdiction of the Israel Maritime Court (which is situated at Haifa) is conferred by the English Admiralty Courts Acts of 1840 and 1861. These acts were extended to the Dominions and Possessions of the United Kingdom by the Colonial Courts of Admiralty Act 1890 and under the Palestine Admiralty Jurisdiction Order of 1937, to Palestine, then a British mandated Territory.

2. When the State of Israel was established in 1948, under the Law and Administration Ordinance, the Admiralty Court Acts of 1840 and 1861 became part of the domestic legislation of the newly established State.

Priorities.

1. Section 41 the Shipping Vessels Law 5720 – 1960 establishes the following priorities:

- (1) The official expenses of selling a vessel pursuant to a judicial sale,
- (2) Port and port related charges and expenses,
- (3) The costs of preserving a vessel pending Judicial sale,
- (4) Payments due to the master and crew including damages for personal injuries,
- (5) Salvage expenses relating to the vessel, its cargo and equipment on board and expenses incurred in saving the lives of the crew and passengers,
- (6) Damages for personal injuries to passengers,
- (7) Damages resulting from collisions or damage caused by the vessel to port installations and buildings, dry docks, and loss or damage to cargo and to passengers personal effects,
- (8) Mortgages (no distinction is drawn between a local or a foreign registered Mortgage),
- (9) Necessaries.

2. The question of the existence of a Maritime Lien or a Statutory Claim in Rem is determined by the "Lex Causae" and the priorities, being procedural, by the "Lex Fori".

The Application for Arrest.

1. The Application for Arrest must be filed together with the Claim in Rem.

The Application must be supported by an Affidavit.

In practice the Affidavit is given by the arresting attorney and copies of all the relevant documents in support of the arrest are attached thereto.

These documents can be supplied by facsimile.

A Power of Attorney is not required.

The Application is made and the Order of Arrest is given, ex parte.

2. The court has a discretion to order that the arresting party furnish security.

It will order the furnishing of security if the Court has reservations regarding the arrest allegations and supporting documentation.

If security is ordered, it will be in the region of 30% of the claimed amount. The security has to be furnished either by payment into Court or by the provision of a bank guarantee issued by an Israel bank.

3. The arrest procedure is relatively swift and the arrest can be effected with 24 hours of receiving instructions.

If the application is made on a Saturday or Public holiday, this period may be extended as result of the necessity to appear before the roster Judge and obtaining the formal Order of Arrest which is issued by the Marshal of the Admiralty Court.

The Order of Arrest will be normally discharged by the provision of a P&I Club or other acceptable guarantee. In the latter case this would be normally be a bank guarantee.

4. The vessel can apply to set aside the Arrest by contesting the merits of the claim or, on the grounds that the claim does not constitute a maritime lien or a statutory right in rem under the Lex Causae or that the Admiralty Court does not have jurisdiction.

In order to avoid delay to the vessel, security can be furnished without prejudice and subject to the vessels rights to contest the Arrest and to have the security provided cancelled.

Upon serving the Order of Arrest on the vessels command the Port Authority and the Border Police, the Arrest becomes effective.

Court Fees and Legal Costs.

1. The Court fees payable are 3.0% of the amount claimed in the Claim in Rem of which half is payable at the time filing the claim. No additional Court fee is payable for the Application of Arrest.

2. The legal fees for attending to the Arrest excluding VAT (at present 18%) and disbursements, are between US\$3,000.- and US\$ 6,500.-, depending on the complexity and urgency of the matter.

ARREST OF SHIPS IN MALTA

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A. Introduction

This article deals with the arrest of ships in Malta as a precautionary measure, either before an action on the merits of the relative claim is brought or, alternatively, during the applicable proceedings (pendente lite).

B. The applicability or otherwise of international conventions

Malta is not a party to the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships. Neither is Malta a party to any of the International Conventions on maritime liens and mortgages (the 1926 and 1967 International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages and the 1993 International Convention on Maritime Liens and Mortgages).

Recently there appears to have been a marked shift in favour of the adoption and incorporation into Maltese law of the 1999 International Convention on Arrest of Ships (signed in Geneva on the 12th March 1999) and the 1993 International Convention on Maritime Liens and Mortgages. Indeed recent amendments made to the Merchant Shipping Act [Cap. 234 of the Laws of Malta] by virtue of section 99 of Act no. XXII of the 4th August 2000 have introduced a new provision in the said Act (section 375). This new provision facilitates the adoption and incorporation of a number of international treaties and conventions addressing merchant shipping matters into Maltese law. In terms of such new provision the Government of Malta is empowered to ratify or accede to (as the case may be) the treaties and conventions mentioned therein, including the 1999 Arrest Convention (section 375 (2)(n)) and the 1993 Maritime Liens and Mortgages Convention (section 375 (2)(m)). Furthermore the Minister responsible for merchant shipping in terms of the Act is empowered, upon such ratification or accession, to make these Conventions applicable domestically by promulgating regulations giving effect to the provisions thereof.

C. Arresting ships in Malta

Clearly the arrest of ships (and therefore the exercise of admiralty jurisdiction) entails two related matters:

- the substantive grounds for the arrest of a ship; and
- the procedural measures available to arrest a ship.

In Malta these matters are regulated by two separate legal enactments: the Merchant Shipping Act and the Code of Organization and Civil Procedure [Cap. 12 of the Laws of Malta] ("the COCP").

The judicial authority competent to arrest a ship in Malta is the Civil Court, First Hall (section 32 (2) of the COCP). No other court or institution has the authority to arrest a ship.

D. The substantive grounds for the arrest of a ship under Maltese law

In this regard three distinct possibilities may be identified.

(1) In terms of the COCP, if Maltese courts enjoy jurisdiction over the defendant, any property belonging to such defendant that is present in Malta may be seized by order of the competent court (made subsequent to, or in anticipation of, an action brought against the defendant). The grounds on which Maltese courts will accept jurisdiction are contained in section 742 of the COCP. These grounds are all based on jurisdiction in personam: in other words they presuppose the (alleged) liability of the defendant. The civil courts of Malta (including the Civil Court, First Hall) enjoy jurisdiction to try and determine all actions concerning the following persons:

- a) citizens of Malta (provided they have not fixed their domicile elsewhere);
- b) any person as long as he is either domiciled or resident or present in Malta;
- c) any person, in matters relating to property situate or existing in Malta;
- d) any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta;
- e) any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta; provided in either case such person is present in Malta;
- f) any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having distinct legal personality or association of persons incorpo-

rated or operating in Malta, if the judgment can be enforced in Malta;

g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

(2) Furthermore Maltese civil courts also exercise a special jurisdiction that pre-supposes a right to bring an action directly against a ship (by way of an action in rem). Recent amendments to the COCP have made it possible for a plaintiff to file any judicial act directly against the ship (section 181A (3) of the COCP). This jurisdiction in rem is intrinsically based on three ancient statutes that were originally in force in Malta when it was a dependent territory of the United Kingdom. These enactments are the Admiralty Court Act 1840 (3 & 4 Vict. Cap. 65), the Admiralty Court Act 1861 (24 Vict. Cap. 10), and the Vice-Admiralty Courts Act 1890.

In terms of section 370 (1) of the Merchant Shipping Act the competent court in Malta (at present, the Civil Court, First Hall) exercises the jurisdiction previously exercised by the Commercial Court by virtue of the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance 1892. This latter Ordinance was itself repealed by the Merchant Shipping Act. The 1892 Ordinance provided that: 'the jurisdiction hitherto exercised by the Vice Admiralty Court, or conferred by the Act of the [British] Imperial Parliament, called "The Colonial Courts of Admiralty Act, 1890", on the Colonial Admiralty Court, shall be exercised by His Majesty's Commercial Court, as part of its ordinary jurisdiction.'

Accordingly the grounds for arresting a ship in Malta by virtue of an action in rem are solely the following:

- a) all claims and causes of action of any person in respect of any mortgage of any ship, provided such ship, or the proceeds thereof, is arrested by a competent court (section 3 of the 1840 Act);
- b) all questions as to the title to or ownership of any ship (or of the proceeds thereof remaining in the registry) arising in any cause of possession, salvage, damage, wages or bottomry instituted in a competent court in Malta (section 4 of the 1840 Act);
- c) all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in Malta, or any share thereof (section 8 of the 1861 Act);
- d) all claims and demands whatsoever in the nature of salvage for services rendered to any ship, provided such ship was within the body of a county or on the high seas at the time when the services were rendered (section 6 of the 1840 Act);

e) all claims and demands whatsoever in the nature of damage received by any ship, provided such ship was within the body of a county or on the high seas at the time when the damage was received (section 6 of the 1840 Act);

f) all claims and demands whatsoever in the nature of towage, provided such ship was within the body of a county or on the high seas at the time when the services were rendered (section 6 of the 1840 Act);

g) all claims and demands whatsoever for necessities supplied to a foreign ship, provided such ship was within the body of a county or on the high seas at the time when the necessities were furnished (section 6 of the 1840 Act);

h) all claims for necessities supplied to any ship elsewhere than in the port to which she belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in Malta (section 5 of the 1861 Act);

i) all claims for the building, equipping or repairing of any ship (section 4 of the 1861 Act);

j) all claims for damage done by any ship (section 7 of the 1861 Act);

k) claims by any seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise (section 10 of the 1861 Act);

l) claims by the master of any ship for wages earned by him on board the ship (section 10 of the 1861 Act); and

m) claims by the master of any ship for disbursements made by him on account of the ship (section 10 of the 1861 Act).

