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7th Members' Meeting

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Antwerp, 3-5 June 2010

Conference Papers

SEVENTH MEMBERS' MEETING OF SHIPARRESTED.COM

Conference hosted by D'Hoine & Mackay

Antwerp, Friday June 4th, 2010

09:15 - Opening address by Valentine de Callatay, shiparrested.com network

09:30 – Morning session one

"Arresting vessels at the Panama Canal" / Francisco Carreira–Pitti, Partner, Carreira Pitti P.C. Attorneys / Panama

"Ship arrests in South Africa" / Tony Edwards, Associate Partner, Shepstone & Wylie South Africa

''Rotterdam Rules - yes or no?'' / Krzysztof Kochanowski, Mar Consult Maritime Solicitors Office / Poland

11:00 – Coffee Break

11:30 –Morning session two

"Piracy" / Richard Faint, Arbitrator & Trade Consultant, CharterWise / UK

"Possibility of arresting a ship in Brazil based on a debt contracted abroad" / Claudia H. Perri, Partner, Felsberg e Associados / Brazil

"The ship arrest in Egypt" / Nabil Farag, Partner, Nabil Farag Law Firm / Egypt

13: 00 – Conference Lunch

14:30– Afternoon session one

"MARPOL, Magic Pipes and Whistleblowers. The Do's and Dont's for Effective Environmental Compliance" / George M. Chalos, Partner, Chalos & Co P.C. / US

"Ship Arrest in Peru" / Sandro O. Monteblanco, Senior Partner, Law Offices of Montblanc & Associates LLC / Peru

"Recent Topics of Arrest in Japan" / Takayuki Matsui, Maritax Law Office / Japan

16.00 – Coffee Break

16:30 – Afternoon session two

"Ship arrest in Gibraltar" / Christian Hernandez, Partner, Isolas / Gibraltar

"Latest interpretation of the article 3 of 1952 Brussels Convention by Romanian Courts" / Adrian Cristea, Partner, Cristea & Partners Law Offices / Romania

"Is Belgium still an attractive forum for ship arrests?" / Kevin Mackay, D'Hoine & Partners / Belgium

18:00 – Ultimate updates of shiparrested.com members

"BVI Shipping Flag" / Alkisti Kannidou, E. Economides & Partners / Cyprus

"Application of Regulation (EC) No. 805/2004 in the Enforcement of Maltese Ship Mortgages in the EU" / Kevin F. Dingli, Dingli & Dingli / Malta

ARRESTING VESSELS AT THE PANAMA CANAL,

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I. PANAMA IS MUCH MORE THAN A CANAL AND AN OPEN REGISTRY

Panama and the Panama Canal are fully recognized names to the international maritime community. For almost 90 years the Panamanian Registry has been a leading place of vessel and mortgages registration, and a tax heaven for vessel ownership. Today, there are over 8,000 vessels registered in Panama and the Panamanian Public Registry has over 5,000 active mortgages on vessels. Since 1914 the Panama Canal has been a focal point in international maritime commerce where over 14,000 vessels transit every year, in addition there are over 9,000 vessels calling Panamanian Ports every year for supplies, repairs, charter delivery, cargo operations and the like, without going through the waterway. This means that there are about 23,000 vessels physically present in Panamanian waters every year, and the number keeps increasing.

II. TWO PANAMANIAN PORTS ARE HANDLING ABOUT 5 MILLION CONTAINERS EVERY YEAR AND INCREASING EVERY YEAR.

In addition to the presence of vessels at the Panama Canal, the Ports of Balboa (Pacific) and Cristobal (Atlantic) are number two and three in handling containers in Latin America and the Caribbean during the years 2006-2009, which not only increases the amount of vessels calling ports, but provide a wider base of potential defendants, being shipowners and charterers. The increase in the traffic of containers, loaded and empty is a new development in the filing of maritime related claims.

In addition, the growing projections of the maritime related activity in Panama is the highest for the region, according to CEPAL, a United Nations Body.

III. THE MARITIME COURT OF PANAMA, A UNIQUE FORUM AT A UNIQUE PLACE

On March 30, 1982 the Maritime Court of Panama replaced the United States Federal District Court for the Canal Zone which ceased operating at the Panama Canal. The Maritime Court of Panama, being one of the few specialized maritime and admiralty tribunals worldwide, has exclusive jurisdiction upon all vessels present in Panama, regardless of their flag (about 23,000 per year), their registered owners, operators and charterers, to hear any maritime related claim; additionally, the Maritime Court of Panama has jurisdiction over all vessels and shipping companies registered in Panama independently of their physical presence and regardless of where the claim arose.

To fulfil the mission of providing an international forum to solve admiralty and maritime controversies, the Maritime Court adopted a procedural system patterned closely after the American Federal Rules of Civil Procedure, including, among others, the flexible discovery rules, oral trials, one appeal on legal issues only, which reflects the modern tendencies of litigation.

The Maritime Court of Panama is not only a tribunal with very modern procedural rules, but a forum with a clear understanding of principles of international judicial cooperation.

IV. JURISDICTION OF THE MARITIME COURT OF PANAMA

The Maritime Court of Panama has jurisdiction upon all vessels present in Panama, regardless of their flag, her owners, operators, and charterers, no matter where the claim arose for in

personam claims. Additionally, where the applicable law to the controversy provides for in rem liability, the Court has jurisdiction to enforce the maritime lien via an action in rem. The basis for jurisdiction is by statute and is split in cases arising INSIDE and OUTSIDE Panama.

Article 19. Maritime Courts shall have exclusive jurisdiction over cases arising from acts related to commerce, transport and maritime traffic occurring within the territory of the Republic of Panama, in its territorial sea, in the navigable waters of its rivers, lakes, and in the waters of the Panama Canal. These cases include claims arising from acts executed or to be executed from, to or through the Republic of Panama. Claims involving the Panama Canal Authority are subject to the provisions of its Organic Law. (Emphasis ours)

As to claims arising OUTSIDE Panama, the Maritime Court of Panama has jurisdiction over all matters (including arbitrable agreed claims) related to maritime commerce, transportation and traffic (anywhere in the world), where the action is directed against the vessel or owners and the vessel is arrested within the territory of the Republic of Panama (which includes the Panama Canal), regardless of the flag the vessel flies or the nationality of her owners. Article 19.1 of the Maritime Code of Panama provides:

"The Maritime Courts shall also have exclusive jurisdiction over actions arising from the acts mentioned in the previous paragraph, but occurring out of the referred territorial scope, in the following instances:

1.- When the respective actions are filed against the vessel or its owners and as consequence thereof the vessel is arrested within the jurisdiction of the Republic of Panama."
As to "sistership" arrests, the statutory support to enforce an arrest are article 19.2 which states: "The Maritime courts shall also have exclusive competence (jurisdiction) with respect to claims arising out of (maritime commerce, transportation, and traffic), but occurring outside (the Republic of Panama), in the following instances:

2.- When the Maritime Court has seized other property belonging to the defendant, even though such defendant is not domiciled within the territory of the Republic of Panama."

As to basis of jurisdiction in matters involving Panamanian registered vessels or Panamanian registered companies, the statute, articles 19.3 and 19.4 states as follows: "The Maritime courts shall also have exclusive competence (jurisdiction) with respect to claims arising out of (maritime commerce, transportation, and traffic), but occurring outside (the Republic of Panama), in the following instances:

3.- The defendant finds itself within the jurisdiction of the Republic of Panama, and has been personally served for any claim filed at the Maritime Court.

4.- When the vessel or one of the vessels involved is a Panamanian - flagged vessel, or when Panamanian substantive law becomes applicable under the contract or the provisions of Panamanian law; or when the parties, either expressly or tacitly, submit themselves to the jurisdiction of the Panamanian Maritime Court."

V. FEW CHARACTERISTICS OF THE PANAMA MARITIME COURTS

The Panamanian effort to handle the maritime jurisdiction at the Panama Canal has resulted in creating Maritime Courts with very distinctive characteristics:
1. It is a specialized court handling only maritime cases.
2. The Judges must have maritime studies, usually a master´s degree and must speak English.
3. The Court adopted the discovery rules similar to the U.S. Federal System, including discovery rules and oral trials.
4. Cases are litigated in any currency.
5. The Courts are available 24/7 during 365 days to arrest and release vessels
6. All vessels transiting the Panama Canal are subject to the jurisdiction of the court as well as all vessels registered in Panama, including Panamanian registered owners.
7. There is only one appeal to the Supreme Court of Panama on issues of law, shortening the time it takes to decide a case.

8. The key to file claims in Panama is the applicable law. Applying flexible rules of procedure, the court has developed considerable experience in applying foreign substantive law to the underlying claim.

VI. - REQUIREMENTS TO FILE THE CLAIM

Panamanian maritime law requires the filing of the underlying claim, along with prima facie evidence supporting of the claim, and the petition for arrest of the vessel present in Panama.

A Power of Attorney is required, but upon filing a cash bond, the action could be filed without it, even though must be filed at a later time.

Since the arrest of a vessel is sought, the claimant must include a countersecurity deposit for the arrest, usually USD$1,000 for damages. This is a nominal security, requiring a showing of a "winnable" claim. In addition an initial deposit for expenses of US$2,500 to cover initial arrest expenses. Depending upon the size of the vessel and other expenses another US$4,500 is advisable. All arrest expenses are taxed against the defendants and fully recoverable, and are to be included in the security for the release of the vessel.

Another requirement is the showing of the corporate status of the claimant and the person executing the Power of Attorney is legally authorized to execute the POA on behalf of the claimant. All documents must be legalized by the Consul of Panama, if available, or by the Consul of any nation or by Apostille. In emergency cases, fax copies of the documents showing prima facie the underlying claim are acceptable by the Maritime Court of Panama, but originals properly authenticated must be filed at a later time.

Once the vessel is arrested, the Maritime Court of Panama has jurisdiction in the matter. Then the defendant (s) option is to post security for the release of the vessel. The court will add three (3) years worth of interest at 10% per year, the commercial rate of Panama, or 6% in tort cases. As to acceptable security, Panamanian law provides for cash, local insurance bonds, government bonds, and local bank guarantees as acceptable security. Additionally any security agreed upon by the parties is also acceptable to the Court. Letters of Undertaking issued by P&I Clubs are acceptable if the parties so agree. In cases of LOU there is an agreed upon text which covers the case in Panama or in any other forum, including arbitration as acceptable security.

VI. REMOVAL OF THE CASE TO A FOREIGN FORUM, INCLUDING ARBITRATION

Once the vessel is arrested in Panama, and the underlying claim is subject to a foreign forum clause or arbitration, the defendant has the option to file a motion to remove the case to the agreed upon arbitration, under article 22 of the Maritime Code of Panama, which provides as follows:

Article 22. Maritime Courts may abstain, upon a petition filed by an interested party, from cognisance or from continuing taking cognisance of cases arising outside the territory of the Republic of Panama, in any of the following cases:
1. When it is necessary to practice testimony and the witnesses resides abroad, and the practice of said evidence or the appearance of said witnesses before the court is too onerous for either party.
2. When it is necessary to conduct a judicial inspection in order to have a better appreciation of the facts and such proceedings would be conducted abroad.
3. When the parties have previously and expressly agreed in writing to submit their disputes to arbitration or to a court in a foreign country. Pro forma or adhesion contracts are not deemed as previously and expressly agreed.
4. When the dispute has been previously submitted to arbitration or to the jurisdiction of a court in a foreign country and its decision is still pending.

The court may demand the fulfilment of certain previous conditions when it were necessary to protect the rights of the parties, such as the appearance before a foreign court within a certain period of term, the deposit of an appropriated security before such court, and if prescription has been timely interrupted under Panamanian law, the court, before declining to take the

judicial cognizance of the case, will order the defendant not to raise statute of limitation as a defence in the forum country.

In those cases where a security cannot be posted before the Arbitral Tribunal or foreign court and a warrant of arrest has been issued against the assets of the defendant in Panama, the Maritime Court may stay the proceedings until the foreign court has rendered a final judgement and the arrest or the security substituting it will be subject to the rulings of such court.

The provisions of this Law concerning the arrest of assets shall apply to the extent that they do not conflict with this Article.

A declined matter could be reassumed if it is proved that the foreign court did not decide the dispute or that any of the conditions ordered by the judge were not complied with. Foreign decisions will be enforced without need to go through exequatur procedure, provided that the petitioner presents an authenticated and legalized copy of the decision.

Maritime Courts should always decline to take cognisance of a case when one of the parties show the existence of a previous agreement to submit the dispute to an Arbitral Tribunal in the Republic of Panama or when the parties agree to submit the case to the decision of such Arbitral Tribunal after the dispute has arisen.

The removal statute is very clear and there is one important item that must be noticed. Article 22.3 permits removal of an action to a foreign forum, including arbitration, where the parties "have previously and expressly agreed in writing to submit their disputes to arbitration or to a court in a foreign country. Pro forma or adhesion contracts are not deemed as previously and expressly agreed."

VII. ENFORCEMENT OF FOREIGN DECISIONS, ARBITRATION AWARDS, AND FOREIGN ARREST ORDERS.

Article 422 of the Panama Maritime Code provides as follows:

Article 422. The final judgments, arbitration awards, interlocutory decisions and resolutions ordering precautionary measures rendered in foreign States, shall have in the Republic of Panama the effect which the respective treaties provide, upon prior declaration of enforceability or exequatur ordered by the Fourth Chamber of General Affairs of the Supreme Court.

In pursuance to article 403, the notification of the petition for enforceability declaration shall be served on the party against whom the action is filed. Pending the proceedings for enforceability declaration, a certified copy of the foreign decision shall be the basis to apply for precautionary measures before the Maritime Courts of Panama.

Article 423. If there are no special treaties with the State in which the judicial decisions had been rendered, they shall be given the same binding effect which is given to judicial decisions rendered in the Republic of Panama.

Article 425. Except as provided in special treaties, no final decision or award rendered outside the jurisdiction of the Republic of Panama may be enforced in Panama, if it does not meet the following requirements:
1. That the judgment was rendered as a result of an in personam claim, unless otherwise provided by the law; for the purposes of this section, an action directed against the vessel, cargo or freight will be considered as an in personam claim provided that the complaint has been served on the master or the custodian of the vessel or cargo if any.
2. That the judgment has not been rendered by default, meaning that, for purposes of this article, the complaint has not been personally served on the defendant within the jurisdiction of the presiding court, unless the defaulting defendant seeks its enforcement.
3. That the obligation which enforcement is sought is lawful in Panama.
4. That the copy of the decision meets the requirements to be considered as authentic.

In case of interlocutory injunction or precautionary measures, the requirements provided in paragraphs 3 and 4 above shall apply. As a practical matter, the cases filed in Panama seeking enforcement of arbitration awards included claims against the original party in the foreign case or arbitration and new owners of the vessel involved under theories of piercing the corporate veil and alter ego, also some degree of fraud was claimed. In those cases there were multiple defendants involved.

As to enforcement of precautionary measures, very recently the Panama Supreme Court enforced an arrest order and an injunction from transferring the ownership of three vessels issued by the Juzgado Maritimo de Venezuela and ordered the arrest of the vessels in Panama and the blocking of the Panama Registry.

VIII. SPECIAL CONSIDERATION AS TO CHARTERPARTIES INVOLVING VESSELS REGISTERED IN PANAMA

In the area of charterparties of Panamanian registered vessels, it is important to notice article 27 of Law 55 of August 6, 2008, The Maritime Commerce Code provides:

Article 27. - Whoever for the marine traffic and or his own account, employs another's vessel, being under his direction or through someone else, will be considered, in his relation with third parties, as the owner of the vessel. The true owner could not be opposed to the exercise of rights by third parties as creditors of the vessel and as a consequence of the employment of the same, unless legitimacy of him is justified and bad faith on the creditor.

Where Panamanian substantive law is applicable to the underlying claim, this provision although not very well drafted in Spanish, is something to keep in mind. The Maritime Court of Panama has not reviewed this provision, nor decides any case under it. Nevertheless, in any claim involving a charterparty (in any form) there are basis for liability of the vessel. This provision has been cited as supporting charterparties claims involving all sort of maritime related claims, such as collection of debts, cargo claims, charterparty breach, and seafarers´ personal injury and wrongful death claims.

IX. - CONCLUSIONS

As we have seen, Panamanian statutes and the Maritime Courts of Panama are established and could assist tremendously in pursuing maritime claims. Arbitrable claims due to the privileged position of assuming jurisdiction in cases related to vessels transiting the Panama Canal, their owners, operators and charterers, as well as involving vessels registered in Panama.

Panamanian Law provides for specialized courts, and a flexible procedure, normally not recognized in many jurisdictions, which permits, if necessary, flexible and relatively faster litigation.

The Panamanian system is designed to facilitate obtaining security or compelling appearance at a foreign forum or arbitration. In cases of on-going litigation or arbitrations it is possible to secure claims and preventing disposal of property. And in enforcing judgments, arbitration awards or precautionary foreign orders there is an expeditious procedure to obtain a satisfactory remedy.

One of the key issues in litigating foreign related cases in Panama is the statutory determination of the **applicable law**. The application of foreign law is not an area of concern in Panama. Not only the involved lawyers are under a duty to research and produce it for the court, but the judges have a duty to find the foreign law themselves as well.

The Maritime Court of Panama should be considered as a viable forum in assuring a successful maritime related litigation.

SHIP ARRESTS IN SOUTH AFRICA

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1. INTRODUCTION

Everyone here is acutely aware of the fallout from the current spiralling down turn and recession world wide and the affect it has had on the shipping industry. They are also very aware of the numbers of insolvencies, applications to court for protection from creditors by court ordered debt stand stills, the attempts by many charterers and ship owners to arrange agreed restructuring and "wash outs" and the numbers of charterers who have simply purported to redeliver vessels on charter to them well before the end of the charter period.

As a result, there are many claimants who have desperately been trying to find jurisdictions where they can try to obtain security against which to enforce claims. New York and its Rule B procedure became very popular but the decision by the US Supreme Court of Appeals for Second Circuit in The Shipping Corporation of India v Jaldhi Overseas Pte Limited effectively put an end to its popularity on 16 October 2009. Of course, this has meant that South Africa has become a popular alternative jurisdiction, due mainly to the "associated ship" arrest procedure.

While a favoured jurisdiction for many years since the promulgation of the Admiralty Jurisdiction Regulation Act in 1983 which introduced this extension of the "sister ship" arrest procedure, there has been a resurgence of enquiries and requests to place ships on our "ship watch" service where we monitor the port lists for expected arrivals of given vessels in a target fleet. At the date of preparing this talk the numbers of vessels on the list has surged to no less than 3,142 individual ships!

This is also perhaps also due to the Geographic position of South Africa at the tip of Africa making it a convenient place for ships to bunker when travelling from the Americas to the Far East and with the mounting threat of piracy along the horn of Africa, increasingly ships choosing to avoid the Suez and the Gulf region and come around the Cape despite its increased distance on a voyage from Europe to the East and vice versa.

It is of course possible to either arrest a ship or cargo *in rem* or attach any asset to launch an action *in personam* (both of which found the South African court with jurisdiction on the merits), but it is also possible to arrest a ship, bunkers or freight by order of court without invoking the South African court's jurisdiction on the merits, solely to obtain security for foreign proceedings, either by a court elsewhere or by a foreign arbitration tribunal.

