SIXTH MEMBERS' MEETING OF SHIPARRESTED.COM
LIMASSOL, 11-13 JUNE 2009
SEMINAR PROGRAMME

Conference hosted by Zambartas Law Offices and Economides & Partners LLC on Friday June 12, 2009

09:00 – Registration

09:30 - Opening addresses:

George Zambartas, Partner, Zambartas Law Offices

Peter Economides, Chairman of Totalserve, on behalf of E. Economides & Partners LLC

10:00 – Morning session one

Ulla von Weissenberg / Borenius & Kemppinen Ltd / "Ship Arrest / Boycott in Finland"

Jason Kostyniuk / Bull, Houser & Tupper LLP / "Arrest Practice and enforcement of maritime claims in Canada"

11:00 – Coffee Break

11:30 –Morning session two

Peter kos / Attorney at law, Slovenia / "A case study of relation between assignment of claim and bank guarantee to release the vessel"

Henry Feh Baaboh / Henry, Samuelson & Co / "Ship arrest as an Executory Measure in Cameroon"

Ingar Fuglevåg / Vogt & Wiig AS / "Ship arrest in Norway"

13: 00 – Conference Lunch

14:30– Afternoon session one

Merav Nur / Naschitz Brandes & Co / "Ship Agent's liability for cargo claims under Israeli case law"

Dr. Kevin Dingli / Dingli & Dingli Law Firm / "Features on ship arrest in Malta"

15.30 – Coffee Break

16:00 – Afternoon session two

Henrik Frandsen / DelacourDania / "ITF – industrial actions against vessels – jurisdiction and liability"

Alfonso Carmona / Arizon Abogados SLP / Considering arrest proceedings when a vessel is operated by tugs and pilots

17:00 – **Valentine de Callatay** / shiparrested.com network / Closure of the conference.

20:30 – Conference dinner with live piano music, sponsored by Marfin Laiki Bank.


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ARREST PRACTICE AND ENFORCEMENT OF MARITIME CLAIMS IN CANADA

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Introduction

This paper will provide a survey of Canadian arrest practice and procedure and an update on new developments in Canadian law with respect to enforcing maritime claims in Canada.

Canadian Courts with Arrest Procedures

1. Canada is divided into ten provinces and three territories. None of the courts of the individual provinces or territories, except the superior court of the province of British Columbia, permit *in rem* proceedings or have rules providing for the arrest of vessels or property.

2. The Federal Court of Canada is designated as the Admiralty Court.[1] As such, it is the Court usually used in maritime matters for the arrest of vessels.

3. The British Columbia Supreme Court Rules provide for the arrest of vessels and other property under Rule 55.[2] The British Columbia provision mirrors the Federal Court procedure. Virtually any arrest order that can be obtained from the Federal Court can also be obtained from the B.C. Supreme Court, with the exception of sistership arrests.

4. As the great majority of arrests in Canada take place in Federal Court proceedings this paper will focus on Federal Court arrest procedures.

Federal Court Admiralty Jurisdiction

5. Section 22 of the *Federal Courts Act*[3] (the *"Act"*) gives the Federal Court jurisdiction in essentially any matter relating to navigation and shipping. Section 22(2) itemizes a variety of particular claims that can be brought in the Federal Court, but that particularization does not diminish the broad jurisdiction over navigation and shipping set out in Section 22(1).[4]

6. The Federal Court's *in rem* jurisdiction arises from Section 43 of the *Act*.[5] Section 43(2) provides that the jurisdiction conferred by the Federal Court in Section 22 may be exercised *in rem* against a ship or other property that is the subject of the action or against any proceeds of sale of the ship or other property that have been paid into Court.

7. A significant exception to the *in rem* jurisdiction is found in Section 43(3). It provides that an action *in rem* shall not be made in respect of a claim mentioned in Section 22(2)(e), (f), (g), (h), (i), (j), (k), (m), (n), (p) or (q) unless at the time of the commencement of the action the ship or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner when the cause of action arose. The claims referred to in those subsections are claims for the loading or carriage of goods, personal injury, charter party disputes, towage, necessaries, repairs or marine insurance.

8. This means that for those types of claims, known as statutory right *in rem* claims, if there has been a change in ownership between the time the cause of action arose and the time the action is commenced, then no *in rem* proceeding is possible.

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[1] *Federal Courts Act*, R.S.C. 1985 c.F-7, ss. 3 and 4 as amended. This legislation can be found at: http://laws.justice.gc.ca/en/showtdm/cs/F-7
[2] Rules of Court, B.C. Reg. 221/90
[3] *Federal Courts Act*, R.S.C. 1985 c.F-7, s. 22
[4] Ibid.
[5] Ibid. , s. 43

9. It also means that unless the owner of the vessel is liable *in personam* for the claim, no *in rem* proceeding can be maintained. In the *JENSEN STAR*[6], a bare boat charterer was liable *in personam* for a necessaries claim, but the Court held that the *in rem* proceeding could not be maintained as the owner, as opposed to the bare boat charterer, was not liable *in personam*.

Sistership Arrest

10. The *Act* also provides for sistership arrest in Section 43(8).[7] Sistership arrest is not possible in the British Columbia Supreme Court as there are no equivalent provisions.

11. In Canada legislation is drafted in both official languages, English and French. The English language version of Section 43(8) provides:

> "43(8) The jurisdiction conferred on the Federal 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 is the owner of the ship that is the subject of the action."

12. That wording has caused problems. It has been held that the term "owner" means only the registered owner and does not include a beneficial owner.[8] Moreover, fractional ownership is not sufficient to meet the requirement of having the same ownership.[9]

13. The Federal Court has held that if a ship causes damage, then the sistership must be beneficially owned by the registered owner of the ship that caused the damage.[10] In practice, therefore, sistership arrests are difficult to maintain in Canada, as such a situation is almost never the case with one ship company fleets. Even if all of the one ship companies have the same parent and could be said to be all beneficially owned by the same entity, under the wording of section 43(8) there could still be no sistership arrest because the "registered owner" is not the same as the "beneficial owner".

14. Currently there is a bill before the Canadian Parliament, which proposes a harmonizing of the English and French versions of Section 43(8).[11] The bill proposes that the English version be replaced by the following:

> (8) "the jurisdiction conferred on the Federal Court by s.22 may be exercised *in rem* against any ship that, at the time the action is brought, is **owned by the beneficial owner of the ship that is the subject of the action**." (emphasis added)

It is widely considered that this amendment to Section 43(8) will broaden the scope of the section and effectively harmonize the English and French language versions.

Government Vessels

15. Government vessels, whether owned by Canada, a province or a foreign sovereign, may not be subject to an *in rem* proceeding if the vessel is a war ship, coast-guard ship or police vessel, is a ship owned or operated by Canada or a province when the ship is engaged in government service or, if owned or operated by a sovereign power, if the ship is being used exclusively for non-commercial governmental purposes.[12]

16. This means that ships engaged in commercial purposes owned or operated by foreign governments are subject to *in rem* proceedings in Canada.

Arrest Procedure

17. Canada has not adopted any international conventions on ship arrest. It has its own system for the arrest of property.

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[6] *Mount Royal/Walsh Inc. v. "Jensen Star"* [1990] 1 F.C. 199 (F.C.A.)
[7] (Supra), Note 1, S.43(8)
[8] *Hollandshse Aanaming Maatschappij v."Ryan Leet"* (1997), 135 F.T.R. 67. This decision has been criticized but never overruled. See *Governor and Company of the Bank of Scotland v."Nel"* [2001] 1 F.C. 408 (Proth)*; Royal Bank of Scotland plc v."Golden Trinity"* 2004 F.C. 795 (Proth.)
[9] *Ssangyong Australia Pty Co. v. "Looiersgracht"* (1994) 85 F.T.R. 265 (Proth.)
[10] *Noranda Sales Corp. v. "British Tay"* (1994), 77 F.T.R. 8
[11] Bill C-7, *An Act to Amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts,* 2nd Sess., 40th Parl., 2009
[12] *Federal Courts Act*, (supra), S.43(7); *State Immunity Act* R.S.C. 1985 c.S-18 s.7; *Sarafi v. "Iran Afzal"* [1996] 2 F.C. 954 (T.D.)

18. In Canada ship arrest is usually simple and relatively inexpensive. If it is a straightforward matter a ship can be arrested in as little as two hours if it is located at port during business hours and all of the documents evidencing the claim are provided to enable the solicitor to swear the Affidavit to Lead Warrant. The cost of arrest can be as little as Cdn. $1500 to $2500.

19. The procedure for arresting vessels in Canada is set out in Part 13 of the Federal Courts Rules and, in particular, in Rule 481.[13] In order to obtain a warrant for the arrest of a vessel, or indeed any property, a party must swear an Affidavit entitled "Affidavit to Lead Warrant". It must state:
    (a) the name, address and occupation of the party;
    (b) the nature of the claim and the basis for invoking the *in rem* jurisdiction of the Court;
    (c) that the claim has not been satisfied;
    (d) the nature of the property to be arrested; and
    (e) where the property is a ship, the name and nationality of the ship and the port to which it belongs.

20. If it is a sistership arrest, then it must also state that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action.

21. The Affidavit may be on information and belief.[14] In most cases, because of the urgency involved in arresting a ship, the Affidavits are sworn on information and belief, and frequently by counsel.

22. The Warrant of Arrest is served by a sheriff by attaching a certified copy on some conspicuous part of the ship or attaching it to the cargo. If it is freight that is to be arrested, then it is served on the person in possession of the monies.[15]

23. Possession of and responsibility for property arrested does not vest in the sheriff but continues in the person in possession of the property immediately before the arrest.[16]

24. In order for the sheriff to go into possession, an application must be made to the Court, and the party who brings such an application then becomes responsible for any costs or fees incurred and may be required to give security to the Court for those costs.[17]

25. In the vast majority of cases, no application is made to put the sheriff into possession and, as a result, the sheriff's fee for an arrest is usually only for service of the documents.

Release from Arrest

26. Vessels are released from arrest under the Federal Court Rules if the amount claimed is paid into Court, or if the amount claimed is greater than the appraised value of the property, if the appraised value is paid into Court. If cargo is arrested for freight, the amount of the freight is paid into Court. Alternatively, bail can be posted. Bail, under the Rules, is a guarantee of a bank or a bond from a surety company licensed to do business in Canada or a bail bond.[18]

27. If the amount of the security cannot be agreed, then an application to Court may be made to fix the amount.[19] A plaintiff is entitled to bail based on its reasonably arguable best case capped at the value of the property,[20] plus an allowance for anticipated costs and pre-judgment interest which typically increases the bail amount by 25% to 50%.

[13] Federal Courts Rules SOR 98-106, as amended, Rule 481
[14] *Magnolia Ocean Shipping Corp. v."Soledad Maria",* [1982] 1 F.C. 205 (T.D.)
[15] Federal Courts Rules, (supra), Note 13, Rule 479
[16] Federal Court Rules, (supra), Note 13, Rule 483(1)
[17] Federal Court Rules, (supra), Note 13, Rule 483(2)
[18] Federal Court Rules, (supra), Note 13, Rule 486(1)
[19] Federal Court Rules, (supra), Note 13, Rule 485
[20] *Canadian Sub Sea Hydraulics Ltd. v. "Cormorant" (Ship)*, 2006 FC 1051

28. It is usually the case that, where insurance is available to the vessel owner, whether through P&I Clubs or otherwise, a letter of undertaking is provided to the claimant instead of a bond.[21]

Movement of Arrested Property, Counter-Security and Wrongful Arrest

29. Movement of the property under arrest can only be done by consent of all parties and caveators, or by leave of the court.[22] Unauthorized movement of arrested property is punishable as contempt of court.

30. In a recent case[23] the Federal Court found the defendants guilty of contempt for removing fishing gear and other equipment a vessel that was under arrest. The Court assessed a fine of $5,000 jointly and severally against the defendants and ordered that they pay costs fixed at $15,000.

31. Payment of counter-security is not required to effect an arrest. However, where the plaintiff is a foreign entity, and upon the application of a defendant, the Court often orders security to be posted to cover the expected costs which would be payable by the plaintiff that defendant, should the plaintiff's action not be successful.

32. In Canada damages for wrongful arrest may be awarded only where the plaintiff's conduct amounts to malice or gross negligence.[24]

Sale of Arrested Property

33. Federal Court Rule 490 governs the sale of a ship or other arrested property.[25] The Court may order the property sold with or without an appraisal or advertisement, and by auction or private contract.[26] Typically the Court orders a formal appraisal and advertisement before sale , however the terms and mechanics of the sale are discretionary and depend on the particular circumstances of each case.[27]

34. When an arrested ship is sold by the Court the purchaser acquires complete title, free and clear of all liens, but that does not necessarily mean that claims under foreign law which are enforceable in foreign jurisdictions are extinguished.[28]

35. On a motion for the sale of a ship *pendente lite,* the Court will consider, *inter alia,* whether there is an arguable defence to the claim; whether the condition of the ship is deteriorating from want of maintenance; whether there will be a diminution in value by reason of delay, including the effect of ongoing costs of maintaining and insuring the ship; and whether it is likely to be sold in any event.[29]

Priorities in Canada

36. The law of priorities under Canadian maritime law is largely non-statutory. It is based on the principles of English admiralty law. With few exceptions, the ranking of claims in Canada is the same as English law.

37. Canada is not a party to any of the international conventions on maritime liens and mortgages and therefore, other than as a possible reference point, they have little or no application in determining maritime claims or their priority.

38. The ranking of claims in Canada is well established. It is:
    (a) special legislative rights, being those rights granted by statute, such as dock, harbour and canal charges, pollution and wreck removal;
    (b) the cost of arrest and sale of a vessel. As stated above, under Canadian law the

[21] However, there is no provision in the Federal Courts Rules for a letter of undertaking to be ordered by the Court and, as such, acceptance of that form of security and its terms are a matter to be negotiated between the parties.
[22] Federal Courts Rules, (supra), Note 13, Rule 484
[23] *Labrador Sea Products Incorporated v." Northern Auk" (Ship),* 2007 FC 679
[24] *Armada Lines Ltd. v. Chaleur Fertilizers Ltd*. [1997] 2 S.C.R. 617
[25] Federal Courts Rules, (supra), Note 13, Rule 490
[26] Federal Courts Rules, (supra), Note 13, Rule 490(1)(a),(b),(c)
[27] *Nordea Bank Norge ASA v. "Kingkuk" (Ship),* 2006 FC 1290
[28] *Canada (Deputy Marshall, Federal Court of Canada) v. "Galaxias" (The),* [1989] 1 F.C. 375
[29] *Franklin Lumber Ltd. v. "Essington II" (The*), 2005 FC 95 (Proth.)

sheriff does not go into possession of a vessel when an arrest is undertaken. If the Court should order that the vessel be placed into the possession of the sheriff, then those costs would also rank in this category;

(c) possessory liens;
(d) traditional maritime liens, such as collision, salvage, seamen's wages and masters' disbursements;
(e) mortgages; and
(f) statutory right *in rem* claims. The principal statutory right *in rem* claims are necessary claims, stevedore claims, cargo claims and general average claims.[30]

39. Under Canadian law the necessaries claimant in Canada does not have a maritime lien but only a low ranking statutory right *in rem*.[31]

Claims Subject to Foreign Law in Canada

40. In Canada validly created foreign maritime liens will be recognized and given the same priority as a lien created in Canada pursuant to Canadian maritime law,[32] "unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right."[33]

41. In the *IOANNIS DASKALELIS*[34], the Supreme Court of Canada held, on the basis of its earlier decision, the *STRANDHILL*[35], that a repair claim of an American shipyard against a Greek owned and Panamanian registered and mortgaged ship, which was arrested and sold in Vancouver, gave rise to a maritime lien under the laws of the United States, where the claim arose, and therefore it was enforceable in Canada as such. In the result, the ship repair claim ranked ahead of the mortgage.