(3) Finally, in terms of section 50 of the Merchant Shipping Act a ship may also be seized under the authority of a competent court by virtue of the existence of a special privilege (or lien) thereon. The special privileges recognized under section 50 of the Merchant Shipping Act are the following:

a) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;

b) fees and other charges due to the registrar of Maltese ships arising under the same Act;

c) tonnage dues;

d) wages and expenses for assistance, recovery of salvage and for pilotage;

e) the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of sale;

f) rent of the warehouses in which the ship's tackle and apparel are stored;

g) the expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port;

h) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

i) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;

j) moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage: provided that such privilege is not competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner;

k) ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege under paragraphs (a) to (i), though in any case for a sum in the aggregate not in excess of four thousand units (the value of which is determined by the Minister responsible for merchant shipping in concurrence with the Minister responsible for justice as set out in section 372C of the Merchant Shipping Act);

l) moneys lent to the master for the necessary expenses of the ship during her last voyage, and the reimbursement of the price of goods sold by him for the same purpose;

m) moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage: provided that such privilege is not competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner;

n) damages and interest due to the freighters for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master or the crew;

o) damages and interest due to another ship or to her cargo in cases of collisions of ships;

p) the debt due in respect of the balance of the price from the sale of a ship (as also specified in section 2009 (d) of the Civil Code).

The above mentioned special privileges will also apply against any proceeds from any indemnity arising from collisions and other mishaps, and against any insurance proceeds, payable to the owner(s) of a ship secured thereby (section 50 of the Merchant Shipping Act).

E. Procedural measures available to arrest a ship in Malta

A ship belonging to a proper defendant may therefore be arrested in Malta (even as a precautionary measure) provi-

ded the relative claim is based:

§ either, on any one of the in personam grounds of jurisdiction set out in section 742 of the COCP - in which case any ship belonging to such defendant may be arrested;

§ or, on one of the in rem grounds of jurisdiction applied in terms of section 370 of the Merchant Shipping Act - in which case only the ship belonging to such defendant and having given rise to the cause of action in question may be arrested;

§ or, on the basis of one of the special privileges contemplated in section 50 of the Merchant Shipping Act - in which case only the ship in respect of which the privilege has arisen may be arrested.

In either hypothesis the arrest is made by virtue of the issue of one or more precautionary acts or warrants.

Under Maltese law a precautionary act or warrant may be issued and carried into effect without the necessity of a previous judgment (section 829 of the COCP). The application (in the prescribed form) for the issue of any such act or warrant must state the origin and nature of the debt or claim and the approximate amount or value thereof, and must be confirmed on oath by the creditor (sections 831 (2) and 832 of the COCP). The creditor must also make the appropriate declaration on oath if the warrant is, for reasons of urgency, to be served after eight o'clock at night and before six o'clock in the morning (sections 280 (2) and 838 of the COCP). The application must also indicate the place where the notice of execution is to be given or left (section 834 (2) of the COCP). Any such warrant may only be issued under the authority (in exceptional cases even oral) of a competent court (section 831 (4) of the COCP).

In terms of section 836 (1) of the COCP any precautionary act or warrant may be revoked by the competent court upon a demand to that effect by the debtor (or other person against whom the precautionary act or warrant has been issued) on any of the following grounds:

- a) if the precautionary act or warrant ceases to be in force (lapse of time to bring the action on the merits of the claim: *infra*); or
- b) if any one of the conditions requested by law for the issue of the precautionary act or warrant does not in fact subsist; or
- c) if other adequate security is available to satisfy the creditor's claim; or
- d) if it is shown that the amount claimed is not *prima facie* justified or is excessive; or

e) if the security provided is deemed by the court to be sufficient; or

f) if it is shown that in the circumstances it would be unreasonable to maintain in force the precautionary act or warrant in whole or in part, or that the precautionary act or warrant in whole or in part is no longer necessary or justifiable.

The court may also (in terms of section 836 (8) and (9) of the COCP) condemn the creditor who has issued a precautionary act or warrant to pay a penalty and damages in favour of the debtor in each of the following cases:

- a) if the creditor does not bring the action in respect of the claim within the time established by law;
- b) if the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor was notorious;
- c) if the creditor's claim is malicious, frivolous or vexatious.

The competent court may also, upon a demand by the debtor, order the creditor issuing a precautionary act or warrant to give, within a time fixed by the court, sufficient security for the payment of the penalty that may be imposed and of damages and interest and, in default, to rescind the precautionary act or warrant (section 838A of the COCP).

In terms of the provisions of the COCP a ship may be 'arrested' by serving thereon through the relevant court machinery a warrant of impediment of departure. The warrant may only be issued in respect of claims amounting to at least Lm 3,000 (section 861 of the COCP). The object of such warrant is to secure a claim that may be frustrated by the departure of the ship in question. A statement to such effect must therefore be made on oath by the creditor in order for the warrant to be issued (section 860 of the COCP). By virtue of such warrant the court marshal is ordered by the court to detain a ship and to deliver to the Comptroller of Customs and the officer responsible for ports in terms of law a copy of the warrant enjoining them not to grant clearance to that ship (section 856 of the COCP). A copy of the warrant is also served on the owner or the master or the agent of the ship (section 857 of the COCP). Any person who disobeys such order will be guilty of contempt of court and a warning to such effect is contained in the warrant (section 858 of the COCP).

This warrant may not be issued against:

- § any ship wholly chartered in the service of the

Government of Malta (section 870 (1) of the COCP);

§ any ship employed in any postal service either by the Government of Malta or by any other government (section 870 (1) of the COCP); and

§ any ship of war (section 870 (2) of the COCP).

In all other cases if the warrant is issued upon a demand made maliciously the creditor may be condemned to a penalty being not less than Lm3,000 (sections 836 (8) and 864 of the COCP). If the warrant was otherwise unjustly obtained the creditor may be held liable for damages and interest in addition to the aforesaid penalty (section 865 of the COCP). The owner, master or other person in charge of a ship detained by such warrant may accordingly demand from the court an order to the creditor to give, within a time fixed by the court, sufficient security in an amount not less than Lm3,000 for the payment of the penalty, damages and interest and, in default, to rescind the warrant (section 866 of the COCP).

Whenever such warrant is issued as a precautionary measure the creditor must bring the action on the merits of the claim within six working days from the issue of the warrant (section 867 of the COCP). Moreover, in such case, the creditor may be held liable in damages and interest (section 867 of the COCP).

The warrant of impediment of departure of a ship may be revoked (in terms of the provisions of section 836 (1) of the COCP) if other adequate security is available to satisfy the creditor's claim. However in such case the debtor must also appoint a regular attorney or mandatory to judicially represent the ship (section 870 (2) of the COCP).

In addition to the warrant of impediment of departure, in practice a warrant of seizure (also in terms of the provisions of the COCP) is also served on the ship in order to secure its 'arrest.' Ships wholly chartered in the service of the Government of Malta are also not subject to seizure under such warrant (section 304 (f) of the COCP). By virtue of such warrant the court marshal is ordered by the court to seize from the possession of the debtor the ship or any other movable object indicated in the warrant (sections 284 and 846 (1) of the COCP). Such seizure may be partial (for example limited to the seizure of the ship's certificates which would then be delivered to the court registrar, or the removal from the ship of certain parts which prevent her from sailing) or total (in which case a representative is appointed by the marshal for the safe keeping of the ship and the shipowner is thus fully dispossessed of the ship).

The court marshal may also appoint (even upon the request of the creditor) a suitable person as a consignatory to take charge of the ship (sections 291 to 299 of the COCP).

Whenever such warrant is issued as a precautionary measure the creditor must bring the action on the merits of the claim within four working days from his receipt of the notice of execution of the warrant or within twelve days from the issue of the warrant, whichever is the earlier (section 846 (2) of the COCP). Otherwise the warrant shall cease to be in force (section 846 (2) of the COCP). Once the action on the merits of the claim is commenced the court may also, upon an application by the creditor, order the sale *pendente lite* of the ship seized if it appears that the debtor is insolvent or otherwise unlikely to be able to continue trading and maintaining the ship (section 847 of the COCP).

In order to obtain the issue of either of the warrants the claimant must file an application before the court requesting the issue of the warrant. Where the plaintiff is applying for a precautionary warrant the contents of the application must be confirmed on oath. No other evidence is required and the application for the issue of the warrant is considered by the court *in camera* and no hearing takes place in open court.

Any such warrant may be rescinded if the defendant provides an adequate security to safeguard the claim (section 830 (2) of the COCP).

ARREST OF SHIPS IN MEXICO

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Introduction

The arrest of ships under Mexican law is in general terms no different than the arrest of other assets owned by a debtor or a wrongdoer. However, as is common to the maritime industry, there are some variations in the applicable substantive and procedural laws that render the arrest of vessels in Mexico somewhat different to the ordinary civil and commercial seizure of assets.

The Mexican legal system is based on civil law hence it is codified and all formalities contained in the substantive and procedural laws attaching to the arrest of ships must be strictly met otherwise the Courts will not issue an arrest order or if issued, the arrest may be claimed wrongful by the Defendant which, if successful, will entitle him to claim damages from the Plaintiff.

Applicable Law

The above is key to understanding the arrest of vessels in Mexican jurisdiction as well as the fact that Mexico is not a party to any of the international treaties dealing with this subject, although many of their main principles have been adopted by our legislation. As is usual with principles contained in international treaties, domestic Courts may give them different interpretations and Mexico is no exception. In Mexico the Courts are open to adopt the interpretation most acceptable to the international milieu provided it is not contrary to the domestic legal system. This grants particular characteristics to the Mexican jurisdiction, which is an aspect which understanding is of wide importance for Mexican attorneys assisting foreign based clients.

Having said the foregoing, Mexican law does recognise maritime liens and mortgages and it contains certain procedural provisions that allow a more expedient procedure although some hindrances will be usually faced throughout the proceedings.