By way of introduction then, I need to dwell briefly on the different procedures available generally to enforce claims or arrest ships or other assets.

2. PROCEDURES TO COMMENCE ADMIRALTY PROCEEDINGS IN SOUTH AFRICA AND THE COURT STRUCTURE

There is often some confusion in the minds of both Common Law and Continental (Civilian) lawyers instructing their South African colleagues with regard to the arrest of a vessel or other maritime property, as to the procedure and relief that can be sought before the South African courts.

There are basically three types of procedure available to a claimant under the Act:

- Firstly, the South African Admiralty Action *in rem,* which encapsulates the classic *in rem* procedures taken over from English law via the Colonial Courts of Admiralty Act, which

applied in the Colonial past of the Colonies of Natal and the Cape. However, the *in rem* procedure applied by the Act, is no longer identical to the English action.

- Secondly there is the procedure *in personam* where, if the action lies against a *peregrinus* (foreigner), this requires the attachment of an asset belonging to that defendant to found or confirm jurisdiction, which is part of the Roman Dutch heritage of South African law.

  This attachment procedure to found jurisdiction still also applies in the normal non admiralty procedures of the High Court, the major distinction being however that in the so called parochial jurisdiction, it is only a local claimant who can attach to found and confirm jurisdiction against a foreigner, whilst in admiralty a foreign claimant can attach as against a foreign defendant, without the cause of action having arisen within this court's jurisdiction, to commence an action *in personam* in admiralty (subject to the claim being a defined "maritime claim" under the Act).

- The third procedure is the application to court to obtain an arrest for security for proceedings either contemplated or already commenced both locally or abroad, being both proceedings before a foreign court and arbitration proceedings.

One of the distinctions between an attachment and an "arrest", both *in rem* and for security, is that the defendant owner of the property arrested only has to put up security to the value of the property arrested, or to the extent of the claim, whichever is the lesser. In an attachment to found jurisdiction however, if the owner wishes to obtain the release of that property attached, the full value of the claim has to be secured.

I need at this stage to refer briefly to the court structure in South Africa, as it is relevant to parties opting for one or other of the procedures available.

Court Structures

Although there has been some debate on the point as to whether magistrates courts have Admiralty Jurisdiction, the fact is that all Admiralty matters are dealt with in the High Courts of SA. Each province has a separate division of the High Court with a distinct and separate geographic jurisdiction. Only in limited circumstances can for instance an order of arrest made by one division be executed against a ship or asset in the physical or geographic area of another court.

While there are 9 provinces, only the "coastal" divisions have unlimited Admiralty jurisdiction, the inland divisions only having jurisdiction to determine maritime claims for instance in respect of contacts of carriage of cargo concluded within that area of jurisdiction.

The names of the various divisions have changed very recently and are not yet in everyday use, but the coastal divisions are basically the Western Cape covering the territorial waters off that province and the ports of Cape Town, Mossel Bay and Saldanha Bay, the Eastern Cape the provincial division of which sits inland in Grahamstown , but covers East London and Port Elizabeth (where there are also local divisions) plus the new port of Coega near Port Elizabeth and then Durban covering its own port and Richards Bay. In all instances the respective courts jurisdiction extends over the territorial waters of 12 miles off the respective province's coastline and in some instances to 50 and even 200 miles, for specific interests.

This geographic separation means that a claimant expecting a vessel to call at one or other SA port for bunkers and wanting to make sure that the warrant is issued in advance for e.g. timing reasons, needs to issue at least three sets of identical proceedings down the coast to be safe. The courts will not issue an attachment or security arrest order until the vessel, bunkers or other asset is physically within the courts geographic jurisdiction, but for arrests *in rem*, the warrant and summons can be issued in advance of any entry into the jurisdiction.

3. SECURITY ARRESTS

In the current economic climate then, of particular interest to claimants who have submitted their claims to arbitration in London or elsewhere, is the entitlement to arrest property, normally a vessel (or an associated ship), solely for purposes of obtaining security for those proceedings.

The launching of the proceedings does not entail the South African Admiralty Court involving itself with the merits of the claim to any great extent and once the order has been made, a ship arrested and security put up to obtain its release, the South African Court drops out of the picture. The security is established for purposes of paying such amount that might be found to be due in the foreign proceedings, not the South African arrest.

Section 5(3)(a) of our Admiralty Jurisdiction Regulation Act, Act 105 of 1983 ("AJRA") provides that: *"A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration or proceedings."*

As far back as 1989 the then Appellate Division (as it then was) in the matter of Cargo laden on board the MV "Thalassini Avgi" vs MV "Dimitris"[1] set out the rules for such an application and these are now in summary accepted as trite law i.e. what the Claimant must show to obtain an arrest for security for foreign proceedings:

A. It has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property or against a ship which is an associated ship of the "ship concerned";
B. It has a *prima facie* case in respect of such claim which is *prima facie* enforceable in the nominated forum or forums; and
C. It has a genuine and reasonable need for security in respect of the claim.

I will not for the present dwell on the reference under "A" above, of the "associated ship" concept which is what makes the South African jurisdiction slightly different to most other jurisdictions and expands the potential for enforcing a claim or obtaining security. I will rather deal with that later in this overview in greater detail, given that it is the concept which attracts the most interest and questions.

4. DETAILED REQUIREMENTS FOR A SECURITY ARREST

A. Turning then to the first requirement under point "A" above, to enable a claimant to arrest an asset for security alone:

- It must have a claim enforceable *in personam* against the asset sought to be arrested (it does not have to be a ship but can be any asset, such as bunkers or freight, or arguably the right title and interest of a bareboat charter in a ship, although that is not yet finally settled law); **or**
- It must be a claim enforceable *in rem* against the asset (normally a ship) sought to be arrested, either on the basis that the claim lies against the owner of the ship and the claim relates to that ship, or the claim is enforceable *in rem* against the ship sought to be arrested, on the basis that it qualifies as an associated ship under the Act.

B. I turn then briefly to the second requirement (point B above) of a *prima facie* underlying claim:

The determination of whether one has a *prima facie* case in respect of a claim must be determined in accordance with the law applicable to the claim. If therefore for instance the claim is subject to English law with disputes to be settled via London arbitration, the question

[1] 1989(3) SA 820 (A)

of whether client has a *prima facie* case in respect of the claim falls to be determined in accordance with English law.

The test for determining whether a *prima facie* case has been established is whether the evidence adduced, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted does not mean that the plaintiff does not enjoy a *prima facie* case. Even where the probabilities are against the plaintiff, the requirement of a *prima facie* case is not negated. It is only where it is quite clear that the plaintiff does not have an action or cannot succeed that an arrest will be refused or set aside on the grounds that the plaintiff does not enjoy a *prima facie* case. This test is applied both in relation to the merits of the claim and the quantum of the claim.

C. Finally I need to refer to the requirement to be established, related to a "genuine and reasonable need for security" (point C above).

There was for some time a measure of uncertainty regarding the exact requirements for establishing a genuine and reasonable need for security. In earlier matters the view was expressed by the Western Cape High Court that in order to demonstrate a genuine and reasonable need for security on a balance of probabilities a claimant must show that the defendant is in a financially precarious position and would not otherwise be able to meet any judgment or award obtained.

This view was however not universally applied by other divisions of the High Court and some confusion reigned until recently the Supreme Court of Appeal issued a defining decision in the matter of the "***Orient Stride*"** (decided at the end of 2008) where the test was set as being that the clamant must establish on the facts of the particular matter ***"the existence of a reasonable apprehension***" by the claimant, that the respondent owner will not satisfy an award made in their favour, to discharge the burden of establishing that it has a genuine and reasonable need for security.

It seems to us that in the current turbulent times, with owners and charterers defaulting on contractual commitments and even huge companies going insolvent or seeking protection of the courts from their creditors, most claimants will have a **"reasonable apprehension"** that an award to be handed down in a number of years hence when the arbitration or other legal proceedings are finally concluded, might very well not be satisfied.

5. DISTINCTION BETWEEN SECURITY ARRESTS AND ARRESTS *IN REM*

I do need to make clear that the arrest proceedings to obtain security and an arrest *in rem,* are very different procedures. In an arrest for security, the court does not assume jurisdiction on the merits of the claim. For an arrest *in rem* however, the court does accept jurisdiction and the arrest and service of the summons (which has to take place simultaneously) are the commencement of proceedings before the South African court.

The *in rem* arrest can be obtain within a very short space of time only requiring a certificate to be signed on behalf of the claimant that the claim is a maritime claim and the amount is due and payable. A summons with a minimum amount of detail has to be issued simultaneously with the warrant of arrest and these papers are issued by the Registrar of the court without any formal application to court having to be made.

An arrest for security on the other hand has to be made in a substantive application to court with full affidavits, annexures and sufficient detail to satisfy a judge of the requirements for such an arrest as set out above. This requires the claimant's attorney to have to prepare these papers, make sufficient copies, have the papers issued by the Registrar and then arrangements to be made to find a judge to hear the application. Where this is over a weekend or in the middle of the night, such arrangements can be difficult to put in hand.

6. THE ASSOCIATED SHIP CONCEPT AND ARRESTS

The requirements for establishing an association are set out in Sections 3(6) and 3(7) of AJRA and are reproduced in Appendix 1 to this paper.

For an associated ship arrest, the first thing that needs to be established is whether or not the claimant has

- A maritime claim as defined in terms of our law,
- Which is enforceable by means of an action *in rem* against the "ship concerned" (sometimes referred to as the "guilty ship").

The Act sets out in section 1(1) the definitions of what are "maritime claims" and suffice to say that they more or less cover any claim remotely linked to the sea and matters maritime..

A claim is enforceable by means of an action *in rem* in terms of South African law if it constitutes a maritime lien (as defined in terms of South African law) or if the owner of the property to be arrested is liable to the claimant *in personam* in respect of the cause of action concerned and the claim relates to that property.

As appears from the above provisions of sections 3(6) and 3(7) of the Act set out in Appendix 1 attached hereto, an associated ship is (in summary) either:

- A sister ship properly so-called (i.e. owned by the original debtor as owner of the guilty ship), **or**
  One where:
- The corporate owner of the guilty ship at the time of the cause of action arising, was at that time,
- Controlled directly or indirectly by the same person (and person includes a corporate entity),
- Who now controls directly or indirectly, the corporate owner of the associated ship (i.e. at the time of the arrest being sought).

The following diagrams might illustrate this better [2] -

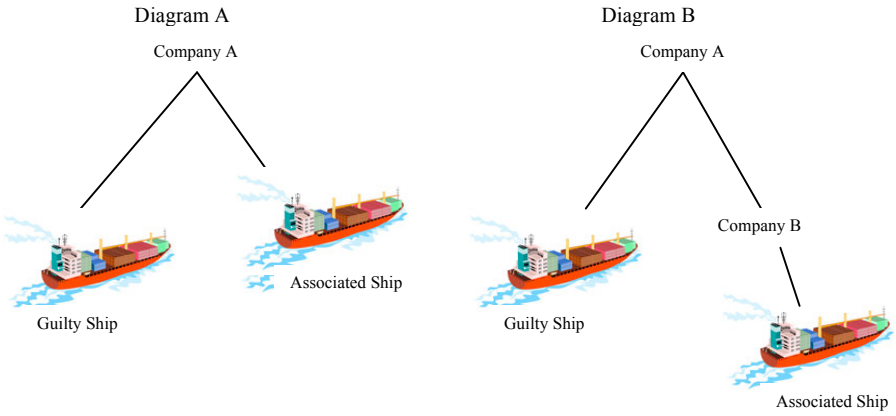


Diagram A illustrates the classic sister ship arrest where the guilty ship and the associated ship are owned by the same vessel owning company. Diagram B illustrates how the associated ship provisions permit the arrest of a vessel which is owned by a company which in turn is ultimately indirectly controlled by the owner of the guilty ship.

Commercial practice rarely mirrors these text book examples and in reality there are usually a number of parties involved in the employment of a vessel up or down the line, only one of those who will have a direct contractual relationship with the registered owner of the vessel and who would therefore be entitled to enforce any claim it may have in respect of the employment of the vessel by means of an action *in rem* and that party is more often then not the "beneficial owner" of the vessel.

7. PROVING AN ASSOCIATION OF SHIPS AND THE ONUS

It is seldom the case that a claimant can go to a public registry and there find the full detail of the ship owning structure, the companies in the group, the shareholders and the directors and a clear recordal of who exactly it is that "controls" the respective companies. Of course this is sometimes the case, particularly where the companies are publicly quoted ones and where on

[2] These diagrams and those below were prepared for a recent paper by my partner in Cape Town, Edmund Greiner and are reproduced with his kind permission.

the bourse concerned, there is a duty of full financial disclosure. But it is seldom those sorts of companies where associated ship arrests seem to have to be resorted to (although in the current economic climate, that is probably changing).

The courts have held that it is normally ultimately the shareholders who control a company, not the directors, as the shareholders in most instances can hire and fire directors. It is the shareholders who decide the course of the company, decide when to borrow money or buy and sell ships.

It must be noted that the issue is not who "controls" the ships and their trading, chartering and the like, at least not alone, but the control of the company which owns the ships that is relevant.

Given then the difficulty in being able to produce proof of actual ownership of shares in the respective ship owning company, in most instances, the claimant will normally rely on circumstantial evidence, which includes

- Common directors
- A common manager (but this alone is not sufficient)
- A common prefix to the ships names in a fleet, or
- A "theme" to the names
- Common registered addresses
- P&I Club fleet entries
- Cross mortgages or collateralisation between ships
- A common personal or corporate guarantor in respect of the mortgage debt
- Internet sites proudly claiming to "own" all the vessels listed
- Statements made in the press as to acquisitions, again normally proudly declared
- Industry directories and credit reports on a group or owner/charterer
- Company searches and public records (where available)
- The detail in prospectuses for IPO's

It must be kept in mind that the South African Supreme Court of Appeal held in the "Heavy Metal" that there is *de facto* control of a company and there is *de jure* control. If they are not the same, then either is sufficient to prove an association.

The control can be direct (i.e. actual shareholders – *de jure*) or indirect such as in the case of nominees where the nominee shareholder is the *de jure* controller, but his principle on behalf of whom he holds those shares, is the *de facto* controller.

That was the case in the "Heavy Metal", which is a classic example of the associated ship situation. I refer to the facts of that matter as detailed in the attached note as Appendix 2.

However, the onus does still rest with the claimant and if the shareholders, Trustee, lawyers or employees are prepared to lie and commit perjury, in many cases it is difficult to discharge the onus.

8. DEEMING PROVISIONS RE OWNERSHIP

Given the requirements under South African law, for both arrests *in rem* and security arrests involving an associated ship, for the claimant to have a claim enforceable *in personam* against the owner of the *res,* certain fictions were introduced some time after the promulgation of the Admiralty Act in 1983, to address certain perceived inconsistencies.

The first of these is in section 3(7) related to associated ships, where a deeming provision was inserted (as 3(7)(c) as reproduced in Appendix 1) to meet the requirement that a claimant must have a claim enforceable against the owner of the "guilty ship" before the issue of its entitlement to arrest an associated ship even arises, in terms whereof the charterer or sub-charter of the ship concerned (i.e. the guilty ship) is deemed to have been the owner of that ship at the time the cause of action arose.

So one has the somewhat curious situation that if Mr X charters his ship the MV "A" to Mr Y who fails to pay charter hire, but Mr Y owns a ship the MV "B", Mr Y is deemed to have been

the owner of the MV "A" (even though in fact owned by Mr X), to enable the associated ship prerequisite to be met as to ownership and liability *in personam* with regard to the "ship concerned". Where there are separate corporations involved, the claimant must then show that Mr Y controlled the chartering company at the time of the debt arising and now controls the associated ship owning company.

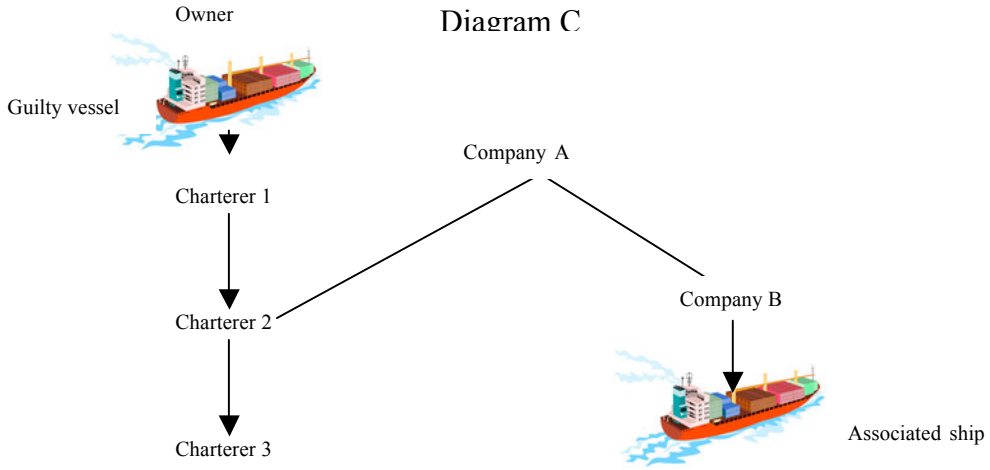
Then much later (and only relatively recently) to satisfy the complaints mainly of the cargo underwriting fraternity, a new section 1(3) was inserted providing that for the purposes of an action *in rem*, a demise charterer is deemed to be the owner of the ship. This obviously was to meet the problem cargo underwriters faced that they would very often not know in the situation where there was a demise clause in the bill of lading, whether there was in fact a demise charter in existence.

As they could only arrest a ship *in rem* if the owner was contractually liable to the cargo receiver *in personam* as carrier, they were potentially exposed to wrongful arrest claims, or at least having their arrest set aside. The English law approach that a vessel could be arrested as against a demise charterer, was not part of South African law. This amendment and deeming provision was adopted to try to remedy this situation.

There was speculation that these two deeming provisions read together (referred to as a "double deemer"), could allow an arrest of a demise or bareboat chartered ship for the liabilities of a time charter company (deemed by section 3(7)(c) to be the owner of the "guilty ship") if the bareboat charter company was controlled by the same person or entity, but in a recent decision of the Cape Court in the Pacific Yuan Geng this was held to not be permitted.

Diagram C below provides a graphic example of the application of the first deeming provision. Where charterer 3 has a claim against charterer 2 he cannot enforce such a claim against the "guilty vessel", however for the purposes of his claim charterer 2 is in terms of section 3(7)(c) deemed to be the owner of the guilty ship for the purposes of the enforcement of his claim against an associated ship.

Diagram C



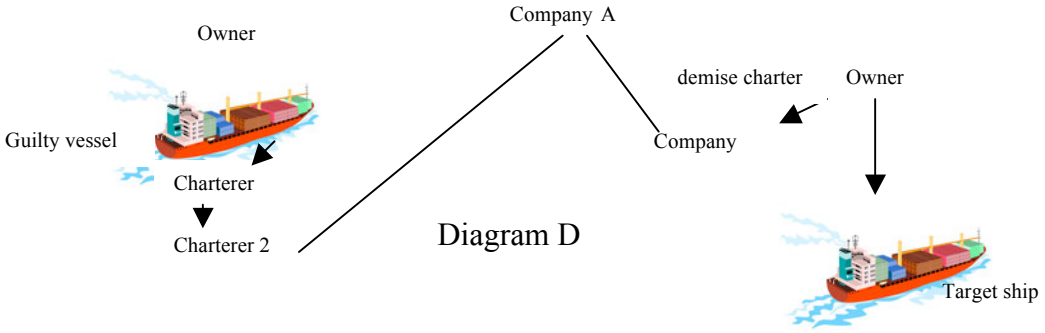
In this example charterer 3 could enforce its claim against the associated ship as Company A which controls charterer 2 also controls company B which in turn owns the vessel, thereby establishing the requirements for an association. This provision applies both up and down the line and charterer 1 could likewise enforce any claim it may have against charterer 2 arising out of the employment of the guilty vessel against the associated vessel.