42. It is firmly established under Canadian law that the nature of a maritime claim against the offending vessel will be determined by the law under which the claim arose.[36] It is also well established that its priority against a vessel or its sale proceeds will then be determined pursuant to the laws of Canada.

43. The same does not apply with respect to sistership arrest. The Federal Court has held that where a claim arises in the United States against a ship that under American law gives rise to a maritime lien, where if the same claim arose in Canada it would only be a statutory right *in rem*, then such a claim cannot be enforced against a sistership as a maritime lien, but only as a statutory right *in rem*.[37]

44. Where a claim arises in Canada pursuant to a contract for the supply of necessaries or bunkers which states that a foreign law governs, the Canadian courts will apply a "choice of law" analysis, using Canadian conflict of laws rules.[38] Where there is an express or implied choice of law by the parties to the contract, that law will normally govern the contract.[39]

45. In the absence of an express contractual provision, the proper law of the contract is determined by assessing which jurisdiction has the closest and most substantial connection.[40]

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[30] *Comeau's Sea Foods Ltd.* v. *"Frank and Troy" (The),* [1971] F.C. 556
[31] Bill C-7, *supra*, proposes to create a new maritime lien for Canadian necessary suppliers against foreign vessels. This provision would redress the imbalance between Canadian and U.S. necessary suppliers but only with respect to foreign ships. Canadian suppliers will not have a lien in relation to supplies made to a Canadian ship, and therefore they will still be out ranked by American suppliers who do enjoy a lien status for their supplies to that Canadian ship
[32] *Holt Cargo systems Inc. v. ABC Container Line N.V. (Trustees of)*, 2001 SCC 90 (CanLII)
[33] *The Strandhill v. Walter W. Hodder Co.*, [1926] S.C.R. 680 at 685
[34] [1974] S.C.R. 1248. This decision was more recently confirmed by the Supreme Court of Canada in *The Har Rai*, [1987] 1 S.C.R. 57
[35] [1926] S.C.R. 680
[36] There is a caveat to that proposition in that the foreign maritime lien must not be of such a nature as to be considered against public policy under Canadian law. See for example *The"Galaxias"* [1989] 1 F.C. 386 (T.D.), where the court indicated that creating a maritime lien for income tax obligations would be contrary to Canadian public policy.
[37] *Fraser Shipyard and Industrial Centre Ltd. v. Expedient Maritime et al.* (1999), 170 F.T.R. 1 (Proth); varied on a different point (1999), 170 F.T.R. 57 (T.D.)
[38] *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801 at para. 29
[39] *Drew Brown Ltd. v. "Orient Trader" (The),* [1974] S.C.R. 1286 at 1288, 1314 & 1318
[40] *Imperial Life Assurance Co. of Canada v. "Colemenares"*, [1967] S.C.R. 443 at 448

The "LANNER"

46. An important decision regarding foreign necessary claims has recently been handed down by the Federal Court of Appeal in *Kent Trade and Finance v. JPMorgan Chase Bank.* [41] In this case a Liberian owned and flagged vessel, LANNER, was sold by Federal Court order at the behest of its mortgagees. At issue was whether the appellants' necessaries claims ought to be afforded the status of maritime liens which would rank in priority to the claim of the respondent mortgagees.

47. The appellants were suppliers of necessaries, including bunkers, to the LANNER in various jurisdictions. None of the appellants were based or incorporated in the U.S. All of the contracts for the supplies had a choice of law clause providing that American law governed the contract.

48. The Federal Court of Appeal went through a "choice of law" analysis using Canadian conflict of laws rules and concluded that American law would apply since the contractual choice of law clause should normally govern and because no other jurisdiction had a closer or more substantial connection to the transactions at issue. The Court declined to decide whether personal liability of the ship owner is necessary for the choice of law clause to determine the proper law.

49. The Court then considered conflicting expert evidence on the law in the U.S. and concluded that American law would recognize a maritime lien for a foreign supplier of necessaries to foreign ships in a foreign port. The Court, in a 2 to 1 decision, then concluded that the appellant necessaries suppliers each had a maritime lien against the LANNER which out ranked the respondent mortgagee's claim.

50. The Court left it open that there could be situations where the supply of necessaries is so closely or substantially connected to another jurisdiction that the contractual choice of law would be displaced.

51. This case is a helpful development for foreign necessaries suppliers outside of Canada/U.S whose claims can now be recognized in Canada as valid maritime liens, which out rank ship mortgages, if their supply contract contains a carefully worded clause incorporating American law.

Conclusion

The arrest of property in Canada is a relatively straightforward and inexpensive procedure which, if done properly, can quickly provide security for claims. With the recent *"LANNER"* decision, foreign ship suppliers are better positioned to enforce their claims as high ranking maritime liens in Canada where their supply contract incorporates U.S. law.

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* This paper contains excerpts from the "Canadian Practice and Procedure in the Enforcement of Maritime Claims", a paper prepared by John W. Bromley presented at the Pacific Admiralty Seminar, Enduring and Emerging Issues in Maritime Law, held on October 6, 2006, in San Francisco, California

[41] 2008 FCA 399

A CASE STUDY OF RELATION BETWEEN ASSIGNMENT OF CLAIM AND BANK GUARANTEE TO RELEASE THE VESSEL

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I. GENERAL

A **bank guarantee** and **a letter of credit** are similar in many ways but they're two different things. Letters of credit ensure that a transaction proceeds as planned, while bank guarantees reduce the loss if the transaction doesn't go as planned.

A bank guarantee, like a line of credit, guarantees a sum of money to a beneficiary. Unlike a line of credit, the sum is only paid if the opposing party does not fulfil the stipulated obligations under the contract. This can be used to essentially insure a buyer or seller from loss or damage due to non-performance by the other party in a contract.

These **financial instruments** are often used in **trade financing** when suppliers, or vendors, are purchasing and selling goods to and from overseas customers with whom they don't have established business relationships. The instruments are designed to reduce the risk taken by each party.

In proceedings relating with arrest of vessel bank guarantee is an important instrument. Once the vessel is arrested, the vessel may be released if the correct bank guarantee is submitted by the debtor. Slovene law defines that debtor must submit first class Slovene bank or first class EU bank in order to release the vessel.

II. WORDING OF BANK GUARANTEE

After arrest warrant is granted, Slovenian law allows that debtor submit bank guarantee in order to release the vessel. Debtor must be very careful in order to submit the correct wording of bank guarantee. If creditor agree on wording of the bank guarantee court do not analyse the wording of bank guarantee and automatically release the vessel.

If creditor do not agree on wording of bank guarantee, court has to decide whether the bank guarantee gives creditor enough protection to get payment from this bank guarantee after the claim on merit is finally decided upon in court procedure.

Bank guarantee shall be recognised by court as sufficient guarantee if the bank guarantee includes:

- the sum of payment including principal claim that is granted with arrest warrant
- the interest that are granted with arrest warrant
- all cost, court fees and other expenses that are granted with arrest warrant.

III. BENEFICIARY OF BANK GUARANTEE – ASSIGNMENT OF CLAIM

There is also an interesting question about the beneficiary person to whom the bank guarantee shall be granted. Some drafts in www and other sources include the name of the court as a person who is legitimate on the basis of bank guarantee to receive the money after the case is finished. Court has nothing to do with the claim of creditor and do not receive any payment of behalf of creditor. Therefore one has to be very careful to nominate the correct beneficiary person - creditor

to be the entitled from bank guarantee.

It is also very important question who shall be the beneficiary of bank guarantee if the creditor assign his claim during the proceeding of arrest of vessel to other person. In case of assignment of the claim the bank guarantee must be reissued to beneficiary of new creditor, because he will get payment from bank guarantee.

IV. DRAFT OF BANK GUARANTEE

Beneficiary:

NAME OF CREDITOR

BANK:

BANK GUARANTEE

In consideration and upon condition that the creditor ***é é é*** *irrevocable refrains from arresting or otherwise detaining m/v* ***é é é é*** *..and/or any other vessel in the same or associated ownership or management, possession or control for the purposes of obtaining security in respect of creditor claim arising out of alleged damage to cargo,*

*BANK ------ grant the irrevocable bank guarantee that will pay for and on behalf of the debtor :****é é é é*** *.. on the first demand of the creditor* ***é é é é é é*** *..the claim with interests and costs as will be adjudged by enforceable judgment or agreed with settlement at the court in the contentious proceeding ref. num.* ***é é*** *District Court* ***é*** *.., pertaining the payment of principal in the amount of* ***é é*** *EUR with default interests from* ***é*** *.., costs of the proceeding for security ref. num. Rzl _____ in the amount* ***é é*** *. with default interests from* ***é é*** *and costs of the contentious proceeding ref. num.* ***é*** *. in the amount* ***é*** *.. with default interests from* ***é*** *.., provided always that this guarantee shall not exceed the amount of* ***é é é é*** *EUR.*

This guarantee cannot be deemed an admission of liability on the part of the debtor nor as a waiver of any of his rights to limitation of liability and is issued entirely without prejudice to any right, defence and exception which the debtor may have, including the right to limit his liability according to the applicable law.

SHIP ARREST AS AN EXECUTORY MEASURE (CAMEROON)

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Applicable law(s):

The law governing ship arrest as an executory measure in Cameroon is the CEMAC Merchant Shipping Community code of 03/08/2001 (the code). The code was inspired chiefly by the International Convention of 1999 on the Arrest of Ships and the Brussels Convention of 1952 on the Unification of Certain Rules on the Arrest of Ships.

This code is a regional legislation applicable to the CEMAC (Communauté Economique et Monétaire de l'Afrique Centrale) sub-region comprising Cameroon, Central African Republic (CAR), Congo, Gabon, Equatorial Guinea and Tchad, with executive secretariat in Bangui, capital of CAR.

The OHADA Uniform Act on the simplified recovery procedure and means of enforcement of 10/04/1998 (the Uniform Act) also applicable in all the CEMAC member states above governs the procedure for the forceful sale of ships.

N.B: The applicable law is actually the CEMAC Merchant Shipping Community Code which only makes reference to the OHADA Uniform Act.

Jurisdiction

There are three sea ports (Douala, Kribi, Limbe) and one river port (Garoua) in Cameroon.

The competent courts in matters of ship arrest as an executory measure here is the "Tribunal de Grande Instance" (in Douala-Bonanjo, Kribi and Garoua) and the High Court (in Buea). In spite of Cameroon's relatively short coastline, there are one or two fishing ports such as Tiko and Idenau. A water vessel to be arrested/sold in these ports should fall within the jurisdictional competence of the High Court of Fako Division holden at Buea according to the theory of forum.

Definition:

Ship arrest as an executory measure is the restraining of a ship by anybody holding an executory title in view of having the ship sold. Such executory titles would include:

- Court decision;
    - Decree absolute;
    - Court orders/rulings which do not obey the nisi-absolute rule;
- Foreign judgements (final) and arbitral sentences (final) with an exequatur obtained in the CEMAC member state wherein the ship is to be arrested;
- A consent judgment (minutes of conciliation signed by the parties and the judge);
- Notarial acts with the executory formulae;
- Decisions to which the municipal law of each CEMAC member state attaches the effect of a court decision.

The arrest proper

With any of these executory titles a bailiff serves a formal notice to pay within 30 days on the debtor failing which the (same) bailiff practices the arrest and now the creditor has 20 days to file

his conditions and articles of arrest/sale (cahiers de charge) at the competent high court registry though his solicitor.

Upon such arrest a report is made and a keeper designated under the same conditions as in ship arrest as a conservatory measure. Such report must contain the following details:

- Name, profession and residence of the creditor upon whose instruction the bailiff is acting; here the code assumes (not all too correctly though) the creditor would always be a physical person, as one only talks of "profession" with reference to a physical persons.
- Court decision authorizing the arrest;
- Amount of claim justifying the arrest;
- Date of the formal notice to pay (which preceded the arrest);
- Forum election done by the creditor in the competent jurisdiction, and in the place where the ship is berthed;
- Name and address of owner of the ship;
- Name, category, tonnage and nationality of the ship.

The report must equally have a statement and description of the launch, rigging and gear of the ship as well as its supplies and store rooms.

If the ship is flying the flag of a CEMAC member state, the arrest report is registered in the register kept by the competent maritime authority and in which the ship is immatriculated. This registration is required within seven days of the date of the arrest. But this deadline is increased to twenty days if the place of arrest and the place where the register of immatriculation is kept are not situated in the same CEMAC member state.

The creditor shall within three days notify a copy of the report to the ship owner and at the same time summon him to the high court of the place of arrest for their statements and remarks (if any) to be heard. If the owner is not resident in the jurisdiction of the court the notification and summons are served on the captain of the ship or the representative of the owner or the captain, in that order.

The deadline of three days is increased by 30 days if the person to be served is without the CEMAC territory. On the contrary if the person to be served is a foreigner resident without the CEMAC territory and is not represented, the summons and notification shall be served according to the procedure of common law i.e. deadline of distance would become applicable (90 days).

The report of arrest is recorded in the register of maritime mortgages kept by the competent administrative authority. This recordal is required within 7 days with effect from the date of the arrest report, which deadline is increased by 20 days if the place of arrest and the place where the register is kept is not situated at the same port.

The conservator of maritime mortgages issues a status of the recordal of the mortgage charge to the creditor. Within 7 days of the delivery of this status of mortgage charge, the arrest is notified to other (registered) creditors recorded in the domicile elected in the records. This deadline is increased by 20 days if the elected domicile is not situated in the jurisdiction of the competent court that issued the order to arrest.

The notification to other (registered) creditors indicate the date they have to enter appearance in court; this date must be without 30 days with effect from the date of notification in the case where the elected domicile is not situated in the jurisdiction of the court.

Procedure

The application for ship arrest as an executory measure is filed before the President of the competent High Court according to the procedure in the Uniform Act for attachment of real property. If there are more than one ships (anchored in different jurisdictions) to be arrested, the application is filed in only one of the competent jurisdictions.

According to the Uniform Act, the arrest/sale procedure has eight steps to be followed strictly.