Thus, the applicable legislation is the Law of Navigation, which was enacted in 1994. Article 5 of the aforementioned law envisages the order in which supplementary legislation shall apply in the absence of a provision. In general, the laws concerning ship arrest apply in a supplementary fashion as follows:

1 - Law of Navigation and its regulations and International Treaties to which Mexico is party.

2 - Code of Commerce.

3 - Civil Code.

4 - Federal Code of Civil Procedure

Jurisdiction

The question of jurisdiction of Mexican Courts is solved by Article 4 of the Law of Navigation, which provides that all vessels situated within Mexican waters are subject to Mexican law and jurisdiction. In addition, Article 3 stipulates that all matters concerning maritime affairs fall within the competence of Federal Courts.

When considering the foregoing, it is important to bear in mind that Mexican law is respectful of contractual "Law and Jurisdiction" clauses. In cases where such a provision is contained in a contract, the claimant can proceed with the rightful arrest in Mexico in order to obtain security and the parties will be at full liberty to either submit to the Law and Jurisdiction clause or waive it and continue with proceedings in Mexican jurisdiction. In each of these cases the procedure will vary depending on the position of the parties. We shall make general comments in this respect further below although it is important to consider that this aspect deserves a thorough case by case analysis.

Type of Actions that can be claimed in Mexican Courts to arrest a ship

Mexican law, in general, avails creditors with remedies to claim all types of debts and arrest a vessel to secure their payment. The maritime industry is additionally afforded with privileged or preferred claims or liens and in some cases the creditor is entitled to retain assets without a Court order provided the corresponding proceedings are commenced in a reasonable period of time.

The ranking of the claims upon vessels is as follows:

1 - Crew wages and other monies owed to crew members.

2 - Claims arising out of wrongful death or injury, resulting from the exploitation of the vessel.

3 - Claims for salvage awards.

4 - Claims for use of port facilities or services.

5 - Claims for damages in tort.

These claims maintain their privileged status provided proceedings to arrest the vessel are commenced within one year as from the time they are born. This time frame is different to the statute of limitation applicable to the claim. This is, if a claim loses its privileged status it will remain in force until it is time barred.

Foreclosure

A mortgagee is availed by Mexican law with the necessary remedies to impose a precautionary arrest upon a vessel in Mexico and continue with formal litigation in the jurisdiction set forth in his contract or to arrest the vessel and complete foreclosure in Mexican Courts.

It is important to consider that the privileged claims enlisted above are preferred upon a mortgage.

Formalities and Proceedings

As mentioned lines above, formalities are an important part of Mexican law. This is particularly true when it comes to documentary formalities that should be met by the parties to the proceedings which, in general terms, are as follows:

- Power of Attorney prepared as per a specific wording and duly apostilled.
- All documents must be in originals or copies certified by a Notary Public.
- All documents must be in Spanish language or translated by an official translator.
- All documents issued by a foreign authority must be legalized or duly apostilled.
- The party requesting the arrest must post counter-security in the form of a bond to guarantee possible damages for wrongful arrest. This Plaintiff may be excused from fulfilling this requirement in cases where the claim is based on the creditor's right to retain the vessel, as in claims for salvage awards and in cases where the claim is based on a document of title.

Further formalities may be required when reviewing documents on a case by case basis. However, the above summarises the main documentary formalities required to appear in Court.

Save for specific cases, the laws of Mexico do not envisage in rem actions, consequently most proceedings commenced in Mexican Courts are in personam. This peculiarity of Mexican law has its pros and cons since in a number of cases the in personam debtor may or may not be the registered owner of the vessel, which may expose the Plaintiff to indemnify the actual owner of the vessel for wrongful arrest. This hindrance may be surmounted if the appropriate representations are made in Court and the proper documentation is produced to support the claim and the validity of the arrest. On the other hand, a convenience is that the arrest of a sister ship or of other assets owned by the debtor can be made on an easier basis.

Our next comment is directed to discuss at which moment can a vessel be arrested. In this connection Mexican law allows a creditor to arrest a vessel before formal litigation is

commenced or during formal litigation.

In the first case, the arrest of the vessel is only precautionary or provisional and there is an obligation to commence formal litigation within three to thirty days, depending on the case. In the case of a petition to arrest a vessel during formal litigation, the Court will usually grant it if the documentary and other formalities are properly met.

In all cases the Court will verify whether or not the petition to arrest the vessel is reasonable based on the criteria set forth in the Code of Commerce, which can be summarised to the possibility that the debtor may hide or dilapidate the vessel.

Release of the Vessel

The release of the vessel may be achieved in several ways being the most expedient the posting security by the debtor in the form of a bond or in a form satisfactory to the claimant. In this case, if the debtor considers the arrest is wrongful he may claim it in Court and recover damages.

Other ways of obtaining the release of the vessel involve claiming the arrest as wrongful while the vessel is arrested, which is usually time consuming and is not advisable when taking into consideration the mitigation of damages.

Time and Cost

The documentary requirements involved in the arrest of a ship in Mexico can give an idea of how time consuming the collection of documents and drafting of applications may be. It is always recommendable to establish an open a dynamic dialogue between the client and the lawyer in order to make joint efforts to achieve an expedient and cost effective arrest.

This is also true and may even be more compelling when the vessel has been arrested and it is necessary to take action to release the vessel.

As regards costs, Mexican Courts do not charge for admitting or handling files hence the costs that should be borne in mind are those in connection with collecting the necessary documents and legal fees.

In all cases, the prevailing party will be entitled to recover most costs and damages from the other except for legal fees, which recovery is limited by law.

SHIP ARREST IN NIGERIA

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Introduction

Nigerian law provides a simple and uncomplicated procedure for the arrest of ships thereby making the country a suitable and favourable jurisdiction for such proceedings.

The Admiralty Jurisdiction Act, 1991 and the Admiralty Jurisdiction Procedure Rules, 1993, govern admiralty matters. The Act provides for two general classes of maritime claims namely: proprietary maritime claims and general maritime claims. Nigeria has acceded to the International Convention for the Unification of Certain Rules Relating to the Arrest of Ocean Going Vessels, 1952 simply referred to as "The Arrest" Convention 1952". The Convention has not been promulgated into municipal law.

Jurisdiction in respect of admiralty matters is vested exclusively in the Federal High Court in the first instance. Appeals in respect thereof lie to the Court of Appeal and the Supreme Court. The court can order the arrest of a vessel in order to confer jurisdiction upon itself or to provide pre-judgment security for the applicant.

Procedure for arrest

Once an applicant has ascertained that his claim falls within the meaning of a maritime claim as defined by the Act (See attached schedule), he may commence the proceedings by filing an action in rem at the Federal High Court in the judicial division covering the port or area where the ship is located. He may at the same time file an ex-parte application disclosing a strong prima facie case for the arrest of the ship. This application must be supported by an affidavit deposed to by the applicant, his solicitor, or his agent stating the following:

- (i) The nature of the claim
- (ii) That the ship is within the jurisdiction of the court
- (iii) That the ship may leave the jurisdiction of the court at anytime thereby depriving the applicant of his pre-judgment security.

The applicant is also required to provide with the application the following:

- (i) Exhibits supporting the claim

(ii) An undertaking to indemnify the ship against wrongful arrest.

(iii) An undertaking to indemnify the Admiralty Marshal in respect of any expenses incurred in affecting the arrest.

(iv) An affidavit of urgency stating facts why the application must be heard expeditiously.

Although, at this stage of the proceedings, the court may admit photocopies of exhibits and undertakings, the applicant would subsequently be required to provide the originals or certified true copies. The Registry of the Federal High Court is usually open between the hours of 8 a.m to 1.30 p.m on Monday to Friday. An arrest order can be obtained within 24 hours of filing the requisite processes. It is important to note that unlike certain jurisdictions where it is possible to obtain an arrest order prior to the entry of the ship into jurisdiction, the Nigerian courts will entertain an application for an arrest only when the ship has entered its jurisdiction. So where a prospective applicant is aware that a ship sought to be arrested is bound for a Nigerian port, it is advisable for him to instruct his solicitors in Nigeria as soon as possible so that the requisite processes can be prepared and filed immediately the ship enters Nigerian territorial waters.

Sister ships

An action may be commenced against a sister ship in respect of general maritime claims. However, the ship in relation to which it is a sister ship must be identified in the writ of summons. The writ of summons may identify more than one ship as a sister ship.

Services of processes

An arrest order is usually served along side an arrest warrant and the writ of summons and statement of claim by delivering same to the master of the ship or by affixing sealed copies of the processes to a mast or some other conspicuous part of the ship. Copies of the said processes must also be delivered to the appropriate officers of the Nigerian Port Plc, for example the Chief Harbour Master, Traffic Manager and Port Manager.

Security for costs

An applicant for an arrest order may be required to give security for costs. The court will order security for costs where the claim is in excess of One Million Naira (approximately USD10,000) or its foreign currency equivalent or where the plaintiff has no assets in Nigeria.

The form of security required is usually a deposit of the sum specified by the court; or a guarantee supplied by a Protection and Indemnity Club, an insurance company or a bank. In determining the quantum of security to be provided, the court shall have regard to all the circumstances of the case and shall not restrict itself to the costs of the legal proceedings.

Release from arrest

The court may order the release of a ship where the amount claimed or the value of the ship is paid into court. The court may also order the release of the ship when a bail bond for the amount claimed or the value of the ship is posted into court or where the applicant gives his consent in writing.

Caveats

A caveat against arrest of a ship may be filed at the registry of the Federal High Court where the caveat book is kept. The filing of a caveat constitutes an undertaking by the caveator to appear in the proceedings and to provide bail. The Registrar may also require the caveator to produce an undertaking in writing issued by a Protection and Indemnity Club or a bank or an insurance company to satisfy any judgment for the amount specified in the caveat.