As mentioned above, section 3(7)(c) only operates to create a deemed action *in rem*, or to put it another way, it only operates on the left hand side of the triangle.

Section 1(3) of the Act provides that: *"For the purposes of an action* in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise."*

It was thought that this provision could be used to arrest, as an associated ship, a vessel demise chartered to the owner or "deemed owner" (pursuant to the provisions of section

3(7)(c)) of the guilty ship or a vessel demise chartered to an associated company of the owner or "deemed owner" of the guilty ship as illustrated in diagram D below.



In the above example charterer 1 has a claim against charterer 2, who in terms of section 3(7)(c) is deemed to be the owner of the guilty vessel. Charterer 2 is controlled by Company A as is Company B who has the target vessel on demise charter from the owner. As such Company B is deemed in terms of section 1(3) to be the owner of the vessel. This was the scenario which presented itself in the Pacific Yuan Geng matter, but the court held that this "second" deeming provision could not have been intended by the Legislature, for purposes of an arrest of the demise chartered ship, to obtain security for a claim against the sub-charterer of the "guilty ship".

APPENDIX 1: ASSOCIATED SHIPS – EXTRACT FROM THE ADMIRALTY JURISDICTION REGULATION ACT

3(6) Subject to the provisions of subsection (9), an action in rem, other than such an action in respect of a maritime claim contemplated in paragraph (d) of the definition of 'maritime claim', may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.
3(7)(a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose-
i. owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or
ii. owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
iii. owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.
(b) For the purposes of paragraph (a)-
i. ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value, of, the shares in the ships are owned by the same persons;
ii. a person shall be deemed to control a company if he has power, directly or indirectly, to control the company;
iii. a company includes any other juristic person and any body of persons, irrespective of whether or not any interest therein consists of shares.
(c)If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable.

APPENDIX 2: THE CASE OF THE "HEAVY METAL"

These are the facts that applied in the precedent setting case of the "Heavy Metal decided by the Supreme Court of Appeal where it was decreed that there could be either *de jure* or *de facto* control of a company for purposes of arresting an associated ship.

There a lawyer in Cyprus, a Mr L, admitted to being the sole director and majority shareholder in two ship owning companies, but stated that he held the respective shares as nominee for two entirely different principals.

Indeed the evidence was that his firm specialised in setting up ship owning structures with many single ship owning companies, de facto "owned" and controlled by widely diverse investors in Greece and elsewhere, but that the partners acted as nominee shareholders in all of the companies and took instructions as to the activities of the companies from the different de facto "owners".

On the evidence, it was common cause that both ships were managed by a management company in Greece, "B" Maritime. The alleged liability arose out of an MOA for the sale of a vessel, the "Sea Sonnet" owned at the time of the sale by Dahlia Maritime. The "Sea Sonnet" was therefore the "guilty ship". Mr. L was the admitted sole director of Dahlia and the majority registered shareholder as to 52% (48% being held by a company the details of which could not be ascertained).

The ship arrested was the "Heavy Metal", the registered owner of which was Belfry Marine Limited. Again the sole director was Mr L and the disclosed shareholders Mr L. as to 60% of the equity (i.e. the majority), another brass plate bearer share company as to 30% and Mr V (well known to be the principal of B Maritime) as to 10%.

Belfry Marine denied that the ships were associated. Mr. L admitted he was the sole director and on paper the majority shareholder of both Dahlia and Belfry, however stated that this was as nominee only and that the respective companies were controlled by entirely different people. He stated that he was precluded ethically and professionally from disclosing the actual separate principal's identities, save that he assured the court that they were separate and that the two ships were not associated ships.

Apparently on being pressed on this non-disclosure in the court *a quo*, he finally "disclosed" one of the intermediate principals, said to be a certain "Mr. T", as being the previously undisclosed principal behind Dahlia, but that he could confirm that Mr T had no control or interest in Belfry. Mr L however steadfastly maintained his position that he could not disclose who his principal was for the majority shareholding in Belfry.

Apart from clearly not believing the lawyer concerned and intimating that the probability was that Mr V was in fact the party who indirectly controlled both companies, the court said "that's fine", but because you Mr L are the registered majority shareholder in both companies, albeit as nominee, even if your principals are different in each company, nevertheless on a strict application of the Act, you *de jure* control both companies and therefore the ships are associated.

ROTTERDAM RULES – YES OR NO?

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Although the arrest of ships is one of the *spécialités de la maison* of our firm, with approval of the organizers I have decided to talk about a different, and at the same time, topical subject.

The signing of the Rotterdam Rules seems to be, at least from my perspective, the most crucial event of the recent years in the field of maritime law. The implications of their possible broad adoption by the international community will be colossal not only for entities directly involved in the maritime and multimodal transport, but also for maritime lawyers.

Even though the number of signatures under the Convention to date is not significant (21 by the end of March 2010) and the Convention as yet has not been ratified by any state, in the nearest future a greater number of signatures and ratifications should be expected. Obviously, it is far from entry into force since it must be ratified by 20 states. It is also possible that the Convention will share the fate of the Hamburg Rules.

Poland is among the signatories of the new convention, yet little follows from that fact. There is no mention in particular about the ratification of the convention. Not only do the officials responsible for those matters make no predictions in that respect, but they do not even address us with questions regarding the recommended courses of action, which the experts from the Legislative Commission could attempt to answer. Consequently, it seems that the government has no vision or opinion whether to ratify that convention or not.

Poland has ratified the Hague - Visby Rules as an international convention and, moreover, it has introduced the solutions and regulations contained in the Rules into its domestic legal system, as a part of the Maritime Code. We ratified the Brussels Convention of 1924 before the war, in 1937, and have not acceded to the Hamburg Rules. Yet also in Poland from time to time there are voices that the Hague-Visby Rules have become outdated and should be replaced by new rules.

I have the pleasure of being a member of the Legislative Commission on Maritime Law – an official body which formulates frameworks and drafts of new acts pertaining to Polish maritime law. In the course of this work an idea of a new Maritime Code is emerging. Although the code currently in force was enacted as recently as 2001, it virtually duplicates regulations and solutions developed in the early 60's. A completely new regulation therefore seems necessary. Needles to say that when designing a draft of such an act as a maritime code the authors should ask themselves a question how ultimately a contract of carriage of goods should be regulated, in particular in the part covering the subject matter governed by the Rotterdam Rules.

Should we depart from the direct application of the Hague-Visby Rules and merely modify these old rules introducing in their place a "mixed" version, as has been the case in the laws of the Scandinavian countries, or assume that the Rotterdam Rules will receive general application and consequently pattern the new solutions after the Rules? What to do with the contracts of carriage excluded from the scope of application of the Rules? Ratification of the Rules would require Poland to denounce the Hague-Visby Rules with effect as of the day of entry into force of the Rotterdam Rules. Simultaneously, in our domestic law we would have to legislate on types of contract of carriage which are not covered by the Rotterdam Rules. Is it

therefore necessary to create yet another international convention, this time dealing with non-liner trade?

We are all well familiar with the numerous pros and cons of entry into force of the Rotterdam Rules so there is no need to elaborate on them. It seems that a significant portion of large container carriers is presently in favour of the Rules, whereas freight-forwarders and, generally, cargo-interests are against them, or at least raise many fundamental objections. Poland is currently a state of shippers and receivers, we no longer have carriers, especially container carriers. This will, among other things, condition our choice.

My professional experience shows that even today Polish courts have difficulties in comprehension and correct interpretation of the Hague-Visby Rules. It is thus frightening to think what *may* happen if they are faced with the task of interpretation of the Rotterdam Rules. I have already personally seen two attempts at translation of the Rotterdam Rules into Polish. The first was grotesque, the second only deficient. Will the third one be successful?

On the other hand *due to application* of European law the effectiveness of choice of law and jurisdiction clauses in shipping documents is constantly rising. Therefore it seems that by incorporating certain rules in their shipping documents the carriers rather than the states decide what the standards of contracts of carriage are. Currently, Polish courts generally recognise the effectiveness of choice of law and jurisdiction clauses in bills of lading applied by carriers, at the same time depriving shippers, and often even receivers, of the possibility to pursue cargo claims before Polish courts and under Polish law. The role of a domestic codification or even of ratification or non-ratification of a particular convention is thus secondary if the carrier is able to dictate the law and jurisdiction chosen by him.

In my opinion the entry into force of the Rotterdam Rules as a primary regulator of the world's container trade is still quite distant unless the European Commission imposes them upon the Member States by enacting the substance of the Rules as its new Regulation on multimodal transport.

PIRACY : ALL YOU WANTED TO KNOW BUT WERE AFRAID TO ASK

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What is a Pirate?

Hollywood - "Pirates of the Caribbean" is the usual image for most people" but this is not about Hollywood, rather it is about real events and real problems that occur daily. Remember this when you go home tonight - if you were a crewmember on a ship in certain areas of the world you would be at risk.

History

As soon as man discovered that he could paddle a log from one place to another he discovered that someone had invented piracy. It may not be the world's oldest profession, but it is surely not that far behind.

Pirates around as long as people have used oceans as trade routes. There are documented instances of pirates who threatened the Aegean civilisation and Mediterranean in the 13th century BC. The island of Lemnos long resisted Greek influence and remained a haven for Thracian pirates. Even the Phoenicians sometimes resorted to piracy, specializing in kidnapping boys and girls to be sold as slaves. By 1st century BC, pirate states along the Anatolian coast, threatened Roman Empire trade.

Julius Caesar got caught in 75 BC.[1] Kidnapped by Sicilian held prisoner in the Dodecanese islet of Pharmacusa. Apparently he maintained an attitude of superiority and good cheer throughout his captivity[2].

3rd century pirate attacks on Olympos (a city in Anatolia) brought impoverishment. Ancient pirateering peoples included the Illyrians, populating the western Balkan Peninsula. Constantly raiding the Adriatic Sea, they caused many conflicts with the Roman Republic. Romans finally conquered them in 68 BC making Illyria a province.

In 258 AD, the Gothic-Herulic fleet ravaged towns in the Black Sea and Sea of Marmara. Aegean coast suffered attacks a few years later. In 264, the Goths reached Galatia, Cappadocia and Gothic pirates landed on Cyprus and Crete they seized enormous booty and took thousands into captivity.

In 286 AD, Carausius, (Roman military commander appointed to command "Britannica") given responsibility for eliminating Frankish and Saxon pirates raiding the coasts of Armorica and Belgica Gaul. In the Roman province of Britannia, Saint Patrick was captured and enslaved by Irish pirates.

Middle Ages to 19th century

Vikings - best known and far reaching pirates in medieval Europe raided from about 783 to 1066, along coasts, rivers and inland cities of Western Europe as far as Seville[3]. Vikings even attacked North Africa and Italy and plundered all of the Baltic Sea, ascending rivers and

[1] Take your choice. Per Suetonius's chronology Plutarch says this happened earlier, on his return from Nicomedes's court. Velleius Paterculus (*Roman History)* says merely that it happened when he was a young man.
[2] These pirates demanded a ransom of 20 talents of gold; Caesar insisted he was worth at least 50 so pirates raised ransom to 50 talents. After ransom was paid, Caesar raised a fleet, pursued & captured the pirates & put them to death
[3] Seville was attacked in 844 AD

getting as far as Persia. Lack of centralized powers in Europe during Middle Ages favoured pirates.

Meanwhile, Muslim pirates terrorized the Mediterranean Sea. From 9th century, Muslim pirate established havens along the coast of southern France and northern Italy. In 846 they sacked Rome and damaged the Vatican. In 911, Bishop of Narbonne unable to return to France from Rome because Muslims pirates from Fraxinet controlled all the passes in the Alps. Muslim pirates operated out of the Balearic Islands in the 10th century. From 824 to 961 Arab pirates in Crete raided entire Mediterranean. 14th century, raids by Muslim pirates forced Venetian Duke of Crete to ask Venice to keep its fleet on constant guard.

So safe to say everyone, virtually everywhere in the world, has their own historical connection with piracy. Moving to 17th century - Europeans lived in fear of being kidnapped by Pirates and sold into slavery. This was not limited to the Mediterranean.

Hundreds and thousands across Europe met wretched deaths on what the English called "The Barbary Coast" - a term given to the North African coast. This name came from Spain - 2 Turkish brothers wreaked havoc on European Christians helping establish Turkish domination of North Africa.[4] Spain gave brothers the nickname "Barbarossa" ("Redbeard"). Pirates lent aid to Muslim Moors driven from Spain by Christians in 1492.

An example: The Reverend Devereux Spratt made a voyage on vessel *John Filmer* from Cork (in Ireland) to England in April 1641 and wrote: *"…but before we had lost sight of land, we were captured by Algerian Pirates, who put all the men in irons"*[5] He spent several years in bondage in Algiers, before being released. Now largely forgotten his experience was not unique in his day.

First half of 1600s, Barbary Corsairs (Corsairs being not quite another term for Pirates) were authorised by their governments to attack shipping of Christian countries. They ranged far and wide, certainly into the North Atlantic.

Privateers

A special mention. A privateer or corsair used similar methods to pirates but acted while in possession of a commission or *Letter of Marquee* from a government or monarch authorizing the capture of merchant ships belonging to an enemy nation. E.G. United States Constitution 1787 specifically authorized Congress to issue Letters of Marque and reprisal[6]. *Letter of Marque* recognized by international convention, so a privateer could not technically be charged with piracy while attacking targets named in his commission. A nicety of law that did not always save the individuals concerned - whether one was considered a pirate or a legally operating privateer depended on whose custody the individual found himself in. If you were taken in the country that issued the commission you had a better chance than being held in the state who owned the ship you had attacked. Spanish authorities executed foreign privateers with their *Letter of Marque* hung around their necks to show that Spain rejected such a defence. Many privateers exceeded the bounds of their *Letters of Marque* by attacking nations with which their sovereign was at peace (Thomas Tew / William Kidd notable examples), making themselves liable to conviction for piracy. A Letter of Marque was useful "cover" for such pirates. Why? Because plunder seized from neutral or friendly shipping could be passed off later as taken from enemy merchants.

Barbary Pirates (if you were British) or Corsairs (If you were from North Africa) were authorised by the State. As were Maltese Corsairs, authorized by the Knights of St. John, and *Dunkirkers* in the service of the Spanish Empire. Sir Francis Drake was a famous privateer. His patron was Queen Elizabeth I, their relationship ultimately proved quite profitable for England.

[4] See. "The Barbary Wars." Global Security. April 27, 2005. http://www.globalsecurity.org/military/ops/barbary.htm
[5] See. British slaves on the Barbary Coast. Prof Rees Davies
[6] Also known as a Letter of Counter Marque.

Privateers made up a large proportion of total military force at sea during 17th and 18th centuries. During Nine Years War, France adopted a policy strongly encouraging privateers to attack English and Dutch shipping. England lost roughly 4,000 merchant ships during the war[7].

Between the end of the Revolutionary War with America and 1812, less than 30 years, Britain, France, Naples, the Barbary States, Spain, and the Netherlands seized approximately 2,500 American ships[8].

So back to Barbary Pirates: A very serious problem for everybody. Pirates looked to disrupt trade by capturing people for sale as slaves, or keeping them for ransom late. British Admiralty records show that during this time Barbary Pirates plundered British shipping (they did not limit themselves to British shipping) pretty much at will.
- 1609 to 1616 no fewer than 466 vessels taken by Pirates.
- 1625 - 27 vessels were taken
- 1682 - *from a list printed in London* – 160 British ships captured by Algerians between 1677 and 1680. Equates to between 7,000 to 9,000 people taken.

These pirates also attacked coastal settlements. E.G. Ireland where, in 1631, village of Baltimore lost almost all of its inhabitants to these pirates.

An estimate of the numbers captured

Pirates (or slave traders) raided coasts of Valencia, Andalusia, Calabria and Sicily. Sailors were only a minimum part of this trade. Allowing for 8,500 captives per year, 1580 to 1680 accounted for 850,000 people. For period 1530 to 1780 figure could have been as high as 1,250,000.[9]

European Response

Given current problem with pirates off the Somali coast it is interesting to see how this was dealt with in the past.

Europeans sometimes attempted to buy their people out of slavery - but no real system before around 1640. After that more systematic attempts - Spain and France sometimes gave state subsidies.

Practically all this was carried out by religious orders (Trinitarian or Mercedarian orders) who collected going to North Africa to negotiate release of those captured by the Pirates.

Prof. Davies refers in his book to churches all over Spain and Italy keeping locked collection boxes marked *"for the poor slaves".* Priests constantly reminded their wealthier parishioners to include grants to ransoming societies in their wills and *"slave redeeming associations"* were formed in hundreds of cities and villages.

Catholic Europe dealt with this problem far better than Protestant Europe. Nothing changes - France and Italy much quicker to pay ransoms to Somali pirates than north European countries

The threat of piracy was so large a system of tribute was established. European trading nations paid Barbary States to stop them molesting their vessels and capturing their crews. It was another income stream for pirates to add other sources of revenue: plundering ships and capturing people.

Pirates were such a success (and continuing success) due in part due to abetment from Europe. Most large nations, trading in India and Far East, had diplomats in Barbary Coast countries. These diplomats encouraged attacks on other countries' ships (rather than those of their nation). Pirates based their tribute demands from nations trading beyond the Mediterranean based on their size. Smaller states paid lesser bribes, while large, powerful nations paid more. Initially the United States fell into the former category but, after

[7] Privateering and the Private Production of Naval Power, *Gary M. Anderson and Adam Gifford Jr.*
[8] US Navy Fleet List War of 1812.
[9] 1,250,000 equals just over a tenth of the number of Africans taken as slaves to the Americas from 1500 to 1800.

independence, America quickly fell into European pattern of extortion under the Barbary States. The U.S. included $80,000 in its 1784 fiscal budget for tribute to Barbary governments[10] By 1795, when the Barbary States realized that America had a significant fleet of merchant ships and a continent's worth of raw materials, this grew to around $1 million (cf. *Gawalt*). The United States, like Europe, was willing to pay.

Payments to the Barbary States amounted to 20% of United States government annual revenues in 1800[11].Throughout the American Civil War, Confederate privateers successfully harassed Union merchant ships.

Thomas Jefferson's election ended this extortion and he took America's first hard-line stance against the Barbary pirate states.

Problem posed by state-sponsored piracy so great that Barbary nations are mentioned explicitly in the **Treaty of Amity and Commerce**, of 1778. This was a pact between France and the United States[12] which called on France to use its diplomatic powers to protect captured sailors and persuade the leaders of the Barbary nations to refrain from capturing American ships.

It was from Paris that Jefferson began a campaign against the Barbary States when he tried to assemble a confederation of nations to take action against the Barbary States. Failed because France and England could not agree cf. *Gawalt*. U.S. / Europe continued to pay tribute and lose citizens and goods to the pirates. After he became president he took America into a war against the Barbary States.