1) ***Formal Notice to pay*** served by bailiff on the debtor. Thereafter the creditor has 50 days to file his application for arrest/sale if payment is not delivered.

2) ***Preparation and filing of the articles and conditions of arrest/sale*** (cahiers de charge) at the competent high court registry.

The documents/details to be included in the articles and conditions of arrest/sale, under pain of nullity, are as follows:

- Title of the act "articles and conditions of arrest/sale";
- The executory title justifying the arrest, the formal notice to pay/proof of service thereof;
- Indication as to the jurisdiction elected by the creditor or the Notary Public conventionally chosen by the debtor and creditor before whom the adjudication would take place;
- Indication as to the place where the sale would take place;
- The name, profession, nationality, date of birth and residence of the creditor;
- The name, title and address of the solicitor of the creditor;
- Designation of the ship under arrest as described in the formal notice to pay or a report of description of the ship by a bailiff;
- The conditions of sale and notably the rights and duties of the seller(s) and adjudicator(s)/buyer(s);
- Details as to the cost of the arrest/sale procedure and any other useful details;
- The upset price fixed by the creditor which shall not be lower than ¼ of the market value of the ship.

To the articles and conditions of arrest/sale must also be annexed all the real charges encumbering the ship (if any).

3) ***Formal notice to the debtor and other (registered) creditors***, requiring them to go to the court registry and get copies of the articles and conditions of arrest/sale.

This formal notice shall contain the following details, under pain of nullity.
- The date and hour of the hearing in which the court would statuate on statements and remarks made by the debtor and other (registered) creditors (if any). This hearing date must be after 30 days of the last formal notice.
- The day and hour for the adjudication. This day must be within the 30th and 60th day after the hearing date (above).
- These statements and remarks mentioned above must be received at the court registry, under pain that it would lapse, up to 5 days before the hearing date (above).

4) The hearing

The right to fair hearing must be observed at the hearing. In case of dispute as to the upset price the contesting party has the right to apply to the court to appoint an expert to assess the value of the ship (at his cost). This hearing in principle should know no adjournments. However an adjournment would be entertained under very grave circumstances: modification of the upset price for instance.

5) Formalities before sale/adjudication

Between 15 and 30 days before adjudication, an extract of the articles and conditions of arrest/sale (signed by the solicitor of the creditor) must be published in an official newspaper and by posting at the door of the residence of the debtor, the competent jurisdiction or the notary public conventionally agreed upon as well as in official places of the municipality where the ship is berthed.

This publication must contain the following details:
- The name, profession, residence of the parties and their solicitors;
- Designation of the ship under arrest;

- The upset price;
- Indication as to the day, place and hour of adjudication;
- The competent jurisdiction or the notary public to do the sale;
- A bailiff's report justifying the legal publication and also publication in public places as indicated above.

6) Sale proper

The conditions of sale of the ship is fixed by the competent court according to the procedure of common law applicable to the forceful sale of realties.

The notice of sale is posted on the most apparent/visible part of the ship, on the main door of the court before which the sale would take place, in public place or in the wharf of the port where the ship is berthed, at the chamber of commerce, at the customs office and at the headquarters of the maritime district of the place.

The sale is by auction. The sale is done either in a public place or at the wharf of the port where the ship is berthed, or at the chamber of commerce or at the customs office or at the department of maritime affairs.

7) Higher bid

Article 287 of the Uniform Act has provided for higher bid in the case of sale of a ship within 10 days of the sale provided the difference is a minimum of 10% of the principal sale price. Beyond the 10^{th} day the right to higher bid would lapse. You cannot withdraw a higher bid once offered otherwise you would be liable in damages. Higher bid is offered at the registry of the court which organized the sale.

8) Adjudication proper

As from the moment of adjudication, a copy of the judgment or report of the Notary Public, as the case may be, is issued to the adjudicator after payment of the cost of procedure, the price of adjudication and after accomplishment of the conditions of the articles and conditions of arrest/sale which must be executed within 20 days of adjudication.

Conclusion

Article 298 of the Uniform Act has anticipated certain incidents which may (or may not) occur in the course of the procedure of ship arrest/sale.

First, there may be a request to divert from execution, some of the attached property. That is, a third party may suddenly appear and tell the court that the ship does not belong to the debtor. This permits such third parties who have claim of ownership over the ship, and who think they are not bound by the debt, to apply to the court to release their ship.

Second, some adventurer might make an irresponsible bid that cannot be made good. This is where the adjudicator does not honour his obligations under the auction and a new auction has to be organized.

Third, any interested party might make an application for nullity of the arrest (for one reason or another) which must be filed at least 5 days before the date of hearing.

Once there are no incidents, payment of the sale price plus ancillary costs or deposit of the sale price only at the court registry would be made and this ends the procedure.

At this juncture there would be distribution of sale price if there are many creditors.

SHIP ARREST IN NORWAY

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1. LEGAL FRAMEWORK

Norway is party to several international conventions within the maritime field, including the 1952 Arrest Convention. Norway has also signed the 1999 Arrest Convention, but this convention has not been ratified by Norway – pending international acceptance of this convention.

Norway is a civil law country, like most European countries apart from the UK, and domestic law is to a much larger extent created through governmental legislation than by case law. International conventions are usually translated and incorporated into domestic legislation. For instance, the 1952 Arrest Convention (hereinafter referred to as the Arrest Convention") has been incorporated into the Norwegian Maritime Code (NMC), and is mainly found in chapter 4 of the NMC.

Norway has also introduced additional requirements for arrest of ships (which are applicable to arrest of any property, not only ships), and such requirements are not found in the Arrest Convention. I will revert to this below, but the important requirement to note is that an arrest is not granted unless the claimant can show a probable cause for arrest. The mere existence of a maritime claim is not sufficient ground for an arrest in Norway.

2. ARREST PROCEDURE

Arresting a ship is a relatively straight forward matter under Norwegian law, and can be arranged quickly at a reasonable cost.

The claimant must submit an application for arrest to the District Court of the port where the ship has called or is expected to arrive, alternatively to the District Court in the judicial district where the debtor (the owner of the vessel) resides if the ship owner is Norwegian.

The application may be forwarded to the Court prior to the vessel entering the port, if one can present evidence showing that the vessel most likely will call a named port in the very near future. The application has to specify the claim, the size of the claim, the so-called "arrest ground" (see below) and provide for an outline of the allegations of the applicant. Documents supporting the allegations are not mandatory, but should ideally be submitted. A well presented case with supporting evidence increases the probability of obtaining an arrest award ex parte.

It is not necessary for the claimant to issue any formal Power of Attorney when instructing legal counsel in Norway in connection with the arrest application. In some jurisdictions such Power of Attorney must be submitted to the court, duly notarized and legalized. This may be a time critical factor when preparing for an arrest.

There are no substantial fees payable to the court in connection with an arrest, only a minor fee in the region of NOK 2,000 – 3,000 (approx. EUR 250-350). The claimant may, however, be requested to post security. I will address the question of security separately below.

3. CLAIMS IN RESPECT OF WHICH A SHIP MAY BE ARRESTED

All maritime claims as listed in Article 1 (1) of the Arrest Convention, with the addition of compensation for wreck removal, may be the basis for an arrest of the ship. These different maritime claims are listed in the section 92 of the NMC:

Section 92 Maritime Claims
A ship can only be arrested to secure a maritime claim.
A maritime claim means a claim based on one or more of the following circumstances:
a) damage caused by a ship in a collision or otherwise,

b) loss of life or personal injury caused by a ship or occurring in connection with the operation of a ship,
c) salvage and the removal of wrecks,
d) a charterparty or other agreement for the use or hire of a ship,
e) a charterparty or other agreement for the carriage of goods by ship,
f) loss of or damage to goods, including luggage, carried by ship,
g) general average,
h) bottomry,
i) towage,
j) pilotage,
k) goods or materials delivered anywhere to a ship for use in its operation and maintenance,
l) the building, repair or fitting out of a ship and costs and fees payable for docking,
m) wages and other remuneration due to the master and other employees on board in respect of their service on the ship,
n) a master's disbursements, including disbursements by shippers, charterers or agents on behalf of the ship or its owner,
o) a dispute as to the ownership of a ship,
p) a dispute between co-owners of a ship concerning its ownership, possession or use or the revenues from it,
q) any mortgage on or security in a ship, except for a maritime lien.

In order to arrest a ship in Norway, the claim for which the creditor is seeking security need to fall within the scope of section 92 of the NMC as listed above. If the claim falls outside the scope of section 92, and is thus not regarded as maritime claim, it is still possible to arrest other objects than the vessel, e.g. the bunkers onboard to secure a claim for hire payment, claim for insurance proceeds and bank accounts. From a practical viewpoint, an arrest of the vessel's bunkers may be as effective as arresting the vessel itself, and may often lead to security being put up for claims which are not maritime claims under the NMC and the Arrest Convention. The bunkers must, however, be owned by the debtor, and it is important to keep in mind that under a time charterparty, the bunkers are normally owned by the Charterers, not the Owners.

4. THE ADDITIONAL REQUIREMENT – "ARREST GROUND"

In addition to the main requirement for a "maritime claim", the applicant must prove upon a balance of probability that he has an "arrest ground" (in Norwegian: "sikringsgrunn"). As mentioned above, this is a requirement which is not found in the Arrest Convention, and it is a requirement imposed by domestic law in addition to the rules of the Arrest Convention.

This requirement is set out in the Norwegian Dispute Act, which contains different rules regarding arrest in general, rules which apply both to arrest of ships and other assets. The relevant rule is found in section 33-2 (1), which reads as follows:

> *"Arrest of assets of economic value can be decreed when the behavior of the debtor gives reason to fear that the enforcement of the claim otherwise will either be made impossible or made substantially more difficult, or has to take place outside the Kingdom"*

In short, this means that the Norwegian Courts are provided with discretion as regards whether or not an arrest shall be granted. On this point, Norwegian law deviates from the Arrest Convention.

As opposed to arrest in most other jurisdictions, an arrest in Norway may only be granted if the debtor's conduct gives reason to assume that enforcement of the claim will either be impossible or significantly more burdensome if an arrest is not granted, or that any enforcement will otherwise have to be made abroad. (This latter alternative is, however, applied very strictly, and is not applicable purely when the debtor is a foreign entity). If it may be proven that the debtor has tried to dissipate his assets (e.g. by transferring assets to other companies), an arrest will most certainly be granted. The same will generally apply if his course of business indicates that there will probably not be any money left unless an arrest is granted. Also, it may prove sufficient if he has failed to settle or respond to an undisputed claim after a number of reminders. It should, however, be noted that it is the actions of the debtor that is relevant; the fact that a debtor is financially weak does not in itself constitute a ground for arrest.

There is, however, one important exemption from this additional requirement; a claimant whose claim is secured by a mortgage or lien on the vessel can arrest the vessel without showing any other cause for an arrest if the secured claim has fallen due. This rule is set out in section 33-2(3) of the Dispute Act. In practice, there are two different categories of claims that may be secured this way. Firstly, claimants with loans secured by a registered mortgage on the vessel can arrest the vessel without any additional reason for arrest, other than the claim is due. The claimant would usually be a bank, acting as lender and mortgagee.

Secondly, a claim secured by a maritime lien will also be entitled to arrest without this additional requirement. Maritime liens are recognized under Norwegian law, and the list of maritime liens in the section 51 of the NMC corresponds with the list in the 1967 Maritime Lien Convention article 4 no 1.

5. OWNERSHIP OF VESSEL – ARREST OF SISTER SHIP

In contrast to some jurisdictions, Norwegian law is strict on the fact that the debtor/defendant must be the owner of the vessel that is being arrested. Claims against time or bareboat charterers do not give the right of arresting the vessel, as the vessel is not owned by the charterers. Norwegian legislators have deviated from the Arrest Convention on this point, as claims against bareboat charterers are subject to arrest pursuant to article 3(4) of the Convention. However, under a time charter, arresting the bunkers onboard may still be a possibility, as the bunkers usually are owned by the charterers.

The legal principle that the debtor has to be the owner of the ship is set out in section 93(4) of the NMC:

> *"Arrest can only be effected if the ship can serve as an object for the enforcement of a claim according to the general provisions of the Enforcement of Claims Act".*

Turning to the Enforcement of Claims Act, sections 11-4 and 7-1, it is clearly said that the debtor must be the legal owner of the asset that is being arrested.

In principle, the only ship that may be arrested is the one out of which the claim arises. However, in accordance with the Arrest Convention, Norwegian law recognizes the right of sister ship arrest. If vessel A and B are owned by the same legal entity, and this legal entity is the debtor for the claim, either of the vessels may be arrested, even if the claim only arises out of vessel A. It should be noted that both vessels in principle must be owned by the same legal entity in order to enable an arrest of the sister ship. If the ownership of vessels is organized with a holding company and single purpose companies as the registered owner of each vessel, arrest of a sister ship will in principle not be possible under Norwegian law.

Piercing the corporate veil may in theory be possible under Norwegian law, but we have very few court cases on the subject, and the principle has not been litigated with respect to arrest of a sister ship. I think it is fair to say that one should anticipate that the Norwegian courts will accept the structure of companies, and is not likely to pierce the corporate veil in connection with arresting sister ships.

6. SECURITY

When arresting a vessel in Norway, the question of security may arise in three different situations:

1. The claimant may be asked to put up counter security in order for the arrest to be granted.
2. The claimant may be asked to raise security for port dues that are being incurred during the arrest period.
3. The debtor may arrange for the release of the vessel by posting security.

Counter security:

Starting with the question of counter security, the Court may in its sole discretion make the arrest order conditional upon the claimant providing security for wrongful arrest in a fixed amount. If such request is issued, the claimant must in accordance with the Enforcement of Claims Act raise security in way of cash deposit with the court or a bank guarantee from a Norwegian bank.

It is very difficult to say in advance whether the Court will request counter security, as it varies from judge to judge and from case to case. I think it is fair to say that the Court is more likely to request counter security if in doubt about whether the claimant has a probable maritime claim and sufficient cause for arrest. In my experience, the Courts seldom requests counter security. However, a few years ago, a large number of arrest attempts were made on Russian fishing vessels discharging their cargoes in the Northern parts of Norway. One particular Court, which was the recipient of the majority of arrest applications, then requested counter security on a regular basis. The requested security could be substantial, and the question of the size of the security did also arise. The security is meant to cover liability for wrongful arrest, which usually would be the loss of hire due to the arrest.

One might ask whether the claimant in any case may be held responsible for any loss of hire suffered if the arrest is deemed wrongful. The question is to my knowledge still not finally resolved, but I am of the opinion that one could argue that the loss of hire should not be recoverable for a longer period that one would expect the debtor to arrange for security and the release of the vessel, which is normally a few days. As a comparison, it could be mentioned that under Danish law, such security is, by statutory legislation, limited to five days loss of hire.