Where a ship is already under arrest, other claimants may, in lieu of obtaining a further arrest order, file a caveat against release to prevent the release of the ship. It is important to note that if the original arrest order is withdrawn, it will be necessary for the caveator to obtain a fresh arrest order.

Caveats remain in force for a period of twelve months unless they are withdrawn or set aside before that period.

Time bars

Save where the parties have by agreement fixed the limitation period in respect of claims, maritime claims must be filed within three years from the accrual of the cause of action. The limitation period for certain claims is fixed by statute, for example, section 394 of the Merchant Shipping Act, Chapter 224, Laws of the Federation of Nigeria, 1990 stipulates a two year limitation period in respect of salvage claims and section 2 of the Carriage of Goods by Sea Act, Chapter 44, Laws of the Federation of Nigeria, 1990 stipulates a one year limitation period in respect of claims for loss or damage to goods under contracts of carriage subject to the Hague Rules.

Costs

The filing fees payable in court for arrest proceedings are assessed as follows:

- (i) Where the sum sought to be recovered does not exceed N20, 000 (USD 200), the fee payable is N1, 000 (USD 10).
- (ii) Where the sum exceeds N20, 000 (USD 200) but not above N100, 000 (USD 1, 000) the fee payable is N1, 500 (USD 15).
- (iii) Where the sum exceeds N100, 000 (USD 1,000) but not above N1, 000,000 (USD 10,000), the fee payable is N2, 500 (USD 25).
- (iv) Thereafter for each additional N1, 000,000 (USD 10,000) or part thereof, the sum of N1, 500 (USD 15) is payable.

Please note that the maximum court filing fee payable in respect of any claim is N50, 000 (USD 500). Where a claim is in a foreign currency, it shall be converted to the Nigerian currency and assessed in the manner set out above.

Disbursements arising in the course of effecting a simple arrest usually range between N50,000 to N75,000 (USD 500 to USD 750). Professional fees are charged on an hourly basis.

Reparation for needless arrest

An applicant for an arrest order is liable to the ship owner for damages arising from a wrongful arrest. A ship owner has three options to wit:

1. He may apply to court within three months from the termination of the suit for general damage not exceeding twenty thousand naira; or
2. He may make an oral application for damages immediately after judgment. The court in this instance is entitled to summarily assess the damages due to the ship owner; or
3. He may also bring an action for wrongful arrest claiming all the damages arising from the arrest, which he can establish.

Schedule

Definition of maritime claim

Section 2 of the Admiralty Jurisdiction Act 1991 defines a maritime claim as follows:

- 1) A reference in this Decree to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.
- (2) A reference in this Decree to a proprietary maritime claim is a reference to

- (a) a claim relating to -
- (i) the possession of a ship; or
 - (ii) title to or ownership of a ship or a share in a ship; or
 - (iii) a mortgage of a ship or of a share in a ship; or
 - (iv) a mortgage of a ship's freight;

(b) a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship.

(c) a claim for the satisfaction or enforcement of a judgment given by the Court or any court (including a court of a foreign country) against a ship or other property in an admiralty proceeding in rem;

(d) A claim for interest in respect of a claim referred to in paragraphs (a), (b) or (c) of this subsection.

(3) A reference in this Decree to a general maritime claim is a reference to -

(a) a claim for damage done by a ship (whether by collision or otherwise);

(b) a claim for damage received by a ship;

(c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;

(d) subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury arising out of an act or omission of -

- (i) the owners or charterers of a ship;
- (ii) a person in possession or control of a ship;
- (iii) a person for whose wrongful act or omission the owner, charterer or person in possession of the ship is liable.

(e) a claim for loss of, or damage to goods carried by a ship;

(f) a claim arising out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;

(g) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land);

(h) a claim in respect of general average;

(i) a claim in respect of pilotage of a ship;

(j) a claim in respect of towage of a ship or an aircraft when it is waterborne;

(k) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance;

(l) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);

(m) a claim in respect of the alteration, repair or equipping of a ship or dock charges or dues;

(n) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship;

(o) a claim arising out of bottomry;

(p) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;

(q) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship; or goods or cargoes carried by a ship;

(r) a claim by a master, or a member of the crew, of a ship for -

(i) wages; or

(ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country;

(s) a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure;

(t) a claim for the enforcement of or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act) made in respect of a proprietary maritime claim or a claim referred to in any of the proceeding paragraphs;

(u) a claim for interest in respect of a claim referred to in any of the paragraphs (a) to (t) of this subsection.

ANATOMY OF AN ARREST IN PANAMA

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Introduction

Panama is one of the most transited maritime routes in the world. For almost a hundred years, it has been an obliged passage for vessels.

Over 14,000 vessels cross the Panama Canal every year. During the last few years, Panama has become a mayor transshipment centre at any of the four (4) state-of-the-art container ports, located at both entrances of the Canal. Panama for its maritime tradition, geographical position and obliged passage route represents a reliable option when considering where to arrest a vessel.

Legal Background

For the first 80 years of Panama's republican existence, the U.S. District Court for the District of the Canal Zone was the only competent forum to handle cases against the Panama Canal Company and also dealt with the enforcement of privileged maritime liens,[1] personal injuries, and others, basically due to the effectiveness and adequate protection provided by the U.S. Federal Rules of Civil Procedure and the Supplemental Admiralty Rules.

Under the new Panama Canal Treaties of 1978, the U.S. Court for the District of the Canal Zone was closed on 1st. April 1982 and Panama enacted Law No. 8 of 30th March 1982, whereby the Maritime Courts are created and rules of procedure are enacted,[2] hereinafter called the "Maritime Law". It should be noted that the draftsmen of the Maritime Law relied to a great extent on the U.S. Federal Rules of the Civil Procedure and the Supplemental Admiralty Rules.

Powers and Functions of the Maritime Court

To date, two Maritime Courts have been established under Maritime Law. The Second of these Courts was just created two months ago. These courts are open 24 hours a day, everyday of the year, including holidays.[3] They have exclusive jurisdiction over cases arising from or connected with maritime trade and navigation occurring within the territory of the Republic of Panama, its territorial sea, the navigable waters of its rivers and lakes and the Panama Canal waters.[4]

Under s. 17 * the Maritime Court will also be competent to take cognisance of actions from commercial and maritime transport activities occurring outside the areas mentioned above, in the following cases:

- When the respective claims are directed against the vessel or her owner and as a consequence thereof the vessel is arrested within Panamanian jurisdiction.
- When the Maritime Court has attached other assets of the defendant although said party is not domiciled within the Republic of Panama.
- When the defendant is within Panamanian jurisdiction and has been personally notified of any claims filed at the Maritime Court. When one of the vessels involved is a Panamanian flag vessel, or Panamanian substantive law becomes applicable under the contract or due to the provisions of Panamanian law, or the parties subject themselves expressly or impliedly to the jurisdiction of the Panamanian Maritime Court.

Labour lawsuits concerning workers on board Panamanian flag vessels will be in the competence of the Maritime Court or of the labour courts at the option of the worker. Notwithstanding the foregoing, claims for damages arising from occupational risks due to fraud, fault or negligence imputable to the employer or to third parties are within the competence of the Maritime Court. [5]

Applicable Law

Claims may be presented invoking:

- The law of the flag of a vessel
- Choice of law agreements, or the place where a connection can be established. To this point, Art. 557* of Law No. 8 establishes general guidelines as to the applicable law in a number of general situations.

Procedural Considerations

Arrests may be executed based on in rem or in personam claims, as per Art. 168** considerations. For both types of claims procedure and execution of arrest is similar.

The complaint

The process in rem against a vessel, cargo or freight (or a combination thereof) subject to a privileged maritime lien is initiated by filing a complaint prepared by the plaintiff which should (a) describe with particularity the circumstances from which the claim arises, the property that is the subject of the action and stating that it is within the jurisdiction of the court or will be during the pendency of the action; (b) contain a statement identifying the claim as an

enforcement of a privilege maritime lien or an in personam claim; and (c) include a petition for arrest of the property in question.[6] Besides the foregoing requirements, the complaint must contain all other information required by Art. 55 of the Maritime Law for ordinary complaints.

Legal Counsel

Only lawyers qualified to practice law in Panama may represent parties at Panamanian courts.[7]

The appointment of legal counsel in Panama must be effected by means of a power of attorney in his favour.

In situations where the time factor requires immediate action and the power of attorney has not yet been received by the Panamanian legal counsel, he may act as a de facto agent of the plaintiff⁷ under a special civil law institution, provided that the original Power of Attorney is submitted as soon as reasonably possible (normally within 3 months following arrest). Said power must be duly notarised and authenticated by the respective Panamanian Consulate or, in default thereof, by that of a friendly nation.

Evidence of Claim

Generally, any available evidence should be attached to the complaint.[8] Initially photocopies will suffice to support the claim as prima facie evidence. For foreign companies, proof of existence of the companies and the authority of their representative must be provided.[9]

Process In Rem

The *conditio sine qua non* of the in rem jurisdiction necessary to execute the lien is the physical presence of the res within the jurisdiction of enforcement. As a consequence and as mentioned before, Paragraph 2 of Art. 526 of the Maritime Law, in prescribing the special formal requirements for actions in rem to enforce privilege maritime liens, requires a statement that the property subject to the action is within the jurisdiction of the Maritime Court or will be during the pendency of the action. However, the actual presence of the res is not a prerequisite to filing an in rem action and initiating the process.

Arrest expenses must be paid in advance to enable its legal counsel in Panama to constitute a security for an amount of U.S.\$1,000 for damages caused by the arrest of the vessel or other property at the moment of filing the initial pleadings, and U.S.\$2,500 for custody and maintenance expenses of the property during the pendency of the arrest. The said amount is always U.S.\$2,500 in the case of vessels. [10] However, the Marshal may require additional sums to cover the projected expenses of custody and maintenance of the res,[11] especially if the vessel remains in their cus-

tody for prolonged periods.