Just before Jefferson's inauguration in 1801, the "Pasha" (Turkish ruler) of Tripoli released crew members of 2 recently captured American ships on the condition that the U.S. increase its tribute. The Pasha advised that if America refused, the Barbary States would declare war on the United States. America mounted a naval expedition to the Mediterranean, resulting in the First Barbary War (1801-1805). The alliance between the Barbary States broke down and, for 4 years, U.S. fought Tripoli and Morocco. Mostly naval, it was on land -- through military action and diplomacy -- that U.S. won. Using tactics similar to the Green Berets today, American Marines landed in Tripoli (giving rise to the first line in Marines' anthem) U.S. identified groups in opposition to the pasha. These opposition groups were amassed into an insurgency that threatened the pasha's throne. As a result, Tripoli agreed to a treaty ending the war in 1805 [*cf. Gawalt*].

In a second Barbary War (1815) U.S. vessels bombarded Tunis and Algiers, captured prisoners and demanded treaties that freed the U.S. from both Barbary threat and extorted tribute.[13] It lasted less than a year, following its show of naval strength; the U.S. stopped paying tribute to the Barbary States causing a ripple effect among European nations. In the following decades, the coast of North Africa and the Barbary rulers fell to European imperialism [cf. *Encyclopedia Britannica*].

Privateering lost international sanction under the Declaration of Paris in 1856. We shall see that history repeats itself.

ATTACKS ON SHIPS IN THE PRESENT AGE. We shall look at this in the following way:

1. Background Information
2. Scale of the problem
3. What is, or is not, Piracy
4. Role of the International Maritime Organization (IMO)
5. Need for co-operation
6. Who pays?

[10] See. "America and the Barbary Pirates: An international battle against an unconventional foe." Geard Gawalt U.S. Library of Congress.
[11] Oren, Michael B. (2005-11-03). *"The Middle East and the Making of the United States, 1776 to 1815".*
[12] Source; Yale -- http://memory.loc.gov/ammem/collections/jefferson_papers/mtjprece.html
[13] See:. "To the shores of Tripoli." Gilmore, Jodie The New American. 16.04.2006. http://www.thenewamerican.com/node/1783.

1. Background Information

Attacks on vessels off Somalia coast are a real and growing problem but are not limited to this area. Everyone (traders, governments, intergovernmental and non-governmental organisations) should take an interest in what is happening and the need to take all possible measures to tackle / reduce the risk to seafarers, ships and international trade.
A steady rise in the number and severity of reported incidents of piracy and armed robbery against ships shows how much of a danger this poses to international trade. Effect is unclear (especially in current economic climate) but cannot be good. The danger to ship's and ships crews is self evident.

1982 United Nations Convention on the Law of the Sea (UNCLOS) (article 101) defined as follows: *"Piracy consists of any of the following acts:*
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft.
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State,
(b)any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b)."

It must follow that, in a strict legal sense, attacks on ships which take place within the jurisdiction of a state (within territorial waters), are not "piracy", and perpetrators are not "pirates".

Being on a ship under attacked this strict legal definition will not be your first concern but, its true to say, attacks on ships which take place within the jurisdiction of a state, are that state's responsibility.

"An act of violence or depredation on the high seas". You will see that this requires:
- Violence or detention
- Committed by the crew or passengers of a private ship/plane on ships/aircraft or property/persons in a place outside the jurisdiction "of any state"

In cases where ships are taken from the control of the crew, it is also a potential cause of environmental disasters. But see "Piracy or not?" below

2. Scale of the problem

It is difficult to assess scale of problem, statistics are not precise – substantial number of incidents still said go unreported. (Query? Fear of reprisals, or doubts that incident will be investigated, or reluctance to delay ship's onward passage.

The IMO, and IMB record incidents of attacks worldwide. No ports immune from risk of attacks, figures show a continuing pattern of attacks in South East Asia and Far East, especially in Indonesian and Malaysian ports and adjacent waters; in Brazil and Ecuador in South America; in and around the Indian sub-continent; in certain ports in West Africa, notably in Nigeria; in east and north east Africa, especially in waters off Somalia.

Indonesia previously area of highest risk - number of recorded attacks in 2000 at 112 (114 in 1999 and 38 in 1998). Somalia has overtaken this position.

Majority of attacks occur in territorial waters, often while ships are at anchor or alongside a berth rather than wheat sea. Relatively few (until recently) take place in international waters but these are often the most serious and life threatening to crews.

3 main types of attack:
• opportunity theft by gaining access to vessel, in port or at anchor, and steal anything handy such as paint / mooring ropes;

• planned robbery, alongside, at anchor or underway, targeted mainly at money, crews' personal effects, and ships' equipment, often carried out by increasingly organised, determined and well-armed gangs;
• permanent hijacking of ships and cargoes with crews sometimes being murdered cast adrift or held to ransom.

Last two types of attack on the increase. Hijacking ships for cargoes is serious, organised crime most prevalent in South China Sea area and off Somalia. Causes suffering to crew, who are often badly treated and held hostage and, in worst cases, murdered.

3. Piracy or not (See definition under "1" above)

Attacks on vessels which take place within the jurisdiction of a state (i.e. within territorial waters), are not in a strictly legal sense "piracy", so the perpetrators are not "pirates". A fine distinction to victims. Attacks on vessels which take place within the jurisdiction of a state, are that state's responsibility to address.

Attacks that have a political "flavour" e.g. "militia" attacks on a neighbours oil-rig or on shipping will not be treated as piracy[14].

4. Role of the International Maritime Organization (IMO)

IMO working to combat piracy since 1983, when Assembly passed a resolution calling on governments to take urgent measures to prevent and suppress acts of piracy in or adjacent to their waters. IMO produces monthly and annual summaries highlighting the high-risk areas.

5. Need for co-operation

Co-operation is crucial to tackle piracy effectively but practical considerations mean many attacks are not investigated so pirates remain free to attack again.

The flag State is responsible for investigating incidents on high seas but this requires permission and assistance of the relevant coastal states for a thorough investigation. A state's right of "hot pursuit" ends when ship enters territorial waters of another state. Without effective communication pirates can avoid arrest.

Coastal state has responsibility for investigating attacks on ships in its ports or territorial waters. Following attacks in 1992, 3 coastal States (Indonesia, Malaysia and Singapore) established co-ordinated. Reinforced October 1992, when ICC/IMB set up Regional Piracy Centre in Kuala Lumpur now 24-hour information centre and focal point for gathering and disseminating reports about incidents of piracy and suspicious movements of vessels.

It issues warnings and advice to ships' masters. (ICC/IMB's regional piracy centre - Tel (011) 60-03-201-0014, fax (011) 60-03-238-5769, telex ma 31880 imbpci and at www.iccwbo.org/ccs/menu_imb_piracy.asp

Supported by financial contributions from the shipping industry, its services are free and are available to all ships irrespective of flag.

A great deterrent to pirates in Malacca/ Singapore Strait area it caused a sharp drop in of attacks, previously been one of the world's worst piracy hotspots.

The key services provided by the Centre are:
• Receives reports from ships of suspicious or unexplained craft movements and actual boarding and armed robbery, and alerting other ships and law enforcement agencies in the region.

[14] **Reuters 14.03.09** Some 30 suspected Nigerian militants attacked Oil Supply vessel contracted to SHELL off Cameroon near the border with Nigeria. 4 crew kidnapped. Such attacks are common – more than 200 foreigners kidnapped over past 3 years & released after ransom paid.

- Issuing regular status reports of piracy and armed robbery via routine broadcasts on INMARSAT-C through its SafetyNET service. Ships can also obtain these status reports by contacting the IMB Centre
- Collation and analysis of all information received, as well as the issuing of consolidated reports to interested bodies, including IMO.

6. Who pays?

Answer is the same now as it was in the 1600s: "*we all do!*"

"Trading" - buying goods from one country and selling them in another country drives the world economy. It is built up following elements:

- Costs of goods
- Costs of transporting goods from country "A" to country "B"
- Cost of insurance and banking
- "Margin" or level of profit trader needs to make.

Piracy adds costs to the above (with added problem - it may or may not occur). Piracy has been with us a long time and is a risk is covered in policies of marine insurance: *"Theft, barratry and piracy"* traditionally, only violent and overt theft was covered under the policy. English law has *"Rules for the Construction of* (marine insurance) *Policy*" - Rule 9 declares: *"clandestine (secret) theft or theft committed by one of the ship's company"* was not covered.

Modern cargo insurance covers theft either by all-risks policy (Form A) or not at all. H & M policies, new forms reinforce Rule 9 by specifically covering only: *"violent theft by persons from outside the vessel"*[15]

Requirement of violence probably satisfied by violence towards property as much as by attacks on people must be for purpose of *private* gain.

Attacks with a "political" bias not piracy[16].

In insurance terms pirates do not have to operate on the high seas (a requirement for *crime* of piracy) but must intend to obtain their ends by force best explained by the following true story.

The Andreas Lemos[17]: *While she was anchored in the approach to Chittagong a group of armed men boarded her at night. Crew took such action that pirates took flight taking some of the ships equipment with them as they escaped. Loss of equipment not a loss by piracy since "pirates" had not intended to obtain their ends by violence – but armed themselves merely for self protection if discovered and attacked".*

According to English courts, cowardly "pirates" are not true pirates.

Should be possible to recover loss under marine insurance under "General Average" or "GA". The GA "sacrifice" in piracy would be ransom paid to the pirates as a GA expense but is not without its difficulties. The law or the flag of vessel may consider ransoms paid as "illegal" or contrary to public policy. Presently it seems Shipowners not keen to declare GA.

A dramatic growth in specialist kidnap & ransom insurance, over last 10 years, to cover corporate employees working in dangerous areas but, possibly, now also being used for crew hostage situations[18]. Such extra insurance premiums will need to be absorbed somewhere.

Conclusion

Having looked at the history of piracy we can see it has never really gone away.
Americans were instrumental in ending the age of Barbary Pirates.
Will we progress or will we see history repeating itself.

[15] Institute Time Clauses (ITC) – Hulls – 1983, cl.6.1.3
[16] The attack on the *Achille Lauro* by terrorists and the killing of an American passenger
[17] *Athens Maritime Enterprises Corp v. The Hellenic Mutual War Risks Association (Bermuda)* [1983] QB 647 2 WLR 425 (1982)
[18] This is a very secretive market and it is difficult (for obvious reasons) to know who has purchased this cover.

POSSIBILITY OF ARRESTING A SHIP IN BRAZIL BASED ON A DEBT CONTRACTED ABROAD.

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As discussed in our article – SHIP ARREST UNDER BRAZILIAN LAW - arrest is one of the specific provisional remedies provided in our legal system. Pursuant to article 813 of the Civil Procedure Code (CPC), an arrest order may be obtained when, among other circumstances, a debtor without a fixed domicile intends to leave a certain place or take certain steps fro the purposes of avoiding payment of the debt

Thus a petitioner seeking an arrest order (a true provisional restraint of assets for the purposes of ensuring the effectiveness and appropriateness of a future claim to collect the debt), pursuant to article 814 of the CPC, is required to evidence not only the conditions mentioned above, but also the existence of a liquidated and undisputable debt.

In what regards vessels, specifically, the arrest is also provided in article 479 of the Commercial Code, according to which in order to verify the applicability of the arrest of a given ship, whether domestic or foreign, a distinction between two possible situations should be made: (1) whether the restraint is motivated by one of the credit claims qualified by the Commercial Code as "privileged"; or (ii) whether the restraint is motivated by credit claims qualified by the Commercial Code as "unprivileged".

The so called "privileged credit claims" are those listed under articles 470 and 471 of the Commercial code and which, due to their intrinsic legal nature, follow the ship wherever it may be[1]. Such claims include precisely those claims arising from expenses incurred with costs, supply and maintenance of the ship.

Therefore, if it has been evidenced that: (i) for the purposes of article 813 of the CPC, the debtor vessel is constantly in transit and it may, at any time, leave without satisfying the creditor's claim; [2] (ii) pursuant to article 814 of the CPC, plaintiff's claim is liquidated and undisputed; and (iii) for the purposes of articles 470, 471 and 479 of the Commercial Code, then the creditor's claim will qualified as privileged.

At this point, we would like to stress that for the purposes of deciding whether or not the arrest is applicable, the ship's flag, the place where the expenses were incurred or the domicile or nationality of the parties involved are of no importance vis-à-vis the provisions of the

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[1] Indeed, such credit claims qualify legally as *propter rem* liabilities and, consequently, are attached to and follow the thing, being enforceable against whomever has the title thereto, for whatever reason.

[2] In summary, the creditor is required to evidence the *fumus boni iuris* (in the case at hand, that it holds a credit against the ship owner) and the *periculum in mora* (that is, without the arrest, the debt will hardly be recovered). The arrest may be lifted if the ship owner offers a guarantee, which should also secure attorney's fees and court costs (art. 829 CPC).

Brazilian Constitution and the International Brussels Convention of 1926, promulgated in Brazil by Decree No. 351 / 1935.

A controversy could arise when the provisional remedy of arrest against a foreign ship owner does not fall in the cases under the international jurisdictional power of the Brazilian Courts, as provided in art. 88 of the CPC, that is, when (i) the foreign ship owner against whom such action has been filed does not have a branch, representative office or agency in Brazil, (ii) the liability is not required to be satisfied in Brazil, or (iii) the action does not originate from an act accruing or actually done in Brazil.

Notwithstanding the dissenting opinions on the matter, we believe that the cases under the international jurisdictional power provided in the CPC are not exhaustive, i.e., there are exceptions.

Accordingly, and considering the Brazilian Courts should be deemed competent to pass judgment on any action when there is no other venue in which the interested party may effectively "claim the relief it needs", we may quote the opinion of [jurist] José Carlos Barbosa Moreira, who states that "denying justice is intolerable in the contemporaneous legal scenario"[3], besides the decision rendered by the Honourable Superior Court of Justice, in the events of such importance as in the case at hand, the cases of international jurisdictional power provided in articles 88 and 89 of the CPC cannot be deemed as in *numerus clausus*.[4]

Therefore, in many other cases, the Brazilian Courts have ruled that, in the event of a foreign ship temporarily remaining in Brazil, and which, most of the time, is in transit in international waters, if it were acceptable to conclude that the Brazilian Courts do not have competent jurisdiction to pass judgment on a claim for arrest, then creditors would be prevented from collecting debts.[5]

In addition to the foregoing, and as established in articles 798, 799 and 804 of the CPC, when the claim is duly grounded and there is justifiable fear that the final decision might not be effective (and, therefore, the fear of irreparable or hardly repairable damage to the plaintiff), the judge may grant relief sought by issuing an injunctive order, without hearing the adverse party.

In such circumstances, the court having jurisdiction will be the court which, due to the transitory localization of the asset, has the material means to enforce the provisional remedy sought, which in summary, is the fulfilment of the principle of effectiveness.

Nevertheless, it is important to note that in the event of obligations under contracts containing a valid clause of choice of foreign venue or arbitration to be held abroad, the competent jurisdiction to hear the action for collection of the debt (except if, once it is filed, the debtor does not oppose to the development of such action in Brazil within the statute of limitations period – principle of submission). In this case, the collection suit may be initiated in the jurisdiction chosen by the contracting parties[6] and the ship will remain arrested in Brazil and/or the guarantee will remain valid so as to secure the future judgment, until final resolution of the dispute initiated abroad.

The argument used by those who are against the arrest of ships is that such order could cause losses to third parties, which would not justify forcing the ship to remain at the Port. What they fail to notice is that, most of the times, a creditor decides to claim the arrest of the ship because all other attempts to recover the debt have been used and such creditor has been incurring losses for a long time; thus, the arrest would function as a good and legitimate instrument of obtaining, if not the prompt payment, at least security while the debt is challenged in court.

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[3] *Problemas relativos a litigious internacionais,* in *Temas de Direito Processual*, p.144, also published in *Revista de Processo no 65.*

[4] In this regard, see the decision rendered by the 3rd Panel of the Superior Court of Justice (STJ) in appeal RO 64/SP, drafted by Justice Nancy Andrighi, published in the DJU 23/06/2008.

[5] Indeed, it is easy for a ship owner to escape from the countries where the "natural" jurisdictions are located for collection of the debt: the jurisdiction where the debt arose (where the bunker was supplied to the ship, the lost goods were shipped, or where the ship collided with another vessel, etc.), the legal domicile of its head offices (many times, it is a tax haven where the ship never berths, or which may be avoided by the defaulting party) or the jurisdiction chose by the contracting parties (which, likewise, may be avoided by the defaulting party).

[6] Or the arbitration procedure may be initiated.

THE SHIP ARREST IN EGYPT.

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1. Overview

In order to proceed an arrest order against an owing vessel in Egypt, in accordance with the Egyptian Maritime Trade Law No 8/1990, Article No 60, It's required to preparing some steps such as filling an arrest application (an arrest petition) to the competent court by their jurisdiction, This petition must explain the matter. A brief of the relation between the claimant and defendant, and the nature of that debit which is one of debts indicated in the Egyptian Maritime Trade Law No 8/1990, Article No 60.

Required documents which relate this debit to the arrest application as above indicated in clause no (1) must be presented and attached with a certified translation into Arabic for all documents, for example (In case of the arrest application was relating to outstanding invoices for insurance installments issued by a marine insurance policy, We have to present all outstanding invoices, Insurance Policy and other documents such as mutual correspondents, Faxes, E-mails other agreements which prove this debt).

A legalized power of attorney must be granted by the client (the claimant) who fills the arrest application. This power of attorney must be signed by the client then certified by the apostil then legalized by the Ministry of Foreign Affairs and by the Egyptian consulate in the client's country. This power of attorney must be translated into Arabic by the Ministry of Justice in Egypt which takes from three to five days to be finished.

2. Applicable Laws

The applicable laws are the following:
The Egyptian Maritime Trade Law No 8/1990, is the first applicable law for the arrest procedures, In addition to the Egyptian Commercial law and the Egyptian substantiation law.

The 1952 Brussels' Convention of the ship arrest is applied too on the ship arrest in Egypt. Otherwise, There are some other applicable laws can applied on the ship arrest in Egypt such as the Egyptian administrative law which allow to the governmental authorities and public establishments to arrest a ship when it has been owe for them as example for a port dues or any other governmental debits, Then the administrative authority or the public establishment have the right to arrest the vessel directly by their order and without getting an arrest order form the court.

3. Claims subject to ship arrest

The legal recognizing liens in Egypt according to the Egyptian Maritime Trade Law No 8/1990, According to Article No 60, as the following:
A. Port and water courses duties.
B. Expenses outlaid for removal, pick up, or lifting the ship wrecks and merchandise.
C.Damages caused by the ship by cause of collision, pollution or other similar marine incidents.
D.Casualties in lives or bodily injuries caused by the ship, as a result of using and exploiting it.
E. Contracts and deeds for using or renting the ship.
F. Insurance on the ship.
G. Contracts for transport of goods by virtue of a rental contract or bill of lading.
H. The destruction of goods and luggage as transported by the ship, or their damage.
I. salvage and rescue works.
J. Joint losses.
K. Tugging the ship.
L. Piloting works.
M. Supply of materials or articles necessary for using the ship or its maintenance, whatever the source such supplies are being obtained.