Port dues:

The claimant may be requested to provide security for the port dues; if the vessel is arrested while berthed at port facilities owned/operated by the municipal port authorities (the same applies if the vessel later is shifted to such port facilities while under arrest). According to section 97 of the NMC, the claimant must, within one week after the arrest order has been handed down, arrange for security for the port dues. If such security is not posted, the arrest may be lifted upon request from the port authorities. The security needed must cover the port dues for a period of minimum fourteen days and should, in accordance with the Enforcement of Claims Act, be established either by way of a cash deposit or bank guarantee from a Norwegian bank. The port dues are not of any substantial amount, but incur on a daily basis, and a lengthy arrest may lead to a substantial liability towards the port authorities.

Release of vessel:

If an arrest is granted, the debtor may arrange for the release of the vessel by putting up security. If the parties are unable to reach an amicable settlement, a commercial ship owner will of course raise security in order to have the vessel back in a working condition as quickly as possible. Most P&I Clubs will issue a Letter of Undertaking (Club Letter), and this is very often commercially acceptable as a guarantee in order to lift an arrest. It should, however, be noted that in accordance with the Norwegian Enforcement of Claims Act, this is not a security recognized by law. In most cases the arrestor will accept a Club Letter from a reputable P&I Club, and the vessel will then be released according to such mutual agreement. However, if the claimant sticks firmly to Norwegian procedural requirements, the debtor may be forced to make a cash deposit or arrange for a bank guarantee from a Norwegian bank to be established.

7. LIABILITY FOR WRONGFUL ARREST

In principle, section 32-11 of the Dispute Act imposes a strict liability on the arrestor for the loss of the defendant if the claim did not exist at the time the arrest was granted. This means that if the Courts later find that the claimant did not have a maritime claim (a claim which falls within the scope of section 92 of the NMC), the claimant can be held liable for the economic loss the debtor may have suffered due to the arrest, regardless of whether the claimant is to blame for giving misleading information or not. The liability is a strict one.

Such strict liability is only applicable in case the claimant does not have any maritime claim against the debtor at all. If the Court later overturns an arrest issued ex parte due to the lack of sufficient ground for arrest, the claimant does not have any strict liability. However, he may in principle be held liable if he has given wrongful or misleading information about the arrest ground and by such misrepresentation is deemed to have acted negligently.

Even if the Norwegian rules are quite strict and may impose a liability for wrongful arrest on the claimant, it is quite rare to see these rules coming into play. The number of court cases where the claimant has been held liable is not many.

SHIP AGENT'S LIABILITY FOR CARGO CLAIMS UNDER ISRAELI CASE LAW

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In Israel, the ship agent is often a potential defendant in actions relating to cargo claims. The reason appears merely to be the ship agent's availability and the convenience in instituting action against him rather than anything else.

Although it has become a common practice to bring an action against the ship agent, there are many obstacles to overcome in such action. First, Bills of Lading usually contain clauses where the carrier is expressed to be contracting on behalf of himself and his servants and agents. The result of this is that when goods are lost or damaged on a carrying vessel, such agents are able to claim immunity from suit. Second, the reasoning for not holding the Agent liable, has always been based on the general principles of the law of agency that an agent, acting on behalf of a disclosed principal, cannot incur personal liability in his capacity as agent or to be sued when his principal is disclosed. This position is an obvious benefit to the ship agent as all he is required to do when sued by cargo interest is to raise the defense of the disclosed principal.

Consequently, the number of marine cargo claims instituted and succeeded by cargo interests against ship agents is minimal. The concept of personal liability of the ship agent has been introduced by the Israeli Courts in several instances. In this paper I shall review only these cases that found the Agent to be liable, and attempt to show that a ship agent in Israel, under certain circumstances, is no longer fully protected and could incur personal liability for the act or omission of the ship irrespective of whether such agent acted for a disclosed principal.

In general, The Israeli Courts holds that the use of the term "as agent only" on the Bill of Lading, by itself, does not automatically exempt the agent from liability and it is necessary to examine the contractual relations between the cargo interest and the agent as well as the specific actions of the Agent.

C.C. 17805/98 (Magistrates' Court of Haifa) Markit Products Ltd. v. Caspi Cargo Lines Ltd.

The judgment was given on June 6th 2004 by Judge Nitzah Sharon at the Magistrates' Court of Haifa.

The Facts:

A monetary claim was submitted by Markit, a chemical importer, against the carrier and against the agent. The plaintiff did not succeed in serving the Statement of Claim to the carrier, and therefore was forced to continue the claim only against the agent.
A cargo of chemicals (magnesium bags) was shipped under a clean Bill of Lading on board the M/V BABA CAPTAIN from Greece to Haifa, and arrived damaged at the port of Haifa. According to the survey report on behalf of the plaintiff, the cargo arrived with water damage, the bags were torn, the content spilled out of the bags. The damage, according to the surveyor, occurred during the voyage due to moisture and wetness in the holds of the vessel.

Arguments of the Plaintiff:

- The agent was negligent as he did not handle and/or shipped and/or stored the cargo in the appropriate conditions.
- The agent breached the contract with the plaintiff as he did not provide a suitable mean of transportation for this type of cargo.

- The agent was aware of moisture in the holds of the ship and was obligated to notify the plaintiff and provide an alternative.
- The agent chose an unreliable shipping company and despite great efforts, the plaintiff was not able to serve the Statement of Claim to the carrier and therefore was eventually forced to discontinue the claim against the carrier.

Arguments of the Agent:

- The Agent acted as a "broker" only and cannot be responsible for the shipment.
- The Agent has no effective control over the goods and is not liable for the good order and condition of the goods.
- The Agent is not a contracting party to the Bill of Lading and was only allowed to sign the Bill of Lading in the master's name "as agent only".
- The Bill of Lading mentions the registered office of the carrier and the Agent cannot bear responsibility for service to the carrier.

Is the ship agent liable to compensate the shipper for the cargo damages caused during the voyage ?

Judgment of the Magistrates' Court:

- The Court decided that the Agent could not be exempt from liability and held the Agent liable for the damages of the plaintiff, in the following words: "**It is true that the parties signed on the bill of lading are liable by contractual liability and I agree that the defendant has not signed the bill of lading as a party to the contract. However, in practice the Agent chose the carrier for the purpose of delivering the goods to the plaintiff in sound good order and condition, and therefore the Agent is not liable "contractually" toward the plaintiff but is liable with implied liability."**
- The court based its decision on the Agency Law and determined that the Agent was authorized to act on behalf of the carrier (the Principal) to create the legal relationship with the plaintiff for the purpose of carriage of goods. But also the actual authority was given to Caspi to act on behalf of the plaintiff in order to deliver the goods from Greece to Israel, and therefore Caspi is liable as an Agent of Markit under vicarious liability.
- The court determined that Caspi had to meet reasonable professional standards in choosing the carrier and the vessel. Caspi, according to the court's decision, was responsible to check the sea-worthiness of the vessel and its holds to make sure it meets the standard for Markit's cargo of chemicals.
- Caspi, then, was ordered to pay the full amount of the claim to Markit plus fees and expenses. An appeal was submitted to the District Court of Haifa and at the time of the hearing, a tribunal of 3 (three) judges recommended the appellant to withdraw the appeal as chances are low they would intervene in the decision of the inferior court. The appeal was withdrawn.

Civil Appeal 1107/00 (District Court of Haifa), Amit Industries Ltd. v. Israeli Scandinavian Marine Agency Ltd.

The judgment was given by Judge Dar in the District Court in Haifa on February 18th, 2005.

The Facts:

An importer of trains and locomotives, Amit Industries Ltd. hired the services of a forwarder, Agish International Transport Ltd., to transport locomotives from Spain to Israel. Agish contacted Scandinavian Marine Agency Ltd. (a ship agent) to arrange the shipment of the locomotives to Israel.

The action had been brought against the ship agent for all damages the shipper has suffered due to the substantial delay in the arrival of the shipment. It must be noted that eventually the shipment

arrived on a different vessel with a different carrier, other than it was originally booked.

The ship Agent, at relevant times, was in dispute with the carrier but failed to inform the plaintiffs of the dispute and of the predicted failure of the carrier to fulfill his obligations under the Contract of Carriage. The action was brought against the ship agency and also directly against two of the agency's managers.

Arguments of the Plaintiff:

- The Scandinavian Agency is liable for damages caused to the third party under the Law of Agency as the identity of the principal was undisclosed.
- The agent is a party to the contract of carriage, as the representative of the plaintiff contacted the Scandinavian Agency based on the professionalism, efficiency and reputation of the Agency and not of the carrier which is unknown to him.

Argument of the Defendant:

- The Scandinavian Agency stated that as he was not the carrier, he should not be liable for claims by the plaintiff. The defendant argues he acted as agent only and as such cannot be responsible for the carriage itself or for any delay in departure.

What is the standing of the Scandinavian Agency in the frame of the contractual relationship of the parties ?

Judgment of the District Court:

- Although the Agent has acted within the scope of an authority given to him by the principal, the actual transaction was made directly between the representative of the consignee and the Agent. Under this agreement, the Agent undertook to use suitable carriers and to meet the time schedule represented by the consignee for the expected arrival of the shipment.
- The Agent will not be exempted from liability, although he acted as agent only on behalf of the foreign carrier. The term "as agent" is not an automatic exemption and the Agent would not be entitled to use it, in particular when his words or conduct reasonably led the consignee to believe that he has the best expertise, resources and contacts to accomplish the transaction.
- The intention of the parties when contacted the Scandinavian Agency, was to authorize the Agent to act on behalf of the consignee and not only to carry out the ship's agent's normal duties of informing the consignee of the arrival of the ship etc.
- The Agent acted in bad faith as he failed to notify and fully inform the consignee of the delay and did not act to properly replace the carrier and to minimize the delay in the shipment departure.
- The court determined that the Scandinavian Agency and the General Manager of the Agency were also negligent in tort, as their actions caused the Breach of Contract (in accordance with clause 62 to the Israeli Tort Regulations) between the consignee and the carrier.
- Personal liability was imposed on the General Manager of the agency as he initiated and activated the relationship with the consignee and with its representatives. The Scandinavian Agency and its general managers were ordered to pay the full amount of claim to the plaintiffs plus fees and expenses.
- The case bears special circumstances of bad faith and dishonest conduct on part of the Agent. Moreover, the Agent carried out not only the normal duties of a ship agent, but rather led the consignee to believe that he undertook to arrange the carriage by sea. At all relevant times, the principal was unknown to the consignee. Due to the very special circumstances of this case, it would be reasonable to assume that this judgment would not apply to other cases brought against ship agents.

Civil Appeal 3656/99 and Civil Appeal 601/99, Transclal Ltd. v. M.A.R. Trading and Shipping Ltd. 56(2) 2002.

The judgment was given by Judge Engelard in the Supreme Court on December 16th, 2001.

The Facts:

Cargo of steel was purchased and financed by the bank by Documentary Credit. As security, the bank received the original Bills of Lading consigned to orders of the bank. When the goods arrived in Israel, a Delivery Order was issued by the agent and the goods were delivered to the importer without the surrender of the Bills of Lading.

An arrangement was reached between the importer and the ship agent and the Agent received a letter of indemnity from the importer. Therefore, the agent agreed to release the goods without the surrender of the original Bills of Lading.

In this case, the agent's involvement was merely that of an agent acting on behalf of a carrier, issuing the delivery order, and making arrangements with the customs.

As the Israeli importer was no longer solvent, the bank sued the ship agent for having released the goods without presentation of the Bills of Lading.

The Supreme Court Judgment:

- The Court outlined the legal framework governing the agent's obligations even in the absence of an explicit agreement between the parties.
- The duty of trust does not derogate from the agent's responsibility in torts, and with regard to this it needs to be examined whether the agent acted as should be expected from an agent in the field of his expertise. The agent is obligated to act according to the appropriate standards of his profession.
- The Supreme Court reached the conclusion that both, the ship's agent and the custom's agent are liable for the damages of the bank, and they were ordered to compensate the bank as follows: the ship's agent for 75% of the damages and the custom's agent for 25% of the damages.

Could the ship's agent rely on a Jurisdiction Clause in the Bill of Lading ?

It was well established by the Supreme Court in Israel that cases of jurisdiction clauses relating to maritime transport should be distinguished, as a jurisdiction clause in such contracts will not achieve its goal unless interpreted by the courts as exclusive. This is an important innovation in the law relating to jurisdiction clauses (C.A. 362/83, Menorah Insurance Co. V. The Donar).

However, this may not be the case when the application for a Stay of Proceedings based on a jurisdiction clause in the Bill of Lading filed by the agent of the carrier, which resides in Israel and its principal place of business is in Israel.

The question was raised before the Supreme Court in two separate cases and in both cases the Court denied a Stay of Proceedings on the basis that the Jurisdiction Clause in the Bill of Lading is not relevant to the Agent but to the carrier only.

Civil Appeal 791/77, Aaron Rosenfeld and Sons Ltd. v. Fireman's Fund Insurance Company Ltd.

The Bill of Lading contained a Jurisdiction Clause stating that any dispute arising under the Bill of Lading shall be decided in Germany, according to the place of business of the carrier.

The application for Stay of Proceedings filed by the Agent was denied by the Magistrate's Court and by the District Court.

The Agent refers to clause 24 in the Bill of Lading stating that **"Every exemption ... applicable to the carrier ... shall also be available ... to protect every such servant or agent of the carrier ... and for the purpose of all the foregoing provisions of his servants from time to**

time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by the bill of lading."

In its ruling, the Supreme Court held that the Agent was not a contractual party to the Bill of Lading, and in any case the Himalaya clause refers only to the liability of the Agent and not to the procedural matters such as jurisdiction.

The Supreme Court determined that the Jurisdiction Clause in the Bill of Lading meant to benefit the foreign carrier that its place of domicile and business is in Germany. However, all of the Agent's business was conducted from Haifa, Israel and it is clear that the most convenient forum for the Agent would also be in Israel and not in Germany.

Civil Appeal 140/83, Prudential Ships' Agents (Israel) Ltd. v. S.K.L. Trading Company Ltd.

The Supreme Court denied the appeal of an Agent for Stay of Proceedings based on a Jurisdiction Clause in the Bill of Lading.

The judgment clearly states that the Agent is not a party to the Bill of Lading and that the consignee and the Agent have a separate implied contract which is not based on the Bill of Lading.

Could the plaintiff serve the Statement of Claim against the foreign carrier at the place of business of the Agent in Israel?

In practice, once a claim is submitted to court against a foreign carrier, the plaintiff has to serve the Statement of Claim at the place of business of the carrier abroad.

A recent case was in **Civil Action 5813/08, T.P.L. Investments Ltd. v. Champion Ferries Co.**, where the court held that as the Agent is the sole representative of the foreign carrier in Israel, the service of the claim at the place of business of the agent is valid.

From the above discussion, it can be concluded that although a ship agent is not regarded as an actual carrier, he may be liable if it appears that he was negligent in his actions. It is therefore imperative that the ship agent fully understand the risks he may be exposing himself to by agreeing to act for a foreign shipping company and make efforts to safeguard himself against damages or plan for recourse measures in the event that he is faced with a court suit.