Order of Arrest

In cases of vessels or other property located within the Panamanian jurisdiction, the order or warrant for the arrest of the vessels or other property will be issued by the Maritime Court and delivered to the Marshal on the same day that the complaint and the petition for the arrest are filed, provided that all security and initial maintenance expenses have been covered by the plaintiff. [12]

Execution of Process

Upon receipt of the complaint and the petition for arrest and the constitution of the pertinent security, the arrest proceeds without notice to the defendant and the Marshal is directed by Art. 168 of the Maritime Law to execute the order at the place where the vessel or other property is located and to serve process on the person in charge of the property. The Marshal will thereafter affix the order in the pilot house in the event of vessels, cargo, or both, or in a conspicuous place in case the cargo is not on board the vessel.

With respect to the arrest of Panamanian flagged vessels or other property located or recorded at the Public Registry of Panama, the clerk of the Maritime Court will instruct the Public Registry to refuse to make any further registrations concerning the arrested vessel or other property after the service of the order of arrest by the Marshal to the person in charge of said property or its custody.

Within the arrest proceedings, the Marshal and the custodian of the property prepare and sign a record of the inventory of the arrested property. In the case of a vessel the Marshal will require the master or other officer in charge to submit all documents listing the parts and assets of the vessel and her cargo, which documents are annexed to the Marshal's records.[13]

Notice

Within the scope of the Maritime Law, a key element to the concept of privileged maritime liens and their enforcement is that adequate personal notice of the complaint to the defendant is accomplished by the execution of the order of arrest.[14]

Custody and Maintenance

The Marshal is appointed by Art. 174 of the Maritime Law to be custodian of the vessel or, other obligations he must take all necessary measures to provide adequate maintenance

nance of the vessel or other property, supervise the repatriation of the officers and crew upon their request, take out insurance, keep accounting records, and render accounts to the Maritime Court.

The owner of the vessel or other property, or its representative, is entitled to supervise the proper maintenance and administration of the res.[15] Nevertheless, in cases of perishable property, the Marshal with previous authorization from Maritime Court, and with the participation of the interested party, may arrange for an interlocutory judicial sale, the proceeds of which are deposited in the National Bank of Panama. [16]

Release of Arrest

The alternatives available to forestall a vessel's judicial sale under the Maritime Law: (a) payment of the claim;[17] (b) establishing other security to substitute for the vessel or other property(including P&I letters of agreement); [18] (c) waiver of the privileged maritime lien by reliance on other security; [19] (d) loss of the lien by expiration of the applicable statute of limitations; [20] or (e) request by the Marshal, upon default by the plaintiff in the provision of additional funds for the custody and maintenance of the res, or by request by the plaintiff. [21]

SHIP ARREST IN PORTUGAL

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Concept

The arrest is a provisional remedy envisaging to ensure satisfaction of a Court decision in a future action brought to collect a debt, through the seizure of assets of value sufficient to secure collection. Ship arrest is regulated by the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships and has a number of particularities resulting from articles 406º and 409º of the Portuguese Code of Civil Procedure.

Grounds for the arrest of a ship or vessel – types of claims

Where the arrest is made under domestic law the claimant must provide the Court with summary evidence of good law and of the serious possibility of obligations not being honoured by the debtor if actions are not taken (*fumus boni iuris* and *periculum in mora*).

Where the ship is in Portuguese waterways the arrest is also possible under the Convention Relating to the Arrest of Seagoing Ships, signed in Brussels on May 10th 1952 (even though Portuguese courts may not have jurisdiction to deal with the merits of the claim). In this case, the prerequisite of the maritime nature of the underlying claim must be observed in order for the Convention to be applicable but there is no need to demonstrate the *periculum in mora*.

Procedures for Arrest

1 - The Creditor who fears the loss of the patrimonial guarantee of its credit may request the arrest of the Debtor's assets, which right may also be exercised against the third party acquiring the Debtor's assets (provided that the transfer has already been judicially challenged or the claimant conveys evidence sufficient to ground an arrest order).

2 - The claimant does not need to prove actual existence of the credit, but only its likely existence (article 403 (1) of the Portuguese Code of Civil Procedure). This is consistent with the fact that the arrest like other provisional remedies, is aimed at obtaining expeditious decisions.

3 - Under the provisions of articles 406(2), 407(1) and 837(1)(3)(4), all of the Portuguese Code of Civil Procedure, the claimant must indicate, to the extent possible, the assets to be seized. Failure to indicate these assets results in the application being dismissed (and the claimant ordered to pay the court costs). The claimant may, however, reinstate the application in new terms.

4 - The arrest shall be declared by the court without hearing the counterparty, which will be notified to deduct its defence afterwards (Code of Civil Procedure, articles 408(1) and 388).

Ship arrest proceedings: how to fight an arrest petition

As already noted above, the defendant is not notified of the arrest pleadings until after the arrest is ordered. The defendant may then file a defence within 10 days as of notification of the arrest order and failure to file a defence will result in the judge immediately deciding the case.

The defence may serve to:

- a) contest the factual basis upon which the arrest was ordered;
- b) demonstrate to the court that the damages suffered as a consequence of the ship arrest are greater than those the claimant is trying to avoid by requesting the arrest;
- c) demonstrate forfeiture or prescription of the claimants credit;
- d) demonstrate that the obligation has already been complied with;
- e) demonstrate that the claimant is not a legitimate party;
- f) allege facts that may lead the Court to order the rendering of a guarantee as a condition to the granting of an arrest order.

Alternatively, the defendant may file an appeal where his disagreement relates only to legal aspects of the arrest. The appeal is aimed at attacking the arrest order itself (i.e. the arrest petition should not have been accepted at all), whereas the defence is used to bring new facts to the proceedings or to convey evidence that the Court has not previously considered.

The defendant may also request, at any stage of the arrest proceedings, that the ship arrest be replaced by an equivalent bank guarantee. However, the arrest shall not be lifted

until the bank guarantee is actually rendered (mere offer does not suffice for ship release purposes).

The release of the ship may occur not only where the appeal, opposition or request for the replacement by a bank guarantee are accepted, but also in case of caducity of the ship arrest.

Caducity occurs:

Where the claimant does not initiate the principal proceedings in the competent court.

If the main proceedings are at a stand still for more than 30 days as a consequence of the creditors failure to take the necessary steps to progress the matter;

Upon expiry of the limitation period concerning the Court decision in the principal proceedings;

Where the defendant is acquitted without a decision on the merits of the case (i.e. the arrest proceedings) having been issued;

Upon the extinction of the creditors right that is supported by the summary evidence of good law and guaranteed by the arrest (be it by caducity, prescription, satisfaction of the obligation impending on the debtor, etc).

Where the existence of the underlying credit is not proved.

Indemnity in case of improper arrest

Damages will be awarded where the owner of the ship proves that the claimant acted with bad faith or lack of diligence and civil liability rules shall apply.

A SHIP ARREST IN RUSSIA

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A ship arrest in Russia became a real possibility when the new Merchant Shipping Code of the Russian Federation came into force on 1 May 1999. Only a few months before in January 1999, Russia acceded to the Brussels Arrest Convention 1952. But the chapter of the Merchant Shipping Code "Arrest of ships" took into consideration not only the definitions of the Brussels Arrest Convention 1952, but partly innovations from the Arrest Convention 1999 which was adopted at the conference in March 1999. Before the 1st May 1999 the arrest of a vessel could be done in Russia only as security for a claim in specified cases in accordance with the Civil Procedure Code of the Russian Federation or the Arbitration Procedure Code of the Russian Federation. (This possibility still exists).

In accordance with the Merchant Shipping Code of the Russian Federation, a vessel can be arrested only by a court's decision as security for a maritime lien or a maritime claim. This rule does not relate to the rights of a Harbour Master, a Port Authority or State official to detain a vessel in situations stipulated elsewhere by Russia Law. For example, a vessel can be detained by the customs authorities if they discover smuggling on board.

The Merchant Shipping Code of the Russian Federation declared that a vessel can be arrested regardless of an existing arbitration clause or even if the dispute is to be judged in a jurisdiction other than the Russian Federation. (In reality, the existing practice of Russian Courts can be very contradictory and it is very difficult in practice to arrest a vessel if the case is not tried in that Russian Court).

But if the particular incident that gave rise to the claim, (a collision or damage to the cargo, etc.) occurred on the territory of the Russian Federation or the port of destination of the cargo is in Russia a claim can be brought in the Russian Court and an additional petition can be lodged to arrest the vessel as security for the claim. This petition would normally be decided by the Court in a day. The Claimant (as well as a Defendant) needs to provide to the Court a duly authorised Power of Attorney that must be notarized and legal-

ized if the party is not a Russian legal entity.

(The Court by its own initiative or by the petition of the opposite party could strictly require from the Claimant counter-security for any possible damages and losses but as a rule it does not.)

The Court issues a ruling to arrest the vessel as security for the claim in accordance with documents evidencing the claim and that the vessel is the only property of the foreign legal entity within the territory of the Russian Federation. The Court's ruling will then be presented to the Bailiff's office and the Bailiff will issue his own order to arrest or detain the vessel. That document the Court Bailiff then presents to the Master of the arrested vessel and to the Port Authority.

The vessel can be released from arrest on the provision of whatever type of security is acceptable to the claimant but if agreement cannot be reached then cash can be paid into court in Russian Roubles. The Court then issues an order canceling the arrest of the vessel and the vessel will be released. The arrested vessel can only be released by a Court order and that order can be as a result of the provision of security or the result of trying the case in the Court (including settlement of the case).