N. Building, repairing or furnishing the ship, and expenses of the ship's presence in dockyards.
O.Salaries and wages of captains, officers, the crew and the maritime and shipping agencies.
P. Amounts expended by the captains, forwarders, renters, or maritime and shipping agencies for account of the ship or its owner.
Q. Disputes over the ship's ownership.
R. Disputes over the common ownership of the ship, or over holding or exploiting and using it, or the rights of ship - owners in common to the amounts resulting from using and exploiting the ship.
S. Marine mortgage.

4. Sister ship / associated arrest

The sister ship to the owing vessel is allowed to be arrested in Egypt in accordance with the Egyptian Maritime Trade Law No 8/1990, Article No 61, which allows the claimant to arrest the sister ship through the same procedural requirements as above mentioned. The referred Article No 61 was stated that: *"Whoever holds to any of the debts specified in the previous article may levy an attachment on the ship with which the debt is connected or any other ship to be owned by the debtor if the latter ship was in his possession at the time of instituting the debt" "However, no attachment may be levied on another ship than the one to which the debt is related if the debt is one of those prescribed in items Q, R and S of the previous article".*

5. Arrest procedures

(1) Filling an arrest application (an arrest petition) to the competent court by their jurisdiction, for example: if the vessel berthed in Port Said port or passing Suez Canal by Port Said port, so the jurisdiction will be held to Port Said court, basically to the Chief of First Instance Court. And if the vessel berthed in Suez Port or passing Suez Canal by Suez port, so the jurisdiction will be held to Suez court, basically to the Chief of First Instance Court and thus, this petition must explain the matter. A brief of the relation between the claimant and defendant, and the nature of that debit which is one of debts indicated in the Egyptian Maritime Trade Law No 8/1990, Article No 60.

(2) The required documents which relate this debit to the arrest application as above indicated in clause no (1) are attached with a certified translation into Arabic for all documents (Our law firm usually advises clients to send the documents by e-mail first to start the translation process urgently in order to save time for preparing the arrest application in proper time), for example (In case of the arrest application was relating to outstanding invoices for insurance installments issued by a marine insurance policy, We have to present all outstanding invoices, Insurance Policy and other documents such as mutual correspondents, Faxes, E-mails other agreements which prove this debt).

(3) A legalized power of attorney must be granted by the client (the claimant) who fills the arrest application. This power of attorney must be signed by the client then certified by the apostil then legalized by the Ministry of Foreign Affairs and by the Egyptian consulate in the client's country. This power of attorney must be translated into Arabic by the Ministry of Justice in Egypt which takes from three to five days to be finished.

The counter security is not required under the new Egyptian Maritime Trade Law No 8/1990. There is no difference between the maritime claim and the maritime lien in respect to arresting a ship which is subjected to same procedures. The maritime liens are recognizing by the Egyptian Maritime Trade Law No 8/1990. The Egyptian court accepts jurisdiction over the substantive claim once the vessel has been arrested, Also all claims against the arrested vessel will be accepted in respect to the jurisdiction. The Egyptian courts usually take a time approximately one to two years to issue its judgment in the legal action of the merits.

6. Claims for wrongful arrest

The claims for wrongful arrest are allowed and organized by the Egyptian Civil Law No 131/1948 article No 163, which indicated as follows/:"Every fault was caused damages to the others shall required the indemnity"

So, The wrongful arrest is protected by the Egyptian Civil Law, and if someone arrests a vessel by wrong or by false documents, The arrestor will be claimed by the ship-owners, Charters or operators to pay them all damages incurred as a result to the wrongful arrest, These damages will be determined by the court which has all rights and free to assume the value of damages including fines, Harbour dues and all other expenses caused by this wrongful arrest.

7. Privileged rights on the ship

The privileged rights on the ship for marine debt was indicated in article No 29 and 30 of the Egyptian Maritime Trade Law No 8/1990, as the followings:
Article No 29: *The following constitute exclusive privileged rights on ships:*
1. *Judicial expenses incurred for selling a ship and distributing its price.*
2. *Taxes and duties payable to the state or Public Law Person, as well as Load, Harbor, Pilotage, and Tug dues, and also guard and maintenance and other marine service costs and charges.*
3. *Debts consequent upon work contracts of the ship captain and sailor, and others bound under contact to work on the ship.*
4. *Compensations payable for rescue work and the ship's share in joint losses.*
5. *Compensations payable for collision or pollution and other navigational incidents, and also for damages to harbors and dock instillations and navigational routes, as well as for physical injuries caused to passengers, the captain and sailors, and for destruction or damage of goods and luggage.*
6. *Debts consequent upon contracts as concluded by the ship's captain as well as the operations carried out thereby outside the port of the ship's registration, within the limits of his legal powers for actual needs necessitated for maintenance of the ship or pursuing its journey, whether the captain is himself the owner of the ship, or is not owner, and whether the debt is payable to him or the supply contractor , the loaners, the persons who perform repair work on the ship or other contractors, as well as the debts established on the ship furnisher ensuing from works performed by the ship's agent pursuant to the provisions of article 140 of the present law.*

Article No 30: *Privileged rights shall not be subject to any formal procedure or any conditions connected with the provision of evidences.*
So, The priority of these rights will be defined as indicated in abovementioned article No 29, by their ranks and grades, Also there will be no formal procedures the privileged rights may subject to.

8. Arresting bunkers

As prior indicated in item No 1 " Procedural requirements" and item No 3 "Recognizing liens" the bunkers claims are considered to be a marine debt as indicated in article No 60 of the Egyptian Maritime Trade Law No 8/1990, item (M) which stated that: *M – Supply of materials or articles necessary for using the ship or its maintenance, whatever the source such supplies are being obtained.*
So, All bunkers companies which supply vessels with Gas Oil, Fuel Oil or any other lubricants upon master request or owners request ...etc. All of them have the right to arrest the supplied vessel or a sister ship which follows the same owners. The required procedures are the same as aforementioned which concentrated in the followings:
(1) Filling an arrest application (An arrest petition).
(2) Including the required documents relating this debt to the arrest application. As example (In case of the arrest application was relating to outstanding invoices for bunker supply, We have to present all invoices, Delivery receipts of bunkers and other documents such as mutual correspondents, Faxes, E-mails another agreements which prove this debit).
(3) The legalized power of attorney granted by the client (The claimant).

MARPOL, Magic Pipes and Whistleblowers.
The Do's and Dont's for Effective Environmental Compliance

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Since the tragic events of September 11th, the United States Coast Guard has undertaken a comprehensive program of boarding vessels calling U.S. ports. As a result of the heightened security measures, there has been a significant increase in the scrutiny to which vessels, her logs, and her records, are being inspected. Such scrutiny, rightly or wrongly, continues to result in numerous vessel and crew detentions, as well as massive civil and criminal charges against vessel Owners, Operators, Managers, Officers and crew.

Specifically, the U.S. Coast Guard established an Oily Water Separator Task Force to examine a wide range of issues related to pollution control equipment and it use on vessels in U.S. waters. The Coast Guard and other law enforcement personnel regularly examine the use and functionality of oily water separator systems more carefully than ever before, and have made it clear that they will seek jail sentences for Masters and engineers of ships committing pollution offense, or falsifying records, including but not limited to Oil Record Books (hereinafter "ORB"). The fact that an Owner, Operator and/or their shore-side staff may be located outside the U.S. is no deterrent to dogged prosecution efforts. Quite often, even if no pollution incident has occurred, the Coast Guard and U.S. prosecutors, upon the mere "discovery" of potential by-passing paraphernalia, (such as a flexible hose or suspicious fittings and piping in the engine room), will commence a Grand Jury[1] investigation seeking to prosecute alleged illegal by-passing of the OWS system and/or the presentation of an ORB containing "false entries".

Document Review During Port State Control Inspection

A document review during a Port State Control inspection will often include an examination of the vessel's IOPP Certificate, ORB, Incinerator Log, and Shipboard Oil Pollution Emergency Plan (hereinafter "SOPEP"). *See* 33 C.F.R. § 151.23(a). These documents are often utilized during the inspection of the vessel to ensure the vessel, its documentation and equipment meet all applicable APPS and Annex I requirements.

Oil Record Book ("ORB")

Since the ORB is supposed to record all shipboard oil transfer, and all bilge water and sludge discharge operations, it is thoroughly inspected. For this reason, the ORB must be filled out in accordance with all applicable regulations, and all internal transfers, as well as all overboard discharges, must be recorded without delay.

[1] A federal Grand Jury consists of 16 to 23 ordinary citizens, whose job is to listen to the evidence of a potential crime presented by the prosecutor, usually an Assistant US Attorney, either through the testimony of witnesses, which include government agents, and/or through tangible evidence such as photographs, graphs, charts, physical evidence in MARPOL violation cases such as piping, valves, hoses, etc. The witnesses appear in the Grand Jury without their lawyers at their side; although the lawyer is outside of the Grand Jury room and can be consulted by the witness at any time he or she feels the need to do so. However, it always appears curious and, possibly suspicious, to Grand Jurors when a witness stops the proceedings to repeatedly consult with his or her lawyer. Consequently, the prosecutor generally has a free reign in the Grand Jury room to present evidence unopposed. In the US we have a maxim that says "a prosecutor can indict a ham sandwich if he or she wanted", meaning, that it is a fairly simple task for the prosecutor to obtain an Indictment from a grand jury. The task of the Grand Jurors is to listen to the evidence presented by the prosecutor and if they feel that "probable cause" exists that a crime has been committed in the district in which they sit, they issue what is known as a "True Bill" which then forms the basis of an "Indictment". An Indictment is the legal document that formally charges a defendant with a crime or a series of crimes that such defendant must then respond to and defend against. An Indictment is only an accusatory instrument; it does not mean that a person is guilty of the charges proffered against him or her. Guilt or innocence is then decided by a petit jury at trial where the standard for conviction is beyond a "reasonable doubt" which, of course, is a much higher legal standard then mere "probable cause". In addition, at trial only admissible evidence is allowed and the defendant's lawyers are present to examine and/or cross-examine all witnesses.

For example, APPS requires an entry shall be made in the ORB whenever any of the following machinery space operations take place: 1) ballasting or cleaning of fuel oil tanks; 2) discharge of dirty ballast or cleaning water from fuel oil tanks; 3) disposal of oily residues (sludge); and, 4) discharge overboard or disposal otherwise of bilge water that has accumulated in machinery spaces. Entries shall also be made in the ORB whenever any of the following cargo/ballast operations take place on any oil tanker: 1) loading of oil cargo; 2) internal transfer of oil cargo during voyage; 3) unloading of oil cargo; 4) ballasting of cargo tanks and dedicated clean ballast tanks; 5) cleaning of cargo tanks including crude oil washing; 6) discharge of ballast except from segregated ballast tanks; 7) discharge of water from slop tanks; 8) closing of all applicable valves or similar devices after slop tank discharge operations; 9) closing of valves necessary for isolation of dedicated clean ballast tanks from cargo and stripping lines after slop tank discharge operations; and, 10) disposal of residues. *See* 33 C.F.R. 151.25(e). All such entries "shall be fully recorded without delay in the Oil Record Book so that all the entries in the book appropriate to that operation are completed." MARPOL, Annex I, Regulation 20(4); 33 C.F.R. §151.25(H).

During a Port State Control inspection, the Coast Guard may question the engine room staff to determine if the recent entries in ORB represent actual procedures followed by shipboard personnel. If the Coast Guard discovers any of the following "red flag" entries in the ORB, they will likely call in the Coast Guard Investigative Service ("CGIS")[2] to begin a criminal investigation:

1. An ORB entry where the amount of bilge water or sludge processed exceeds the rated capacity of the pollution prevention equipment that is indicated on the IOPP;
2. ORB entries that utilize the wrong code for the task performed;
3. ORB entries that are not in chronological order;
4. Missing pages in the ORB or entries that are concealed by "White-Out";
5. Repetitive entries that are indicative of the falsification of ORB activities;
6. If waste oil, sludge, bilge and other tank levels noted during the inspection vary significantly from the last entries in the ORB[3] and,
7. If the recorded quantities of oily bilge water pumped to holding or processed by the OWS directly from the bilge wells does not compare to observed conditions within the machinery space.

If the vessel maintains an Incinerator Log, it, too, will likely be inspected by the authorities. If the vessel is utilizing the incinerator to dispose of sludge, the Coast Guard will compare the entries in the Incinerator Log to the corresponding entries in the ORB. If there is a discrepancy between these numbers or if the log indicates that the incinerator is working beyond its rated capacity, suspicions will be raised that the vessel is improperly disposing of sludge.

The Coast Guard will also examine the SOPEP to verify that it has been approved by the vessel's Flag. The Coast Guard will spot check the pollution response equipment listed in the SOPEP and verify that the phone numbers and points of contact listed in the SOPEP are up to date (*i.e.*, National Response Center, local Captain of the Port, or Coast Guard or Sector offices).

Penalties for Violations

Generally, it is well settled U.S. law that in order for a person to be guilty of a crime, the person must act with "criminal intent" or "mens rea"[4]. However APPS, like most environmental

[2] The Coast Guard Investigative Service (CGIS) is a division of the Coast Guard that carries out the Coast Guard's internal and external criminal investigations. When personnel from CGIS board a vessel it is a tell-tale sign that the inspection is no longer civil in nature, and a criminal investigation is underway.

3 For example, the ORB indicates a liquid level in the vessel's sludge tank at the completion of the previous voyage, the sludge level is currently at a lower level, and the ORB fails to indicate how the ship disposed of this liquid.

[4] The *mens rea* is the Latin term for "guilty mind". The standard test of criminal liability is usually expressed in the Latin phrase, *actus non facit reum nisi mens sit rea*, which means that "the act does not make a person guilty unless the mind is also guilty". Ordinarily, there must be an

and public health and welfare criminal statutes, does not require that the government prove that a defendant wrongfully intended to violate the law. Instead, the government need only prove that an actor knowingly committed an act and that act violated an existing law or regulation. For example, the criminal enforcement provision of APPS provides that any person who "knowingly violates" a specific provision of the statute may be guilty of a felony, even if an individual did not know that such conduct was a crime. In addition to criminal fines, if an individual or corporation is found to have violated a provision of APPS or MARPOL, the government can also impose a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each violation. See 33 U.S.C. § 1908(b).

APPS places an affirmative duty on the Master, Chief Engineer - or other person in charge - of any vessel subject to APPS to report any "discharge, probable discharge, or presence of oil" while the vessel is within the navigable waters of the United States. APPS places the same duty to report on persons in charge of seaports and oil handling facilities within United States jurisdiction. To ensure compliance with these regulations, the Coast Guard is authorized to inspect any vessel at any U.S. port. If it is determined that a vessel or her crew may have violated pollution prevention laws, its customs clearance will be revoked and the vessel "held-up" until the owner and operator post a surety satisfactory to the Secretary [of the department in which the United States Coast Guard is operating][5]. The vessel may also be arrested and sold to satisfy any fine or penalty under APPS.

As stated above, APPS applies to every vessel that is operated under the authority of the United States (i.e., "U.S. flagged vessels"). In addition, it is applicable to foreign flagged vessels when these vessels are in the navigable waters of the United States[6]. This is a critical distinction, since the jurisdiction of the United States to criminally prosecute Owners, Operators and crewmembers of foreign flagged vessels, is strictly limited to acts committed in U.S. navigable waters. Parenthetically, we note that for Owners, Operators, and crewmembers of U.S. flagged vessels there are no such limits on the jurisdiction of the United States to prosecute violations of APPS and MARPOL. Thus, if a U.S. flagged vessel knowingly violates the provisions of APPS or MARPOL anywhere in the world, it can and will be prosecuted by the United States government.

In short, it is a class D felony to knowingly violate the provision of APPS. A class D felony is publishable by up to ten (10) years imprisonment, and a fine up to $250,000 for an individual, and up to $500,000 for a corporation, for each violation. A violation of APPS where the individual or corporation did not knowingly violate these sections is punishable by a civil penalty not to exceed $25,000 for each violation.

Other Pollution and Environmental Protection Statutes

In addition to APPS, there are a number of other federal environmental protection statutes that make it a crime to discharge oil or waste in U.S. waters. Specifically, the Clean Water Act, 33 U.S.C. § 1251, *et seq.* prohibits the unpermitted discharge of any pollutant, including a discharge of oil, by any person into navigable waters of the United States[7]. A "knowing" violation of the Act is a felony. A "negligent" violation of the Clean Water Act is a misdemeanor. Failure to report a discharge is punishable by imprisonment of up to five (5) years, and a fine of up to $250,000 for an individual, and up to $500,000 for a corporation.

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actus reus or "guilty act", accompanied by some level of *mens rea* to constitute the crime with which the defendant is charged. As more fully discussed above, when a defendant is charged with a strict liability crime, the government is not required to prove *mens rea*.

[5] The Coast Guard, acting on behalf of Homeland Security, in order to release the vessel from any Custom's hold, has generally been demanding bond security in amounts of $1 million or more. In addition, as part of its investigation, the Coast Guard generally removes from the vessel as potential "material witnesses the entire engine room crew and many times other crew members, as well. Consequently, as part of any security agreement for the vessel's release, the Coast Guard requires, among other things, the vessel owner and/or operator to house, feed and pay the salaries for any crewmembers so removed for periods ranging from 90-270 days. Depending on the length and breadth of the investigation, such expenses can be substantial.

[6] The navigable waters of the United States are: 1) the territorial seas of the United States; 2) internal waters of the United States that are subject to tidal influence; and, 3) internal waters of the United States not subject to tidal influence that are or have been used as highways for substantial interstate or foreign commerce. *See* 33 C.F.R. §2.36(a). Territorial seas of the United States are the waters, 12 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline. *See* 33 C.F.R. §2.22.

[7] "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." *See* 33 C.F.R. § 329.4.

Similarly, the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, *et seq*., provides that any discharge of refuse of any kind from a vessel into navigable waters of the United States is strictly prohibited. A violation of the Act is a misdemeanor. The courts have taken a broad view of what constitutes "refuse" under the Act, and the Act has been extended to a discharge of oil or petroleum. A person can be convicted of a misdemeanor violation of the Rivers and Harbors Act based solely upon proof that the person placed a banned substance into navigable waters of the United States.

A party can also be found guilty of a felony for conduct that does not directly involve the discharge of oil or waste into U.S. waters. Under 18 U.S.C. § 1001, it is a felony to make a false statement to the U.S. Government. To sustain a conviction for a violation of the Act, the Government must only show: (1) that a statement or concealment was made; (2) the information was false; (3) the information was material to a government investigation or activity; (4) the statement of concealment was made "knowingly and willfully;" and (5) the statement or concealment falls within the executive, legislative or judicial branch jurisdiction.

The false statement need not be an affirmative statement, but can also include the concealment of the truth when an individual has a duty to answer. For example, a false statement about, or concealment of, any discharge of oil is a violation.

Additionally, the U.S. authorities vigorously prosecute individuals and corporations suspected of tampering with witnesses in connection with an on-going investigations. Under 18 U.S.C. § 1512, anyone who knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with the intent to hinder, delay or prevent the communications to a law enforcement officer or a judge of the United States of information relating to the commission, or the possible commission, of a federal offense, shall be fined or imprisoned up to ten (10) years, or both.

In situations where two (2) or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, (pursuant to 18 USC § 371), each shall be fined or imprisoned up to five (5) years or both.