FEATURES OF SHIP ARREST IN MALTA

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Ship arrest in Malta until very recently was regulated by obscure British statutes[1] giving rise to rather limited heads of admiralty jurisdiction, and by the consistent practice of the Maltese Courts over time. There was no Warrant of Arrest proper, and ships were arrested by the suing out of a combination of two separate warrants[2].

Until the advent of the "POKER" case[3], it was always considered that the elements required for an action '*in rem*' to be successfully instituted were (i) that the ship be physically within Maltese territorial waters; (ii) that the particular ship be detained under the authority of the Court in virtue of the aforementioned warrants; (iii) that the Claim be directed against the particular ship concerned and (iv) that the claim fall within one of the heads of admiralty jurisdiction recognised at the time.

The "POKER" case, which arose in the context of a bareboat charterparty scenario, upset settled practice by additionally requiring another element, namely (v) the underlying personal responsibility of the ship owner.

In the absence of any legal provisions regulating the arrest of a ship under bareboat charter, a crying need for statutory intervention came about, and opportunity to completely overhaul the law was presented in the form of Act XIV of 2006[4], amending the Code of Organisation and Civil Procedure ("COCP") by implementing various measures relating to judicial proceedings.

The changes brought about were principally as follows :

- the action '*in rem*' was completely revamped. Heads of jurisdiction were significantly increased or expanded upon; and for the first time the substance of the action came to be regulated by law.

- a new Warrant of Arrest was introduced, both as a precautionary as well as an executive act, the precautionary warrant securing claims not yet judicially acknowledged or otherwise constituting executive titles whilst the executive warrant enforcing executive titles.

- the Judicial Sale by Auction of ships was reformed; and

- Court approved Sales for ships were introduced for the very first time.

The Action '*in rem*' / Maritime Claims

The action '*in rem*' is a special type of legal action instituted against a Ship (the 'res') being physically present and arrested within the territorial jurisdiction of the Court in connection with a recognised maritime claim arising in connection with that Ship, or where admissible a Sister Ship.

The action '*in personam*' is an ordinary legal action instituted against the Owner of a Ship for any claim arising under contract or tort whenever that person may be subject to the ordinary jurisdiction of the Court.

Whilst every '*in rem*' claim would also constitute an '*in personam*' claim, the converse is not always true - e.g. in the case of a shipowner's personal guarantee not secured by a ship mortgage.

[1] Vice-Admiralty Court Act 1840; and Admiralty Court Act 1861.
[2] the Warrant of Impediment of Departure of a Vessel and the Warrant of Seizure.
[3] A number of cases were instituted, the first of which was decided at first instance in 2001
[4] This was later amended in virtue of Act XV of 2008

The COCP makes separate provision for persons subject to the jurisdiction of the Civil Courts[5] of Malta (the in personam jurisdiction of the Courts[6]), and for jurisdiction in rem against ships or vessels (the in rem jurisdiction of the Maltese Courts[7]).

The Warrant of Arrest may be sued out in order to secure both maritime '*in rem'* claims, as well as '*in personam'* claims. Ship Arrest in security of maritime claims, giving rise to the '*in rem'* jurisdiction of the Courts, is however the primary focus of this paper.

Under a new Article 724B added to the COCP[8], the Civil Courts are now vested with jurisdiction '*in rem'* against Ships in regard to the host of Maritime Claims therein listed.

A total number of 25 Maritime Claims giving rise to such '*in rem'* jurisdiction are provided for[9]. These follow closely on the British Supreme Court Act 1981, but also incorporate the maritime claims recognised under both Arrest Conventions of 1952 and 1999 even though Malta not yet signatory to either.

In cases concerning :
(a) any claim to the possession, ownership or title to or of any Ship or to the ownership of any share therein;
(b) any question arising between the co-owners of a Ship as to the ownership, possession, employment or earnings of that Ship; and
(c) any claim in respect of a mortgage, hypothec or charge on a Ship or on any share therein

an action '*in rem'* may be brought against the Ship in connection with which the claim or question arises.

In <u>all other cases</u> concerning the remaining Maritime Claims[10], an action '*in rem'* may be brought against :

(a) <u>that Ship</u>, where the person who would be liable on the claim for an action '*in personam'* ("the Relevant Person") was, when the cause of action arose, an owner or charterer of, or in possession or in control of, the Ship, <u>if</u> at the time when the action is brought the Relevant Person is either an owner or beneficial owner of that Ship or the bareboat charterer of it;

(b) <u>any other</u> Ship of which, at the time when the action is brought, the Relevant Person is the owner or beneficial owner as respects all shares in it.

This introduces the possibility of Sister-Ship-Arrest in Malta in connection with '*in rem'* actions for the very first time.

<u>Special Privileges</u>

Maltese law does not recognise the concept of a 'Maritime Lien' as known to English law.

Nevertheless the Merchant Shipping Act ("MSA") 'special privilege' status to a number of claims[11].

Special Privileges have no jurisdictional relevance '*per se*', but survive the voluntary sale of the Ship to which they relate for a period of 1 year, commencing to run from the date on which the sale of the ship was registered, documented or otherwise annotated in the registry to which that Ship belongs or, in cases where this is not effected, from the date of closure of registry following such voluntary sale.

In the NORBEL BULK case[12], the Court has recently held that the aforementioned registration needs to be effected in the Ship's new register, but the writer believes the Court was mistaken in its interpretation of the relevant provisions of the MSA[13] dealing with the attachment and extinguishment of charges, and the case is now pending appeal.

[5] In Malta the Civil Courts entertain both civil as well as commercial (including maritime) cases. The Vice-Admiralty Court was abolished long ago, and in more recent times the jurisdiction of the Commercial Court was assigned to the Civil Court.
[6] Article 742 of the COCP.
[7] Article 742B of the COCP.
[8] replacing the former Article 370 of the Merchant Shipping Act
[9] under paragraphs (a) – (y)
[10] as listed under paragraphs (d) – (y)
[11] as listed in Article 50
[12] Writ of Summons No. 1151/95/GC determined by the First Hall of the Civil Court on 23 March 2009
[13] Article 37D(3) of the MSA, particularly as amended by Act XXII/2000

In an action '*in rem*' which concerns a claim attracting a Special Privilege, the test requiring the Relevant Person to be the owner or beneficial owner or the bareboat charterer of the Ship at the time when the action is brought does not apply.

Warrant of Arrest

A new Warrant of Arrest has been introduced. This replaces the former Warrant of Impediment of Departure and the Warrant of Seizure which were previously coupled to effect a Ship Arrest.

The law provides for a Precautionary and an Executive Warrant of Arrest.

Precautionary Warrant of Arrest[14]

The Warrant of Arrest of Sea Vessels is one of the recognised Precautionary Acts[15].

Precautionary Acts are available to secure the rights of a person without the necessity of any previous judgment. They are issued and carried into effect on the responsibility of the person suing out the Act.

The Precautionary Warrant of Arrest may be issued against any sea-going vessel having a length exceeding 10 metres, whether at sea or at some other place (within the territorial jurisdiction of the Maltese Courts) :
- to secure a debt or claim whether *in personam* or *in rem* of not less than €11,600; and
- which could be frustrated by the departure of the Ship.

No other warrant may be issued against a Ship.

The Arrest Convention 1952 provides that a Ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim but in respect of no other claim. A similar provision is to be found within the Arrest Convention 1999 (not yet in force).

Malta is not yet a signatory to the Arrest Conventions, so that a possible future issue might arise when Malta becomes a signatory in regard to the arrest of a Ship flying the flag of a Contracting State in security of an '*in personam'* claim not also constituting a Maritime Claim (e.g. a personal guarantee issued by a shipowner not secured by a ship mortgage).

The effect of Warrant of Arrest is :
- to seize the Ship from the debtor
- to attach the Ship in the hands of the Authority where the property is; and
- to order the Authority not to release the Ship, or allow the debtor to divest himself of the same or give or surrender to any person any rights on the same.

The Malta Maritime Authority ("MMA") is deemed by law to be the authority having the arrested Ship in its hands or under its power or control as soon as the Ship enters Maltese territorial waters. The Minister may designate another authority.

The party issuing the Warrant is to bear all expenses necessary for preservation of the arrested Ship from the moment the warrant is served on the Authority, saving the right of recovery thereof together with his Claim.

The Precautionary Warrant of Arrest is sued out :
- by Application to be filed in prescribed form, which includes the Court Decree giving necessary orders;
- under pain of nullity clearly stating (i) particulars enabling identification of the Ship (ii) the name of Authority under whose power or control Ship may be and (iii) the place where Ship is to be found.

Power is given to the Court Executive Officer to adopt all measures deemed necessary for execution of warrant, subject to any directives given by Court / Registrar.

[14] as regulated under Articles 855 – 865 of the COCP.
[15] as listed in Article 830(1), paragraphs (a) – (g), of the COCP having marginal note 'Precautionary Acts'.

The Warrant is executed upon service thereof on the executive officer of the Authority having the Ship in its hands or under its power or control. A copy of the Warrant is also to be served on the Owner, Master/other person in charge or Agent of the arrested Ship.

Action is to be brought, **or** arbitration to be commenced, in respect of the Claim stated in Warrant, within 20 days from date of issue of Warrant[16].

In default, saving for just cause, the effects of the Warrant cease and the person suing out the Warrant shall be liable for all damages and interest.

Council Regulation (EC) No. 44/2001 is applicable to Malta pursuant to its EU Membership since 2004. Article 31[17] would allow a Precautionary Warrant of Arrest to be issued in Malta even if the Courts of another Member State have jurisdiction as to the substance of the matter. Certainly this would apply to '*in personam'* claims (FLINTEMAR case).

However, Article 2 provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the Courts of that Member State. It is questionable whether this provision applies to '*in rem*' actions - or only to '*in personam'* ones.

The difficulty arises because Malta is not party to the Arrest Conventions, so that Article 71 saving any conventions to which Member States are parties governing jurisdiction in relation to particular matters would not be applicable.

A Penalty of not less than €11,600 is applicable in the event it were to be found that the Warrant was obtained on demand maliciously made.

The Court may also, on good cause being shown, on demand of the Owner / Master / Agent, order the party suing out the Warrant to put up Security within a given time in an amount of not less than €11,600 for the payment of the penalty, damage and interest; and in default the Warrant is to be rescinded.

Following its arrest the Court may, on Application of the MMA, order the Ship to be shifted from a port or harbour to any other anchorage within territorial waters, if satisfied that because of the cargo, length or draft of the Ship; and/or other circumstances concerning safety, pollution, navigation or port operation, it is advisable that the Ship should leave port without delay.

Following its arrest the Court may also rescind a Warrant of Arrest and order the Ship to leave Malta and its territorial waters without delay on Application of the MMA if satisfied that because of the nature of the cargo of the Ship; and/or other circumstances concerning safety or pollution, it is advisable that the Ship should leave port and/or territorial waters.

The Court may order the sale of an arrested ship *pendente lite* if, on application of a Creditor, it appears that the debtor is insolvent, or unlikely to continue trading and maintaining the asset.

If the Ship be removed from the jurisdiction in breach of the Warrant, the owner / bareboat charterer or other person in possession of the Ship shall additionally be liable jointly and severally to a penalty of €116,400 in favour of the party issuing Warrant.

The person against whom a Precautionary Warrant of Arrest has been issued may have recourse to the Court issuing the same praying that the Warrant be revoked on grounds recognised by law[18]. These would include :
- that other adequate security is available to satisfy the claim; and/or
- if amount claimed not prima facie justified or excessive; and/or
- if sufficient security provided.

The Court hears any such Application with urgency.

[16] Article 843 of the COCP.
[17] under Article 10 - Provisional, including protective, measures.
[18] as listed in Article 836, COCP.

Executive Warrant of Arrest[19]

The Executive Warrant of Arrest of Sea Vessels is one of the recognised Executive Acts[20] available to persons in possession of an executive title recognised by law for the purposes of enforcing the same.

Executive Titles[21] include, *inter alia* :
- Judgements and decrees of the Courts of Justice of Malta;
- Awards of Arbitrators registered with the Malta Arbitration Centre; and
- Ship Mortgages securing amounts certain, liquidated and due.

The Executive Warrant of Arrest is sued out:
- by Application to be filed in prescribed form;
- under pain of nullity clearly stating (i) particulars enabling identification of Ship (ii) name of Authority under whose power or control Ship may be and (iii) place where Ship is to be found; and
- describing in detail any rights and encumbrances.

The Court Executive Officer has power to adopt such measures deemed necessary for execution – subject to directives given by Court / Registrar.

On Application made for the issue of such Warrant, the Court shall establish whether it shall order the Sale of the Ship; **or** fix a time-limit within which the debtor is to pay the amount due.

If the Court orders the Sale of the Ship, it shall proceed according to the procedures laid down in the provisions relating to judicial sale by auction

If the Court fixes a time limit within which the debtor is to pay, it shall order the Warrant to remain definitely in force until payment of the amount due is effected.

When the time limit fixed passes without any effect, the Court, upon demand made by the interested party, shall order the Judicial Sale by Auction to take place in respect of the Ship.

The person against whom an Executive Warrant of Arrest issued, or any interested person, may have recourse to Court issuing such Warrant, containing all submissions and sustaining documents, praying that the Warrant be revoked, either totally or partially, for reason valid at law[22]. The Court decides after hearing the parties, and there is the possibility of appeal from the Court's decision.

Judicial Sales by Auction[23]

Before a Judicial Sale by Auction may occur, a Ship need now only be appraised if required by the creditor or the debtor.

However, the law still provides that the procedure to be followed shall be that laid down for the judicial sale by auction of immovable property. This is evidently an oversight on the part of the Legislator, which needs to be rectified as soon as possible, thereby avoiding unnecessary uncertainty such as whether the *jus redimendi* - allowing a debtor the right to repurchase immovable property sold by auction within 4 months from the date of registration of the act of adjudication in the Public Registry – applies to judicial sales by auction of Ships.

The writer considers this to be unlikely, as this is not strictly a procedure for auction of immovable property but a right subsequent; and the act of adjudication of a Ship is not registered in the Public Registry of Malta.

Furthermore, Article 37D(1) of the MSA provides that where a Ship has been sold pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of sale, the interest of the mortgagees as well as of any other creditor in the ship shall pass on to the proceeds of the sale. Therefore judicial sale by auction gives clean title to the buyer.

Judicial Sale by Auction of a Ship is conducted by a Public Auctioneer in the presence of the

[19] as regulated under Articles 388C – 388D of the COCP.
[20] as listed in Article 273, paragraphs (a) – (i), of the COCP, having marginal note 'Executive Acts'.
[21] as listed in Article 253 of the COCP under paragraphs (a) – (e), but also including Ship Mortgages as provided under the MMA.
[22] under Article 281 COCP having marginal note 'How executive acts may be impugned'.
[23][23] as regulated under Articles 313 – 357 of the COCP.