The cost of arresting a ship in Russia is equivalent to the Court fee that the Claimant must pay when the claim was lodged. It is about five percent of the amount of the claim. This sum can be recovered from the opposite party if the claim is successful. But if the claim is lost, the shipowner has a right to claim all damages and losses resulting from the arrest of the vessel.

SHIP ARREST IN THE RUSSIAN FEDERATION

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Introduction

This article provides an overview of the law applicable to ship arrest in the Russian Federation (hereinafter "Russia"), and outlines the basis for jurisdiction of Russian courts to decide matters pertaining to ship arrests, as well as the procedures followed by claimants and the courts in petitioning for and determining issues of arrest respectively.

General

There are several procedures that a claimant may follow in order to procure the arrest of a ship from a Russian court, whether a court of general jurisdiction or a State Arbitrazh Court¹. The two predominant methods, which are discussed in further detail in this article, are procuring arrest as an injunction measure in action proceedings, and procuring arrest based on a maritime claim as set forth in Merchant Shipping Code of the Russian Federation dated April 30, 1999 (hereinafter "Merchant Shipping Code").

Applicable law

Russia is a party to certain international conventions pertaining to the arrest of ships and to maritime liens and mortgages. For instance, Russia is a party to the International Convention for the Unification of Certain Rules relating to the Arrest of Maritime Ships concluded in Brussels on May 10, 1952 ("1952 Convention"). Russia joined the 1952 Convention on January 6, 1999 through issuance of the Federal Law "On the Russian Federation Joining the International Convention for the Unification of Certain Rules Relating to the Arrest of Maritime Ships" subject to the following reservations. Specifically, although Russia joined the 1952 Convention, it reserved the right to not apply the provisions of the 1952 Convention as follows² :

- to warships, war-subsidary and other ships owned by the State or used by the State solely for non-profit purposes;

1. The Arbitrazh Court system in Russia should not be confused with private arbitration. The Arbitrazh Courts grew out of the Soviet system for resolution of disputes between State enterprises, and these Courts today have jurisdiction over most commercial disputes between juridical persons.

2. The below list contains all reservations.

- to arrest of a ship under a maritime claim arising from disputes involving the title to or ownership of a ship, disputes between co-owners of a ship regarding the ownership, possession, employment, or earning of such ship (Article 1, Items "o" and "p" of the 1952 Convention)³. Russia further reserved the right to apply Russian legislation to such claims;

- to not apply Article 3, Item 1 of the 1952 Convention to the arrest of a ship within the jurisdiction of Russia pursuant to claims arising from a ship mortgage (Article 1, Item "q" of the 1952 Convention).

Russia is also a party to the International Convention on Maritime Liens and Mortgages, concluded in Geneva on May 6, 1993 (the "1993 Convention"). It joined the 1993 Convention on December 17, 1998 by issuing the Federal Law "On the Russian Federation Joining the International Convention on Maritime Liens and Mortgages of 1993" without any reservations.

Russia is not a party to the International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages concluded in Brussels on April 10, 1926 and May 27, 1967. Russia is also not a party to the International Convention on the Arrest of Ships concluded in Geneva on March 12, 1999 ("1999 Convention"). Although not a party to the 1999 Convention, Russia has implemented some important provisions of this Convention, including its list of maritime claims, in its own domestic maritime legislation, specifically, the Merchant Shipping Code.

Thus, the main domestic Russian law that deals with ship arrests under specific maritime claims is the Merchant Shipping Code. Procedural requirements are contained in the Code on Arbitrazh Procedures of Russia (hereinafter "Code on Arbitrazh Procedures") and the Code on Civil Procedures of Russia (hereinafter "Code on Civil Procedures").

Ships Subject to Arrest

Under the Merchant Shipping Code procedure, a ship against which a maritime claim³ has arisen may only be arrested under the following circumstances: a maritime claim against a ship owner is secured by a maritime lien on a ship and is among the list of claims established by merchant legislation; a maritime claim is based on the mortgage on a ship or duly registered encumbrance of the same nature; a maritime claim relating to the right of ownership or possession of a ship; other cases when owner (bare-boat charterer) of a ship is liable for a maritime claim and owns a ship (is its bare-boat charterer) at the moment arrest procedure commences.

3. See next section entitled "Maritime Claims" for a list of such claims.

Sister ship(s)

In accordance with the Merchant Shipping Code, a sister ship is any other ship that is owned by the person/entity liable under a maritime claim who was, at the time the claim arose, the owner of a ship against which a maritime claim has arisen, or the bareboat charterer, time charterer or voyage charterer of such a ship. The Merchant Shipping Code allows the arrest of one or more sister ships under a maritime claim procedure. In order to arrest sister ships, a claimant must prove that there is a connection between the ship against which a maritime claim has been asserted and the entity (physical person or legal entity) liable for the maritime claim (at the time the claim arises, the person/entity who is the owner of the ship, or its charter under a bareboat charter, time-charter or voyage charter), and between the sister ship and this person/entity.

Ships Not Subject to Arrest

In accordance with the reservations made by Russia when ratifying the 1952 Convention discussed above, warships, war-subsidary and other ships owned by the State or used by the State solely for non-profit purposes are not subject to arrest.

Ship Arrest Pursuant to Maritime Claims

The Merchant Shipping Code provides that a ship may only be arrested pursuant to the assertion of a specific maritime claim. There are 22 such claims, which are enumerated in Article 389 of the Merchant Shipping Code, which corresponds to a list of such claims contained in the 1999 Convention. A maritime claim is asserted by filing a petition for arrest with a court⁴. A maritime claim is defined as any claim arising out of:

- (a) damage caused during the operation of a ship;
- (b) loss of life or personal injury to a person which occurs either on land or on water, in direct connection with the operation of a ship;
- (c) a salvage operation or any contract on salvage;
- (d) expenses for measures taken by any person to prevent or minimize damage, including damage to the environment, if such a claim arises out of an international treaty of the Russian Federation, law or any agreement, as well as damage which has been caused or might have been caused by such measures;
- (e) expenses for the raising, removal and destruction of a sunken ship or its cargo;
- (f) any contract for use of a ship;

(g) any contract relating to the carriage of goods or passengers by sea;

(h) loss of or damage to goods, including luggage carried on a ship;

(i) general average;

(j) pilotage;

(k) towage;

(l) supply of provisions, materials, fuel, stores, equipment, including containers, for the purposes of the operation and maintenance of a ship;

(m) construction, repair, modernization or re-equipment of a ship;

(n) port, canal and other waterway dues;

(o) wages and other sums due to the ship master and other members of the ship's crew from their employment on the ship, including costs of repatriation and social insurance contributions payable on behalf of the ship master and other members of the ship's crew;

(p) disbursement expenses incurred in regard to a ship;

(q) insurance premiums, including mutual insurance contributions payable by the owner of a ship or its charter by demise or on their behalf;

(r) commission, broker's or agent's remuneration payable by the owner of a vessel or its bareboat charterer or on their behalf;

(s) any disputes as to the right of ownership or possession of a ship;

(t) any disputes between two or more co-owners of a ship as to the use of the ship and the division of earnings;

(u) a registered mortgage on a ship or registered encumbrance of the same nature;

(v) any dispute arising out of a contract for sale of a ship⁵.

Jurisdiction

Non-Russian legal entities and physical persons may apply to Russian Arbitrazh Courts or to courts of general jurisdiction for protection of their rights and lawful interests in cases provided for by the procedural legislation of the Russian Federation.

It should also be taken into consideration that the Merchant Shipping Code provides that a ship may be arrested (based on a maritime claim) in order to obtain a security even if, in accordance with a jurisdictional clause or arbitration clause specified in a respective agreement or otherwise, the maritime claim pursuant to which a ship is arrested is subject to consideration by a court or arbitration body of another country. In such case, a Russian court would only have the

4. See sections entitled "Jurisdiction" and "Procedure".

5. Article 389 of the Merchant Shipping Code.

authority to arrest the ship, but the main dispute would later be considered by the foreign court.

Procedure

1) Arrest as an Injunction Measure in Action Proceedings

As stated above, an arrest may be imposed on a ship as an injunction measure in Arbitrazh Court proceedings and courts of general jurisdiction. This is accomplished by filing a petition for injunction with a respective court at any stage of the proceedings (such application may be filed on the same date of filing a statement of claim and can even be incorporated into the statement of claim, or filed during the proceedings).

In order to procure arrest as an injunctive measure, the claimant must prove to the court that non-acceptance of the injunction measure (arrest) would complicate the execution of a court's decision or make the execution impossible. The advantage of this approach is that in accordance with Russian procedural legislation, a petition for injunction must be examined and decided by a court of general jurisdiction on the day of its filing, and by an Arbitrazh Court not later than the next day. This usually means that the request for injunction will be considered by the court without the opposing party having an opportunity to be present in the court. Moreover, a court's ruling on ship arrest as an injunction measure must be executed immediately.

The initiation of court proceedings in Russia requires a claimant to pay a state fee (to the State). The amount of this fee in property disputes is calculated as a specific percentage of the value of the claim and, therefore, can potentially be rather high. It is possible, however, to later recover court costs from the opposing party should the claimant prevail in the case.

In addition, in Arbitrazh Court action proceedings a court may request a claimant to provide counter-security before deciding on a petition on injunction measures, the amount of counter-security may not be less than half of the amount of the claim. If a claimant does not provide counter-security requested by a court in time, it may become ground for rejection to impose injunction measures. A defendant has a right to provide counter-security in exchange for injunction measures by depositing money in the amount demanded by a claimant into a deposit account of a court, in which case the arrest order will not be granted or will be withdrawn.