Recently, the Department of Justice has also been charging crewmembers and vessel owners and operators accused of presenting false records to the government with violations of the Sarbanes-Oxley Act, 18 U.S.C. § 1519[8]. This statute is commonly known as the "Enron" statute and was intended to apply to corporate fraud. The significance of utilizing this statute is that it carries a potential jail sentence of 20 years, which is a powerful motivator for someone threatened with prosecution under this statute to turn "state's evidence' as the phrase goes. In fact, no vessel Owner, Operator or crewmember has ever been convicted under this statute, although it has been charged in recent Indictments.

Recommendations for Shipboard Personal on How to Respond to U.S. Authorities Conducting Port State Control Inspections and Prepare for Criminal Investigations

1. Shipboard personnel ***must***, at all times, obey all international and U.S. environmental regulations;
2. All shipboard personnel must be truthful and forthcoming during all port state inspections;
3. If the Port State Control inspection appears to be more than a routine inspection, immediately notify the manager and/or the vessel's port agent and/or the P&I Club's local correspondent;

[8] 18 U.S.C. §1519 reads: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

4. Once an investigation commences, do not under any circumstances remove or destroy any documents, computer files, emails, correspondence, piping, flanges, or other potential evidence and do not give or accept any orders to do so;
5. Officers and crewmembers must not attempt to influence other officers and/or crew as to their discussions with the authorities, other than to insist that the officers and crew are honest and forthright with all authorities; and,
6. Seek the advice of competent maritime criminal counsel.

The Fifth Amendment to the U.S. Constitution

The most basic, yet essential, advice any maritime criminal lawyer can give to today's mariner is: *seek the advice of counsel as soon as practical, and always be truthful and forthright in your dealings with the U.S. authorities.* It is extremely advisable that if U.S. authorities undertake any onboard investigation, which goes beyond the scope of the ordinary port state control inspection, competent criminal counsel should be engaged to protect the rights of the vessel officers and crew, not to mention her Owner, Operator, Manager, and their shore-side personnel. For example, if a member of the CGIS comes onboard a vessel during a Port State Control Inspection, a criminal investigation has begun and it may be in the crewmember's best interest to invoke his Fifth Amendment Privilege against self-incrimination.

The Fifth Amendment of the United States Constitution states that:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

The Fifth Amendment Privilege against self-incrimination is not dependent upon the nature of the proceeding in which the testimony is sought. It is applicable wherever the answer might tend to subject one to criminal responsibility and applies in both civil and criminal proceedings.

A seaman may also invoke his Fifth Amendment privileges even if there is no U.S. criminal investigation, but rather may subject the seamen to criminal liability outside of the U.S., so long as the seaman can show that the subject of the government's questions raises "a real danger of being compelled to disclose information that might incriminate him under foreign law," and second, that there is a "real and substantial fear of foreign prosecution."

Individual crew members should invoke their Fifth Amendment privilege against self-incrimination until competent counsel is engaged and present. In short, once a criminal investigation has commenced and a mariner invokes his own Fifth Amendment privilege, he is not required to speak with the U.S. authorities and/or respond to any of their questions, which may lead to self-incrimination.

Conclusion

Environmental compliance and the U.S. Government's prosecution of suspected violations are extremely serious matters. For more information on the subject, please feel free to contact George M. Chalos at the above noted details, or by e-mail at: gmc@chaloslaw.com

ARREST OF A SHIP IN JAPAN

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I. INTRODUCTION

The aim of this article is to describe arrest of a ship in Japan. Especially, I would like to focus on the key "practical" points when arresting a ship in Japan.

As I will explain in this article, there are three types of a ship's arrest in Japan.

1) Provisional Arrest
2) Arrest to enforce a maritime lien, possessory lien or mortgage
3) Execution of judgement, arbitration award etc.

1) is called "Kari-Sashiosae". 2) & 3) are called "Hon-Sashiosae".

In this article, I would mainly like to explain the Provisional Arrest and Arrest to enforce maritime lien.

II. PROVISIONAL ARREST ("KARI-SASHIOSAE")

(1) Feature

Provisional arrest ("Kari-Sashiosae") is an arrest to secure in advance the arrestor's probable monetary claim against a shipowner. This is based on an action in personam. It shall be well noted that the "monetary claim" may not be limited to a maritime claim. In Japan a creditor of the registered owner of a ship can arrest the ship to secure a non-marine claim.

The ship, as a security for the probable claim, is frozen by this arrest temporarily until the arrestor can obtain an enforceable judgment. The merit of the case is decided later in Japan or another jurisdiction (whose judgment is enforceable in Japan). If no merit is eventually found by the court, the arrested ship must be released.

Recently the courts have taken the view that a judgment in England or Hong Kong is enforceable in Japan in principle. Therefore, it is possible to arrest a ship in Japan for the purpose only of obtaining security for the claim subject to jurisdiction in the England & Wales or Hong Kong.

As the purpose of this arrest is to secure the probable claim, an actual sale by auction will not automatically follow after the arrest.

(2) Sister Ship Arrest and Corporate Veil

Provisional arrest is an arrest to secure the arrestor's probable claim against a shipowner. In other words, this arrest is in-personam in nature and the obligor of the claim must be the owner of the vessel to be arrested.

Therefore provisional arrest can be made on one of the sister ships in the same ownership as the ship against or in respect of which the claim lies.

In principle, it is impossible to arrest a sister ship in different ownership to the vessel concerned. Exceptionally, the Tokyo District Court recently ordered the arrest of a ship by lifting the corporate veil. However, generally speaking, it is not so easy to pierce the corporate veil in Japan.

(3) Procedure

1. Documentation

The following documents are worth mentioning amongst all the documents required when arresting a ship. You need to have in your mind the following documents especially when considering arrest in Japan.

Original Power of Attorney: The power of attorney must be executed by an individual claimant or a representative director of a company and be notarized by a notary public. No authorization of the authority of the notary public is required. An original is required (but faxed copy or telex is sometimes accepted at the discretion of the court).

Copy of Company Register: Company register of the arrestor and debtor are required. If there is no company register system, substitute documents (e.g. notarized affidavit describing the existence of a body corporate and its representative director, and its good standing) are required.

Valuation of the Vessel: The value of the vessel is taken into account when the amount of the counter security is determined. This is made by a London broker, the Nippon Kaiji Kentei Kyokai or the Japan Shipping Exchange, etc.

The claimant is also required to produce documentary prima facie evidence before the court to prove that a claim exists at a specific amount.

2. Counter-Security

Unlike real arrest, a claimant seeking provisional arrest is required to lodge counter-security with the court when arresting. This counter security is security to cover any possible damage sustained by the shipowners in cases where the arrest turns out to be wrongful. The amount is determined at the discretion of the court (normally, around 30% of the amount of the claim or the value of the ship).

The following types of counter-security are acceptable by the court:
1) Cash
2) Negotiable instrument (i.e. Government Bond)
3) Letter of guarantee issued by a bank or an insurance company (not P&I Club) recognized in Japan

3. Special Features

Under Japanese laws it is illegal to arrest the ship once she has completed her preparation for her voyage from the port. This rule is applied not only to provisional arrest but also to real arrest. This rule is criticized by scholars and lawyers but still good law. The position is not so clear in relation to a vessel completing her voyage. However, normally Japanese lawyers arrest a vessel as soon as she enters into a Japanese port or give up arresting. Major scholars take a view that it should be when all necessary preparation for the next voyage is made (i.e. hatch is closed, all the crew are on board the vessel, customs officers leave the vessel, etc). Time is of the essence for a ship's arrest in Japan.

4. Arrest Process

On examining the application for arrest, the court renders a decision as to whether to commence the arrest proceedings.

The decision of the court, if positive, prevents the shipowners from navigating the vessel. In addition, the order instructs the bailiff to arrest the vessel by removing from the vessel the Certificate of Nationality of the vessel, etc, without which the vessel can not navigate. The Japanese lawyer for the arrestor is usually requested to go on board the vessel as an interpreter with the bailiff when he removes the documents. The documents are kept in the court until the arrest is released.

The decision of the arrest is served on the shipowners via the captain. Therefore it is prudent to make an inquiry in advance into the power for the captain to receive such a decision under the flag laws (I understand it is positive normally).

5. Release of Arrest

There are several ways to release the arrested ship.

The most straightforward way is to put up cash (or a negotiable instrument) as security in the amount designated in the arrest order. The amount is usually equal to the claim amount of the arrestor. The shipowners can release the ship

Another important measure to release the arrested ship is (i) to contest the validity of the arrest by filing an objection with the court and (ii) to put up the security with the court. The amount of the security is determined by the court at its discretion (and the amount shall be the estimated amount of the arrestor's damage if the objection by the shipowners is wrong and the release of the ship is therefore wrong). Under our law, only cash or LOU (by bank or insurer licensed in Japan) is acceptable as security for these procedures.

The third important measure to release the arrested ship is to request the arrestor to file a lawsuit or commence arbitration within a limited period by some special procedure. After the arrest of the ship, the arrested party can file a motion to the court requesting the arrestor to file a lawsuit or commence arbitration in respect of the underlying claim by some deadline date. Upon receipt of such motion, the court determines the deadline. If the arrestor can not file a lawsuit or commence arbitration by that deadline, the arrest is set aside by the court.

6. Wrongful Arrest

The arrestor is exposed to wrongful arrest when it turns out that the arrestor (a) had no grounds to arrest the vessel at the time of the arrest (e.g. the arrestor had no claim against the arrested party), but (b) nevertheless arrested the vessel intentionally or negligently. The burden of proof of negligence (or intention) of the arrestor is on the arrested party. However, negligence is presumed if he can establish that the arrestor had no claim against him under our old Supreme Court case.

III. ARREST TO ENFORCE MARITIME LIEN

(1) Feature

A mortgage, maritime lien or possessory lien enables a claimant to arrest a concerned ship and sell her at a public auction. These arrests are called Hon-Sashiosae.

In this article I would like to focus on enforcement of maritime liens.

(2) Recognized Maritime Liens

This is one of important areas which have developed recently.

Until recently, it is considered that a Japanese court will enforce a maritime lien if (i) the governing law recognizes the maritime lien and (ii) the law of the flag of the ship to be arrested also recognizes the same maritime lien.

For example, a collision occurs between a Vietnamese ship and a Panamanian ship in Korean waters. In this case, the Panamanian ship which damages the Vietnamese ship then sails to Japan.

To bring a maritime lien case in Japan the governing law would be Korean as the collision took place in Korean waters. As a result, Korean law would have to recognize a maritime lien to arrest the ship based on the maritime lien in Japan. If the ship which caused the damage and the one which you are seeking to arrest are Panamanian the law of Panama would also have to recognize collision as a maritime lien to arrest the ship based on the maritime lien in Japan. It was very harsh for a claimant as he needed to make an inquiry into maritime laws in many countries in advance when arresting a foreign flagged vessel in Japan.

However, recently several district courts took a view that only Japanese law should be applied when deciding whether the underlying claim has a maritime lien. According to this view it is enough for the claimant to research only Japanese law in order to arrest a foreign flagged vessel in Japan.

It is still unsettled on the governing law of the maritime lien on the ship in Japan.

Maritime liens recognized under Japanese law are as follows:

i) Expenses relating to the sale of the vessel and its appurtenances by official auction and expenses of preservation after commencement of the proceedings for the sale by official auction.
ii) Expenses of preservation of vessel and its appurtenances at the last port.
iii) All public dues levied on the vessel in respect of the voyage.
iv) Pilotage dues and towage dues.
v) Salvage remuneration and ship's contribution to general average.
vi) Claims which have arisen from necessity to continue the voyage. (Supreme Court 24.3.1981, Supreme Court 27.3.1984)
vii) Claims of the Master and other crew which have arisen from their contracts of employment.
viii) Claims which have arisen from the sale or construction of the vessel or the equipment of the vessel, but only if the vessel has not yet made any voyage after her sale or construction; claims in respect of the equipment, food and bunkers for the vessel's last voyage.
ix) Claims generating a maritime lien under the Law relating to International Carriage of Goods by Sea, the Law relating to Shipowners' right to limit of liability and the Oil Compensation Law.

Claims which have arisen from necessity to continue the voyage (vi) are not so clear a concept and create many disputes in our arrest law. Under Japanese law the cargo claimant is given a maritime lien and can arrest the ship easily based on the maritime lien (ix).

(3) Procedure

1. Documentation

Unlike provisional arrest, the claimant seeking this type of arrest does not need to lodge any counter-security with the court when arresting. This is a great advantage to a claimant.

A claimant is required to pre-pay a certain portion of the expenses arising from the arrest and the sale of the ship. However the amount of the expenses requested by the court is usually not so much in cases where prompt release of the vessel is clearly anticipated (e.g. in case of the collision or cargo claim, it is expected that the P&I Club of the arrested vessel will issue private L/G acceptable to the arrestor within a few days of the arrest and the arrestor releases the vessel soon afterwards). In this case, a Japanese lawyer acting for the arrestor is requested to produce to the court his affidavit confirming that the vessel will be released within a few days. However many Japanese lawyers do not produce this type of affidavit easily due to some bitter experiences.

2. Arrest Process

It is the same as provisional arrest.

I must here also mention a special system which helps this type of arrest. As I have explained, it is illegal to arrest a ship once she has completed her preparation for her voyage from the port. Therefore, if the call of the vessel in the port is very brief, it may be too late to make the application to the court after she enters into the port. To alleviate this problem, Japanese laws allow the claimant, even prior to the vessel's arrival at the port, to obtain a special pre-emptive court order which instructs a bailiff to take up the Certificate of Ship's Nationality, etc as soon as she enters into the port. The documents can be removed immediately upon the vessel's arrival at the port by the bailiff. It is very useful when arresting a ship in Japan but applicable only to this "Hon Sashiosae".

(4) Release of the Arrest

This is very important when considering merit of the real arrest in Japan.

The shipowners can obtain the release of the arrested ship. The following security is accepted by the court to release the arrested ship:

i) Cash
ii) Negotiable instrument (e.g. Government Bond)
iii) Letter of Guarantee issued by a bank, insurance company or P&I Club recognized in Japan.

The amount of the security is the aggregate of all the claims plus the court execution costs.

The above iii) is very important. Unlike provisional arrest, letter of guarantee is admissible as a security to release the arrested ship. In addition you will note that P&I Club's guarantee is acceptable. The guarantee required by the court is a standard one but does not include any jurisdiction clause.

This release by putting up the security with the court does not take so much time (normally within one day). Therefore, unlike provisional arrest, the shipowners do not have to compromise with the arrestor and arrange a private L/G acceptable to the arrestor to release the vessel. If a vessel of your principal is arrested by this type of arrest, I strongly recommend you to release the vessel by lodging letter of guarantee issued by P&I Club etc in this way. Unlike the provisional arrest, your principal does not have to arrange the L/G which includes jurisdiction clause favourable to the arrestor.

IV. **FINALLY**

All documents submitted to the court should be translated into Japanese language. The translation is normally made by the Japanese lawyer. Strict formalities and lots of paper work are also required by the court. Therefore it usually takes some time to prepare arrest of a vessel in Japan. Once again, time is the essence for ship's arrest in Japan.

ARRESTING SHIPS IN GIBRALTAR

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Political and legal system

Britain is responsible for Gibraltar's defence and foreign policy. Britain appoints the Governor who is the representative of the Crown in Gibraltar. However, Gibraltar is self-governing and its democratically elected Parliament enables Gibraltar to maintain its independent tax status and enact laws independently of Britain. The legal system is based on the common law and statute law of England. Gibraltar is also a member of the European Union as a dependent territory of the United Kingdom but is outside the customs union and accordingly VAT does not apply.

The Court system

The Supreme Court of Gibraltar presently consists of two judges, namely the Chief Justice and an additional judge appointed by the Governor. Due to the volume of admiralty work, judges traditionally have been well versed in admiralty matters.

The Court of Appeal consists of a president and a number of Justices of Appeal. The Chief Justice of the Supreme Court is an ex-officio member of the Court of Appeal and in practice deals with interlocutory matters not requiring a decision of the full Court. The Court of Appeal is composed of English Court of Appeal judges who visit Gibraltar several times each year to hear appeals.

In some circumstances including Admiralty matters, there is a further appeal to Her Majesty in Council. Such an Appeal is heard in London.

As stated before the legal system of Gibraltar is based on the common law and statute law of England. In 1962 the English Law (Application) Act was passed declaring the extent to which English law is in force in Gibraltar. The common law and the rules of equity from time to time in force in England apply to Gibraltar subject to any modifications or exclusions made by Her Majesty in Council, an Act of Parliament or an Act passed by the House of Assembly of Gibraltar. The Act further lists in its schedule the statute law of England which applies to Gibraltar.

The Admiralty Jurisdiction

The Supreme Court of Gibraltar has jurisdiction to try admiralty matters by virtue of the Colonial Courts of Admiralty Act 1890 and the Admiralty Jurisdiction (Gibraltar) Order 1987. The same provides that the Supreme Court of Gibraltar which is a Colonial Court of Admiralty, shall have the like admiralty jurisdiction as that of the High Court of England, as defined by section 20 of the supreme Court act 1981 with certain modifications. It also extends certain of the provisions contained in part ii of that act to Gibraltar. The Brussels and Lugano Conventions apply in Gibraltar by virtue of the Civil Jurisdiction and Judgements Act which was brought into effect in 1998.

A detailed analysis of the provisions of the Supreme Court Act 1981 is outside the scope of this paper. For the present purposes it is enough to say that the Supreme Court Act 1981 provides that certain categories of claim specified in the Act are within the Admiralty Jurisdiction of the Court and may be the subject of an action in personam and, in respect of some of those claims, also of an action in rem. It is therefore necessary to examine the nature of actions in personam and actions in rem.

Actions in Personam

An action in personam is an action brought against a Defendant the purpose of the same being to seek a remedy against that Defendant. Thus in the context of the admiralty proceedings an action in personam is not against a ship but against the Defendant and so does not give a rise to arrest. The claim may or may not be directly enforcing some obligation imposed on a Defendant but could be based on a Defendant's act. The Supreme Court Act 1981 section 21(1) provides that any claim within the Admiralty Jurisdiction may be enforced by an action in personam. Most of these claims may also be enforced by an action in rem (see post).

Claims contained in the Supreme Court 1981 enforceable only by action in personam

(i) any claim for damage received by a ship (section 20 (2) (d))
(ii) applications under the merchant shipping act 1894 to 1979
(iii) certain collision actions (section 20 (1) (i) (b) and section 20 (3) (b))
(iv) limitation actions
(v) the sweeping up clause (section 20 (1) (i) (c)) (arguable) - refers to the jurisdiction before the commencement of the act)

Although these claims can only be brought in personam, it should be remembered that there may be an overlap with claims listed in section 20 (2) of the act so that proceedings may also be brought in rem, e.g. where the damage received by a ship is caused by a ship.

Actions in rem

An action in rem is basically an action against a thing, usually a ship, rather than against a person as is the case in an action in personam. The availability of the action in rem confers upon the plaintiff the advantage of being able to obtain security for his claim by proceeding against the ship itself and arrest the same.

No personal liability can attach to the person who would be potentially liable in personam unless he or she chooses to take part in the proceedings. On the other hand any judgement in an action which remains solely in rem can only be enforced against the rem not against any other personal assets of the person why would be liable in personam.