Registrar of Courts, and the Purchaser shall be highest bidder. The general rule applicable to judicial sales by auction of immovable property to the effect that no offer may be accepted if less than 60% of the value at which it has been appraised no longer applies to Ships, even in cases where an appraisement has been made.

The Auctioneer may demand that bidders be in possession of necessary guarantees. Bids *pro persona nominanda* or by a person notoriously incapable of fulfilling obligations arising out of adjudication are not to be accepted. Any bid *animo compensandi* as may on Application be allowed is made on condition that bidder binds himself to pay price into Court should it so be adjudged. Opposition to an application to bid *animo compensandi* may only be made after the Judicial Sale.

The Purchaser is required to pay the price into Court within 7 days from date of final adjudication. Delivery of the adjudicated Ship takes place *ipso iure* on final adjudication and payment of the price into Court or approval of set-off. The Court may make Orders to ensure that the adjudicated Ship be delivered to the purchaser forthwith upon the giving of security to safeguard claims of the parties. Such Orders are not open to challenge and are to be implemented forthwith.

If during the Judicial Sale, before adjudication, it appears that a sum sufficient to meet the debts and costs of the auction has been obtained, the Registrar shall order the auction discontinued; and upon verbal demand by the Debtor, the Court shall order the unsold Ship to be restored to him.

Court Approved Sales[24]

Court approved Sales constitute an innovation introduced as an alternative to judicial sales by auction of Ships.

Essentially, on Application made by any Creditor in possession of an Executive Title, the Court may approve the private sale of a Ship in favour of an identified Buyer in consideration of a determined price.

The Application must attach Appraisements made by 2 independent and reputable Valuers, confirming the value of the Ship

The Applicant must satisfy the Court that:
- such private sale is in the interest of all known creditors; and
- the price offered by the proposed buyer is reasonable in the circumstances of the case.

The Application is served on such persons as the Court deems it appropriate to call upon to make their submissions in the circumstances, acting upon the information given by the Applicant.

The Application is appointed for Hearing within 10 days of filing.

In any Decree acceding thereto, the Court nominates a person entitled to effect the transfer of the Ship in accordance with approved terms and conditions as though he were the owner.

The person so appointed is required to deposit the price in Court within 7 days of completion of sale.

The Court Approved Sale gives the Buyer legal title to the Ship free from all privileges and encumbrances. After such Sale, all claims and demands against the Ship may be enforced only against the proceeds of sale.

The end result achieved therefore equates to a Judicial Sale by Auction – only the procedure is much more expeditious.

[24] As regulated under Articles 358 – 364 of the COCP.

ITF – INDUSTRIAL ACTIONS AGAINST VESSELS – JURISDICTION AND LIABILITY

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Industrial actions from trade unions can lead to vessels being stuck in ports and owners suffering significant losses. This article deals with recent case law in Denmark regarding (i) jurisdiction for owners' claims for compensation against foreign trade unions and (ii) the liability of ITF – International Transport Workers Federation - and ITF inspectors for unlawful actions.

The first case I'm going to deal with is relevant to our European colleagues as the case has been heard at the European Court of Justice and deals with the proper venue/jurisdiction for claims against foreign trade unions for unlawful industrial actions. Based on a decision from the European Court of Justice the Danish labour court has confirmed in the *Tor Caledonia* matter that a foreign trade union (in this case a Swedish trade union) can be sued in the EU country where the shipowner is domiciled (in this case Denmark) even if the industrial action took place outside Denmark. The claim of the shipowner was based on financial losses due to an unlawful notice of industrial action by the Swedish trade union.

The facts of the case were as follows:

The Danish carrier, DFDS and its subsidiary DFDS Torline A/S are operating several passenger- and cargo-lines in Northern Europe i.a. between the Scandinavian countries and the UK. DFDS Torline A/S was operating a ro-ro vessel by the name Tor Caledonia between Gothenburg in Sweden and Harwich in the UK. Tor Caledonia was registered in the Danish International Ship register (DIS) and thus considered a Danish vessel. The crew was polish and was employed on the basis of individual contracts in accordance with a frame work agreement between some Danish trade unions on the one hand and Danish Shipowners' Association on the other.

In 2001 the Swedish trade union for sea farers (SEKO) became aware that Tor Caledonia was calling at Gothenburg with a foreign crew not employed on the basis of the ITF standard agreements and decided to initiate industrial action against the vessel and the Danish owner. It should be noted that the conditions for the Polish crew under their employment contracts with DFDS Torline A/S were in many aspects better than provided for in the ITF standard agreement - nevertheless, SEKO demanded that DFDS Torline A/S entered into an ITF standard collective agreement which would provide employment conditions for the crew according to the ITF standards.

DFDS Torline A/S refused to sign a collective agreement with SEKO arguing that SEKO had no interest in this case as neither no members of SEKO nor Swedish nationals were employed on the vessel. SEKO then served a notice of industrial action instructing its Swedish members not to accept employment on Tor Caledonia. This notice was not harmful to DFDS Torline A/S as no members of SEKO were intended to be employed on Tor Caledonia. However, SEKO also called for sympathy action from other trade unions and the Swedish Transport Workers' Union followed this request and gave notice of sympathy action and instructed its members not to engage in any work relating to Tor Caledonia. This sympathy action was serious to DFDS Torline A/S as it would prevent the vessel from loading and discharging in Gothenburg. Therefore, DFDS Torline A/S decided to take action in the Danish labour court against SEKO and the Swedish Transport Workers' Union, claiming that the two unions should acknowledge that the actions were unlawful/contrary to collective agreements and that they should withdraw the notices of industrial action.

Just to explain that in Denmark the venue for disputes between trade unions and employers is a court specialised in employment law and thus called the labour court; the ordinary Danish courts are not competent to deal with such disputes. The labour court deals with disputes quite quickly,

and in this case a hearing was soon scheduled in the labour court. On the day of the hearing, however, SEKO decided to suspend the industrial action and a few days later the notice of industrial action from the Swedish Transport Workers' Union was withdrawn.

However, by that time DFDS Torline A/S had already decided to withdraw the Tor Caledonia from the Gothenburg-Harwich route and to charter another vessel to serve this route.

DFDS Torline A/S suffered financial losses as they had chartered a substitute vessel and DFDS Torline A/S decided to seek compensation from SEKO at the Danish Maritime and Commercial Court in Copenhagen claiming that SEKO was liable in tort for rendering a notice of unlawful industrial action and inciting other Swedish trade unions to give notice of sympathy action, which was also unlawful. The labour court is not competent to deal with claims for compensation and DFDS Torline A/S thus had to bring the action before the Danish Maritime and Commercial Court whereas the Danish labour court would decide whether the industrial action was unlawful under Danish employment law. As the question of whether the industrial action was unlawful or not was of paramount importance to the question of whether the DFDS Torline A/S was entitled to compensation – it was common ground that DFDS Torline A/S would not be entitled to compensation if the industrial action by SEKO was lawful - the Maritime and Commercial Court decided to stay the proceedings awaiting the decision of the Danish labour court whether or not the industrial action was lawful.

SEKO contested that the Danish labour court was competent to deal with this dispute. SEKO was domiciled in Sweden and the industrial actions took place in Gothenburg and the only connection to Denmark, was the fact that DFDS Torline A/S is a carrier domiciled in Denmark. Therefore, SEKO argued that the Danish labour court was not competent to deal with this dispute as there was no venue against SEKO in Denmark. The Danish labour court held that in order to decide on the points regarding the jurisdiction, an interpretation of article 5 (3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgment in civil and commercial matters - the former Brussels Convention - was necessary. The Danish labour court decided to refer a number of questions to the European Court of Justice for a preliminary ruling. As many of you are aware, it is possible for a court in an EU member state to refer questions to the European Court of Justice if the court is not certain how to apply or interpret EU law.

Thus, the Danish labour court before dealing with the main dispute regarding the alleged unlawful labour actions in Sweden (partly carried out and partly suspended before they were due) sought to establish the applicable venue; Denmark or Sweden; or whether Danish or Swedish law was applicable.

As many of you are aware the current Brussels I regulation (Council Regulation (EC) No 44/2001) article 5 (3) states that a party domiciled in member state may be sued in another member state - in matters relating to tort, delict or quasi-delict - in the courts of the place where the harmful event occurred. The question was then whether the harmful event had taken place in Denmark as DFDS Torline A/S was domiciled in Denmark and suffered their financial loss there.

A number of questions were referred to the European Court of Justice, including how to interpret article 5 (3) in respect to industrial actions. In February 2004 the European Court of Justice rendered a rather cryptic ruling stating i.a. that article 5 (3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a ship registered in another Contracting State sails must not necessarily be regarded as having occurred in the flag State with the result that the shipowner can bring an action for damages against that trade union in the flag State". "In that connection, the State in which the ship is registered must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place".

As you will note the ruling of the European Court of Justice is not clear at all as ECJ states that Denmark as flag state would not necessarily be the proper venue for actions against the trade unions and there are other factors which should also be considered when deciding where the harmful event took place. If you are interested, the ruling of ECJ is published in the official

European Gazette under reference number C-18/02.

The ruling of the ECJ did not solve the court proceedings at the Danish labour court as the trade unions maintained the argument that Denmark was not the proper venue for court proceedings against the trade unions. The Danish labour court therefore continued the proceedings and on 31 August 2006 the labour court rendered a judgment that the financial loss from the notice of industrial action was suffered by DFDS Torline A/S in Denmark and thus there was jurisdiction in Denmark for the claims. Moreover, the Labour Court found that Danish law (rather than Swedish law) was applicable and according to Danish law such notice was unlawful as Danish law provides that collective agreements entered into by a foreign trade union on Danish vessels may only include members of the trade union or individuals from the country where the trade union is domiciled. Consequently, SEKO's demand for a collective agreement for the Polish crew (who did not reside in Sweden) was unlawful.

Subsequently, at settlement was made in the case at the Maritime and Commercial Court and obviously SEKO had to pay some kind of compensation to DFDS Torline A/S

Although the ruling of ECJ is not clear it can - together with the decision from the Danish labour court - found jurisdiction in other EU countries against trade unions from all EU countries. Under EU law a shipowner should sue a trade union in the country where the union is domiciled unless the owner is able to rely on one of the alternative jurisdictions provided for in the Brussels I Regulation. Article 5 (3) provides an alternative jurisdiction in tort matters at the "courts for the place where the harmful event occurred" and the ECJ has now confirmed that this rule is applicable in shipping - this is not a surprise - and means that a shipowner can sue a trade union in the flag state of vessel, i.e. often in their own jurisdiction even if it is a foreign trade union and the industrial action took place outside the flag state.

This rule provides great comfort to owners as they do not need to go abroad and sue trade unions at the domicile of the unions. The rule is in particular advantageous to owners if the industrial action is lawful in the country of the trade union but unlawful in the flag state. This was the situation in the *Tor Caledonia* matter where the industrial action was lawful under Swedish law but unlawful under Danish law. Following the ECJ ruling "forum shopping" is expected to increase among shipowners, i.e. to seek the jurisdiction most advantageous to their course, and trade unions to be more careful when taking industrial actions against vessels from other EU countries given the risk that the trade union may have to appear in court in a another EU country.

As a final remark I would like to point out that the Tor Caledonia matter is one of three important cases either pending or having recently been decided by the European courts in respect to jurisdiction and applicable law in cases against trade unions concerning industrial actions.

The other cases are the Viking Line case (C-438/05) regarding whether the ITF actions constitute an unlawful restriction on freedom of establishment and the Laval case (C-341/05) regarding whether collective actions are contrary to freedom to provide services. It will be too far reaching to go into details regarding these cases in this article and a study of the cases I just mentioned will provide much more details to you in respect to the questions of industrial actions on the one hand and the EU fundamental rights on the other hand.

The second case I would like to mention to you concerns the liability of ITF and ITF Inspectors when forcing ship owners to sign ITF standard collective agreement and to pay wages according to ITF standards during unlawful industrial actions against vessels.

As you may know it is common practise for ITF to demand owners of vessels flying a flag of convenience to sign ITF standard collective agreements and to pay minimum wages set by ITF to the crew members. If such agreements are not accepted by the owners, owners will often face that the stevedores in harbours will not engage in loading or discharging the vessel. Obviously, ITF will deny that the industrial action taken by the stevedores has anything to do with ITF requiring the owners to accept the ITF standard collective agreement and to remunerate the crew members by ITF standards. For some reason the industrial action against the vessel will cease once the owners

give up and pay.

Such actions have also taken place in Denmark; however, Danish case law now provides a very useful remedy against ITF collective agreements signed under duress and additional wages paid to crew members. Based on a Danish case from 2006 owners may hold ITF liable and the ITF inspectors jointly liable for the losses following unlawful industrial actions against a vessel.

The facts of the case were as follows:

The vessel *BBC Chile*, registered in Antigua, was scheduled to call at Aarhus in Denmark to load parts for wind turbines in October 2004. ITF learned that this vessel flying a flag of convenience was going to call at the Danish port and requested the owners to sign an ITF standard collective agreement before calling at Aarhus.

Upon arrival in Aarhus the ITF inspector, KG, went on board and required the owners to sign the agreement with retroactive effect and to pay wages according to ITF standard levels for the current and former crew members. Obviously, the owners refused to make such an agreement and shortly after KG had left the vessel, the stevedores decided to take industrial actions against the vessel by stopping the discharge operations.

Under Danish law industrial actions in support for members of other trade unions are unlawful/contrary to the collective agreement and four days later the stevedore's trade union admitted that the industrial action was contrary to the their collective agreement and ordered the stevedores to resume the work. In the meantime, KG had 'convinced' the owners to accept the ITF standard collective agreement and a 'settlement agreement' according to which owners had to pay approx. 586,000 USD to the crew members. Some 467,000 USD to the former crew members was subsequently deposited on a bank account by KG. Approx. 10,000 USD was payment to ITF as 'entrance/membership fees' and 'welfare funds contribution'. The master signed the agreement and noted the following: "signed under protest and illegal duress".

Subsequently, the owners sued ITF and KG before the Maritime and Commercial Court in Copenhagen alleging that the ITF standard collective agreement and 'settlement agreement' were signed under duress and invalid according to the Danish Act on Contracts; that the unlawful industrial actions by the stevedores were initiated by ITF and KG and, moreover, that ITF and KG were jointly liable for the owners' loss, i.a. the amounts paid to the crew members. IFT contested that the ITF standard collective agreement was signed under duress.

Based on extensive witness statements in court, the court found that ITF had taken part in the unlawful industrial actions by the stevedores due to the link between ITF and the stevedores trade union; that the ITF collective agreement and 'settlement agreement' was only accepted by owners due to unlawful industrial actions preventing the vessel from discharging and that ITF and KG had been aware of this. On this basis the court found that ITF and KG were jointly liable and had to indemnify the owners for their loss.