2) Arrest in accordance with the Merchant Shipping Code (based on a maritime claim)

Another option for arrest of a ship is to file a petition on arrest as preliminary injunction measure before commencing formal proceeding, based on a maritime claim as out-

lined above⁶, following procedures established by the Merchant Shipping Code and the recently adopted edition of the Arbitrage Procedural Code⁷.

The Merchant Shipping Code defines arrest of a ship as any detention or restriction in movement of a ship within the jurisdiction of the Russian Federation, carried out under a decision of a court, Arbitrazh Court or maritime arbitration court authorized by law to impose arrest on a ship to secure a maritime claim, except for seizure of a ship effected in execution of a decision of a court, Arbitrazh Court or arbitration tribunal which has come into legal force. The legislation establishes that a ship may be arrested even when it is ready to sail.

A petition for arrest of a ship under this scenario (as a preliminary injunction measure) is to be filed with an Arbitrazh Court by a place of location of a petitioner, funds or other property in question, or by a place of violation of applicant's rights. A petitioner is required to provide counter-security for the amount specified in a petition and provide a court with document confirming such. A statement of claim related to a demand on preliminary injunction is to be filed with a court within 15 days from issuance of a court ruling granting arrest of a ship as a preliminary injunction measure. In case of a violation of this requirement, preliminary injunction measures are to be canceled by a court, which originally imposed them.

On the stage of preliminary injunction measures a defendant may plead a court for changing preliminary injunction measures for counter-security (by way of depositing money in amount of demands into a deposit account of a court). Provision of a court with a document confirming making counter-security by a defendant is a ground for rejection of injunction or its cancellation.

3) Other options for arrest

It is also possible to seek the arrest of a ship in a Russian court by way of execution of a commission from a foreign (non-Russian) court. In order to accomplish this, there must be a treaty between Russia and a foreign state providing for execution of commissions within the territory of the Russian Federation. It should be noted that the official procedure of delivery of commissions from a foreign state to Russian courts is via diplomatic channels, and therefore, can be lengthy and complicated.

Russian legislation also provides for the arrest of a ship in a

6. See sections entitled "Ship Arrest Pursuant to Maritime Claims" and "Ships Subject to Arrest".

7. Please note that procedure discussed in this paragraph, specifically, arrest through preliminary injunction measures, is only available in Arbitrazh Courts and is not provided for in procedural legislation regulating courts of general jurisdiction (the Civil Procedural Code).

Russian court by way of execution of a relevant decision of a foreign (non-Russian) court. There must be an appropriate treaty between the foreign state and the Russian Federation governing execution of court's acts. A complete discussion of the circumstances in which a Russian court will enforce a foreign court's judgment is beyond the scope of this article.

Wrongful arrest

When granting a ship arrest, a court is empowered to request security in the form of depositing money into court's deposit account from the claimant for possible damage that might be caused to the ship-owner. In addition, if the arrest is later rejected by a court as wrongful, the ship-owner may file a claim in the same court for compensation of damage caused by wrongful arrest of the ship after the decision on rejection enters into legal force.

Power of Attorney

In order to request relief from the Russian courts whether by injunction or by filing a maritime claim, to monitor the execution of an arrest with bailiffs and to perform other relevant actions, a litigation Power of Attorney from the claimant is required. It should be signed by the claimant's authorized representative, contain the company's seal, and be notarized, as well as legalized or apostilled (if a country is a party to the Hague Convention of May 5, 1961) by an authorized person and be accompanied by a notarized Russian language translation.

Due to the fact that Russian courts have the authority to not consider a claim if it is believed that the claim is signed by an unauthorized person, it is recommended that the Power of Attorney be carefully prepared by a Russian lawyer to comply with all requirements.

Documentation

A petition for arrest, whether pursuant to the Merchant Shipping Code or as a request for injunction measure in action proceedings, should be supported by supplementary documents evidencing the claim, such as contracts, invoices, charter-parties, and letters requesting payment. In order to submit documents to Russian courts, they should be legalized or apostilled by competent authorities, and a notarized Russian language translation should be attached. Usually originals or notarized copies of the documents must be presented to the court. Simple copies will not suffice.

Execution of Arrest

The court may simultaneously issue a writ of execution based on its ruling granting arrest. The writ of execution is

then executed by court marshals (bailiffs). In accordance with legislation on execution procedure, the arrest should be made no later than one month from the date the decree on commencement of execution procedure is served to the defendant, or in some cases at the same time it is served. As noted above, if the arrest is granted as an injunction measure, it should be executed immediately.

Release from Arrest

Based on a petition filed by an interested party, an arrest imposed as an injunction measure may later be reversed or amended to provide for a different injunctive measure. Such petition may be supplemented with evidence confirming provision of counter-security by the defendant. It is possible that the arrest is changed to other statutory injunction measure by the court as a result of petitioning by a claimant or a defendant.

During ship arrest procedure as a preliminary injunction measure, a ship may be released from arrest (and preliminary injunction measures canceled) on the basis of a court's decision based on a petition from a defendant, upon providing sufficient counter-security by way of depositing money into a deposit account of a court.

Costs

Court costs:

As noted above, a claimant seeking to procure arrest in action proceedings must pay a state fee when filing a claim with a court.

Bailiffs' costs:

Bailiffs collect a fee in the amount of the lesser of 5% of the satisfied sum or property value, and 10 minimum monthly wages (currently 1,000 rubles or 10 X 1,000= approximately US\$320). The fee is collected only if a bailiff secures real and timely execution of arrest.

Attorney's fees:

In some firms, attorneys' fees are calculated on an hourly basis, in others, fees may be based on a fixed sum or contingency basis.

It appears from our recent practice that Russian courts currently prefer to impose arrest on ships as an injunction measure in action proceedings as opposed to using the procedure recently established by the Merchant Shipping Code and Code on Arbitrazh Procedures.

SHIP ARREST IN TURKEY

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Introduction

Set out below is an overview of ship arrest issues and procedures in Turkey grouped under the subject headings most frequently queried by our clients.

General

A ship may be arrested at a Turkish port by an ex parte application to the court pleading for the issuance of a precautionary judgement. By depositing a determined amount of counter-security the precautionary judgement may then be enforced over the vessel to detain it from sailing. Since the purpose of the arrest is to obtain security, the vessel's owners are free to substitute adequate security in place of the vessel to secure its release. The precautionary judgement then continues in force over the security.

Claims permitting arrest

There is no closed category of claims which may give rise to a vessel's arrest in Turkey. Any debt of the vessel's owner, whether arising out of contract or tort, may support an arrest application.

Documentation

All documentation evidencing the claim (e.g. charterparties, invoices, contracts etc.) are required and these must be officially translated into Turkish prior to submission to the court. It is generally the case that sworn translations of documents are acceptable without the need for notarisation (although if objected to notarised translations are necessary).

A power of attorney is also required to make the court application. The power of attorney should be notarised in the country of the grantor (and apostilled where appropriate) and this too requires sworn translation and notarisation for submission to the court. In urgent cases a faxed power of attorney from overseas can be accepted provided the original is duly presented thereafter.

Counter-Security

When issuing a precautionary judgement, the court will require an amount of counter-security to be deposited to allow enforcement of the judgement. The amount of counter-security is at the discretion of the court and is usually a figure between 15% and 40% of the claim amount (although it may be higher depending on the circumstances). The courts in Turkey require that the counter-security take the form of either cash or a bank guarantee issued by a first-class Turkish bank.

Action on the Merits

Upon obtaining a precautionary judgement, this judgement is only valid for an initial period of ten days and the judgement will fall unless the claimant commences an action on the merits before a competent tribunal within this period. To protect the precautionary judgement, the court requires that written evidence be submitted to the file demonstrating that an action on the merits has been commenced.

Sister Ships

Sister ship arrest in the international sense is not permitted in Turkey. Only vessels in the ownership of the debtor company may be arrested and Turkish law does not enquire into the shareholding interests of affiliated companies of the debtor (even where such companies are owned and controlled in exactly the same way as the principal debtor).

Release of Arrest

The owner may arrange release of the vessel by either settling the claim or depositing cash or a Turkish bank letter of guarantee in acceptable wording to the court file. Club letters of undertaking are not accepted by the courts in Turkey.

Wrongful Arrest

The claimant may be held liable for the losses and damages incurred by the defendant as a result of a wrongful arrest. The counter-security submitted by the claimant when implementing the arrest forms a security for any counter-claim by the defendant for wrongful arrest.

SHIP ARREST IN UNITED ARAB EMIRATES

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Claims for which arrest can be sought

An application may be made to a court in the UAE to arrest a vessel in respect of a "maritime debt". Article 115 of Federal Law No.26 of 1981: The UAE Maritime Code, defines maritime debt as meaning a claim in respect of a right arising out of any of the following causes:

- (a) Damage sustained by the vessel by reason of a collision or otherwise.
- (b) Loss of life or personal injuries occasioned by the vessel and arising out of the use thereof.
- (c) Assistance and salvage.
- (d) Contracts relating to the use or exploitation of the vessel under a Charterparty or other contract.
- (e) Contracts relating to the carriage of goods under a Charterparty, bill of lading, or other documents.
- (f) Loss of or damage to goods or chattels being carried on board the vessel.
- (g) General average.
- (h) Towage or pilotage of the vessel.
- (i) Supplies of products or equipment necessary for the utilisation or maintenance of the vessel, in whatever respect the supply is made.
- (j) Construction, repair or fitting out of the vessel, and costs of it being in dock.

Sums expended by the Master, shippers, charterers or agents on account of the vessel or on account of the owner thereof.

- (l) Wages of the Master, Officers and crew, and other persons working on board the vessel under a contract of maritime work.

- (m) A dispute as to the ownership of the vessel.

A dispute in connection with the joint ownership of the vessel, or with the possession or use thereof, or with the right to the profits arising out of the use thereof.