Claims giving rights to an action in rem

(a) any claim to the possession or ownership of a ship or the ownership of any share therein.
(b) any question arising between the co-owners of a ship as to the possession, employment or earning of that ship.
(c) any claim in respect of a mortgage of or charge on a ship or any share therein.
(e) any claim for damage done by a ship. (maritime lien)
(f) any claim for loss of life or personal injury in respect of a defect in a ship, neglect or default in navigation, management of the ship, loading, carriage or discharge of goods, embarkation, carriage or disembarkation of passengers,
(g) any claim for loss or for damage to goods carried in a ship.
(h) any claim arising out of an agreement relating to the carriage of goods in a ship or the use or hire of a ship.
(i) any claim in the nature of salvage (including aircraft). (maritime lien)
(j) any claim in the nature of towage in respect of a ship or an aircraft.
(k) any claim in the nature of pilotage in respect of a ship or an aircraft,
(l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues.
(n) any claim by the master or a member of the crew of a ship for wages. (maritime lien)
(o) any claim by a master, shipper, or charterer or agent in respect of disbursements made on account of a ship.
(p) any claim arising out of an act which is or is claimed to be a general average act.
(q) any claim arising out of bottomry. (maritime lien)

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

The arrest of a ship

The main purpose of arresting a ship is to obtain security for an eventual judgement in an admiralty action in rem. The information, documents and undertaking required to arrest a ship in Gibraltar mirror those in use in England. A Claim Form therefore, should be prepared with either brief particulars (which is just a brief summary) of the claim or Particulars of claim together with a praecipe (a request) for service of the Claim form in rem, a praecipe for warrant to arrest, (a warrant is a command issued in the name of the Queen to the Admiralty Marshal instructing him to arrest the property). A solicitor's undertaking to pay the Admiralty Marshal's costs and expenses and an Affidavit or Declarataion to lead warrant (i.e. an Affidavit or Declaration supporting the application to arrest) are also required.

The Claim Form is served on the ship itself by or through the agency of the Admiralty Marshal (normally this is done by one of the Court bailiffs). The Admiralty Marshal is an Officer of the Court who administers the physical arrest of the vessel. The Claim Form can only be served, within the territorial jurisdiction of the Court and can only be served on the vessel itself. It must also be served (unless renewed) within 12 months of the date of issue.

The Declaration to lead warrant is normally made by the arresting party's solicitors and should state the following:-

(i) nature of claim.
(ii) name of ship to be arrested and its port of registry.
(iii) that the ship being arrested is the ship against which the action is brought and is the ship in connection with which the claim in the action arose.
(iv) who in the declarant's belief is the person who would be liable on the claim in an action in personam.
(v) that in the declarant's belief when the cause of action arose that person was either the owner or the charterer or in possession or in control of the ship.
(vi) that in the declarant's belief that person was on the date the Claim Form was issued either the beneficial owner of all the shares in that ship or was the charterer of that ship under a charter by demise.

(Items (iv) to (vi) are not required where there is a Maritime Lien).

It should be noted that there is provision to arrest sister ships but this is usually only possible where they are true sister ships in the sense that the person who is liable is the beneficial owner of both ships. This is increasingly rare with the use of single ship companies.

The ship will be arrested if the Court Registry is satisfied that the Affidavit or Declaration to lead warrant complies with the statutory and procedural requirements. Thus provided full instructions with the supporting documents are received enabling the solicitor to prepare a general endorsement of the claim on the writ together with an Affidavit in support, an arrest may be carried out within hours of receiving instructions. The Admiralty Marshal or his substitute will be on call 24 hours a day, 365 days a year, and therefore in urgent cases a ship may be arrested at any time. In this respect and compared to other jurisdictions in the Mediterranean Sea, Gibraltar clearly has the advantage. The Admiralty Marshal, however, does not work on overdraft and will require a deposit to cover the costs of the arrest, provision of ship keepers, water and fuel for the vessel and maintenance of the crew. The deposit required is normally of between £10,000 and £20,000 depending on the size of the ship. This payment forms part of the Admiralty Marshal's costs and expenses in the arrest and is recoverable from the proceeds of sale of the ship in priority to all other claims. In certain cases where we are instructed by a London firm if an undertaking is given by that firm that the £10,000 is going to be sent forthwith, we would be able to arrest without the money being physically in Gibraltar. During the course of the arrest further funds may need to be send depending on the Admiralty Marshal's requirements.

Likewise should the claim in respect of which the arrest has been carried out be satisfied, an arrest may be lifted almost immediately and it is frequent for a claimant to be satisfied by the provision of a letter of undertaking from the ship's P and I Club or a guarantee from a first class bank. However, if no form of security is provided the arresting party would apply by a motion for judgement in default or otherwise and also for an order for appraisement and sale of the ship. An order for sale pendente lite (i.e. before judgement) is possible and can be made when the security is deteriorating for one reason or another.

A motion for judgement in default will usually be heard shortly after the period for acknowledging service is up and after delivery of a statement of claim and the filing of an Affidavit verifying the claim. However, if the Defendant appears to contest the claim the case will proceed to trial in the normal manner. If judgement is given for the claimant, it is normal for the vessel to be ordered to be appraised and sold.

It is possible for such a sale to be by way of public auction or by way of private treaty. Public auction sales are by sealed bids and normally take about 4 weeks from the date the order is made. Private treaty sales can be done in less than a week. However in order to seek a sale by way of private treaty one must have a buyer willing to pay at least market value for the vessel having regard to the fact that the vessel is under arrest in Gibraltar. This is done by obtaining two valuations from reputable London brokers and securing an offer to buy the vessel on an as is where is basis in an amount over and above those valuations.

When a vessel is sold by private treaty, the sale is not advertised although the money would have to be paid into Court for a period typically of 60 – 90 days in order to allow other creditors the chance to claim against the proceeds of sale of the vessel.

When a vessel has been arrested other people having a claim on the vessel can enter a caveat against the release of the vessel. The praecipe for a caveat against release states that the claimant claims to have a right in rem against the vessel arrested and states the nature of the claim and the amount if known. A Caveator will receive prior warning of applications to the court including one for the release of the vessel by the arresting party giving the Caveator the opportunity to arrest if so desired.

If a ship is wrongfully arrested then the Defendant may make a claim against the arresting party for wrongful arrest. However such claims are rare in practice, given that the Defendant must prove that the arresting party acted mala fides or was grossly negligent in arresting the ship. It is not possible for a Defendant to obtain damages for wrongful arrest where a bona fide claim has been brought even though that claim ultimately failed.

As in other jurisdictions cargo and freight can also be arrested.

An owner friendly or claimant friendly forum?

Gibraltar can be described as both an owner friendly and claimant friendly forum. The reason for this is that Gibraltar is, in all, a very favourable jurisdiction for the resolution of maritime disputes. Not only can an arrest be effected at very short notice and in very little time (an advantage for the claimant) but a party whose ship has been arrested can have the ship released almost immediately after he has satisfied the claim or provided security for the same (an advantage to the owner). In addition, admiralty cases in the Supreme Court of Gibraltar are given priority to other cases and it is therefore not difficult to obtain hearing dates at relatively short notice.

Catching ships whilst bunkering, changing crew or awaiting orders

A large number of ships pass the Straits of Gibraltar every year. Many of these call into Gibraltar mainly to take bunkers. Gibraltar's importance as a bunker call port is increasing every year due mainly to the deep sheltered waters of the bay of Gibraltar, its competitiveness (there are three major oil suppliers in Gibraltar) and the good availability of bunkers due to the proximity of an oil refinery. In addition it is not unusual for ships calling in Gibraltar to take bunkers, to also effect crew changes whilst taking bunkers given that Gibraltar has an airport and therefore it is easy to fly in crew members quickly and cheaply. It is during many of these

calls, which tend to be short in duration, that many of the arrests effected in Gibraltar take place. As has been seen it is possible to effect an arrest in Gibraltar at short notice.

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Christian is a Partner at ISOLAS, the oldest and one of the largest law firms in Gibraltar. He is acknowledged as one of the leading lawyers in Gibraltar in the fields of admiralty and shipping law. He has been named as a leading individual in by Chambers and Partners, the European Legal 500 and Global Counsel 3000 amongst others.. Among others he represents the International Transport Workers' Federation, P&I Clubs, banks and shipowners.

What they say about Christian:

"Christian Hernandez, head of the firm's admiralty and shipping team, is 'undoubtedly one of the heavyweights in the sector" *THE LEGAL 500, 2009*

"Hernandez is regarded as one of Gibraltar's experts in the area." *Chambers 2008*

Sources identify partner Christian Hernandez as "a leading practitioner – he's proactive and receptive." *CHAMBERS & PARTNERS 2009*

LATEST INTERPRETATION OF THE ARTICLE 3 OF 1952 BRUSSELS CONVENTION BY ROMANIAN COURTS.

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Traditionally, the conditions imposed by Romanian law for arresting a vessel in Romanian were for many years:

a) Indicate and provide evidences to the Court that plaintiffs have started the main legal action (Court action or arbitration proceedings according to the provisions of the C/P or B/L)against the defendant.The evidence should be a letter from a Court,apostilled according to Hague Convention 1961 or a letter from the arbitrator appointed showing that arbitration has started;

b) Indicate and provide evidences to the Court that the defendant in the main proceedings is the owner of the vessel;

c) Provide a bank letter of guarantee to the Court up to the amount of 10 % of the claimed amount (the amount will be fixed by the Court but in most of the cases is 10%).

In case the matter is very urgent, vessels can be provisionally arrested through the Harbour Master,paying a tax of Euro 400 (Saturdays and Sundays Euro 800).

A notice of arrest will be notified to the Harbour Master.

Harbour Master will place the order of arrest to the vessel's file and will not interupt in any way vessel's operations. Notice of arrest will become effective when the vessel will finalise operations and vessel's agent will attend Harbour Master to receive vessel's permit to leave outside. Starting with the hour when vessel's agent will ask for the Permit to leave, Harbour Master will count 24 hours (Saturdays and Sundays are not included within this hours anyway) and the vessel will be arrested for 24 hours. During these 24 hours, plaintiff will need to apply to the Court asking for the arrest of the vessel. Courts are judging these cases on an urgent basis and normally are issuing the decision within 24 hrs. There is no need for the time being to place the counter-security which will be requested by the Court at a later stage.

Court costs are in the region of Euro 100. Lawyer fees normally calculated on hourly basis Costs are usually recoverable from defendant.

Romania has acceded to the International Convention for the unification of rules concerning the arrest of vessels, signed in Brussels on May 10th 1952, on November 8th 1995.

Romanian Courts have decided in favour of internal law in most of the cases where conflicts between the provisions of 1952 Arrest Convention and internal law arose.

The question whether the claimant may arrest the ship in respect of which the maritime claim arose after its sale to a *bona fide* purchaser received different solutions in different countries which are parties to the 1952 Arrest Convention. It is generally admitted in the international maritime practice of the various national Courts that ,unless the claim is secured by a maritime lien, the right of arrest of a ship in respect of a maritime claim exists and will be confirmed by the Court only if that ship, at the time of her arrest, is still owned by the company who owned the ship when the maritime claim on the vessel has arose.

What will happen if the vessel has been sold prior to the application of arrest?

In case the claim is secured by a maritime lien, the vessel can be arrested and, if the vessel will be sold, the claimant can pursue a recovery claim against the sale proceeds of the vessel.

A very recent decision of the Constanta Court, Maritime section, when taking into consideration the request of arrest of a vessel (m/v *Jasmine)* for a maritime claim which was not secured by a maritime lien, decided that the vessel should be arrested on the grounds of article 3 para 1 of 1952 Arrest Convention, although the ownership on the vessel has been transferred to a third party purchaser prior to the application of arrest.

The judge decided that arrest of the vessel should be applied taking into consideration the fact that the maritime claim of the plaintiff is in close connection with the vessel and also the fact that at the time when the maritime claim arose the vessel was owned by the owner against whom arbitration proceedings has been commenced, irrespective of the fact that the ownership on the vessel has been transferred to the third party purchaser.

Constanta Court of Appeal confirmed the decision of Constanta Court and rejected in full the appeal declared by the owners.

The decision is not in the spirit of the Romanian internal law (article 907 Romanian Commercial Code) which mentions that only the assets of the debtor can be arrested by the creditor and it is also not in the spirit of the 1952 Arrest Convention.

A maritime claim gives rise to an action which is of a conservative nature and a conservative action can never be exercised against a *bona fide* purchaser of the vessel.

The matter is very important and a distinction should be made between the arrest of the vessel belonging to a *bona fide* purchaser and the provisions of article 3 para 4 of the 1952 Arrest Convention when in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship , the claimant being entitled in such a case to arrest such ship or any other ship in the ownership of the charterer by demise.

IS BELGIUM STILL AN ATTRACTIVE FORUM FOR THE ARREST OF SHIPS?

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1. Introduction

Belgium has an impressive tradition in maritime law. The *Association Belge pour l'unification de Droit Maritime*, founded in 1896, is the oldest maritime law association in the world and was one of the founders of the Comité Maritime International (CMI).

The latter institution took the initiative in searching for international uniform rules in various fields of maritime law, leading amongst others to the 'International Convention for the Unification of Certain Rules of Law relating to Bills of Lading' ("Hague Rules"), signed in Brussels in 1924. In 1930 the preparatory works started for uniform law on the arrest of ships which led two decades later in May 1952 at the Diplomatic Conference in Brussels to the adoption of the 'Convention for the unification of certain rules relating to the arrest of sea-going ships' (hereinafter the "Brussels Arrest Convention").

The Brussels Arrest Convention was subsequently incorporated into the Belgian Judicial Code in 1961 and interpreted by the Belgian courts making Belgium up till now an attractive forum for ship arrests.

2. Allegation of maritime claim is sufficient

A sea-going ship may be arrested in Belgian territorial waters as a security for a maritime claim enumerated in littera a) to q) of Article 1468 of the Belgian Code of Civil Procedure (which is identical to Article 1.1 of the Brussels Arrest Convention).

It is generally accepted that the claimant only has to present an allegation of maritime claim. Allegation means that the claimant will not have to provide evidence – as is the rule for any other arrest – that the claim is in all respects certain, quantified/quantifiable and due. As soon as the claimant proves that his maritime claim is 'sufficiently probable', i.e. when the judge accepts *prima facie* evidence presented to him on an ex parte basis, his request for authorisation to arrest a ship will be granted.

3. Flag of the ship and debtor of the maritime claim are irrelevant

The sea-going ship, in respect of which the maritime claim arose, can be arrested in Belgian territorial waters, whichever flag it is flying. It is not required that ship is flying the flag of a contracting state of the Brussels Arrest Convention.

Furthermore, in most countries that are party to the Brussels Arrest Convention a ship may only be arrested if its owner, or at least its bareboat charterer, is the debtor of the maritime claim or if the claim is guaranteed by some sort of title *in rem* on the ship such as a maritime lien, privilege, mortgage or *hypothèque*.

Initially the Belgian judges of seizures were of the same opinion. However, in 1976 the highest Belgian court, the *Cour de Cassation*, held in its *Omala* judgment that "*pursuant to the distinctive parts of Article 1469 of the Judicial Code [i.e. the corresponding Article 3 of the Brussels Arrest Convention] the ship in respect of which the maritime claim arose can be arrested, irrespective of whether it is the owner or another person who is liable for the maritime claim within the meaning of the said Article 1468 of the Judicial Code".*
Since then the Belgian jurisprudence holds unanimously that the ship to which the claim relates can be arrested even if the claim is not secured by some sort of lien or mortgage and

even if the debtor of the maritime claim is not the owner but the charterer of the ship or another third party. The only restriction to this principle is that the debts must be "incurred by the ship" or be made "for account of the ship".

Many Belgian cases relate to claims for the non-payment of bunkers. Pursuant to Article 1.1 (k) of the Brussels Arrest Convention (or Article 1468 k) of the Belgian Code of Civil Procedure) conservatory arrest of ships is possible for claims arising out of "*goods or materials wherever supplied to a ship for her operation or maintenance*", such as bunkers. Belgian jurisprudence accepts that the ship to which the bunkers were delivered, can be arrested even if the owner is not liable for the claim but the charterer who ordered the bunkers. Arrests have also been allowed for claims by bunker suppliers who had physically delivered bunkers directly into the ship's tanks in situations where the claim was not against the owner or the charterer but against a bunker trader who had been contracted by the charterer or by the shipowner and who in turn had ordered the bunkers for his own account from the physical supplier.

Other Belgian cases relate to claims by the cargo interests in case their goods are damaged. Even if the shipowner is not liable to pay compensation for such damage, the cargo interests may arrest the ship which transported the goods (or other ships owned by those who are responsible for the damage (see below)).

Belgian case law accepts that a ship under arrest may be sold as soon as the claimant disposes of an enforceable title. This will also be the case if the judgment is not rendered against the owner of the ship but against another person who is debtor of the claim related to the particular ship. Therefore, in order to have its ship released from the arrest, the owner of the ship will have to give security that guarantees the payment of the claim, even if a third person (such as the charterer or the issuer of the Bill of Lading) is the debtor towards the arresting party.

4. Arrest of sisterships is allowed

Under Belgian law it is however allowed to arrest another ship, which is owned by the person who, at the time when the maritime claim arose, was the owner of the particular ship in respect of which the maritime claim arose. The fact that the vessel to which the claim relates is at the time of the arrest of the sistership no longer in the ownership of the debtor, is irrelevant. Also the fact that the debtor of the claim became owner of the arrested sistership after the claim arose, is not important. Not only the ship to which the claim relates will have to secure the claim but also all other ships in the same ownership.

Ships will be deemed to be in the same ownership when all the shares therein are owned by the same person or persons. It is not possible to arrest a ship that is owned by another company. However, when owners tried to make abuse of this rule by creating 'single ship companies', Belgian Courts, in order to protect the rights of claimants, occasionally upheld the arrest of a ship owned by one person as a security for the debts of another (shipowning) company. In all these cases the court lifted the corporate veil and treated ships owned by different companies as if they were in the same ownership once evidence was provided that there was a blending and commingling of the said companies to such an extent that – although they were formally separate legal entities – they were considered to be "one". The separate corporate personality was only an artificial screen that did not correspond to reality.

In 2003 the highest Belgian court, the *Cour de Cassation*, held in its *Sokna* judgement that the ship to which the maritime claim relates cannot be arrested if it changed ownership between the claim arose and the time of the (intended) arrest, unless the claim is secured by a maritime lien or mortgage.

If it is not the owner but another third person who is liable for the maritime claim, not only the ship in respect of which the maritime claim arose may be arrested but also the ships owned by this third person. In this case ships owned by the owner other than the ship in particular, may not be arrested.

5. Simple and short arrest proceedings

a) Quick authorisation

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

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

b) No complete set of documents or original documents required

In practice, no complete file of documents of evidence on the merits of the claim is needed to obtain an authorisation to arrest a ship. A claimant, requesting authorisation, only has to make his allegation of the existence of the maritime claim reasonably certain. Given the fact that at the time of the request the claim often just arose, the Judges of Seizure do grant authorisations for claims only scarcely documented.
It is advisable – but therefore not always necessary - to have a copy of the Bill of Lading, an invoice, a (general) protest and/or an interim report of a surveyor available.