Hopefully, you realise that this judgment could be useful if a situation occurs where ITF demands signing of an ITF collective agreement which owners are forced to accept because they face industrial actions. Of course ITF will always deny that they have anything to do with the industrial action by the stevedores, however, often it is quite clear that the industrial action was encouraged by ITF. Then the collective agreement is signed under duress and is invalid. After this judgment was rendered by the Maritime and Commercial Court, in Denmark we have seen a much lower number of ITF actions against vessels. Apparently, the risk that ITF and the ITF inspectors will be liable for owners' loss has given ITF second thoughts about actions in Denmark.

If you are dealing with similar ITF matters this judgment may be useful to you.

CONSIDERING ARREST PROCEEDINGS WHEN A VESSEL IS OPERATED BY TUGS & PILOTS

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By means of this session we are going to analyze some key points which ought to be taken into account when considering an arrest proceedings for damages caused by a ship while being operated by tugs and Pilot.

Since the entering into force of the 1952 Brussels Convention on unification of certain rules on arrests of sea-going vessels, and the further enactment of Spanish Law 2/1967 on ship arrest, arrest proceedings have become steadily an up-rising tendency in our country as a result, among other reasons, of the relatively easy-to-comply initial requirements (i.e.: *fumus boni iuris* & *periculum in mora*). Thus, when considering a request for the arrest of a ship the Court should merely make a preliminary investigation in order to find out whether the contention that a certain claim exists is reasonable. The claimant must assert that he has a claim, but not prove it.[1]

However, parties filing in Court petition for ship arrest proceedings should not let themselves be blinded by this apparently pro-arrest approach and disregard liability issues which have to be addressed sooner or later.

Whenever berthing operations, or similar ones, are being carried out with the Pilots compulsory involvement and the tugs assistance, questions have long arisen and will continue to do so for years to come as to where and how to set limits on each party liabilities.

The scenario above set forth has been judged by the recent decisions of the Spanish Supreme Court, setting out the position on these cases (STS 26.03.2007 – *Terminales del Turia vs. G.S. Medglory Shipping Company and Valship, S.A*.). Indeed, the vessel in question was being berthed when she hit a shore crane with her bow, causing damages amounting to € 400.000,00.

In that case, following the arrest of the vessel, Terminales del Turia, S.A., a Stevedores (loading/unloading) Corporation and owners of the shore crane of big dimensions, sued the Captain, the shipowners, and the vessel shipagents on account of the allision of the vessel's bow against the crane while berthing her.

In fairness, deduced from a first approach to the matter, it should entitle them to look to the shipowners for compensation as they did. More careful scrutiny, however, reveals this perception to be much less compelling than it could have been thought.

Digging up the facts, it was found by the first instance Court, and upheld by the Appellate Court, that the allision was the result of a wrong manoeuvre directly executed by one of the Tugs operating the vessel. The case thus presented the question whether a vessel was liable in rem for a tort committed by her, being the result wholly of either the pilot, or the tugs, or both negligence's.

Her owners set up for defence that at the time of the allision, she was in charge of a pilot duly licensed and operated by two tugs under his command; that he directed all the manoeuvres of the tugs which preceded the allision, and that the same was not in consequence of any negligence of her officers or crew.

[1] *Berlingieri on Arrest of Ships,* Third Edition Lloyds International Law Library.

Further to Plaintiffs allegations, it was acknowledged by the Supreme Court that indeed Pilots under Spanish legislation render his services by merely "advising" the Captain about the manoeuvres. Notwithstanding this, the Supreme Court upheld the Court of Appeals reasoning which minimize the importance of this aspect by highlighting two of its statement:

- "*Captain's liability for Pilot's fault by breach of article 834 of Commercial Code, would have to be determined specifically, and it will not be on an every-case basis.*"

- "*In order to trigger Captain's liability as referred to in article 834 of Spanish Commercial Code, it is necessary that the damage arises as a result of his concurrent fault objectively and subjectively*".

And that was something denied in the first instance, where it was clearly determined that the cause of the bow contact with the crane owned by the plaintiffs was an element out of the sphere of Captain's control, since it was performed by an external force not under his command (i.e. the Tugs); and additionally, the vessel's own engine was either stopped or dead slow. Likewise, it is important to remark that no complain was found against the performance of the Captain on Pilot's compulsory report.

Consequently, special attention must be paid to what happened in the bridge prior to any casualty, in order to determine, in spite of the general statement of Captain's duty to supervise, what was the cause of action and to dredge up individually faults of the so-called operating triangle to which Captain, Pilot and Tugs are part of in this sort of manoeuvres. Hence, questions like the followings set below will have to be tackled:

- What was Pilot's advise?
- Who was directly addressing the Tugs?
- In what language?
- What was each party reaction to prevent the allision / collision if any?
- Was it reasonable to expect, according to her circumstances, any reaction from the ship herself to prevent the casualty?
- What was Pilot's report content?
- What was Captain and Second official's statements?
- Would this have made a difference?

To this effect, we must state that no further inquiries were made as to whether the tugs performed wrongly because of Pilots instructions or by their own mistake, since these two parties had not been initially sued not brought into the proceedings at a later stage.

Briefly, it is to be reminded that the Convention states "damage done by a ship either in collision or otherwise". When analysing the meaning of "done by a ship", one must bear in mind that it is a figurative phrase which is a term of the art in maritime law whose meaning is well settled by authority (see *The Vera Cruz* (1884) 9 P.D., 96; *Currie vs M'Knight* (1897) A.C.97.) Therefore, to fall within the phrase, not only must the damage be the direct result of natural consequence of something done by those engaged in the navigation of the ship, but also the ship itself must be the actual instrument by which the damage was done, although there is no need for physical contact (see *The Eschersheim* 1976; 2 Lloyd's Report 1). Following this path, since ship's liability may be held even without the need for physical contact, it is to be construed, as the Spanish Supreme Court has ruled, that physical contact by itself it is not to be enough ground, *per se*, to be under the figurative umbrella of "done by the ship", bringing unquestionable relevance to facts such as vessel own steering and power engine at the time of the accident, here is to say, her own manoeuvrability without external forces.

Finally, let us advance that a strikingly similar case has been brought to the Almeria's Commercial Court as a result of damages to a shore crane by allision of a vessel operated by tugs and Pilot, which proceedings are currently outstanding and in which shipowners' interests are being defended by our law firm, ARIZON ABOGADOS, S.L.P.

In conclusion, this latter case may well settle in Spanish jurisprudence the immunity of the wrong doing vessel in some circumstances, when pilot is in charge, and manoeuvring with tugs, which happen to be alone in fault and the sole cause of the damages, concluding that as ruled by the Spanish Supreme Court, Captain's liability will not be held on a strict liability basis, but rather when he has incurred, objectively and subjectively, on fault.

NEW CIVIL JUSTICE REGIME: IMPACT ON SHIPPING CASES *

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Introduction

The extensive revision of Hong Kong's civil justice rules seeks to allow litigants, lawyers and the courts to cooperate in order to resolve disputes in a practical, fair, time-efficient and cost-effective manner. It might be argued that shipping and transport lawyers have always followed the spirit of these underlying objectives; however, the new rules are expected to have a considerable impact on their work.

Rule 1 of Order 1A states that the rules aim to:

- increase the cost-effectiveness of practices and procedures followed in relation to proceedings before the courts;
- ensure that cases are dealt with "as expeditiously as is reasonably practicable";
- promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- ensure fairness between parties;
- facilitate the settlement of disputes; and
- ensure that court resources are distributed fairly.

Rule 2 requires that the courts seek to follow these aims when exercising their powers or interpreting the rules or a practice direction. A court must recognize that the primary aim in exercising its powers is to secure the just resolution of disputes in accordance with the parties' substantive rights. Under Rule 3, the parties and their legal representatives must assist the court in furthering these objectives; Rule 4 sets out the court's duty actively to manage cases to the same end.

Order 1A is a new order and should be read in conjunction with Order 1B, which sets out the court's case management powers. The emphasis has changed from a wholly adversarial system whereby lawyers looked at the procedural rules as a tactical game. The rules invite - and, to a degree, compel - lawyers to look at the rules as a means of resolving disputes. Therefore, master tacticians must play by the new rules of the game. The case management provisions allow the judge to ensure that they do so, but the primary duties apply to the parties.

The rules militate against vagueness and seek to channel practitioners into a critical analysis of pleadings through a succinct summary of material facts and a more structural approach, thereby identifying the real issues. Although the rules have not formally adopted the concept of front loading, the need to identity issues at an early stage is likely to have the same effect, as resources will have to be committed upfront.

The time for filing an acknowledgment of service of writ remains 14 days, but the time for service of defence has been extended to 28 days. The purpose of the change is to give a defendant's lawyer sufficient time to investigate, take instructions and plead its client's case properly.

Front Loading

Front loading has long been a cornerstone of successful shipping and transport practice, especially in casualty cases. Solicitors and surveyors routinely proceed to distant locations to interview witnesses (usually a ship's crew) and collect documents (if not destroyed in a casualty).

Although matters of jurisdiction and security are usually resolved early in a case and jurisdiction is established either by the issuance and service of proceedings or through a security and jurisdiction agreement,(1) the parties often agree a general extension of time for pleadings, usually determined upon agreed notice, in order to enable the parties to front-load the obtaining of evidence.

Pre-litigation discovery and discovery before close of pleadings

An order for ship's papers is available, but limited to marine insurance cases where there is sufficient suspicion to enable a potential defendant underwriter to plead the insured's misconduct. Even in the absence of such an order, it has long been customary for insurers' solicitors to demand extensive and far-reaching discovery relevant to the facts at issue to probe the merits of the insured's case.

Case preparation

In shipping and transport cases, particularly in admiralty and marine insurance cases, it is vital to analyze the facts and identify the issues at the earliest possible stage. Upon first notice of a casualty and once instructions have been obtained, an admiralty solicitor or manager normally proceeds at once to the location of the ship (or the crew, if the ship has sunk or been destroyed).
Only one in 10 cases goes to trial in Hong Kong. For admiralty and marine insurance cases and most carriage of goods cases, the proportion is even lower - perhaps 5% or less. No collision case on liability has been tried in Hong Kong since *The Ocean Tramp* in 1969 and there is no record of a salvage case being tried in Hong Kong in living memory. Cargo cases on the substantive merits involving nautical issues are almost never tried.

More typical is the 1996 *Pegasus Case,* a total loss of ship and cargo case involving allegations of crew incompetence, in which the defendants' nerve broke three days before trial and a handsome settlement was negotiated. No marine insurance cases went to trial in Hong Kong for around 100 years until a number of such cases were heard at the turn of this century. Marine hull insurance cases are rare and very seldom go to trial in Hong Kong, although there were a number of marine insurance fraud cases in the late 1970s during one of the shipping industry's previous downturns.

The rarity of shipping and transport trials is related to the longstanding tendency of shipping and transport lawyers, especially in the casualty field, to front-load cases. Such cases are normally fact intensive and once the parties have obtained evidence upfront, they can make an early assessment of the strengths and weaknesses of their respective cases, which encourages early settlement. All evidence is collected in contemplation of the issues to be pleaded and with a view to discovery and an efficient trial. A clear correlation exists between properly prepared shipping and transport cases, which almost invariably necessitate front loading, and the likelihood of the need for a trial. Even sophisticated clients are often reluctant to pay for front loading, but it nearly always proves a sound - even highly productive - investment in terms of mitigation or payback.

In *The Gunung Klabat* an oil tanker was sunk in the East China Sea by a log carrier that suddenly altered course by 90 degrees, striking the tanker's engine room. The log carrier was arrested on calling at Hong Kong. Based on contemporaneous evidence, a court order was obtained to inspect and preserve the log carrier's steering gear and associated parts. In the subsequent limitation of liability proceedings, the opponents were pressed for full discovery of documents in the collision action, leading to the discovery of damning evidence of an inadequate steering gear repair. This led to the leveraging of a settlement involving the acquisition of title over the log carrier (which by this time had been under arrest in Hong Kong for over a year, its owners having omitted to renew hull and protection and indemnity cover), plus the limitation fund which had been paid into court.

Admiralty practitioners are frequently involved in cases that require an unconventional resolution to suit a purpose. Such cases may be beyond court management and may have to be managed with a reliance on instinct and a responsiveness to developments by practitioners in this field. Such cases can undoubtedly benefit from front loading.

Purpose of interlocutories between pleading and trial

The aim of interlocutories is to:

- establish jurisdiction;
- obtain security;
- refine facts or expert issues;
- weed out frivolous matters; and
- gather evidence.

There is already a strong tendency towards voluntary case management among shipping and transport lawyers, especially in the casualty field. Most of the underlying objectives are routinely achieved in the course of front loading and the initial stages of a case, which are almost always crucial to its success or failure.

There have long been informal methods of alternative dispute resolution, other than arbitration, which often take the form of pyramid-like structures of firms and a teamwork approach to case handling. Most firms can normally cooperate so that issues can be identified and resolved and a dialogue maintained to promote settlement at various stages. Good admiralty practice has always encouraged practitioners to self-manage cases. Before it substantially cut back its coverage, the Salvage Association was frequently involved in casualty cases, especially marine insurance cases, in which the question of hull and machinery cover might be pertinent. Frequently, such cases were approached by agreement between the firms representing the various parties and by representatives proceeding to an appropriate point or meeting onboard the vessel with a Salvage Association surveyor so that joint statements could be obtained. This was one of the forerunners of the more formal procedures of the new regime.

Jurisdiction

Jurisdiction in shipping cases is founded as of right by service in Hong Kong in person or on the ship. Leave can be obtained to serve outside the jurisdiction in certain circumstances.(2)
Jurisdiction is open to challenge on the basis of:

- the existence of an arbitration clause;
- the *forum non conveniens* principle (ie, where a court in another jurisdiction is a more suitable forum for the trial of the action);
- the existence of an exclusive jurisdiction clause; or
- a case on the same matter which is already pending elsewhere.

The revised regime includes a significant change relating to interim relief in support of substantive proceedings commenced or to be commenced in Hong Kong. It states that:

"*(1) Without prejudice to Section 21L(1), the court of first instance may by order appoint a receiver or grant other interim relief in relation to proceedings which:*
(a) have been or are to be commenced in a place outside Hong Kong; and
(b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any ordinance or at common law...

(4) The court of first instance may refuse an application for appointment of a receiver or interim relief under Subsection (1) if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of proceedings concerned makes it unjust or inconvenient for the court to grant the application...

21N. Supplementary provisions as to interim relief in the absence of substantive proceedings
(1) In exercising the power under Section 21M(1), the court of first instance shall have regard to the fact that the power is:
(a) ancillary to proceedings that have been or are to be commenced in a place outside Hong Kong; and
(b) for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings.
(2) The court of first instance has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under Section 21M as if the order were granted under Section 21L in relation to proceedings commenced in Hong Kong."
This effective abolition of the *Siskina* principle means that it is no longer necessary to establish a substantive cause of action in Hong Kong, provided that the court is satisfied that proceedings exist that are capable of giving rise to a judgment or award which would be enforceable in Hong Kong.