- (o) A maritime mortgage.

Vessels susceptible to arrest

Pursuant to Article 116 of the Code, any person seeking to recover the maritime debts referred to in Article 115 may "arrest the vessel to which the debt relates, or any other vessel owned by the debtor if such vessel was owned by him at the time the debt arose. It shall not, however, be permissible to arrest any vessel other than one to which the debt relates if the debt is one of those specified in (m), (n) or (o) above."

Procedure for arrest

Before an application for arrest can be filed it is necessary for the claimant's lawyer to be in possession of a power of attorney. This needs to be executed by the authorised signatory of the claimant company before a notary public and then this needs to be authenticated and legalised for use in the UAE.

While the power of attorney is being executed, notarised authenticated and legalised, the arrest papers can be prepared. A claimant will need to produce documentary evidence which is sufficient to support a prima facie claim giving rise to a right to arrest. All documentation to be used in UAE proceedings needs to be translated into Arabic by a court approved translator.

It is a requirement that, within eight days of the application for the arrest being made, the claimant must commence substantive proceedings in the court in which the arrest order has been obtained. Failure to do so will result in the arrest order lapsing.

Provision of counter security

The local Courts usually request counter security in the form of a Bank guarantee before granting an arrest order. Historically, the amount of counter security has been the same value of the claim amount. This, however, seems to be becoming the exception rather than the rule and, increasingly, we are seeing Court orders pitching the amount required to be provided by the arresting party at around AED100,000-150,000. This is security for damages for wrongful arrest. We are not aware, however, of any case where a shipowner has successfully brought an action for wrongful arrest.

It is sometimes possible to persuade the court to accept an undertaking from the arresting party in lieu of a bank guarantee, being an undertaking to indemnify the owners of a vessel for damages suffered in the event of a finding of an arrest having been brought without justification or vexatiously.

In addition, in Dubai (but currently not in any of the other

six Emirates of the United Arab Emirates) the court requires an undertaking to be signed by the arresting party by which that party undertakes “....to pay all charges, taxes and expense relating to the maintenance, towage and any works aimed at keeping the vessel afloat” until the arrest is lifted.

Costs

The Court fees for arresting a vessel in Dubai are approximately 3.75% of the value of the claim subject to a maximum of AED15,000. That maximum would, of course, apply in this case. For substantive proceedings, Court fees in Dubai are 7.5% of the amount of the claim with a cap of AED30,000. In the other Emirates, the court fees on the arrest are 5% of the amount of the claim with a cap of AED10,000 and for the substantive suit 5% of the amount of the claim again with a cap of AED10,000.

Court fees paid by a successful litigant are recoverable at the end of the litigation from the losing party.

Release

If there is no agreement between the parties regarding the form of security for the claimants' claim meaning that security has to be posted with the court, the UAE courts will not consider, for example, a P&I Club letter of undertaking to be sufficient security. The owner/demise charterer of the vessel will have no alternative but to provide a bank guarantee or deposit funds with the court in order to secure the release of his vessel from arrest.

Order of priorities for division of proceeds of sale

Article 84 of the Maritime Code provides:

"The following and only the following debts shall be priority debts:

(a) Legal costs incurred in protecting and selling the vessel, and distributing the proceeds thereof, as well as loading, lighthouse and port charges and other dues and taxes of the same type, pilotage fees, compensation for damage caused to port installations, docks and navigation lanes, the costs of removing obstacles to navigation caused by the vessel, and costs of towing and maintenance of the vessel from the time of its arrival at the last harbour.

(b) Debts arising out of a contract for the employment of the Master and crew, and other persons bound by a contract of maritime employment on board the vessel.

(c) Monies due for assistance and salvage, and the share of

the vessel in general marine average.

(d) Compensation due for collisions and other navigational accidents, compensation due for bodily injuries to the passengers and crew, and compensation for loss or damage to goods and possessions.

(e) Debts arising out of contracts made by the Master, and operations carried out by him outside the port of registration of the vessel within the scope of his lawful powers for an actual requirement dictated by the maintenance of the vessel or the continuance of its voyage, whether or not the Master is also the owner of the vessel, or whether the debt is due to him, or to the persons undertaking supply, or lenders, persons who have repaired the vessel, or other contractors.

(f) All premiums for insurance effected on the hull, equipment and fittings of the vessel due in respect of the last insured voyage, including whether the insurance was effected for the voyage or for the last period of insurance if the insurance was effected for a specified purpose, but provided that in either case the total does not exceed the premiums for one year. "

Pursuant to Article 86, the priority rights attach to the vessel and to freight charges of the voyage during which the debt arises and to the vessel's accessories and to freight earned since the commencement of the voyage. Pursuant to Article 89, priority debts of one voyage shall rank in the manner set out in Article 84 and the debts mentioned in each section thereof shall rank equally and shall be distributed in proportion to the value of each of them. Debts mentioned in paragraphs (b) and (c) of Article 84 shall rank in relation to each sub-paragraph taken separately in reverse order of the date on which each of them arose.

Pursuant to Article 91 "Priority debts shall follow the vessel into the hands of whomsoever it may be."

Priority Debts are, therefore, akin to claims giving rise to a maritime lien in other jurisdictions.

Mortgagees do not appear in Article 84, at all. Rather confusingly, the rights of mortgagees appear later in the Code, at Article 105 which provides:

"the mortgage shall rank directly after the priority debts referred to in sub-paragraphs (a), (b), (c), (d) and (e) of Article 84. Debts secured by a mortgage shall rank in the order of the dates of registration thereof."

Therefore, of the priority debts, the mortgage only ranks higher than the priority debts listed at (f) - i.e. insurance premiums etc.

If a debt is not a priority debt, after payment of priority debts, any remaining proceeds (of which there may not be

much, if anything) will be distributed, pursuant to Article 134, according to "the laws and regulations in force in the State." This probably means Articles 316-320 of Federal Law No 11 of 1992: the Code of Civil Procedure which effectively provides that, save for priority debts, all other debts rate equally and will receive an equal percentage of such funds as may remain available after priority debts have been paid.

IS AN ORDER SETTING AS AN ARREST SUSPENDED WHEN AN APPEAL IS NOTED AGAINST IT ?

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A very practical issue arises where A has arrested B's ship, B successfully challenges the arrest and gets it overturned, and A then notes an appeal against that order: does the arrest stay in place pending a decision on appeal? If not, what is the point of the appeal?

There are two forms of order which are relevant to this debate.

1 - The first is a rule nisi, obtained ex parte, where the Respondent is called on to show cause on the return day why an attachment of the asset should not be granted. Together with the rule, the court will usually grant an interim order for the attachment pending the return date.

2 - The second is an arrest order simply obtained ex parte which, while final rather than interim in nature, is always subject to challenge by the Respondent.

Previously, some of our courts have held that where leave was given to appeal against the setting aside of an attachment (or arrest), the original attachment order continued in effect (pending appeal), unless it was subject to a specific time limit⁸. Others held otherwise⁹. However, the position was clarified by our Supreme Court of Appeal in the judgment of the "Snow Delta"¹⁰, which now lays down definitively that the granting of leave to appeal does not revive the original attachment order. In order to keep the vessel secure pending its appeal, the arresting party would now have to bring an urgent application for an interdict preventing the vessel from leaving the jurisdiction until the appeal was heard.

The Snow Delta

On the return day of a rule nisi (issued with an interim order

8. Uniform Rule 49(11) and the Triena 1998 (2) SA 938 (D)

9. SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd

10. Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 SC

for the attachment of the charterer's rights under the charterparty in the use of the ship) the respondent successfully applied for the setting aside of the attachment order. Leave to appeal was granted against the order setting aside the attachment. The applicants then approached the court for an order declaring that the asset (the rights) was no longer under attachment and the vessel could leave the jurisdiction of the Court.

The Court held that the effect of setting aside of the attachment order was analogous to the attachment having been unsuccessfully sought in the first instance. The granting of leave to appeal did not revive the attachment order pending the outcome of the appeal. The application for a declaratory order (allowing the ship to sail) was accordingly granted.

The ship had therefore sailed by the time the appeal was heard, and the issue of whether the attachment was sustainable on the merits and still technically in place had become moot (in the sense that it could now not be enforced in any event). However, the court exercised its discretion to hear the matter on the basis of public interest. On the issue of suspension of the order setting aside the attachment, the appeal court upheld the finding of the lower court and confirmed that the effect of its order (setting aside the attachment) was that the original application for attachment had failed and that there was therefore no attachment which could have been kept in place pending the appeal.

The Chrome Circuit case

The Snow Delta judgment did not deal in terms with the situation where the court of first instance makes a final order of arrest or attachment in urgent ex parte proceedings, as opposed to an interim order coupled with a rule nisi and specified return date. (This is the manner in which security arrests, rather than attachments in personam, which found substantive jurisdiction in South Africa, are brought).

In the Chrome Circuit¹¹ case, the judge held that while the court setting aside the original attachment order appeared to have been granting a separate order, distinct from the first order, it was in fact simply reconsidering the first order in terms of Rule 6(12) (c) of the Uniform Rules of Court after affidavits had been filed by the parties, and was in substance refusing the application for attachment of the

goods, after hearing both sides of the matter. (The rule in question allows any person against whom an order is granted in his absence in an urgent application, on notice, to set the matter down for reconsideration.)

The court having now set aside or, more properly, reconsidered and finalised the application for attachment, a notice of appeal could not have the positive effect of creating an order of court which did not exist (i.e. it did not revive or perpetuate the order discharged or set aside).

We believe the position is now therefore the same, whether the original arrest or attachment has been obtained in urgent ex parte proceedings (without any return date) or by way of a rule nisi and interim order.

11. Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc. 2000 (2) SA 188 (W)

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