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

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

6. Quick release from arrest

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

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

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

7. No requirement to provide security for damages in case of wrongful arrest and reluctance to grant claims for wrongful arrest

The Belgian law provides that the Judge of Seizures, issuing the leave for arrest, can rule that the arrest will only be valid if after a short period of time (e.g. 48 hours) a counter security has been put up. Such counter security must guarantee the damages suffered by the shipowner in case the arrest would ultimately be considered as wrongful. For more than twenty years, no Belgian judgement granting authorisation under the condition of a counter-security has been reported. In the 1970s and 80s, the judges systematically imposed such counter-guarantee, but this practice was abandoned.

A claimant will only be liable in case of wrongful arrest. An unjustified arrest is not sufficient. A claim for wrongful arrest is based on an action in tort. It means that the shipowner will have to prove the fault of the claimant by arresting the vessel, the damages it caused and the causal

relationship between fault and damages. A claimant will only be considered as having acted at fault by arresting the vessel if he obtained and put the arrest in a thoughtless and reckless way knowing that he would cause damages. The Belgian courts are extremely reluctant to grant such claim for wrongful arrest.

8. No obligation to start legal proceedings on the merits

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

The arrest of a ship does not impose upon the arrestor the necessity to start legal proceedings on the merits of the case; nor does Belgian law impose Belgian jurisdiction for the claim on the merits after an arrest in Belgium (although the Belgian Commercial Courts will in principle not refuse jurisdiction based upon Article 7 of the Brussels Arrest Convention).

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

9. Fair costs

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

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

10. Conclusions

From the above analysis, we may conclude that Belgium is indeed still a convenient place to arrest ships.

The arrest of a ship is well organised: a simple and short procedure with several Judges of Seizure who are at the disposal of the parties 24 hours a day, 7 days a week. A vessel can be arrested within a few hours after having received instructions. No power of attorney or original documents are required and the claimant only has to present an allegation of maritime claim. Moreover Belgium knows the unique opportunity of arresting a vessel even if the owner of the vessel is not the debtor of the claim, and ship arrest is allowed on sisterships. On the other hand, the formalities to lift the arrest are minimal, and can be fulfilled within the hour. Finally, last but not least, Antwerp disposes of local representation of all P&I Clubs of the world and an experienced Antwerp Maritime bar.

BVI SHIPPING FLAG

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General

Totalserve Management Ltd has been appointed as the sole representative of the Virgin Islands Shipping Registry (VISR) in Europe, Africa, the Middle East, Russian and the Ukraine.

The British Virgin Islands (BVI) has been a British colony in the Caribbean since 1672. BVI maintains a self-governed political structure and its own internal legislation based on a common law legal system. The BVI has been an international business centre since the 1980s with constant updates to its legislation to ensure it remains on the cutting edge of the international business industry.

The BVI is a non-sovereign overseas territory of the United Kingdom (UK) which is governed by the UK legal system, laws and regulations.

Moreover, the BVI has been placed on the "whitelist" of those countries that have substantially implemented the internationally agreed tax standards as set by the Organisation for Economic Cooperation and Development (OECD).

Virgin Islands' Shipping Registry (VISR)

The VISR is a founding member of the Red Ensign (REG) of British Registries and operates directly under the BVI Premier's Office. The BVI is also party to all relevant International Maritime Conventions.

Until recently, the VISR was regarded as a prime registry for yachts. However, since 2008 VISR has been upgraded to Category One British Registry, enabling it to register Larger – Mega and Super – Yachts of up to 3.000 gross tons and General Cargo ships of unlimited tonnage. Also, vessels previously under Category Two, commercial ships of up to 150 gross tons and pleasure vessels of up to 400 gross tons.

Services:

Totalserve is in a position to offer the following services and provide effective and efficient local support through its wholly-owned subsidiary, Totalserve Trust Company Ltd. The company is based in Road Town and holds a General Trust License issued by the Financial Services Commission of the BVI.

- Ship and Yacht Registration and Recording of Ownership
- Issue of Provisional Certificate of British Registry
- Recording, Transfer and Discharge of Mortgage Deed
- Change/Transfer of Ownership
- Ship/Yacht Change of Name and Name Approval
- Issue of Current, Historical and Closed Transcript of Registry
- Physical Search and Inspection of Register
- Issue of Seaman's Discharge Books
- Inspection Survey Certification and Licensing of ships and other commercial and pleasure vessels for safety, welfare, security and pollution prevention

- Investigation of Maritime Accidents and Casualties
- Examination and Certification for BVI Boat Master Licenses and Boat Engineer Licenses
- Change of Port State Registry
- Port State Control Inspection on foreign vessels calling in BVI ports
- Issue of STCW Endorsement

BVI Shipping Flag Advantages

- Competitive initial registration and annual maintenance fees
- BVI flag-bearing vessels are entitled to British Diplomatic/Consular support and the protection of the Royal Navy
- In-house and worldwide technical expertise such as the UK Maritime and Coast Guard Agency (MCA)
- Other Red Ensign Group members, seven major IACS-member Classification Societies and approved Certifying Authorities and special Appointed Surveyors
- Fully compatible Fleet Management and Ship Information Database
- Up-to-date maritime legislation based on UK Common Law that includes excellent mortgage protection
- VISR specializes in Yacht registration and its Certificates are recognized worldwide

Conclusion

The BVI is the Yachting Mecca of the Caribbean, equipped with modern state-of-the-art facilities, accommodation, supplies and other services.

APPLICATION OF REGULATION (EC) NO. 805/2004 IN THE ENFORCEMENT OF MALTESE SHIP MORTGAGES IN THE EU

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Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter the "Regulation") has recently been resorted to in connection with procedures for the arrest and judicial sale of the Maltese registered ship **AMELIA CACACE** in Rouen, France, by mortgagee banks Monte dei Paschi di Siena Capital Services Banca per le Imprese S.P.A. and GE Capital S.P.A. seeking to enforce the first priority Maltese Ship Mortgage executed in their favour by Peninsula Enterprise S.A. as Owner/Mortgagor on the 12th June 2008 and duly entered in the aforementioned ship's register.

At the time of writing, the matter remains *sub judice* before the French Court. However, since this was the very first time that the Registrar of Courts in Malta (as the Designated Authority appointed by Malta as the Member State of Origin) was called upon to issue a European Enforcement Order Certificate – Authentic Instrument in connection with a Maltese Ship Mortgage, it would certainly be in order to discuss the application of the Regulation in the context of the enforcement of Maltese Ship Mortgages within the European Union as a potential new development.

Malta became a Member State of the European Union on the 1st May 2004. Regulations having direct force of law within Member States, as of that date the Regulation became legally applicable also in Malta.

The declared purpose of the Regulation, under **Article 1** thereof (Subject Matter) "…*is to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement*."

The whole *ratio legis* is therefore the abolition of the *exequatur*. For purposes of this paper our interest is focused on 'authentic instruments', and in this context paragraph 2. of **Article 25** (Authentic Instruments) is of immediate relevance. This provides that :
"2. *An authentic instrument which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability* ***and*** *without any possibility of opposing its enforceability*."

This in fact is the cardinal distinguishing feature of the Regulation from its predecessor Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also known as the Brussels I Regulation), and which also deals with Authentic Instruments.

I do not wish to suggest in any way that there are no possible remedies available to a debtor faced with a European Enforcement Order, even though that might necessitate a separate discussion beyond the scope of this paper. In fact, **Article 10** (Rectification or withdrawal of the European Enforcement Order Certificate) of the Regulation which, in virtue of Article 25(3), is also applicable to Authentic Instruments, provides for the right of the debtor to make application to the Court of Origin, using the standard form provided in Annex VI, seeking rectification or withdrawal of a European Enforcement Order, within the strict parameters of paragraphs (a) – applicable to rectification or (b) – applicable to withdrawal of Paragraph 1. thereof.

Whilst under **Article 27** (Relationship with Regulation (EC) No. 44/2001) it is optional for a creditor under an authentic instrument on an uncontested claim either to apply for certification as a European Enforcement Order under the Regulation in the Member State of Origin, or to instead choose the system of recognition and enforcement under the Brussels I Regulation by applying for a Declaration of Enforceability in the Member State of enforcement, yet it will be appreciated that the Regulation presents a much more attractive option in that it does away with the need for approval by the judiciary in a second Member State, with the delays and expenses that this entails.

The Regulation therefore enables a very expeditious and considerably simplified enforcement procedure abroad in respect of those Authentic Instruments falling within the ambits of its provisions, namely those dealing with money claims.

The questions of relevance to this Paper are :
1. what is an 'Authentic Instrument' for the purposes of the Regulation ? and
2. does a Maltese Ship Mortgage constitute such an 'Authentic Instrument' ?

Article 4 (Definitions) defines an '**Authentic Instrument**' to be *inter alia* :
(a) *a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which* :
(i) *relates to the signature and the content of the instrument; and*
(ii) *has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates*.

This definition is perhaps at first sight not the most helpful, as it appears to beg the question of what an authentic instrument might be, especially in those jurisdictions where that legal term might not be employed.

For instance, one does not find the term 'authentic instrument' utilised as such in Maltese domestic law, with one single exception to be found under **Section 2026** of the **Civil Code**[1], which provides that contracts made outside Malta, by any public or authentic instrument, can create a hypothec over property existing in Malta, if the competent civil court, on the demand of the creditor, shall have ordered the registration thereof.

However in the **Preamble** reference is made, in the context of 'uncontested claims' with particular reference to court settlements and authentic instruments, to '*an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument*.'

In addition, Paragraph 1. of **Article 3** (Enforcement titles to be certified as a European Enforcement Order) provides that the Regulation shall apply *inter alia* to authentic instruments on uncontested claims, and regards a claim to be uncontested if *inter alia* "(d) *the debtor has expressly agreed to it in an authentic instrument*. "

Finally, Article 25 already above referred to, falling within Chapter V of the Regulation dealing with Court Settlements and Authentic Instruments, provides in Paragraph 1. thereof that :
"1. *An authentic instrument concerning a claim within the meaning of Article 4(2) which is enforceable in one Member State shall, upon application to the authority designated by the member State or origin, be certified as a European Enforcement Order, using the standard form in Annex III.*"

I have purposely separately underscored what I consider to be the key words. It would appear that in order to be eligible for a European Enforcement Order from the Member State of Origin, the document concerned will need to satisfy three (3) requirements :
- it must be in the nature of an authentic instrument; and
- it must concern a 'claim' within the meaning of Article 4(2); and
- it must be enforceable in one Member State.

[1] Chapter 16 of the Laws of Malta

I believe that it could safely and reasonably be said that a document is to be treated as an authentic instrument if it is so considered to be under the law of the Member State of Origin; and that only if the authentic instrument is enforceable in the Member State of Origin is it also enforceable in the other Member States.

In so far as concerns the requirement of the authentic instrument to concern a claim within the meaning of Article 4(2), one obviously needs to consider the definition of the word "claim" therein given. "Claim" is in fact defined as :
" *a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument.*"

Having treated with the nature of an Authentic Instrument, the remaining question to be dealt with, which is of paramount importance, is whether the Maltese Ship Mortgage qualifies as an 'Authentic Instrument' as understood by the Regulation, thereby allowing for the application of the Regulation for purposes of its enforcement in an EU Member State other than Malta itself.

To do this, we must perforce analyse and discuss the nature and attributes of a Maltese Ship Mortgage under Maltese law.

It is already generally accepted that Authentic Instrument covers the notarial deeds as they are known in a number of Member States including Malta[2]. It would therefore also be useful, in the process, to draw analogies between the Maltese Ship Mortgage and the Notarial Deed.

A good point to start off with is **Section 37B** of the **Merchant Shipping Act[3]** (hereinafter the "MSA") which coupled with **Section 38** of the same MSA provides the only form of definition of the term "Mortgage" which, as an Anglo-Saxon concept, is otherwise completely extraneous to Maltese civil law which recognises the continental system of hypothecs.

Thus subsection (2) of the aforementioned Section 37B of the MSA describes a "Mortgage" as being "*a special charge over a vessel*" created by agreement; whilst subsection (1) of the aforementioned Section 38 continues to provide that :

"(1) *A registered ship or a share therein may be made a security for any debt or other obligation by means of an instrument creating the security (in this Act called a "mortgage") executed by the mortgagor in favour of the mortgagee in the presence of, and attested by, a witness or witnesses*. "

The fact that the execution of a Mortgage requires to be attested by a witness is interesting. Whilst no particular form of attestation is stipulated, yet the common meaning of the verb 'to attest' is to affirm in an official capacity to be correct, true or genuine. In relation to an authentic instrument, it would arguably be desirable for such attestation to be effected by a Notary Public in Malta, who could not only witness the signature and identity of the person executing the Mortgage, but could also attest to such signatory's legal capacity and authority to execute the same, thereby lending further authenticity to the instrument beyond any authenticity which could be attributed thereto by the Registrar himself.

Malta in fact adopts the British 'statutory form' of Mortgage, and mortgages are executed on the statutory form prescribed by the Minister responsible for Shipping.

In terms then of subsections (5) of the same Section 38 of the MSA :
"(5) *A mortgage registered under this Act may be drawn up to secure the payment of a principal sum and interest, an account current[4], as well as the performance of any other obligation. It shall not be necessary to indicate the monetary value of the indebtedness in the mortgage*."

[2] Practice Guide for the Application of the Regulation on the European Enforcement Order issued by the European Commission
[3] Chapter 234 of the Laws of Malta
[4] "Account Current" is defined by the MSA to mean any indebtedness of a mortgagor in favour of a mortgagee arising and determinable in accordance with an underlying obligation.

For the purposes of the present discussion on authentic instruments, it is only those Mortgages which secure either the payment of a principal sum and interest or an account current which are of interest since, as we shall have occasion to outline, only those mortgages securing a debt certain liquidated and due and not consisting in the performance of an act are deemed by law to constitute an executive title.

Section 39 of the MSA then goes on to provide that :
"(1) *On the production of a mortgage for registration the registrar shall record it in the register*."

The register, which is maintained by the Registrar, is in the nature of a public register, available for public inspection; and of significance in this connection is the fact that when dealing with the recognition of foreign mortgages, **Section 49** of the MSA specifically lays down as part of the requirements for recognition the fact that:
"(a) *such mortgage has been validly recorded in the registry of ships of the country under whose laws the ship is documented;*
(b) *such registry is a public registry; and*
(c) *such mortgage appears upon a search of the registry*"

Of supreme and overriding relevance in the context of this debate must surely be **Section 42** of the MSA which provides, in subsection (2) thereof that :
"(2) *A registered mortgage shall be deemed to be an* ***executive title*** *for the purposes of Section 253 of the Code of Organisation and Civil Procedure*[5] (hereinafter the "COCP") *where the obligation it secures is a debt certain liquidated and due and not consisting in the performance of an act*."

In terms of subsection (3) it is provided that :
"(3) *The provisions of this section shall apply to all registered mortgages which secure debts resulting from any account current or overdraft or other credit facility.* ";

And finally subsection (4) requires that :
"(4) *In connection with the enforcement of any mortgage, not being a mortgage contemplated in subsection (2) of this section, for the purpose of determining the amount certain liquidated and due in connection with any judicial sale of a ship, the mortgagee shall specify the sum due at the time of enforcement by means of an affidavit served on the mortgagor : Provided that this shall be without prejudice to the right of any interested party to contest such amount according to law.* "

Section 253 of the COCP - subtitled "Executive Titles**"** - lists the various executive titles which are recognised by Maltese law. Although mortgages are not specifically listed therein, they are included in virtue of the aforesaid provision of the MSA, which is a *lex specialis* and which very unequivocally provides that a registered mortgage shall be deemed to be an executive title for the purposes of Section 253 of the COCP.

Of certain importance, by way of analogy, is the fact that the COCP also expressly recognises as executive titles :
"(b) *contracts received before a notary public in Malta, or before any other public officer authorised to receive the same where the contract is in respect of a debt certain, liquidated and due, and not consisting in the performance of an act*;"

One can immediately detect the employment of identical wording to that found under Section 42 of the MSA above referred to in the words *"debt certain liquidated and due and not consisting in the performance of an act."*

Section 256 of the COCP distinguishes between the enforcement of judgments and decrees of the Courts of Justice of Malta, which themselves constitute executive titles in terms of the COCP, and the enforcement of other executive titles.

[5] Chapter 12 of the Laws of Malta

Section 256 (2) of the COCP – subtitled "Other executive titles to be enforceable after two days from judicial intimation" - provides that :
"(2) *The enforcement of any other executive title may only take place after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act.* "

This subsection applies to all those executive titles being other than a judgement or decree of the Courts of Justice of Malta.

Mortgages and, for that matter, Contracts received before a Notary Public in Malta, would clearly fall within this category of 'other executive title'; and therefore their enforcement in accordance with Maltese law would require the prior service of an intimation for payment on the debtor made by means of a judicial act. This would usually take the form of an Official Letter filed in the registry of the First Hall of the Civil Court. It is also standard practice to attach to the aforesaid Official Letter the Affidavit additionally required in regard to Mortgages (but not in regard to Contracts received before a Notary Public in Malta) in terms of Section 42(4) of the MSA above referred to.

In the European Enforcement Order issued by the Registrar of Courts in the AMELIA CACACE case above referred to, possibly owing to the Registrar's inexperience when coming to issue such a Document in relation to a Mortgage, the Registrar appears to have considered the Official Letter filed before the First Hall of the Civil Court by the Mortgagee/Creditor Banks against the Mortgagor/Debtor pursuant to Section 256 of the COCP discussed above to actually constitute the 'Authentic Instrument', enforceable after the lapse of two days from its service upon the debtor; although it must also be said that the Registrar then proceeded to attach as a certified copy of the original held at the Court Registry all the documents which had been annexed to the Official Letter including the Mortgage Deed and the Affidavit required in terms of Section 42(4) of the MSA also above discussed.

The action taken by the Registrar in the AMELIA CACACE case is understandable from the point of view that it is the Official Letter which is the actual document filed with the Registrar himself (the Mortgage being registered with the Registrar of Ships); and the Registrar also took the view that it is the Official Letter which quantified the actual claim. However, in the event that an Executive Act were to have been filed in Malta by way of enforcement of the Mortgage as an executive title, clearly the Executive Act concerned would have described the executive title in virtue of which its issuance was being sought as being the Mortgage itself, rendered executable in virtue of the Official Letter. Therefore it is the respectful opinion of the undersigned that certainly for the future it would be preferable for the Registrar to directly, rather than indirectly, consider the Mortgage, as rendered enforceable in virtue of the Official Letter (and the Affidavit) to be the Authentic Instrument for purposes of the Regulation.

Although, as may be concluded from an analysis of the aforementioned provisions of Maltese law, the Maltese Mortgage is not in the nature of a Contract received before a Notary Public in Malta, yet it is still in the nature of a Contract (albeit a unilateral one, executed as it is by the Mortgagor alone) and instead of being received by a Notary Public in Malta (who enjoys the status of a 'public officer'), it is received by the Registrar of Shipping (who may also be said to enjoy equivalent status of a 'public officer'). The execution of the Mortgage is also required to be attested. Additionally, the registration of the Mortgage attracts a substantial degree of publicity in that on being received by the Registrar it is duly recorded by him in the vessel's register. Lastly, but certainly by no means least, the law accords to the Maltese Mortgage the very special status of an executive title on par with Contracts received before a Notary Public in Malta or before any other public officer authorised to receive the same.

For all these reasons in appropriate cases, and upon following the aforementioned procedures prescribed by law, the Maltese Ship Mortgage could certainly be considered as a suitable candidate for the issuance of a European Enforcement Order Certificate – Authentic Instrument in its regard.

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