The Siskina [1979] AC 210 concerned a Mareva injunction granted by the English Commercial Court in a case involving non-payment of freight and, notwithstanding that no substantive cause of action could be established in the jurisdiction, the making of an order for service of notice of a writ outside the jurisdiction and a Mareva injunction to restrain removal or disposal of the defendant's assets within the jurisdiction. However, on application by the owners to set aside the writ and

injunction, Justice Kerr held that:

"*(1) The authorities established that in a writ served out of jurisdiction, it was not permissible to include claims which did not fall within any of the sub-rules of [Order 11 of the Rules of the Supreme Court (RSC)] and if there was jurisdiction under sub-rule (i), the claims for damages and interest had to be struck out of the writ so that the only maintainable claim would be the claim for the Mareva type of injunction.*

(2) Apart from the claim for the interim injunction, there is nothing which is properly before the court. The plaintiffs have no claim to the insurance money which they seek to restrain the defendants from receiving and removing out of the jurisdiction... [F]or the purposes of Order 11 and for the reasons already explained, their writ contains no cause of action whatever against the defendants, since the claim for damages and interest [either] must be struck out (as I have already held) or admittedly fails to provide any basis of jurisdiction for serving the defendants in Greece. In these circumstances one is simply left with a claim for an interim injunction relating to a fund which the plaintiffs cannot and do not claim as such. Accordingly, since the writ contains no cause of action against the defendants, at any rate for the purpose of Order 11, it is simply strikeable out. It follows that this is not a Mareva type of case at all, but something entirely novel and in my view contrary to the principle, though it might well be desirable to confer upon the courts a discretionary power of this kind by legislation. Meanwhile, it seems to me that everything that has ever been said about the need for caution in giving leave under Order 11 applies in this case par excellence*.*

(3) This was not a Mareva type of case and the notice of a writ and all subsequent proceedings would be set aside."

In its innovations in the new regime, the Hong Kong legislature has done what Kerr thought might be desirable - it has conferred upon the Hong Kong courts a discretionary power by legislation. However, the likely application of the new provisions should be appraised cautiously.

As of April 2 2009, it has been possible in Hong Kong to obtain interim relief by way of Mareva injunctions or Anton Piller orders in relation to proceedings which are taking place or will take place outside the jurisdiction and where no such substantive proceedings have been contemplated in Hong Kong. However, the jurisdiction to grant interim relief in aid of foreign arbitration or foreign proceedings will be limited to proceedings and arbitrations which would lead, in the ordinary course, to a judgment or arbitral award which could then be enforced in Hong Kong.(3) Moreover, there is a strong element of court discretion.

In bringing applications for Mareva and Anton Piller orders, the emphasis is on:

- a good, arguable case against the defendant;
- the presence within the jurisdiction of assets belonging to the defendant;
- a real risk that unless the injunction is granted, judgment will go unsatisfied; and
- full and frank disclosure.

A Mareva injunction will usually be made only where the claimant can show that there is at least a good, arguable case that it would succeed at trial, and that the refusal of an injunction would involve a real risk that a judgment or award in its favour would remain unsatisfied.

Where, as often, the Mareva order is combined with an Anton Piller order, it can be disastrous for the defendant, as the effect of the orders is draconian and can destroy a business by freezing most of its assets and revealing information to competitors. The court treats such applications with great caution - as should plaintiffs' lawyers.

The United Sing

The United Sing emphasizes the evidential difficulties facing a cargo claimant in establishing a good, arguable case, even where upfront evidence is available from which a court can draw an inference of unseaworthiness. After the vessel became stranded on the coast of China, a Mareva injunction was obtained by the cargo interests in relation to the vessel's hull and machinery proceeds in Hong Kong. An application was brought by the shipowners to discharge the injunction on the grounds that the cargo interests could not establish the necessary good, arguable case. Notwithstanding its approval of the arguments in *The Makedonia*, the Court of Appeal failed to decide on the issue of seaworthiness before considering the issue of due diligence by requiring the

shipowners to establish on a balance of probabilities the exercise of due diligence in selecting and supervising a competent officer. It was established on evidence that the third officer, following an exchange of charts, misinterpreted the latitude scale on two occasions and wrongly plotted the position of the vessel, despite having previously obtained two radar fixes. This directly caused the stranding of the vessel. The crucial question for the court in considering the discharge of the Mareva injunction was whether the carrier had failed to exercise due diligence in providing a competent third officer in the circumstances. The court held that the cargo interests had failed to establish an arguable case, despite the third officer's manifest repeated errors.

Taking into account the exposure which a plaintiff faces pursuant to the undertaking in damages and the difficulties inherent in obtaining Mareva injunctions and Anton Piller orders (even though it is no longer necessary to establish jurisdiction, subject to certain constraints), it is worth establishing whether there are real prospects of establishing court jurisdiction, either *in personam* or *in rem*.(4)

It remains to be seen whether the innovations in the regime with regard to interim relief will result in an equivalent of the French concept of '*saisie conservatoire*' or Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims in the US Federal Rules of Civil Procedure.

Orders for Inspection

Where Hong Kong court jurisdiction is founded, court orders for inspection may well provide safer and more predictable remedies than interim injunctions.

Order 29, Rule 2 states that:

"*2.(1) On the application of any party to a cause or matter, the court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.*
(2) For the purpose of enabling any order under Paragraph (1) to be carried out the court may by the order authorize any person to enter upon any land or building in the possession of any party to the cause or matter.
(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.
(4) An order under this rule may be made on such terms, if any, as the court thinks just.
(5) An application for an order under this rule must be made by summons or by notice under Order 2(7).
(6) Unless the court otherwise directs, an application by a defendant for such an order may not be made before he acknowledges service of the writ or originating summons by which the cause or matter was begun."

Such applications may be made in shipping cases and non-shipping cases, regardless of whether they fall within or outside Order 75.

The watershed of these varieties of order is the court's power under its inherent jurisdiction to secure, by orders, a just and proper trial of the issues, and is thus similar to the jurisdiction to grant Anton Piller orders. Anton Piller orders complement the jurisdiction specifically provided in Order 75 and should be considered in conjunction with them. Such principles, established in the inherent jurisdiction of the court to secure a just and proper trial, are reinforced by the objectives of Order 1A - they encourage cost effectiveness, expeditious handling, procedural economy and fairness, and facilitate settlement and court management (eg, marshalling of evidence) by orders, helping to ensure a just and proper trial of the issues while the evidence remains fresh and within the court's jurisdictional power.

The extension of Order 29(2) in admiralty proceedings states that:

"*Without prejudice to its powers under Order 29(2) and (3) and Order 35(8), the court may, on the application of any party, make an order for the inspection by the assessors (if the action is tried with assessors) or by any party or witness, of any ship or other property, whether real or personal, the inspection of which may be necessary or desirable for the purpose of obtaining full information*

or evidence in connection with any issue in the action."

Orders 29(2) and 75(28) have been underused in Hong Kong shipping cases since the early 1980s; however, both assume new relevance in the context of the revised regime.

Order 75(28) will be exercised only where the party seeking the order can demonstrate that it is necessary to obtain full information and evidence on any issue in the action, such as unseaworthiness. If it cannot be shown that the inspection will assist the court or if the application is a 'fishing expedition' (ie, an opportunistic attempt to uncover as yet unknown information that may be useful to a party's case), the order will not be granted. In *The GoodEast* the vessel was arrested and held in relation to an action between the plaintiff cargo interests and the defendant shipowners. The court ordered that the vessel be appraised and sold. The plaintiffs applied for inspection of the ship, which had been damaged by fire. The judge refused the action, but the order was not sealed. Instead, the plaintiffs invited the judge to reconsider the application, having regard to the additional material and information made available. In ordering the inspection of the vessel, the judge ruled on two key points

First, the inspection of the ship by a fire expert was both necessary and desirable in the circumstances for the purpose of obtaining full information or evidence in connection with the issue before the court in respect of the fire, which in turn bore upon the issue of unseaworthiness in the action.

Second, although the affidavit did not suffice to show a good, arguable case, the balance of convenience overwhelmingly pointed towards the making of the order. In so ordering, the judge considered the judgment in *The Mare Del Nord* ([1990] 1 Lloyd's Rep 40) as providing useful guidance on the circumstances under which inspection should be ordered, including the showing of a good, arguable case on the merits. The judge in *The GoodEast* considered that the court should primarily have regard to Order 75(28), which refers to "the inspection of [a vessel] which may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action".

The judge considered that the key terms were 'full information' and 'evidence'. It seems probable that in the context of the changes introduced in the new regime, such orders for inspection are more likely to be made pursuant to these considerations.

The Gunung Klabat

An earlier judgment in *The Gunung Klabat* is also a good authority for the application of the order for inspection rules.

On October 11 1983 a collision occurred between a Chinese oil tanker and the Gunung Klabat in the South China Sea. The wireless operator of the latter vessel had given its position and at the time of the collision had signalled that it had collided with the tanker because its steering gear was out of order.

Four days later, when the Gunung Klabat called at Hong Kong, an *ex parte* claim was obtained from the High Court to restrain the owners from causing repairs to be carried out to specified parts of the vessel until the hearing of an *inter parte* summons returnable on October 21 1983. The summons was adjourned by consent pending the hearing. A summons was issued on behalf of the Gunung Klabat which sought to vary the terms of the *ex parte* order. The solicitors agreed to the adjourned *inter partes* summons being before the court, as well as the defendant's summons to vary the *ex parte* order. The judge commended this approach - which is comparable to the spirit of the new regime - and proceeded to review Orders 29(2) and 75(28).

The judge commented that neither rule prescribes a time at which an application must be made. They do not, for example, state that it must be made after close of pleadings - a fact favourable to front loading.

The defendants' counsel contended that the term 'in connection of any issue in the action' should be construed so as to preclude the plaintiffs from seeking an order for a general inspection of the vessel. He submitted that the interlocutory relief sought must be relevant to the issues as defined - if not at this juncture, by pleadings by some other means (ie, within the underlying objectives of

Order 1A, as now applied). By about December 1983, the plaintiffs would be required to lodge a preliminary action which would contain many particulars relating to the collision, including speeds and course, all of which would be relevant to the eventual finding on liability. It would be impractical for the court to order an inspection after close of pleadings. By that time, defective parts would have been repaired in order to render the vessel seaworthy. Therefore, the judge concluded that the expression 'in connection with any issue in the action' should be construed broadly to cover matters which, on the material available at the time, may reasonably be regarded as relevant to probable issues. The court held that the signal which indicated a highlighted state of the steering gear of the vessel would be an issue. Whether there was a defect in it was likely to have a bearing on whether the defendants had been negligent, as was the case initially in *The Frosta* [1973] 2LL Rep.

Therefore, and in order to facilitate a just and reasonably cost-efficient solution of the dispute, the judge held that an inspection by surveyors appointed by the plaintiffs - to take place the following day or the day after - was warranted. On condition that the plaintiffs gave the usual undertaking as to damages, the judge ordered that:

"*the defendants, their servants or agents, contracted or otherwise, be restrained and an injunction is hereby granted restraining them until 7:00 pm on November 2 1983 from causing or effecting any repairs to those parts of the Gunung Klabat referred to below, unless such parts have by then been inspected as hereinafter provided.*

The plaintiffs by not more than two of their appointed surveyors accompanied by any appointed surveyors required to be present by the defendants be at liberty to inspect the following parts of the Gunung Klabat at a time convenient to the respective surveyors and to observe a demonstration of the operation of the said parts, namely:

(a) the steering gear and the autopilot on the steering flat and bridge including the electric motors connected thereto - I make this order because the vessel may at the material time have been operating under autopilot or the steering system may have been changed... between one system and another autopilot or the steering system may have been changed... between one system and another.

(b) the telegraph and helm equipment to the bridge engine room and steering flat - I include the telegraph because the communication between bridge and engine room at the time of emergency must be relevant to issues which will arise at the hearing.

(c) the gyro compass and repeater, radar, VHF and bridge rudder repeaters - The gyro compass may well have been governing the steering gear at the material time.

(d) generators, main engines and switchboards in the engine room - I interpolate that the whole electrical system of the vessel was dependent on the effective operation of the generator. (In the case of generators there should be a demonstration of individual starting and running under sea load and, in the case of main engines, a demonstration of ahead and astern movements consistent with the safety of the vessel and third-party property at the time). If a berth is rented, the plaintiffs are to pay [for it] and if a sea trial is required, the plaintiffs are to pay any additional insurance required, both in the first instance. These costs will, in due course, become costs in the case.

(e) whistle signals - The defendants are to provide the plaintiffs' surveyors, tomorrow, with a sight of all plans and manuals which are on board the vessel relating to the aforesaid parts.
It is also desirable for efficacy that an order be sought and obtained that the respective surveyors be at liberty to take photographs of the aforesaid parts."

Despite the constraints of Order 19(2) and Order 75(28), permitting a party's surveyor to inspect the ship and its documents - which could amount to premature discovery - and to take samples from the vessel, although mandatory in form, is not an injunction. Plaintiffs seeking such orders must produce affidavit evidence to show:

- a good, arguable case on the merits;
- more than a negligible shortage of cargo on delivery; and

- a likelihood that such inspection or taking of samples or analyses is likely to assist the trial judge.

However, as seen in the approaches in *The Gunung Klabat* and *The GoodEast*, the test is essentially pragmatic and such pragmatism may, in certain instances, fall short of the strict requirement of a 'good, arguable case' - *The United Sing* offers a useful comparison on this point.
As with Mareva injunctions and Anton Piller orders, to protect the shipowners from unnecessary interference and any third party from adverse effects, the plaintiffs will be required to give an undertaking in damages against any loss suffered as a result.

In *The Mare Del Nord* (cited in *The GoodEast)*, in which the defendant owners refused to permit the plaintiffs' surveyor to board the vessel to inspect and take samples, it was held that although an order for discovery of documents at that stage was premature, a surveyor who was required to consider whether oil could have leaked from a cargo space to a non-cargo space could not carry out the task without seeing the general arrangement plan and the piping plan, and that the inspection of such documents was within Order 29(2). The order was mandatory in form, but it would not usually be described as an injunction, even if its effects in practice were similar to that of an injunction. The principal matters to which the court should have regard in exercising its discretion were:

- the evidence or affidavit in support of the plaintiff's case to show that the plaintiff had a good,arguable case on the merits;
- the question of whether the plaintiff could show that the taking of samples and analyses thereof might assist the judge at the trial;
- the question of whether the plaintiff should be required to give an undertaking in damages in case the defendant was subsequently found to have suffered loss as a result of the order being obtained; and
- the registrar's duty to balance the inconvenience that might be caused to the shipowners against the possible benefit to the plaintiff.

The registrar's order was affirmed and the appeal was dismissed.

Endnotes
(1) See the London Admiralty Solicitors Group forms.
(2) See Order 11.
(3) See Hong Kong Reciprocal Enforcement Provisions.
(4) Under Order 11 or Order 75, respectively.

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